

Court of King's Bench of Alberta

Citation: Lehvoss (UK) Limited v BioNeutra North America Inc., 2023 ABKB 568

Date: 20231011
Docket: 2103 12280
Registry: Edmonton

Between:

Lehvoss (UK) Limited

Plaintiff

- and -

BioNeutra North America Inc.

Defendant

**Memorandum of Decision
of the
Honourable Justice Donald Lee**

Introduction

[1] This Action and Application by Lehvoss (Uk) Limited ["Lehvoss"] relate to issues of contractual interpretation regarding an agreement in which BioNeutra North America Inc. ["BioNeutra"] granted Lehvoss certain exclusive and non-exclusive distribution rights for the Products. In response to the Application BioNeutra saw no need to file any Affidavit evidence but did question Mr. Pennington on his Affidavit filed on behalf of Lehvoss. The facts are essentially not in dispute. If the contract was terminated pursuant to Lehvoss' view, the 2019 sale figures would be used to calculate a "termination penalty/transition compensation" of 751,934€. BioNeutra's comparable "termination calculation/ transition compensation" based on its view of the matter would be 208,776€.

Issues

[2] Whether the Agreement allowed for two separate and/or partial terminations, and what is the amount of the termination fee/transition compensation payable?

BioNeutra's Argument

[3] BioNeutra disputes Lehvoss' contention that the Agreement could not be partially terminated. BioNeutra submits that the Parties here partially terminated the Agreement by way of either the September 2020 Termination or as a result of a combination of that notice together with the subsequent events. They also later terminated the balance of the remaining Agreement by way of the January 2021 Termination. Each termination occurred "without cause" pursuant to section 9(b) of the Agreement.

[4] The Agreement does not expressly prohibit a partial termination of portions of the Agreement nor does it prohibit the full termination of the Agreement by way of an initial partial termination followed by a subsequent final termination.

[5] BioNeutra submits that on a plain reading of the Agreement, and by their decision to include the words "in its entirety" in section 9(a) [the "with cause" termination] while excluding those words from section 9(b) [the "without cause" termination], it must have been the intention of the Parties to differentiate between what could be terminated under a "with cause" scenario from what could be terminated "without cause". In other words, had the Parties intended the language used in section 9(b) to allow only for a full termination, they would have then included these additional words in section 9(b) as well, either that or in the event the language of section 9(b) already allows only for a full termination, then why include the words "in its entirety" after using the same language as section 9(b) in section 9(a) at all?

[6] In the alternative, BioNeutra submits the wording of the Agreement creates an ambiguity as to whether portions of the Agreement may be terminated "without cause" and in these circumstances, this Court must then consider the different language used in sections 9(a) and 9(b), as well as the conduct of the parties at the time of contracting, the factual matrix of the parties conduct throughout the Agreement and following the September 2020 Termination, in considering whether this ambiguity can be resolved.

[7] Upon receiving the September 2020 Termination, Lehvoss did not act as if this notice alone terminated the entire Agreement, nor did it respond by rejecting this as an effective partial termination of the affected territories either.

[8] Instead, it ceased activity only in those territories terminated by the September 2020 Termination notice and provided BioNeutra customer related information only for those specific territories as well. Further, Lehvoss then thereafter also continued on with its marketing activities, but only in the remaining territories unaffected by the September 2020 Termination notice. It also subsequently responded to the January 2021 Termination notice by providing customer related information on December 11, 2020, but only for those territories identified in that notice.

[9] BioNeutra submits that if Lehvoss truly believed the Agreement was fully terminated by way of the September 2020 Termination, it would have:

- (a) provided (and been required to provide) a complete customer disclosure package on or before August 11, 2020, for all of the Exclusive Territories and Non-Exclusive Territories - which it failed to do; and
- (b) fully ceased all activity under the Agreement by the September 11, 2020, date specified in the September 2020 Termination notice and not have continued on past that date, but it did not.

[10] If BioNeutra can terminate the same contract twice, BioNeutra's position is that under section 9(e), it shall compensate Lehvoss for the First and Second Terminations by paying Lehvoss:

- a) the average contribution margin for the July Territories for the year 2019;
- b) the average contribution margin for the November Territories for the year 2020.

Lehvoss' Argument

[11] Lehvoss argues that this is untenable and it notes that BioNeutra has not paid either amount, in any event. BioNeutra's basis for this position is that the effective date for the First Termination takes place in the 2020 calendar year, and the effective date for the Second Termination takes place in the 2021 calendar year. However, Lehvoss submits that the Agreement provides that the Transition Compensation shall be calculated using the average contribution margin of the last one full calendar year preceding the "date of termination". It does not say the last one full calendar year preceding the *effective* date of termination. Interpreting the Agreement objectively, the word "effective" would have been included in section 9(e) if the true intention of the parties was to calculate the Transition Compensation from the effective date of termination. As evidence of this, section 9(d) of the Agreement requires Lehvoss to meet its obligations under the Agreement "up to and including the effective date of termination" [emphasis added]. As such, within clause 9, the Agreement distinguishes date of termination from effective date of termination.

[12] Second, the Agreement also stipulates that Lehvoss must provide BioNeutra with "all customer related information" within 30 days of the Notice of Termination. Then BioNeutra is required to pay Lehvoss the Transition Compensation "within Ten (10) days" of receiving the customer information. A plain reading of this portion of the Agreement clearly suggests that, if BioNeutra terminates the Agreement on a "without cause" basis, BioNeutra will have to pay Lehvoss the Transition Compensation within 40 days of the Notice of Termination. Contrary to BioNeutra's position, the Agreement does *not* say that Lehvoss is to be paid within ten days of the "effective date of the termination", or any other comparable wording.

[13] It is not disputed that Lehvoss provided BioNeutra with customer information pursuant to the Agreement on August 11, 2020 and December 11, 2020. As such, under the Agreement, the Transition Compensation was all due and owing in 2020.

[14] It would be illogical and contrary to the Agreement for the Transition Compensation to be both (a) due in 2020 and (b) calculated using the average contribution margin for the calendar year of 2020. It is clear that, if BioNeutra can terminate the Agreement twice, the Transition Compensation for both the First and Second Terminations should be calculated on the basis of the average contribution margin for the "previous calendar year", that being 2019.

Conclusion

[15] The Agreement does not contemplate that the parties have the right to terminate the Agreement in a piecemeal fashion. The Agreement grants the parties the right to terminate the Agreement, either “for cause” or “without cause”. The Agreement does not allow for BioNeutra to partially terminate provisions of the Agreement. The Contract is clear that once there is a termination, the Transition Compensation Provision set out in clause 9(e) is triggered.

[16] BioNeutra's decision to terminate the Agreement in a piecemeal format clearly minimized the Transition Compensation.

[17] Whether or not the agreement can be terminated more than once, I conclude that the agreement is at best ambiguous, and in this regard, it could be interpreted in several ways. Since it was drafted by BioNeutra, the agreement should be interpreted against BioNeutra in case of ambiguity.

[18] I conclude that the most reasonable interpretation of the Agreement is that the transition payment would be based on the 2019 sales figures for these reasons:

- (a) The contract does not allow for piece-meal termination. As soon as the July termination letter was issued, the Transition Compensation was owing within 10 days of the Plaintiff providing the contractual obligated transition materials to the Defendant on August 11, 2020;
- (b) Even if one accepts that the Contract could be terminated twice, the November 2020 Termination Letter required that Transition Compensation was due and owing in December 2020. It would not be reasonable to interpret "prior calendar year" as being 2020, when the Transition Compensation was due in 2020; and
- (c) The Contract in other instances refers to the effective date of termination and as such distinguishes it from the termination date. In this instance, the termination dates were the dates that notice was given that the Contract was terminated that being July 10, 2020 and November 13, 2020. As such, the 2019 sales figures would be used to calculate the Transition Compensation.

[19] The Parties agree that if the Court concluded that the 2019 sales figures are to be used, then the amount owing to the Plaintiff is 751,934 € (\$1,091,631 CAD) with a conversion date as of March 8, 2023. This is the amount this Court now orders is payable by BioNeutra to Lehvoss.

Heard on the 6th day of April, 2023.

Dated at the City of Edmonton, Alberta this 11th day of October, 2023.

Donald Lee
J.C.K.B.A.

Appearances:

Stephen J. Livingstone
McLennon Ross LLP
for the Plaintiff

Brent W. Mielke/Carly J. Toronchuk
MLT Aikins LLP
for the Defendant