

HONG KONG / JUDGMENT

SOURCE ONE LTD v. E.F. APPLIANCES CANADA LTD

COURT

District Court

DECIDED

31 October 2007

CASE / FILE NUMBER

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bjbj a>~u DCCJ 205 / 2007 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION CIVIL ACTION NO. 205 OF 2007

BETWEEN SOURCE ONE LIMITED Plaintiff and E.F. APPLIANCES CANADA LIMITED Defendant

Coram: His Honour Judge Thomas Au in Chambers (open to public) Date of Hearing: 24 October
2007 Date of Handing Down Judgment: 31 October 2007

JUDGMENT

The Plaintiff (Source One) had been the Defendant s sourcing agent for small kitchen appliances from Mainland factories. The Defendant (E F Appliances) terminated the agency relationship on 10 September 2005, and paid Source One s agency fees and commission up to 30 September 2005. Source One says E F Appliances termination was wrongful since it had failed to give reasonable notice to do it. This amounted to a repudiation of the agency contract. Source One accepted the repudiation on 12 September 2005. It now claims summary judgment against E F Appliances for agency fee and commission up to 30 December 2005. The total sum sought is US\$64,000.00. Alternatively, it seeks interlocutory judgment with damages to be assessed. E F Appliances however says it was entitled to terminate the contract without notice since Source One was in breach of various contractual obligations of services. Alternatively, it says the contract was determinable by way of one-month notice anyway. That having been done since Source One was paid its fee and commissions until 30 September 2005, E F Appliances was therefore not in breach of the agreement for want of reasonable notice. The issues before me are thus: Is there a triable issue as to whether Source One was in breach of the contract to entitle E F Appliances to

terminate it without notice. Is there a triable issue as to whether, absent any breach, E F Appliances was entitled to terminate the agency agreement by one-month notice. If the answers to the above two questions are in the negative, is there a triable issue on quantum?

Applicable principles

The principles applicable to a summary judgment application are well known. The burden is on the defendant to show a triable defence which is not practically moonshine and is worthy of belief. The defendant should also condescend to particulars in support of the defences raised. See: Hong Kong Civil Procedure 2007, paras 14/4/3, 14/4/4, 14/4/9. However, at this stage, the Court should not embark on a mini trial on affidavits, and Order 14 is reserved only for clear cases. The procedure is not appropriate where the plaintiff's entitlement to recover any sum is the subject of any serious dispute, whether of law or fact. See: the oft-cited observation by the late Godfrey JA in *Man Earn Ltd v Wing Ting Fong* [1996] 1 HKC 225 at 228. Was Source One in breach of the agency agreement in around September 2005 Source One accepts in its pleading that as sourcing agent, it should provide to E F Appliances the following pleaded contractual obligations of service: All sourcing activities for any products selected by E F Appliances. Following up on purchase orders. Discovering new factories for new product ventures. Quality control inspections on goods as per E F Appliances criteria. Providing daily communication with E F Appliances on project progress (as required). These are very generally pleaded obligations. The scopes of the obligations are very wide and general. However, no further and better particulars have been requested. For the present consideration, I will have to take them as they are. The repudiatory conducts (or lack of conducts) that E F Appliances complained of leading to the termination of the agency agreement are in summary as follows. During the months of July, August and September 2005 (which were its peak shipping months), E F Appliances had experienced inadequate and slack responses from Source One's staff. The situation was made even worse with the frequent absences of Mr Glass (the boss of Source One) for holidays. More specifically, E F Appliances says hundreds of emails had been sent to Source One around that period of time concerning matters such as following up of orders and shipments, as well as questions raised on the quality of some of the products to be shipped. However, some of these emails were not answered. Some of the answers were meaningless. Further, there were responses from Source One which sided more on the factories side instead of assisting E F Appliances to have the problems solved. E F Appliances cites some examples in support of these complaints: In relation to the product of an Electric 1.7 Litre Stainless Steel Kettle with model number BS79, E F Appliances had raised certain quality problem with Source One's staff and asked her to ensure the quality and follow up the matter. However, instead of taking on the quality issue with the factory, the staff sided with the factory and insisted on having the goods shipped. Source One had acted effectively only as a post box by passing on E F Appliances emails to the factories in Mainland, and vice versa. Source One had also failed to take up initiatives to assist E F Appliances in relation to its dealing with the factories. When Mrs Stevenson of E F Appliances chased for a reply from Mr Glass after making complaints about the lack of response and assistance, Source One's staff replied in an email saying that Mr Glass would return in a few

days time and he would respond to her. Various exhibited copies of emails exchanged between Source One and E F Appliances prima facie support the above instances of criticisms. Some examples are as follows. In an email dated 4 August 2005 from E F Appliances Mitchell Stevenson to Source One, E F Appliances complained about Source One's failure to source new factories and opportunities for it. It writes as follows: I am sending this Toaster Oven to you as a prime example of complacency between our two companies. While we bitch and complain about developing new factories there are factories out there ready to do business which are very capable. We just got out butts cleaned by Toastess- Again! This is totally not acceptable and as our agent in HK you need to be out there looking and getting these opportunities. The 2% commission we pay you is not just to send and chase sample requests. I am most frustrated at the fact that Strix recommended this factory to us over a year ago and I actually stood in their booth in Hong Kong In an email dated 10 August 2005 (a Wednesday), Mrs Mary Stevenson of E F Appliances wrote to Mr Glass as follows: Are we to assume that because you are on several weeks vacation that your staff is as well? I have reviewed several complaints from [staff of E F Appliances]. They have advised me that the assistance they are receiving is negligible. The fact that your company is paid 2% commission on all purchases for the majority of our products would leave me to believe that we should have a dedicated team in Asia to support our growth. What we are receiving is basically a sample forwarding service. This in my mind does not warrant a 2% commission. As you are well aware we have been involved with other companies that have had or have Hong Kong based agents. I can assure you that on my conversations with them there is much stronger assistance provided to those companies than we are currently experiencing. You are well aware of the number of products that we launched this year and the critical time of on-time shipments. We are fighting our own battles and your office has not gone to bat for us. While you personally have been helpful this past year with a number of critical issues we are not at the most crucial fulcrum point of our year with the launch of some many new items and factories. We would have expected your staff to rise to the occasion but we are not seeing anything of tangible value that is supporting us. It is extremely disappointing to our team in Canada that we are not receiving the support we require from Source One during this critical time. If there is anything you can do to assist us it would be greatly appreciated. I await your comments and or suggestions. When Source One's staff replied on the same day that Mr Glass would be finishing his holiday on Saturday and would reply to her the following Monday, Mrs Stevenson promptly wrote back as follows: This response is good enough. No need for him to respond further. Source One through Mr Glass affidavits has provided some explanations or rebuttals to these allegations. Mr Glass has also exhibited copies of over 40 emails exchanged between Source One, E F Appliances and the factories to show that, contrary to E F Appliances criticism, it had carried out its contractual obligations by having constant and consistent communications between E F Appliances and the Mainland factories. Mr Maurellet for the Plaintiff submits that the contents of the emails show clearly and summarily that E F Appliances complaints are not justified. I disagree. It is sufficient for me to simply refer to the quoted emails from E F Appliances above. I also accept the submissions of Ms Man for the Defendant that the Court should hear live evidence at trial on the factual background matrix leading to those emails to properly decide whether the complaints are justified. I therefore cannot summarily resolve the contentions between the

parties merely based on the evidence presented before me. I hold that it is triable as to whether E F Appliances' above complaints or criticisms of Source One's conduct are justified or established. This leads to the question of whether, if such criticisms or complaints are established, they are capable of amounting to Source One's breach of its contractual obligations. I think they do. As I said above, the pleaded obligations (which are admitted by Source One) are very wide. It certainly cannot be said at this stage that Source One's complained conducts (or lack of conducts) if established could not amount to a breach of any of these obligations. Mr Maurellet for the Plaintiff however submits that E F Appliances' case of summary termination on breach is clearly incredible since it had not raised this ground in its termination letter or in its Canadian lawyers' letter and email when Source One through its solicitors demanded payment of commission and agency fees up till November 2005. Mr Maurellet says if termination for breach were genuinely a ground, it would have been absurd for E F Appliances not to have instructed its Canadian lawyers about the same, so that they would set out in detail such grounds in their reply to rebut the Plaintiff's demand. I would have found Mr Maurellet's submissions persuasive if there was never anything in writing contemporaneously which supports E F Appliances' case for breach. But there is in the present case. I again refer to the above quoted emails from E F Appliances. In my judgment, these emails from Mrs Stevenson show objectively a prima facie case that E F Appliances was at that time seriously dissatisfied with Source One's service and lack of response, and with her last email on 10 August 2005, she was indicating to Source One a possible end to the relationship between the two companies. I therefore do not accept the Plaintiff's submissions that E F Appliances' case on termination for breach is wholly incredible for the reason of lack of any such suggestions in writing. Mr Maurellet's above submission may well form a fertile ground for cross-examination, but that is a matter for trial. For the above reasons, E F Appliances has shown to my satisfaction that there is a triable issue as to whether it was entitled to terminate the agency agreement without notice for Source One's various breaches. This would have been sufficient to dispose entirely the present application, since the question as to whether the contract is determinable by one-month notice does not arise. However, if I am wrong above, I will deal with this issue as follows. Is the agency contract determinable by one-month notice? It is common ground that the agency agreement (as evidenced by various emails in 2000 and 2002) does not contain any express provision for termination by notice. However, it is not contended between the parties that it cannot be terminated by notice. They however differ on what is the reasonable period for such a notice. Source One says, for the present purpose (and its counsel expressly his rights to argue otherwise if the matter goes to trial), the minimum length for such a notice should be four months. E F Appliances says it should be one. As a matter of law, absent an express provision, what amounts to a reasonable notice for terminating a particular contractual relationship must be evaluated in light of the circumstances prevailing at the time the notice was given: *Good Earth Agricultural Co Ltd v. Novus International Pte Ltd* [2007] 1 HKLRD 685, at para 70 (p. 686H-I) per Stone J. Further, each case depends on its own facts and there are no universally applicable rules. As observed by Clarke JA in *Crawford Fitting Co v. Sidney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438 (at p. 456F): the great variety of contracts in which it is appropriate to imply a term requiring the giving of reasonable notice before a contract, which has not been breached, might be terminated and the great variety of factual circumstances which

might be encountered render it highly undesirable that any attempt be made to lay down factors of universal application See also: Good Faith Agricultural Co Ltd, supra, para 67 at p. 699I 700B. Applying the above principles, whether the agency contract between Source One and E F Appliances could be terminated by a one-month notice (as contended by E F Appliances) or four-month notice (according to Source One) depends much on all the factual circumstances surrounding and leading to the termination in around September 2005. This is an application for summary judgment, and the Court is not presented comprehensively with the factual matrix relevant and leading to the termination. As such, the Court is simply unable to (and in my view should not) come to a conclusion on this issue before it could fully those circumstances at trial. Moreover, in light of the above triable complained conducts of Source One in the performance of the contract at around the time of the termination, it must also mean in my view that it is triable as to whether E F Appliances was entitled to terminate the agreement by one-month notice, even if those complained conducts, if established, do not amount to Source One s repudiations as alleged. For these reasons, I also conclude that there is a triable issue as to whether E F Appliances was entitled to terminate the agency agreement by way of one-month notice. Quantum If I were wrong on both of the above issues, I would have concluded that there is also a triable issue as to quantum, and only interlocutory judgment should be entered. This is so because E F Appliances has adduced sufficient evidence to show that Source One should not be entitled to certain part of the commissions (commissions form a significant part of Source One s claim for damages) given that some of the products were in fact not shipped or that some were defective and might have to be returned.

Conclusion

I am satisfied that E F Appliances has shown a triable issue on (a) whether it was entitled to terminate the agency agreement without notice for breach, and (b) even if there were no repudiations by Source One, whether it was in any event entitled to give one-month notice to terminate the agreement. I therefore dismiss Source One s application. I further grant an order nisi that the costs of the application be in the course. There will also be certificate for counsel for both parties. The nisi order would be made absolute 14 days from today unless there is an application to vary it before then. (Thomas Au) District Court Judge Ms. Maurellet, Jose-Antonio instructed by Messrs Liao, Ho & Chan for Plaintiff. Ms. Phoebe MAN instructed by Messrs Laracy Gall for Defendant. PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V & `#\$ & `#\$ bLHM 1i3 L/ R#bn _Zj#)Lc@ P_o/: t?71 ^s4J{R)#6Lc@ >R@8 z"}A oDF FLc@ 5"GJ d5OH`2 -4 S ZVLc@ K^XX0~&)Z*4 I}6[bJ{R (A<cP ^SOi dl(Wn(p qbLHM K^XX Wn(p -4 S (A<c P_o/ z"}A ^SOi I}6[t?71 _Zj# 1i3 4n@F @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title GJ~u GJ~u GJ~u Microsoft Word Document MSWordDoc Word.Document.8

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