IN THE HIGH COURT OF MALAYA AT SHAH ALAM, SELANGOR
[SUIT NO: 22NCVC-114-01/2013]

BETWEEN

SPICE CSL INTERNATIONAL SDN BHD ... PLAINTIFF

AND

1. C & L CELLULAR MARKETING SDN BHD

2. CHAN THIM WENG ... DEFENDANTS

JUDGMENT

Introduction

The plaintiff, Spice CSL International Sdn Bhd commenced this action against the defendants to recover its debt amounting to RM668,879.20 due and owing by the defendants for goods sold and delivered by the plaintiff and acknowledged receipt by the defendants.

Background facts

The plaintiff is a company who is engaged in the manufacture, distribution and sale of mobile handsets under the brand name "Spice CSL" (the

goods). The plaintiff and the 1st defendant has entered into a Distributor Agreement dated 24.3.2010 (the agreement), wherein the plaintiff has agreed to appoint the 1st defendant as one of its authorised distributors for the promotion and sale of the goods. By entering into the said agreement, the parties had made it clear that their relationship is solely that of buyer and seller. The distributor's area designated to the 1st defendant is Southern Perak till Tanjung Malim. The agreement contained *inter alia* the following terms:

a) The agreement is valid for 24 months. Renewal had to be done by way of a written agreement on terms to be mutually agreed by the parties.

b) The distributor shall directly purchased from the plaintiff all the goods for sale and distribution in the distributor's area at the distributor's price.

c) The distributor shall promptly pay all outstanding invoiced amounts subject to a credit term of 30 days.

d) Plaintiff shall have the right to charge interest of 1.5% per month on the outstanding amount.

The plaintiff's claim against the 1st defendant is for the sum of RM668,879.20 being money due and owing by the 1st defendant to the plaintiff for goods sold and delivered by the plaintiff to the 1st defendant. The plaintiff's claim against the 2nd defendant is made pursuant to the Letter of Guarantee dated 24.3.2010 signed by the 2nd defendant, guaranteeing to repay the amount due and owing by the 1st defendant to

the plaintiff under the Distributor Agreement. At all the material time, the 2nd defendant is a director in the 1st defendant's company.

The business transactions between the plaintiff and the defendants commenced from April 2010 until July 2012. During this period of time, the 1st defendant made regular payments to the plaintiff, the last of which was for the sum of RM100,000.00 in July 2012. However, even with this last payment, there is still an amount of RM668,879.20 due and owing by the 1st defendant for the period between March 2012 to 19.7.2012.

The 1st defendant denied the plaintiff's claim and had raised the following defences:

a) The goods were not in good conditions and had been returned by the defendants to the plaintiff.

b) Goods delivered were not as per order.

c) The plaintiff had delivered goods which were not ordered by the 1st defendant.

Having read the defence, I noted that nowhere in their defence, the 1st defendant had pleaded they did not receive the goods. Their only complaints were essentially that:

a) Some goods delivered were defective;

b) Some goods were not as ordered; and

c) Some goods they did not order at all.

The 1st defendant is bound by their pleadings. They cannot now raise non-receipt of the goods as a defence to the plaintiff's claim. The 2nd defendant pleaded defence is the plaintiff's claim against him is pre-mature as the plaintiff's claim against the 1st defendant has yet to be resolved.

The trial of this case proceeded with three witnesses, two for the plaintiff and one for the defendants. The two witnesses for the plaintiff are:

(i) Mr. Ang Khean Ming, the Chief Operating Officer of the plaintiff (PW1); and

(ii) Mr. Rakesh Khera, an Indian citizen and is the Chief Financial Officer in the plaintiff's company (PW2).

The 2nd defendant (DW1) testify on behalf of the defendants.

Admissibility of documents

Through PW1 and PW2, the plaintiff sought to establish their case by producing the following documents:

1. Distributor Agreement and Letter of Guarantee. The 2nd defendant (DW1) had admitted that he was the one who had signed both the Distributor Agreement and the Letter of Guarantee. Therefore, the authenticity of these two documents is not disputed and I accept them as evidence and marked them as exhibit P3 and P4 respectively.

2. Carbon copy of invoices, delivery order and packing lists. Learned counsel for the defendants raise objection that these documents are not admissible because PW1 and PW2 had no personal knowledge of the same and the originals were not produced. It is not disputed that PW1 join the plaintiff's company only in Mei 2012 and PW2 join the company much later ie, on 6.9.2013 respectively. Both witnesses readily admitted they had no personal knowledge of events taking place prior to them joining the company. Nevertheless, they both claimed to have knowledge about this case based on the documents kept in the company as well as from the record saved in the computer system of the company. PW1 further explained the original of all these documents were forwarded to the 1st defendant and are no longer in the plaintiff's custody. Hence, the plaintiff could not produced the original copies. Despite there being photocopy or carbon copy only, learned counsel for the plaintiff argued these documents are consistent with the invoices and these are the best documents which the plaintiff possess since the original have been sent to the 1st defendant. Thus, counsel for the plaintiff submits, these documents should be accepted as evidence. I agree for the following reasons. The evidence adduced show the original of these documents could not be produced or made available simply because the originals had been sent to the 1st defendant and not that the original did not exist or the photocopy is a concortion. In demanding and insisting the plaintiff to produce the original documents, the 1st defendant is trying to take advantage of the situation when they knew about the documents. I then marked these documents as exhibit P5 and admit them in evidence.

3. Requisition Forms. These requisition forms are all photocopy because those are rubber stamped by the defendants and then faxed to the plaintiff as per the plaintiff's instruction stated in the requisition form. These copies are kept in the plaintiff's company file. Like the earlier documents, the plaintiff never possessed any originals for these requisition forms. Same argument were raised by both counsel. On the same ground, I admitted these documents into evidence and marked them as exhibit P2.

4. Courier Slips. Only photocopies are available and kept in the plaintiff's company's file as the originals are kept by the Nationwide Courier Services. The defendants allege that without the original courier slip, they cannot really see the chop. I find this allegation is not true. DW1 in his testimony had admitted that one of the persons who acknowledged receipt on the courier slip is Liew Wen Nuo, a director of the 1st defendant's company. Looking at the courier slips myself, I notice not only most of them had the name of Liew Wen Nuo written on it, but also they contained his signature and the 1st defendant's company chop. During cross-examination, DW1 testified that the 1st defendant's rubber stamp had to be authorised by him before they are applied. If that is the case, it is reasonable for me to say that all the courier slips must have been validly verified by him before the rubber stamps are allowed to be imprinted on the courier slips. It therefore follow that the courier slips are definitely true and accurate when the contents are verified by DW1 before the rubber stamp is applied. If the courier slips were untrue, surely the defendants would have called the 1st defendant's director to the court

to dispute the acknowledgement. But the defendants never do so. Therefore, the acknowledgement by Liew Wen Nuo, a director of the 1st defendant must be deemed to have been proper and in order. Based on DW1's admission that the chop on the courier slips are indeed the 1st defendant's company chop and the document are acknowledged receipt and signed by the director of the 1st defendant, I admit the courier slips as evidence and marked them as exhibit P1.

5. Statement of Account, which is a computer generated document. PW2 has testified that the statement of accounts was produced in the ordinary course of the plaintiff's business. I accept his evidence. The statement of account is admissible under section 90A(1) of the Evidence Act 1950 and was marked as exhibit P5.

To sum up, I agree with the plaintiff that the defendants' objection against the admissibility of the documents is mere technicality which the defendants intended to rely to defeat the plaintiff's claim, knowing that the original invoices, the original requisition forms, the original courier slips, the original delivery orders are in the 1st defendant's possession being the recipient of the original documents. It is correct for the plaintiff to say such objection cannot stand because in the defendants' pleaded case, they never disputed they had received the goods from the plaintiff. As the non receipt of the goods was not pleaded, the issue of whether the delivery orders were authentic or the courier slips was real and whether the plaintiff did deliver the goods do not arise. The truth of the matter is all these documents were produced from the record of the plaintiff's company where

PW1 being the Chief Operating Officer and PW2 being the Chief Finance Officer have custody and control over the documents. These documents, not only formed part of the company's record, but are consistent to each other. Full weight are given to exhibit P1, P2, P3, P4 and P5.

I now move on to the issues.

Issues to be tried

The four (4) issues formulated by the parties are as follows:

1. Whether the Distributor Agreement legally and validly binds the defendants?

2. Whether the Letter of Guarantee legally and validly binds the 2nd defendant?

3. Whether the goods sold and delivered had been returned by the defendants?

4. Whether the plaintiff is entitled to claim for the relief stated in paragraph 13 of the statement of claim?

The first issue

The defendants' argued the Distributor Agreement is valid from 24.3.2010 until 23.3.2012 and ended on 24.3.2012. This argument is made based on clause 2.2 of the agreement which states the agreement is valid for two

years from the date it was signed. Further, the same clause also mentioned, upon its expiry, the agreement shall come to an end and shall not be extended unless such renewal or extension has been done by way of a written agreement. Now, the defendants say the statement of account dated 30.9.2012, produced by the plaintiff show transactions that takes place from 9.3.2012 until 19.7.2012. Hence, the defendants took the position that since the 1st defendant's obligation under the agreement has ended on 23.3.2012, the defendants are no longer bound by the agreement and not liable to the plaintiff for the transactions after 23.3.2012. On the other hand, counsel for the plaintiff argued whether the Distributor Agreement had expired or otherwise is immaterial. So long as the defendants had received the goods from the plaintiff, they are liable to pay for the same. The plaintiff is right. Although the agreement had expired on 24.3.2012, through their conducts of ordering and purchasing the goods the parties continue their business relationship. If the 1st defendant do not wish to continue the business relationship beyond 23.3.2012, they should not have purchased the goods anymore or returned the same to the plaintiff or intimated their intention of not continuing business to the plaintiff. The 1st defendant never did any of those things. Therefore, although there was no formal agreement between the parties (after 23.3.2012), the law under the Sale of Goods Act 1957 is applicable in that the delivery and payment for the price of the goods delivered are concurrent. The defendants are liable to pay to the plaintiff for the goods they received for the period from 23.3.2012 to 19.7.2012. The first issue is answered in favour of the plaintiff.

The second issue

For this issue, the defendants argued since the Distributor Agreement had expired on 23.3.2012, the Letter of Gurantee also expired on 23.3.2012 and no longer bind the 2nd defendant. This argument is baseless. The Letter of Guarantee is for repayment of all monies due and owing by the 1st defendant to the plaintiff. There is no pre-condition that the plaintiff must recover payment from the 1st defendant first before commencing any legal action against the 2nd defendant as the guarantor. Under clause 2.3 of the Letter of Guarantee, the 2nd defendant had agreed to be a principle obligor for the debt and not merely surety. Clause 3.3(a) enables the plaintiff to take action against the 2nd defendant without having to take any action first against the 1st defendant. I, therefore hold the 2nd defendant's defence of pre maturity of the legal action is a non starter and must fail. The answer to the second issue is the Letter of Guarantee is valid and binding on the second defendant even after 23.3.2012.

The third issue

The defendants have alleged that the goods were not in good condition and the same were returned to the plaintiff. Pursuant to section 101 of the Evidence Act 1950, the burden to prove that fact lies on the defendant. This the defendants have failed to do. Before this court, the defendants have not produced any documentary evidence to show that they have complained and returned the goods. There is also nothing from the defendants to prove that the goods delivered were not as per their order. I

could sum up by saying what were pleaded by the 1st defendant was not proved at all. These issues are raised as an after thought or a bare allegation to defeat the plaintiff's claim. In the end, there is no proof whatsoever of any goods returned to the plaintiff or that the plaintiff has failed to take into account goods returned by the defendants and to deduct the amount outstanding. In the circumstances, I reject the defendants' defence. This third issue also is held in favour of the plaintiff.

The fourth issue

Counsel for the defendants argued the plaintiff's statement of account is inaccurate and suspected because its maker was not called to explain how the figures were derived at. Further, counsel argued there was no proof the statement of account was served on the defendants. I reject both the argument. The authenticity and admissibility of the statement of account has been considered by the court. The statement of account has been admitted in evidence and could no longer be challenged by the defendants. These statement of account are consistent with the other documents and they proved the defendants had indeed received goods worth RM668,897.20. To accede to the defendants' contention would run counter to all the documentary proof and caused grave injustice to the plaintiff. Based on all the documents tendered, the plaintiff has proved to this court that they have delivered goods worth RM668,879.20 to the defendants but no payment was received. In the circumstances, the plaintiff is entitled to the reliefs claimed in the statement of claim.

Conclusion

This is a straight forward claim for goods sold and delivered to which the defence is a sham. I, therefore enter a judgment for the plaintiff as prayed for in the statement of claim with RM20,000.00 cost.

Dated: 21 JULY 2014

(HADHARIAH SYED ISMAIL)
Judge
High Court
Shah Alam

COUNSEL:

For the plaintiff - Joseph Ting (Allen Tan with him); M/s Hing Chambers

For the defendants - George Shek; M/s Tan Chia Min & Partners