IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0024 OF2008S
(High Court Civil Action No. HBC 32/2007)

BETWEEN:

DELMA CORPORATION SOUTH PACIFIC

Appellant

AND:

ORICA COATINGS [FIJI] LIMITED

Respondent

Coram: Byrne, JA
Shameem, JA
Khan, JA

Hearing: Thursday, 5th March 2009, Suva

Counsel:
S. Valenitabua]
M. Saneem] for the Appellant
]
A.K. Singh]
M. Rabuku] for the Respondent

Date of Judgment: Monday, 16th March 2009, Suva

JUDGMENT OF THE COURT

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[1] The plaintiff and the defendant entered into distributorship agreement on 20 January 2005 of which the following are some of the more noteworthy provisions:

(i) Clause 5 was headed Commencement and Terms of Agreement. It provided in 5.1 that the agreement was for a term of 2 years and

could be terminated by either party giving to the other 6 months notice. This Clause has curious drafting in that it said that the agreement shall continue for 2 years **until** it was terminated by either party. On one view, it meant that the agreement could not be terminated for a period of 2 years. However, as no question of interpretation of this Clause arises in this appeal, we say no more about it.

(ii) Clause 5.2 entitled the respondent only to terminate the agreement if the appellant failed or refused to continue to do business.

(iii) By Clause 6 the appellant was appointed the respondent's distributor for the goods under the name of Dulux.

[2] It was also agreed between the parties that the supply of paint by the defendant to the respondent was initially on the basis of a 30 day credit, meaning, paint sold in one month had to be paid for by the end of the following month. This arrangement later changed to a 25 day credit.

[3] The appellant claimed at first instance that the respondent had committed a breach of the distributorship agreement by failing to supply paint to it without any reason. It also failed to give the 6 months notice required for termination by Clause 5.1.

[4] It became clear during the course of the discussions between the bench and counsel for the appellant that the appellant took the view that by refusing to supply paint it was the respondent who terminated the contract and that this entitled the appellant to damages for the loss of his business, for general damages together with interest.

[5] The respondent in its defence had alleged that the reason why it did not supply paint was because the appellant had failed to pay in accordance with the credit arrangement which they had made, It counter claimed against the appellant for the sum of $14,739.61 being for paint supplied inclusive of interest at 1.5% per month.

[6] If we were to accept the appellant's argument, we would have to turn basic principles of contract law on their head. Thus a party's right to damages would accrue from the termination of the contract by the other party. This is clearly incorrect.

[7] There was nothing in the contract which provided for an automatic termination of the contract on the happening of certain event. That being so, we fail to see how the contract automatically came to an end upon the respondent's failure to supply paint as agreed in the distributorship agreement.

[8] In contract law, where a party stands at the junction of two rights, namely, termination or affirmation, he has to make an election either to terminate the contract or to affirm it and continue with its performance. If he elects to terminate, a clear intention to bring all obligations to an end must be shown in order to establish that the contract had been terminated: ***Fitzgerald v. Masters*** (1956) 95 CLR 420 at 431.

[9] Normally a letter signifying that the party was terminating the contract would be sufficient notice to the other party that the giver of the notice was terminating the contract. No such notice was given by Delma to Orica or ***vice versa*** leaving aside the question of the validity of the termination.

[10] In those circumstances, even if we hold that Delma had a justifiable ground upon which it could terminate the contract, its failure to notify the respondent was a fatal deficiency.

[11] At best, the appellant could have argued that the respondent's failure to supply paint was a repudiation of contract which it accepted and thereby brought the contract to an end by valid termination.

[12] However we do not believe that the failure to supply by the respondent was a repudiation because it had a valid reason not to supply and the mere non supply for the first time was not in our view, a repudiation of contract. In any event, evidence was adduced on behalf of the respondent to the effect that the respondent could not supply the appellant's order within a day or within 2 days because of certain steps it had to take to prepare the paint. Further, even if we hold that there was a repudiation, there was no acceptance of it so as to bring the contract to an end. See ***Ogle v. Comboyro Investments Pty Ltd***. (1976) 136 CLR 444.

[13] So, we have a situation here where the distributorship agreement is claimed to have been terminated automatically by the appellant when there was no repudiation and there was no provision in the agreement which allowed for automatic termination in the event of non supply. It will be recalled only the respondent had the right to terminate the contract if the appellant refused to do business under Clause 5.2.

[14] We are of the opinion that the appellant had no valid ground upon which to consider itself discharged from the distributorship contract.

[15] We make the following orders.

(1) The appeal is dismissed

(2) The respondent is to pay the appellant costs in the sum of $3,000.00.

Byrne, JA

Shameem, JA

Khan, JA

Solicitors:

Sherani and Company, Suva for the Appellant
Diven Prasad Lawyers, Suva for the Respondent