Slide & Hide System (S) Pte Ltd v Chua Seng Guan
[2009] SGHC 191

Case Number	: Suit 100/2007, RA 94/2009, 96/2009
Decision Date	: 26 August 2009
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Christopher de Souza and Lim Ke Xiu (Lee & Lee) for the plaintiff; Malathi Das (Joyce A Tan & Partners) for the defendant
Parties	: Slide & Hide System (S) Pte Ltd — Chua Seng Guan

Damages

26 August 2009

Tay Yong Kwang J:

Introduction

1 This judgment concerns two cross-appeals against the decision of an Assistant Registrar ("AR"). RA No 94 of 2009 is the plaintiff's appeal against the AR's award of nominal damages of $1,000 to the plaintiff and her consequential decision to award the costs of the assessment of damages hearing fixed at $20,000 against the plaintiff. RA No 96 of 2009 is the defendant's appeal against the AR's decision to award the costs of the trial on liability (heard by Chan Seng Onn J) to the plaintiff on the High Court scale and to award only $20,000 for the assessment of damages hearing to the defendant.

The factual background leading to the assessment of damages

2 The plaintiff is a Singapore company involved in the manufacture, sale and installation of a pocket or cavity sliding door system called "SlideHide". This system saves wall space as the sliding door is tucked away in a cavity in the wall. After the plaintiff established SlideHide in Singapore by the late 1990s, the plaintiff decided to market it abroad.

3 In 2004, the defendant, an experienced Malaysian businessman and barrister, indicated his interest in entering into a business relationship with the plaintiff to expand the overseas reach of SlideHide. As the defendant was well-connected in the building materials market in Malaysia, the plaintiff decided to enter into a distributorship agreement with the defendant on 1 June 2004 whereby the defendant was appointed the plaintiff's exclusive distributor in respect of Sarawak, Sabah and Brunei ("the territory").

4 The distributorship agreement had the following salient clauses:

4.5 The Distributor is prohibited to sell, publicise, or produce in and outside the territory products of any other manufacturer of pocket wall system or similar products which might be in conflict with the Seller's interest. This prohibition is extended to all activities covering direct or indirect participation in other companies or using of proxies.

4.6 Within two (2) years after the termination of this Agreement, the Distributor is not allowed to engage in a similar product production in terms of function and application in and outside the territory. This prohibition is extended to all activities covering direct or indirect participation in other companies or using proxies.

5 After the distributorship agreement was signed, the defendant placed orders for SlideHide mainly through Trend Living, an entity in which the defendant and his wife had interests. As the defendant's sales figures in the territory were below the projected quota, the parties agreed that the defendant be allowed to market SlideHide in West Malaysia as well. The defendant then began to market the plaintiff's product in West Malaysia via Kimgres Marketing Sdn Bhd ("Kimgres"), a Malaysian company in which he is a director. The defendant is also the managing director of Kim Hin Industry Bhd ("Kim Hin"), a public listed company in Malaysia in which his family has a substantial shareholding. Kim Hin and its related companies, including the said Kimgres, are in the business of manufacturing and distributing sanitary ware and other household items.

6 Subsequently, the plaintiff came to know that the defendant, together with Ivan Koh and Ong Chin Huat, had set up a company in China called Concealtec Building Products (Zhuhai) Co Ltd ("Concealtec") in August 2005 to manufacture and sell a concealed door system which was substantially similar to the plaintiff's SlideHide in both function and design ("the competing product"). On 30 September 2005, the plaintiff decided to terminate the distributorship agreement on account of the defendant's breach thereof.

7 After the termination of the distributorship agreement, the defendant continued to compete against the plaintiff in breach of clause 4.6 (see [4] above). Accordingly, the plaintiff commenced the present suit in February 2007.

8 The trial on liability was heard by Chan Seng Onn J ("the trial judge") in November 2007. On 19 March 2008, the trial judge delivered oral judgment and made the following findings and orders:

(1) Plaintiff's claim is allowed for an inquiry as to damages or at the plaintiff's option, an account of profits arising from the breach of clauses 4.5 and 4.6 of the distributorship agreement dated 1 June 2004 to be heard before the Registrar, and I grant the order for payment to the plaintiff of all sums found to be due upon the inquiry or the account. I make no order on the plaintiff's claim for the injunction and no order for delivery up as these are superseded by events and the plaintiff is no longer pursuing them;

(2) Interest on the amounts found due on inquiry on damages or the account to be reserved to the Registrar hearing the assessment;

(3) The defendant's counterclaim is dismissed;

(4) Costs of the action on the claim and in defending the counterclaim are to be reserved to the Registrar hearing the assessment;

(5) Such costs are to be paid by the defendant to the plaintiff;

(6) No certificate for two counsel for the trial before me;

(7) Exhibit P2 (mock-up model in blue bag) to be returned to the plaintiff.

9 It was accepted by the trial judge that the defendant had divested his 33% shareholding in Concealtec on 15 October 2007. However, the damages would be computed from date of termination (30 September 2005) to two years thereafter under the distributorship agreement (i.e. up to 30 September 2007) ("the liability period") as the said divestment took place after 30 September 2007.

10 The plaintiff opted for an inquiry as to damages and the matter then went before the AR for this purpose.

The assessment of damages before the AR

11 The assessment of damages before the AR took four days. In her grounds of decision dated 17 March 2009, the AR found that the plaintiff failed to prove that it had suffered damages as a result of the defendant's breaches of the distributorship agreement and made the following orders:

(1) The plaintiff be awarded nominal damages of $1,000;

(2) The defendant to pay the plaintiff costs of the trial on liability to be taxed on the High Court scale; and

(3) The plaintiff to pay the defendant costs of the assessment hearing fixed at $20,000.

12 Against these orders, the said cross-appeals were filed by the parties (see [1] above).

The appeals before me

13 The plaintiff contended that the AR was wrong to have held that the relevant documents of Concealtec (relating to its production of the competing product) were not in the defendant's possession, power or custody simply because the defendant was no longer a shareholder of Concealtec by the time of the trial in November 2007 and because he was not an officer of the said

foreign entity. The defendant had conceded at the assessment that if he were a shareholder, he would have access to the relevant documents. He had also admitted that he was a non-executive director of Concealtec. His responsibility relating to discovery of documents vested at trial when the order for discovery was made on 15 June 2007 and he only ceased to be a shareholder less than three weeks before the trial. The plaintiff argued that the documents evidencing the production levels of Concealtec were highly pertinent to the dispute between the parties, both at trial and at the assessment, as they were direct documentary evidence of the defendant's breaches of the distributorship agreement. Reference was made to O 24 r 8 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) relating to a party's continuing obligation of discovery until the proceedings in question are concluded.

14 The plaintiff also argued that the suggestion that the plaintiff ought to have sought discovery against Concealtec was wrong and impractical as that company was a foreign non-party and was clearly hostile to the plaintiff as they were competitors. Concealtec's projected production level in August 2005 was 2,000 sets of the competing product per year, with 70% to be exported and 30% to be sold within China, as shown in its official incorporation documents to which the defendant had appended his signature. That estimated figure should therefore be considered to be a true and fair representation of Concealtec's actual production level during the liability period in the absence of evidence to the contrary and the defendant had produced no evidence to contradict the estimate. Indeed, the plaintiff argued, 2,000 sets ought to be regarded as the minimum level of annual production as the estimate must have been arrived at by the defendant and his fellow investors after careful consideration of all relevant factors.

15 The plaintiff claimed damages from the defendant's breaches of the distributorship agreement, in particular clause 4.6 thereof by his involvement in the production of the competing product during the liability period, which flowed from the diversion of sales away from the plaintiff and its related entities. The diversion in sales occurred through the marketing efforts of the competing product by the entities related to the defendant, namely, Concealtec, Trend Living, Kimgres and Concealtec Building Products ("Concealtec Singapore"). Concealtec Singapore was also described as the Singapore head office of Concealtec.

16 Clause 4.6 was held by the trial judge to have a legitimate worldwide restrictive effect for the liability period. The evidence adduced during the trial showed that SlideHide was, and continued to be, sold without any other competitor in Singapore, Malaysia and China. The close relationship between these entities and the defendant made him liable for their sales activities. It was unnecessary to show that the other entities (i.e. other than Concealtec) had also produced the competing product within the liability period. Even if the said entities were not sufficiently related to the defendant to make him liable for their sales activities, the defendant would be liable for Concealtec's sales to these entities as they would be sales diverted from the plaintiff. Production was obviously for the purpose of sale and sale of the competing product flowed naturally from its production through Concealtec. The defendant's contention that the plaintiff did not have a presence in Malaysia where the competing product was sold was flawed. The defendant was the plaintiff's exclusive distributor there and it was natural, and indeed contractual, that the plaintiff would not be trading on its own there in competition against the defendant. The plaintiff's product would have market presence through the marketing efforts of the defendant.

17 The plaintiff also submitted that the AR was wrong when she held that the plaintiff could not claim for losses suffered by Slide & Hide Suzhou, its wholly-owned subsidiary in China. The AR was of the view that the plaintiff and Slide & Hide Suzhou were separate legal entities. The plaintiff argued that being the only shareholder of Slide & Hide Suzhou, both of them were effectively part of the same economic entity. Any profits or losses of Slide & Hide Suzhou would translate into profits or

losses for the plaintiff as well.

18 The plaintiff claimed damages amounting to some $1.9 million quantified in the following manner:

(1) sale of 1230.5 sets of the competing product by Trend Living in Malaysia (a fact accepted by the AR) with $325 loss of profits per set (a figure also accepted by the AR and which she would have awarded if she found that the plaintiff had tendered for the same building projects as Trend Living). For the purpose of the appeals before me, the number of sets (computed from the defendant's documents) is rounded down to 1230;

(2) reduction of the plaintiff's quoted prices in Malaysia for two building projects by some $48,000 and $143,000 respectively;

(3) sale of an estimated seven sets of the competing product in Singapore by Concealtec Singapore (with a loss of profits at $300 per set);

(4) reduction of the plaintiff's quoted prices in Singapore for two projects by $3,950 and $4,650 respectively and sale of 1,896 sets at the reduced price of $400 per set (instead of the usual price of $550 per set) resulting in a loss of $284,400;

(5) future loss of profits in Singapore because the plaintiff has submitted quotations for more than 16,000 sets with an estimated 5,700 sets affected by the defendant's competing product being sold at a reduced price, resulting in a loss of $150 per set;

(6) losses in China by Slide & Hide Suzhou for at least 1,800 sets with a profit margin of $76.87 per set.

19 The plaintiff also named the following as the defendant's proxies through which he sold the competing product:

(1) Concealtec, as the defendant was then holding 33% shares therein;

(2) Concealtec Singapore, as Ong Chin Huat, the defendant's fellow shareholder in Concealtec, is its sole proprietor and Concealtec Singapore shares the same website and catalogues as Concealtec. Ong Chin Huat's calling card also stated Concealtec Singapore as the "Singapore Head Office" and the defendant had testified that he had supplied Concealtec Singapore with the competing product out of his own stocks. Concealtec Singapore was registered on 6 November 2005, a few weeks after the termination of the distributorship agreement on 30 September 2005;

(3) Trend Living, as the defendant and his wife are partners therein;

(4) Kim Hin, as the defendant is its managing director and his family is its major shareholder;

(5) Kimgres, as the defendant is a director therein and it is owned by Kim Hin.

20 The plaintiff further submitted that after the termination of the distributorship agreement, it

was virtually impossible for it to enter the market in the countries involved as the defendant had practically cornered the said market with the competing product. The defendant simply replaced his customers' orders for the plaintiff's product with the competing product, even going as far as re-labelling its remaining stock from the plaintiff as the product of Concealtec. There was therefore no need for the plaintiff to prove that it had quoted or tendered for the same projects as the defendant.

21 The plaintiff had no competitor other than the defendant's competing product. While an alleged competitor, Pocket Door System Ltd, remained a live company, there was no evidence that it was trading in similar products or that it was still trading at all since 2003, the date of the documents produced by the defendant in court. The evidence did not show the availability of competing products in the market during the liability period.

22 As shown in [14] above, it would be reasonable to conclude that no less than 4,000 sets of the competing product were produced and sold during the two-year liability period. It was not disputed that there was a gestation period of about two to three years between the initial marketing efforts and fruition in sales. It therefore followed that sales of the competing product during the liability period must have been the result of marketing efforts made in relation to the plaintiff's product.

23 The defendant had obviously copied the plaintiff's product brochures. The defendant's introduction of the competing product, which the trial judge held was "very similar" to the plaintiff's product, must mean that the plaintiff would lose its monopoly and have to lower its prices in order to meet the competitor in tenders for building projects. This would translate into lower profits. While there may be other factors influencing pricing policy, the main consideration was the presence of hitherto non-existent competition. The evidence also showed that there was a general trend to quote less over the years despite the liability period being a boom time for the real estate business.

24 In 2006, there were two major projects in Malaysia where the plaintiff had to quote reduced prices for its product. Although the winning bids for these projects were still not announced, the plaintiff asserted that the damage had already been done. The plaintiff therefore claimed that it was entitled to at least the difference between the prices it would have quoted without the threat of a competitor and the prices it was forced to quote, even if it was awarded the tenders subsequently. If it loses the tenders to the defendant, its damages would be correspondingly greater because it would not even have any profits from these projects.

25 Concealtec Singapore had given quotes for and supplied the competing product in Singapore. The plaintiff estimated that at least seven sets of the competing product were sold here. This figure was derived in the following way. There were four housing units cited by the defendant as its job reference and these housing units had a total of ten floors. Assuming each floor used one set of the competing product, there would be a total of ten sets lost to the plaintiff. The plaintiff then deducted three sets to account for the possibility that not every floor used concealed sliding doors. Its estimate of its profit margin in Singapore was $300 per set.

26 Similar to what was claimed in respect of the two projects in Malaysia, the plaintiff also claimed that it was forced to reduce prices in Singapore as a result of Concealtec Singapore's presence as a competitor. It also claimed future losses for projects which it had tendered for in which the winning bids have not been announced. Since it had submitted quotations for 16,911 sets of SlideHide, and estimating that its pricing was influenced by the defendant in 30% of the cases, the plaintiff would have suffered losses in relation to the 30% or 5,073 sets.

27 The plaintiff further argued that the AR was wrong in considering Slide & Hide Suzhou to be a separate legal entity on the facts here. Where a parent company owns all the shares of its

subsidiaries, the group is virtually the same as a partnership and should not be treated separately, thereby depriving them of compensation on a technical point (see *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852). In respect of a building project known as the Huafa Century City Condo, the plaintiff's subsidiary was asked to quote for 300 sets of its product. The winning bid eventually went to Concealtec for the supply of 1,800 sets of the competing product at a price higher than that of the plaintiff. This was due to a rise in material costs at the time the tender was awarded. Nevertheless, the plaintiff submitted, it remained entirely plausible that the plaintiff would have been awarded the tender but for Concealtec's competing bid. The plaintiff would have made a profit of RMB475 per set or roughly $99.75 per set if its price was RMB950 per set. Even if it had been awarded the tender at RMB750 per set, there would still be a loss of profit of $76.87 per set multiplied by the 1,800 units sold.

28 The defendant submitted that the plaintiff had failed to confine its case at the assessment to damages for production of a similar product by focusing on sale of Concealtec products and on sale of such products by entities which were not involved in the production of such or which were not related to the defendant. It was alleged that the plaintiff had also claimed damages suffered by entities other than itself. The heads of claim of the plaintiff were said to be outside the scope of damages envisaged by the trial judge and were too remote to be claimable.

29 The defendant also contended that the breach of clause 4.5 of the distributorship agreement was a mere technical one as there was no production of any competing product during the term of the agreement and hence no sale or publicity. The manufacture and export of the finished competing product took place only after the termination of the distributorship agreement. The plaintiff had therefore failed to prove damages resulting from breach of clause 4.5 since there was no production.

30 The defendant pointed out that clause 4.6 only prohibited production and not sale and publicity of similar products. As the distributorship agreement was drawn up by the plaintiff, it must be held strictly to the different words used in the two clauses in issue. The trial judge found that the defendant had engaged in the production of a similar product by virtue only of being a substantial shareholder in Concealtec and nothing else. This was in spite of the plaintiff's pleading of implied terms (such as selling and competing) where clause 4.6 was concerned. This was accepted by the AR who held that the plaintiff could only claim damages for losses resulting from similar product production by Concealtec during the liability period but added that this would include damages arising from any diversion in sales that flowed from such production by Concealtec.

31 The defendant contended that the following findings by the AR were sound ones:

(1) the defendant could not be said to have possession, power or custody over Concealtec's documents showing its production output;

(2) the plaintiff could not argue that the defendant was liable for losses arising from trading or other activities by Concealtec Singapore or Trend Living;

(3) the plaintiff could not claim damages suffered by its wholly-owned subsidiary, Slide & Hide Suzhou;

(4) the plaintiff could not rely on Concealtec's incorporation documents setting out its projected scale of business as representing its minimum amount of annual production.

32 Where sale of the competing product in Malaysia was concerned, the defendant argued that

there was no restriction on sale whether by Concealtec or any third party related to the defendant after the termination of the distributorship agreement. In any event, the defendant averred that only 571 sets of the competing product were supplied by Concealtec. The AR found the plaintiff to have a market presence in West Malaysia post-termination but not in East Malaysia. The plaintiff had not shown that the sales made by Trend Living, the bulk of which were in East Malaysia, were sales that it would have made but for the breach of clause 4.6. It failed to show that it had tendered for the same projects and lost to Trend Living. It was also not demonstrated that the plaintiff would have been awarded the projects which it was not even aware of.

33 In respect of the claim relating to reduced prices in Malaysia, the defendant argued that this head of damage had not even crystallized as the winning bids for the projects had not been announced during the liability period. There was no evidence in any event that the defendant had quoted for the projects in question. The AR held that clause 4.6 related to similar production and not competition.

34 As for the sale of the competing product in Singapore, the defendant denied that Concealtec Singapore, a sole proprietorship, was a related entity. As the AR pointed out, there were no documents showing the relationship between Concealtec and Concealtec Singapore and it would be straining the meaning of "proxy" to impute liability on Concealtec Singapore. The defendant also denied that Concealtec Singapore had sold seven sets of the competing product here. In any event, it disputed that sale fell within the purview of clause 4.6.

35 In respect of reduced prices in Singapore, the defendant again maintained that clause 4.6 did not restrict competition by entities such as Concealtec Singapore. There was also no evidence that Concealtec Singapore quoted for the projects in question. It was not sufficient to allege that the mere presence of a competitor necessitated the reduction in prices. There was no evidence at any rate to show the prices quoted by the plaintiff previously so that comparison could be made. It was also not proved that Pocket Door System Pte Ltd was not the plaintiff's competitor in Singapore.

36 On the issue of future loss of profits in Singapore, the defendant contended that this head of damage fell outside the liability period and was entirely speculative in nature. As the AR pointed out, the plaintiff had failed to show how this related to the production of similar products by Concealtec during the liability period.

37 The plaintiff's alleged losses in China were suffered by a separate legal entity (Slide & Hide Suzhou). There was no credible evidence that the Huafa Century City Condo project would have been awarded to the plaintiff.

38 The defendant adopted all of the AR's findings save for her holding that Trend Living sold 1,230.5 sets of the competing product during the liability period and that the damages for each set would be $325. The defendant stated that Trend Living sold only 572 sets. The unit price of the sets varied according to the model too. The AR also found that the plaintiff's pricing policy was inconsistent as it depended on the circumstances of each transaction.

39 The defendant concluded by contending that since the plaintiff failed on all heads of damages claimed, it ought rightly to bear the costs of the assessment but such costs should be more than the $20,000 awarded by the AR. On this point, the plaintiff's stand was that the AR was wrong to have awarded only nominal damages and, consequently, costs of the assessment against the plaintiff. The plaintiff contended that substantial damages should be awarded and that it was entitled at the very least to damages at $325 per set for the 1,230.5 sets accepted by the AR. If that happened, costs should naturally follow the event and the plaintiff ought to be awarded the costs of the assessment

as well.

40 I accepted the plaintiff's contentions in respect of the matters discussed below. In particular, I accepted that the entities named by the plaintiff were indeed the defendant's proxies. The defendant, as the plaintiff's exclusive distributor, was supposed to be the plaintiff's market presence in East Malaysia. However, he breached the distributorship agreement and would now have the plaintiff show something which he was supposed to accomplish contractually but had failed to do so. That would be allowing the defendant to capitalize on his own wrong. The sales that Trend Living made in East Malaysia would have been the plaintiff's sales but for the breach by the defendant. Accordingly, I adopted the findings of the AR in respect of the number of sets sold and the amount of profits per set and awarded the plaintiff damages at 1,230 sets X $325, amounting to $399,750.

41 Where sales in Singapore were concerned, there were four housing units cited by the defendant as its job reference. Although the plaintiff's estimate of seven units in total was said to be a conservative one bearing in mind the total number of floors in the housing units, I was of the view that such sliding doors were not necessarily used on every floor of houses as it depended on the configuration of the walls. However, there must be at least one set of the competing product installed per housing unit since they were used as the job reference. In the absence of evidence showing more than four sets were used, I awarded the plaintiff damages at 4 sets X $300, amounting to $1,200.

42 I held that the plaintiff was not entitled to the following heads of claim. In respect of reduction in quoted prices, as acknowledged, pricing policy could be influenced by a variety of factors and not merely by the presence of market competition. Therefore, there would be no award for future loss of profits resulting from reduction in quoted prices. As for the loss of profits for 1,800 sets said to be suffered by Slide & Hide Suzhou, I accepted that the plaintiff could claim for losses suffered by its wholly owned subsidiary in China. However, even if the quotation by Concealtec was made within the liability period, the award of the tender was made only in June 2008. Giving a quotation by itself was not a breach of clause 4.6 – only production would be in breach. Since there was a window period of at least eight months between 1 October 2007 (when the liability period had ended) and June 2008 (the award of the tender), it could not be said that production of the 1,800 sets must have taken place within the liability period. There would therefore be no award for this head of claim as well.

43 I decided to fix the costs for the assessment before the AR and for the appeals before me. After hearing the parties on the issue of costs, I ordered costs for the assessment at $30,000 but awarded the plaintiff only 75% thereof (i.e. $22,500) to account for the issues which it was not successful in. For the appeal before me (which took almost one full day), I ordered costs at $10,000 but awarded the plaintiff only 80% thereof (i.e. $8,000) for the same reason as above.

44 The defendant's appeal in RA No 96 of 2009 became academic as a result of the award of damages in [40] and [41] above which clearly exceeded the District Court's jurisdictional limit of $250,000. In the result therefore, I allowed the plaintiff's appeal in RA No 94 of 2009 and made no order in respect of RA No 96 of 2009.

45 On 4 August 2009, I heard the defendant's application for a stay of execution on the judgment as set out above. I dismissed it with costs fixed at $1,200 (inclusive of disbursements) to be paid by the defendant to the plaintiff.

46 Finally, I wish to record my appreciation to Mr Christopher de Souza, Ms Malathi Das and Lim Ke Xiu for being thoroughly prepared for the appeal before me and thus assisting me greatly whenever questions relating to the assessment of damages arose. They have all done a most commendable job in the appeals and I thank them for their diligence.