CR. AMANYA
ADVOCATES & SOLICITORS

CASE DIGEST FORTRANSLINK LTD VERSUS CHEMI & COTEX INDUSTRIES LTD,TANZANIA (CCIL), CHEMI & COTEX UGANDA LTD(CCUL) and NATHAN RAMACHANDRAN CIVIL SUIT No. 0100 OF 2019 Synopsis

Synopsis

In this case, the High Court awardedUSD.18,000,000 based on trade secrets protection and proprietary rights, unfair business practices, and unfair termination of a distributorship arrangement.
Legal principles covered:
1.Agency
2.Unwritten and partially unwritten contracts
3.Length of notice of termination
4.Rights of a distributor
5.What amounts to trade secrets and proprietary rights
6.What amounts to brand equity
7.What is the criteria for calculating general damages in the event of breach of contract.

Brief facts

The Plaintiff, and the 2nd Defendant are companies incorporated, andcarrying on business in Uganda. The 1st Defendant is a manufacturingcompany incorporated in Tanzania and is the majority shareholder in the2nd Defendant Company, which was the distributor of the 1stDefendant's manufactured products in Uganda.The 1st Defendant is the manufacturer, and owner of the Whitedent brandof oral care products ("the Whitedent Brand"). In 2012, the Plaintiff through email, and physical meetings sought from the1st Defendant a distributorship arrangement, which was agreed to. Underthe said arrangement the Plaintiff would purchase, and import the goodsfrom the 1st Defendant, and distribute these products in Uganda at anagreed mark up on the landed cost. The 1st Defendantterminated the distributorship arrangement; the lawfulness of thistermination was contested by the Plaintiff who sued seeking the followingreliefs; declarations that the 1st Defendant breached the contract, and or AgencyDistributorship Agreement, and that the 1st, 2nd, and 3rd Defendants infringed onthe Plaintiff's proprietary data, and trade secrets; orders for an award of special,general, and aggravated damages, interest, and costs of the suit.

Detailed discussion of legal principles discussed in the case

1.Agency

The trial judge relied on Halsbury's laws to explain that agency connotes the relation which exists whereone person has authority or capacity to create legal relations between theperson occupying the position of Principal and third parties.

The nature of the relationship will determine whether there is an agent- principal relationship even where parties may use different terminology to define their relationship.

The facts of the case indicated an implied relationship of agent-principal because the 1st Defendant did not deny that the 3rd Defendant was their agent,and secondly, the principle of vicarious liability operates in agent/principalrelationships on the notion that it is common to regard control by the principal as a defining characteristic of agency.

The 3rd Defendant disguised to be working together with the Plaintiff on instructions of the 1st Defendant, and moved around the Country with the Plaintiff's Country Manager, and sales team to all the Plaintiff's customers, andsub-contractors taking their contacts, and later converted all information to theDefendants benefit.

The judge relied on under section 118, part X of theContracts Act No. 7 of 2010, and stated that "It's a well-established principle that where an agent, makes a contract on behalf of the principal, the contract is that of the principal, not that of the agent, and prima facie at common law the only person who can sue or be sued is the principal."

In conclusion, the parties had a principal-agent relationship where the principal was liable for the actionsof their agent, but the agent could not be sued, when the principal is known, and sued as well. The plaintiff had no cause of action against the 3rd Defendant.

2.Unwritten and partially unwritten contracts
A contract may be written or oral.In the instant case, the terminated agreement was entered into orally, however, the Plaintiff, and the 1st Defendant continued with their conversations by email correspondence. The proposition of the law is that emails form documentary evidence, in so far as the opposite party is notified, and approves of the same.
The parties had a partially oral agreement and the other part on email which from the time the brand building commenced totalled to a 5 years'distributorship arrangement between the Plaintiff, and the 1stDefendant.
3.Length of notice of termination

Citing several persuasive decisions, the Judge held that; It is trite law that where a contract is silent on the duration, and termination rights,it can still be terminated on reasonable notice on the part of one or both parties.
Contracts are not intended to be perpetual.

She relied on the case of MartinBaker Aircraft Co. Ltd.& Another Vs Canadian Flight Equipment Ltd[1955]2QB 556at 558) to determine reasonable notice.Consideration should be given to the circumstances at the time of thenotice, as opposed to those existing when the contract was made.

The parties in this case had a 5 years' distributorship arrangement; the nature of the transaction(volume), and the level of trust that isnoticeable from the conduct of 1st Defendant, and the Plaintiff. Two months' notice to terminate was not sufficient.
"In conclusion, for a transaction of this kind, which entailed mutual trust, and the whole arrangement by which the 1st Defendant's Whitedent brand, and business was fostered by the Plaintiff, six months' notice would have been sufficient notice."

4.Rights of a distributor.
Thelearned trial judge having found that the relations of the Plaintiffs and defendants was an exclusive distributionarrangementdifferentiated an agency from a distributorship.
An agent is appointed by the principal to negotiate and possibly conclude contracts with customers on the principal's behalf. A distributor buys goods from manufacturers or other suppliers and resells them to others in the supply chain such as resellers and end –users, adding a margin to cover its own costs and profit.The distributor may also provide services for the manufacturer or supplier, such as product marketing and post-sale support services.

The well-known role of a distributor is to buy goods from the manufactures or othersuppliers and resell them to others in the supply chain however, when buying andreselling the products, the distributor contracts both with the supplier and with itscustomer, and title to the products in question passes to, and from the distributor.

5.What amounts to trade secrets and proprietary rights?
The trail judge ably discussedwhat amounts to a trade secret and the evidence a party should adduce to succeed while citing both Ugandan laws and international laws on protection of trade secrets.

Trade secret as information including but not limited to a formula, pattern,compilation, program, method, technique, or process, or information containedor embodied in a product, device or mechanism which—
(a) is, or may be used in a trade or business;
(b) is not generally known in that trade or business;
(c) has economic value from not being generally known;and
(d) is the subject of efforts that are reasonable under the circumstances to
maintain its secrecy.

Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPSAgreement") provides that the unauthorized acquisition, use or disclosure of such secret information in amanner contrary to honest commercial practices by others is regarded as unfairpractice, and a violation of the trade secret protection.
The customerlist was developed over a period of 28 years, which was unique to the distribution business of this nature, and that the Plaintiff had kept itconfidential not until the Defendants by unlawful means obtained the saidconfidential information and used it to the detriment of the Plaintiff.
The Defendants claimed that they did not obtain "tradesecrets" from the Plaintiff leading up to, and prior to the termination of thedistributorship arrangement. That the list of the retail outlets, in which stock andgoods sold, and their physical locations was not, and cannot amount to a "trade secret".
The Court found that the Plaintiff's information on the listof customers, customer profiles, value performance, the specific insights ofdealing with customers, and the distribution infrastructure of the business inUganda, which was at all material times kept confidential by the Plaintiff, and thatthe said information, which was unknown to the 1st, and 2nd Defendants.
The Judge was persuaded by and cited Sanford Lee Hertz Vs The Luzenac Group, a French Corporation, 576 F.3d 1103,1114(10th Cir.2009), cited by Counsel for thePlaintiff, in which the Court held that: "A customer list can be a trade secret when it is the end result of a longprocess of culling the relevant information from lengthy and diversesources, even if the original sources are publicly available. "
Court further found that the new distribution arrangement between the 1st Defendant, and the 2nd Defendant, in which the 1st Defendant is the majority shareholder in the 2nd Defendantcompany, and the use of the Plaintiff's confidential information, in disregard to what was agreed between the 1st Defendant, and the Plaintiff, is contrary tohonest commercial practices, and regarded as unfair practice, and a violation of the trade secret protection.

6.What amounts to brand equity
The judge found that positive brand equity is beneficial in a sense that companies charge more for their products, and the equity(value) is transferable to other related products using the same brand name hence more sales, and profits.

Counsel for the defendants defined "brand equity" to include brandawareness and recognition; the tendency of customers to try out the brand, toprefer it to other brands, and to remain loyal to it.

The Plaintiff's counsel explained that building brand equity is done in terms of investment by paying for marketing activities, time, effort, technical know- how, and or expertise, and resources to the building of the commercial equity (value) of products.
He further defined as positive brand equity the market (people, and or customers) think so highly of a particular brand), is beneficial in a sense that companies charge more for their products, and the equity(value) is transferable to other related products using the same brand name hence more sales, and profits.

7.Criteria for calculatingdamages in the event of breach.
Special damages must be specifically pleaded and proved. The Plaintiff discharged the evidential burden of proof to the required standard regarding USD 18,053,972.39 (UnitedStates Dollars Eighteen Million, Fifty-Three Thousand, Nine Hundred Seventy-

Two,Thirty-Nine, as per the summary of the certified claim attached to the audit report. The Plaintiff adduced evidence of invoices, receipts and witnesses.
Court also awarded aggravated damages because the Defendants arrogantly terminated the contract without a board resolution, and without alawful termination notice, which caused unexplainable humiliation to the Plaintiffwas unchallenged by the 1st, and 2nd Defendants.
It was the Plaintiff's evidence that she suffered loss of proprietary business data infrastructure, which the Defendants are profiteering from to the detriment of the Plaintiff.
To award interest at the rates of 24% on special damages, and 12% on aggravated, and general damagescourt took into consideration the period of 28 years that the Plaintiff took todevelop their trade secret, which is not just the customer list and the tremendous efforts put in the brand equity that ledto the two awards of the super brand, and people's choice of the year award.

Legal Implications and key takeaways
1.Parties must respect confidential information shared between them even when the contractual relationship ceases to exist. Sharing and using information previously considered confidential between two parties in a totally new agreement in disregard to previous agreement, is contrary to honest commercial practices, and regarded as unfair practice, and a violation of the trade secret protection.

2.It is crucial to have written contracts even after parties have established contractual relationships clearly defining the terms of the relationship and stipulating the relationship envisaged between the parties.

3.The case emphasizes the procedure of termination of contracts which must be preceded by sound reason, sufficient notice and board resolution in case of companies.

End
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