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DREW & NAPIER LLC

LEGAL UPDATE

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CASE UPDATE

ASSESSMENT OF DAMAGES IN A BREACH OF CONTRACT

Fish & Co Restaurants Pte Ltd (f.k.a. O.B. Singapore Operations Pte Ltd) v MFM Restaurants Pte Ltd & Another [2009] SGHC 70

Executive summary

Where a party seeks to assess damages suffered as a result of a breach of a contract, the court must be satisfied, on a balance of probabilities, that the alleged loss is causally connected or linked to the breach of contract.

Tony Yeo and **Rozalynne Asmali** of Drew & Napier LLC successfully represented Fish & Co Restaurants Pte Ltd, the party seeking to assess damages suffered.

Background

Fish & Co Restaurants Pte Ltd (the "**Plaintiff**") is the owner of a chain of seafood restaurants called "Fish & Co". The 1st Defendant, MFM Restaurants Pte Ltd (the "**1st Defendant**") is the owner of seafood restaurants in Singapore called "The Manhattan Fish Market". The 2nd Defendant, Low Theng Yong Dickson (the "**2nd Defendant**") was the former Operations Manager of the Plaintiff, and had full access and knowledge of Fish & Co's confidential information and trade secrets while in the employ of the Plaintiff.

Sometime in 2002, several months after the 2nd Defendant had resigned from the Plaintiff, the latter discovered near-identical restaurants in Malaysia called "The Manhattan Fish Market". On 30 March 2005, the Plaintiff commenced proceedings against the 2nd Defendant for breach of his employment obligations in his employment agreement with the Plaintiff on the basis that he had set up and was actively running "The Manhattan Fish Market" chain of restaurants in Malaysia.

These proceedings were eventually discontinued. The Plaintiff and the 2nd Defendant entered into a settlement deed on 27 April 2005 (the "**Settlement Deed**"). Notably, the 1st Defendant and three other Malaysian companies agreed to be parties to the Settlement Deed even though they were not named as defendants in these proceedings.

Under the terms of the Settlement Deed, the Defendants and the three Malaysian companies voluntarily gave the following undertakings (the "**Undertakings**"):

- (i) they would not use, in the Manhattan Fish Market restaurants around the world, serving pans which were identical and/or similar to those used by the Plaintiff;

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- (ii) they would use sauces which were completely different from particular sauces of the Plaintiff's;
- (iii) they would not use any slogans and/or jingles which were identical/confusingly similar to the Plaintiff's slogans; and
- (iv) they would not use particular words/phrases which were used by the Plaintiff.

Despite several reminders by the Plaintiff, the Defendants failed to comply with the Undertakings. In particular, the 1st Defendant opened the first Manhattan Fish Market restaurant in Singapore in May 2005 and did not comply with the Undertakings.

In September 2005, the Plaintiff commenced proceedings in Singapore against the Defendants for breach of the Undertakings. On the first day fixed for trial, the Defendants consented to judgment in favour of the Plaintiff and injunction orders similar to the Undertakings, with damages to be assessed.

The assessment of damages

At the hearing for the assessment of damages, the Plaintiff put forward two main heads of claims:

- (i) loss of profits during the breach period from August 2005 to January 2007 ("**the Breach Period**"); and
- (ii) loss of profits from February 2007 onwards.

Both parties adduced expert evidence to support their case. The Plaintiff's expert provided the court with two methods of calculation to calculate the damages suffered by the Plaintiff. The Defendants' expert did not provide any.

At the first instance, the Assistant Registrar awarded the Plaintiff damages in the sum of \$72,688 for both heads of claim. In reaching this quantification, the Assistant Registrar adopted one of the methods of calculation put forward by the Plaintiff's expert. The Assistant Registrar rejected the evidence adduced by the Defendants on the basis that its expert's reasoning was simplistic and faulty. The Assistant Registrar also took the view that the Defendants' expert was not objective as he had strayed into areas outside his area of expertise.

Both parties appealed to the High Court. The Plaintiff argued that it was entitled to a higher award. The Defendants, on the other hand, argued that Plaintiff was not entitled to any damages.

The High Court's decision

On appeal, the court increased the award of damages to the Plaintiff from \$72,688 to \$269,000.

One of the issues which the court had to deal with was the issue of causation, i.e. did the Defendants' breach of the Settlement Deed cause the Plaintiff to suffer losses?

The court found that the Plaintiff's actual loss could properly be attributed to the Defendants' breach of the Undertakings. The court took into account the following factors:

- (i) the Undertakings in the Settlement Deed were closely related to the Plaintiff's business operations. Given the circumstances of the case, the Plaintiff's loss of business is the best evidence of loss;
- (ii) the intention of the parties when entering into the Settlement Deed was clear -- there can be no breach without inflicting at any rate some measure of damage on the Plaintiff having regard to the evidence that the breach took place in a commercial context;
- (iii) evidence was adduced to show that the 1st Defendant's performance as a new entrant in the Singapore market in 2005 was exceedingly good;
- (iv) the sales figures of the Plaintiff's Glass House outlet compared with the 1st Defendant's restaurant at Plaza Singapura illustrated how the 1st Defendant's operations had affected the performance of the Plaintiff's Glass House outlet;
- (v) the Department of Statistics, which offered independent evidence, showed how restaurants were generally performing in Singapore during the Breach Period. It was clear from those statistics that the Plaintiff's Glass House outlet was performing well below the industry benchmark during the Breach Period while the 1st Defendant's restaurant at Plaza Singapura was outperforming the industry; and
- (vi) on the issue of remoteness of damages, the court found that the Defendants, who had acted on legal advice and gave the Undertakings voluntarily, ought reasonably to have contemplated that the Plaintiff's loss of profits would be a likely consequence of their breaches, and that they would have to pay damages and costs if the Undertakings were breached.

Method of calculation

In ascertaining the quantum of damages, the court adopted one of the methods of calculation put forward by the Plaintiff's expert. This method utilised a percentage of the 1st Defendant's sales revenue multiplied by the Plaintiff's profit margin and cost structure. In essence, this method endeavours to recover the Plaintiff's lost profits from the 1st Defendant's actual sales on the basis that these sales would have been the Plaintiff's sales but for the Defendants' breach of the Undertakings.

Comment

The case highlights the importance of adducing strong and direct evidence of the causal link between a party's breach and the damage suffered by the innocent party. It also highlights the importance of using independent expert evidence, and how such expert evidence can be of

assistance to the Singapore courts. The case also offers a possible method of calculation for loss of profits in breach of contract cases.

The Defendants have since appealed to the Court of Appeal. This will be one of very few assessment of damages cases which have been heard before the Court of Appeal.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the intellectual property lawyers in Drew & Napier LLC (please refer to the Directors' profiles on our [website](#)), or:

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