IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Meridian Distribution Ltd. v. Endeavor Design Inc.,* 2019 BCSC 2406

Date: 20191219
Docket: S149270
Registry: Vancouver

Between:

Meridian Distribution Ltd.

Plaintiff

And

Endeavor Design Inc.

Defendant

Before: The Honourable Madam Justice Francis

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	P.K. Sandhu
Counsel for the Defendant appearing by teleconference:	G.N. Harney
Place and Date of Hearing:	Chilliwack, B.C. November 29, 2019
Place and Date of Judgment:	Vancouver, B.C. December 19, 2019

[1] **THE COURT:** This is a summary trial application brought by the plaintiff seeking judgment against the defendant for breach of contract.

[2] The plaintiff is in the business of distributing sporting goods and related accessories in Canada. The defendant is a company that makes snowboards and snowboarding accessories.

[3] The business relationship between Meridian and Endeavor started in 2003 and ended in 2012. The nature of that relationship and the obligations that the parties had to one another are matters of great disagreement between the parties. It is the plaintiff's position that in 2003, the parties entered into an oral agreement that Meridian was to be the exclusive distributor for Endeavor snowboards and other items for an indefinite period of time. As such, when Endeavor purported to terminate the business relationship in 2012, Meridian says that it was entitled to reasonable notice of the termination of the agreement.

[4] Endeavor argues that the parties entered into a written distribution agreement with a term of one-year on or around December 1, 2003. After the one-year term of the agreement expired, Endeavor says that the parties agreed to continue their relationship on substantially the same terms as the original distribution agreement, and this arrangement was renewed annually. In 2012, Endeavor elected not to renew the agreement. Because the agreement had only a one-year term, Endeavor says it had no financial obligation to Meridian when it decided not to renew the contract.

[5] This matter was complicated by a number of disputes of fact on the evidence. However, I am satisfied that I can make the necessary findings of fact on the record before me to determine this matter summarily.

[6] At the outset of the hearing, counsel for the plaintiff brought an application to exclude certain evidence submitted by the defendant, specifically the affidavit of Mr. Wells, on the basis that it consists of parole evidence and inadmissible hearsay.

[7] I do not need to deal with the plaintiff's evidentiary concerns, as I find it is not necessary to have recourse to the affidavit of Mr. Wells or any of the exhibits to that affidavit to determine this matter.

Facts

[8] Murray Fraser, the president of Meridian, started in the distribution business in 1983 when he was a competitive water skier. He and Max Jenke, who is a director and officer of Endeavor, have known one another for many years. Mr. Jenke was a competitive snowboarder before he went into the business of selling snowboards, and Mr. Jenke and Mr. Fraser's paths crossed often in the world of outdoor sports equipment, sales, and distribution.

[9] From 2003 to 2012, Meridian was the exclusive distributor in Canada for Endeavor snowboards, Airhole face masks, and other items made by Endeavor.

[10] The arrangement between the companies involved Meridian paying up front for Endeavor's stock. Meridian would only get paid for the Endeavor products if sold to retailers once the retailers sold the products.

[11] Over the years, Meridian took on initiatives to promote Endeavor products and had one of its sale representatives dedicated exclusively to selling Endeavor products. Distribution networks were developed and maintained by Meridian for Endeavor products.

[12] In 2012, sales of Endeavor products were 21.3% of Meridian's gross sales revenue from all brands. They were over 86% of the gross sales revenue that Meridian received from winter season brands.

[13] In November 2012, the parties began discussing arrangements between them for the coming year. Endeavor wished to start handling its own distribution in Canada and it proposed an alternative business arrangement that would have Endeavor take over the Canadian distribution of its own products with some financial incentives offered to Meridian.

[14] Endeavor's proposal was not accepted by Meridian and the business relationship was terminated.

[15] Meridian was unable to find another winter sports brand in time for the January 2013 purchasing season. Meridian takes the position that it suffered a monetary loss as a result of Endeavor's without-notice termination of their long-term business arrangement.

What were the terms of the Agreement?

[16] The first thing I must determine is whether the agreement between Meridian and Endeavor had a fixed or indefinite term. This requires me to first identify whether there was a written or an oral agreement between the parties. An unsigned written agreement (the "Distribution Agreement") was produced by the defendant. It appears to be a distribution agreement between Meridian and Endeavor. The Distribution Agreement is dated December 1, 2003, and has a one-year term. It states that it may be terminated by either party with cause on 90 days' written notice.

[17] There is a dispute between the parties as to whether the Distribution Agreement was ever signed. Mr. Fraser recalls discussing the Distribution Agreement with Mr. Jenke, but does not recall it ever being signed. Mr. Jenke recalls the Distribution Agreement being signed at the Boardroom Christmas party in 2003. He has lost the signed copy and it has not been produced. I find it more likely than not that that the Distribution Agreement was signed. However, this is not dispositive of much, since the agreement expired after one-year and any terms of its renewal were not recorded in subsequent written agreements and are the subject of conflicting evidence between the parties.

[18] Mr. Jenke's Affidavit #1 states at para. 15, in characterizing the agreement:

> Since 2003 when the agreement was signed, the distribution agreement with Meridian has always been an annual contract, renewed only by mutual agreement in the fall of each year. Prices and terms are agreed and samples are purchased at this renewal time for the following sales season. There was never a perpetual agreement for Meridian to be the Canadian Endeavor distributor.

[19] In his examination for discovery, Mr. Jenke characterized the agreement a bit differently, admitting that the agreement between the parties was one that would "continue until one of the parties stopped either purchasing or selling to each other."

[20] The manner in which Mr. Jenke characterized the arrangement in his discovery evidence is consistent with the position of the plaintiff that the agreement between these two companies had an indefinite term and would continue until one of the parties stopped either purchasing from or selling to the other.

[21] I find that notwithstanding the single contract signed in 2003, the agreement between these parties was not an annual contract that was renewed each year. It may have begun that way, but over time, as the business affairs of the two companies became more intertwined, the contract between them acquired the characteristics of the intermediate category of cases described by our Court of Appeal in *Marbry Distributors Ltd. v. Avrecan Int. Inc.*, 1999 BCCA 172 [*Marbry*].

[22] In *Marbry*, the Court described an intermediate category of contracts that are not employment contracts but have characteristics that give rise to an implied requirement of reasonable notice to terminate the contract: *Marbry,* paras. 14-26.

[23] While the parties in this case never formalized their relationship in a written contract after 2003, the only reasonable conclusion, based on the actions of the parties, is that theirs was a relationship of a more permanent character than an annual contract. There were a number of facts in evidence that support the more permanent nature of the relationship between Meridian and Endeavor:

a) Meridian was the exclusive distributor for Endeavor in Canada for nine years;

b) Meridian hired and paid a staff member whose sole job was to market Endeavor products;

c) Meridian purchased and stored Endeavor inventory before it had been sold to retailers, and took on the cost and risk associated with same;

d) Meridian established distribution networks for Endeavor that did not previously exist; and

e) while prices and volume were negotiated each year, there was no annual revisitation of the issue of whether Meridian would be the exclusive Canadian distributor for Endeavor from 2003 until the business relationship was terminated.

[24] I am satisfied that the permanency of the relationship between Meridian and Endeavor places this case within the class of cases described in *Marbry*. As such, I find that Meridian was entitled to reasonable notice with respect to the termination of the relationship.

[25] I also find, consistent with the decision of the B.C. Court of Appeal in *TCF Ventures Corp. v. The Cambie Malone's Corporation*, 2017 BCCA 129, that the loss suffered by Meridian in the termination of what is akin to an employment relationship must be calculated with reference to the gross revenue it has lost.

[26] I am satisfied that nine months is a reasonable notice period in these circumstances. It is the notice that the Court of Appeal held in *Marbry* to be reasonable on a business relationship of similar duration and terms to the one in this case.

[27] The defendant argues that the estimated damages of the plaintiff, i.e., the estimation of nine months of gross revenue being $212,987.71, is inflated. However, I have been given no evidence or submissions as to how else to calculate the gross revenue for determining the damages. This was a summary trial and each party was required to put in the requisite evidence in order to prove their position: *Gichuru v.* Pallai, 2013 BCCA 60 at para. 35.

[28] Therefore, I find that, but for the matter of mitigation, which I will discuss next, the plaintiff ought to have received nine months' notice and ought to be entitled to a payment equivalent to nine months of gross revenue for the sale of Endeavor products in the amount of $212,987.71.

Mitigation

[29] The fundamental principle of compensation for pecuniary loss flowing from a breach of contract is qualified by the requirement that a plaintiff has a duty to take all reasonable steps to mitigate the loss consequent on the breach.

[30] In this case, the defendant argues that the plaintiff failed to mitigate. Endeavor made an offer to Meridian that, while most certainly not as attractive to Meridian as the relationship they previously had as exclusive distributor of Endeavor products, would have mitigated their loss.

[31] The terms of what was offered by Endeavor are set out in two documents. Both counsel referred me to a November 16, 2012, email from Bruce Wells to Murray Fraser, attaching a document entitled “Distribution Canada”, which included a section called “Brief of new changes”. I was also referred to a document attached to a December 6, 2012, email from Max Jenke to Murray Fraser entitled “Meridian Distribution Termination Terms and Conditions”. These two documents contain similar but not the same proposal.

[32] The last proposal made in the negotiations between Meridian and Endeavor was the December 6, 2012, “Meridian Distribution Terms and Conditions”. This is Endeavor’s last proposal for an ongoing business relationship after the termination of Meridian’s exclusive distributor arrangement, and it sets out the terms Endeavor offered to Meridian at the termination of the distributor relationship. This proposal has the following terms that would financially benefit Meridian and/or related companies:

a) Endeavor offered a 25% discount for Endeavor and Airhole products sold through The Boardroom, which is a retail store owned by Mr. Fraser; and

b) Endeavor offered to pay Meridian 5% of total Endeavor and Airhole product sales in Canada for the period January 1, 2013, to December 31, 2013, payable March 31, 2014.

[33] I find that Meridian had a duty to mitigate its loss by accepting this offer. While the offer was not as attractive as being the exclusive distributor in Canada for Endeavor, it would have put Meridian in a better position than they would otherwise have been in, and there was no reasonable basis for Meridian not to accept the terms proposed by Endeavor, at least until they were in a position to find another winter sports company whose products they could distribute.

[34] I am not persuaded by the plaintiff's argument that Endeavor's proposal only contained benefits for Boardroom, a separate company, and not Meridian. I agree that any benefits that accrued to Boardroom under Endeavor's proposal are irrelevant to the mitigation inquiry, as Meridian and Boardroom are different legal entities. However, the proposal also contained substantial benefits to Meridian, namely payment in the amount of 5% of total Endeavor and Airhole products sold in Canada during 2013. It was not reasonable for Meridian to simply walk away from this offer, which would have substantially mitigated its loss, and simply let its damages accrue.

[35] Unfortunately, evidence of what Endeavor's product sales were in 2013 was not before me, so it is not possible to quantify the value of the proposal Endeavor made. It is clear on its face that there was some value to it and that Meridian's damages will be limited to the difference, if any, between the $212,987.71 in damages they suffered and the value of 5% of total Endeavor and Airhole product sales in Canada during 2013 that they would have received had they accepted Endeavor's proposal.

[36] Because of a lack of evidence on the value of Endeavor's December 6, 2012, offer, I am unable to quantify the plaintiff's damages on the evidence before me. However, I will make the following orders:

a) the plaintiff's pre-mitigation damages are set at $212,987.71;

b) from the plaintiff's pre-mitigation damages there must be deducted the amount of 5% of the total Airhole and Endeavor Canadian sales for the

period January 1, 2013, to December 31, 2013 (“the Mitigation Amount”);

c) If the parties cannot agree on the Mitigation Amount, the assessment of the Mitigation Amount is referred to the registrar. At the registrar’s hearing, should it occur, the parties are at liberty to present evidence that would enable the registrar to quantify the value of 5% of the total Canadian sales for the period January 1, 2013, to December 31, 2013;

d) The result of any registrar’s assessment shall be certified by the registrar and that certificate will be binding on the parties to the proceeding; and

e) If the parties proceed to the registrar, they will be required to attend a prehearing conference before the registrar before they set the reference for hearing.

“Francis, J.”