Aglow Alicom Pte Ltd v Neewscomm Marketing Pte Ltd & Others
[2002] SGHC 312

Case Number : Suit No 351 of 2000, Notice of Assessment No 33 of 2001
Decision Date : 31 December 2002
Tribunal/Court : High Court
Coram : Thian Yee Sze AR
Counsel Name(s) : —
Parties : —

Judgment

GROUNDS OF DECISION

By virtue of the consent interlocutory judgment, the 1st defendants are liable for first, the breach of the non-solicitation term with respect to the 3rd defendants and/or Globalcom, and second, the breach of the confidential information term and breach of confidence. The 2nd defendant is liable for breach of confidence only. I deal first with damages for breach of the non-solicitation term.

(I) Damages for breach of the non-solicitation term

2 In arriving at the amount of damages for breach of the non-solicitation term in the one year period from the date of the termination agreement (ie 31 August 1999), I took into account the following factors:

(a) total number of terminated customers

(b) percentage of customers who stay active

(c) average loss of usage per day

(d) average number of business days per month

(e) number of months which each customer remains as a customer with the plaintiffs

(f) profit margin

3 The damages to be awarded to the plaintiffs should be the loss of profits which the plaintiffs suffered as a result of the 1st defendants' breach in this regard. I agreed with the plaintiffs' submission that the quantum of damages to be awarded should be based on the following formula:

[Total number of terminated customers] x [Percentage of customers who stay active] x [Average loss of usage per day] x [Average number of business days per month] x [Number of months which each customer remains as a customer with the plaintiffs] x [Profit margin]

I looked into each of the factors in turn.

4 With respect to (a), after considering all the evidence, I found that, on a balance of probabilities, the most accurate figure to use was 173. It is incontrovertible evidence that the

attached schedule to the termination agreement of 31 August 1999 set out the plaintiffs' customers, which stood at 322 according to the agreement (or more accurately, 321). This agreement, together with the schedule, was an agreement between the parties, and the 1st defendants cannot recant from admitting the veracity of the contents of that agreement, unless very clear and unequivocal evidence is presented to the contrary. This, I failed to find. I accepted Anthony Khoo's evidence that the attached scheduled was prepared by the 1st defendants, as opposed to the 1st defendants' contention that it was prepared by the plaintiffs. The 2nd defendant's evidence was inconsistent. He could not clearly ascertain when the termination of the 17 customers (which the defendants contended were the only customers who terminated the plaintiffs' services as a result of the 1st defendants' breach) took place. I accepted Simon Har and Craymond Ching's evidence that the database of the plaintiffs' customers was handed to the 3rd defendants after the date of the termination agreement. Having established that as at 31 August 1999, 322 customers were the plaintiffs' customers, I accepted the plaintiff's evidence and found that 173 of those had terminated the plaintiffs' services (190 minus 17 who re-subscribed to the plaintiffs' services).

5 Factor (b) is crucial as not all 173 customers who terminated the plaintiffs' services could have done so because of the 1st defendants' breach of the non-solicitation term. This is because the customers who would have terminated the services in the normal course of the plaintiffs' business would have to be taken into account. After evaluating the plaintiffs' expert witness, Chee Yoh Chuang's, evidence as to the accurate percentage of attrition in the normal course of business, I found that the best figure to use was 57.2%, based on Scenario 1 of his report and the findings in paragraphs 2.15 to 2.17 therein. Although there was some evidence that some customers used the plaintiffs' services after a lapse of more than six months, that was not, in my view, sufficient to establish such a trend as to render this selected pool of customers "active". As such, I did not rely on the premises set out in Scenario 2 of the report. On the other hand, the defendants did not proffer any cogent evidence to rebut the figures put forth by the plaintiffs.

6 With respect to factor (c), I accepted the plaintiffs' calculation that each customer used the plaintiffs' fax forwarding service at an average of 14.03 minutes per day. The defendants did not submit any cogent evidence to contradict this. Factor (d) is not in contention. With respect to factor (e), I accepted Chee Yoh Chuang's method of calculation in arriving at a period of 2.5 years, or 30 months, as set out in paragraphs 2.21 and 2.22 of his report (taking the premises in Scenario 1). I did not agree with the defendants' submission that one should deem customers who were "inactive" for more than six months as customers who had terminated the services with the plaintiffs. First, there was evidence that some of these customers used the plaintiffs' services after being "inactive" for more than six months. Second, the contractual terms in the plaintiffs' standard agreement with their customers provided that termination would have to be effected in writing. With respect to factor (f), I accepted the plaintiffs' estimated figure of between $0.45 to $0.64 per minute. On the other hand, the defendants did not produce substantiated evidence as to why these figures should be rejected. They submitted a figure of $0.30 per minute without explaining clearly how that figure was arrived at. I arrived at a figure of $0.45 per minute, taking Anthony Khoo's estimate.

7 As such, the damages awarded to the plaintiffs payable by the 1st defendants as a result of the breach of the non-solicitation term are:

173 (customers) x 0.572 (percentage of customers who stay active) x 14.03 (average loss of usage per day in minutes) x 20 (working days per months) x 30 (months in which each customer stays as a customer of the plaintiffs) x $0.45 (profit margin per minute) = $374,855.20

(II) Damages for breach of the confidential information term and breach of confidence

8 There is an overlap in the damages suffered by the plaintiffs as a result of the breach of the non-solicitation term, and the breach of the confidential information term and breach of confidence. The plaintiffs contended that the calculation for such a loss was either loss of profits or the value of the information (which in this case was the database of customers). I was of the view that calculating the loss to the plaintiffs on account of the value of the database was not accurate; although there was some evidence that the 1st defendants were trying to sell the 3rd defendants the database for $120,000, no agreement was reached. There was no definitive "price" which could be affixed to the database. As for loss of profits suffered by the plaintiffs, it was difficult to attribute what portion of the terminated accounts was as a result of the breach of the non-solicitation term, and what portion was as a result of the breach of the confidential information term and breach of confidence. Neither the plaintiffs nor defendants brought up any evidence towards this end. Hence, I could only calculate damages on the basis that the loss of profits would be calculated as a result of all the three types of breaches as a whole and not apportion the damages to each type of breach.

9 For all the above reasons, I awarded the plaintiffs damages in the sum of $374,855.20 to be payable by the 1st and 2nd defendants. Interest on the judgment sum would be at a rate of 6% per annum from the date of the issue of the writ to the date of judgment. The costs of the assessment and the action are to be paid by the 1st and 2nd defendants to the plaintiffs, the quantum of which are to be agreed or taxed.

Sgd:

THIAN YEE SZE
ASSISTANT REGISTRAR