CUT ABOVE THE REST LIMITED, ABODE WEST LIMITED

ADVICE

Introduction

1. Mr Darren Bolger is the managing director of the above companies, who wish to bring proceedings against Magnet Group Limited ("Magnet") for breach of contract and conceivably Knauf for economic torts including the procurement of a breach of contract by Magnet.

2. The purpose of this Advice is to give a preliminary view of the merits for the purposes of guiding strategy and also for the purposes of seeking funding.

3. The limitation period for the prospective causes of action expires very shortly and there is therefore a degree of urgency about this Advice.

Background

4. In 2008 Mr Bolger incorporated the two companies ("CATR" and "AW"). He had a history in the building industry and owned an existing company called CC Developments UK 2007 Ltd which was intended to run a database of builders, materials suppliers and quantity surveyors and to provide marketing, project management and procurement services for the members in connection with building projects.

5. In the course of attempting to negotiate a discount kitchen deal with Magnet in the early part of 2008 (which did not ultimately materialise) Mr Bolger came into contact with Mr Paul Cooper, a salesman at Magnet's Fulham branch, who was apparently tasked with bringing in work for Magnet in what seems to have been a very competitive business environment.

6. There is no doubt that in 2008 Magnet were running an offer on plasterboard and similar products (see Nicola Saul's witness statement). Various "flyers" were printed by the Fulham branch quoting very cheap prices for plasterboard and related products

which were headed "*Best Prices Guaranteed. Limited period only*". It seems from the subsequent internal disciplinary inquiry which Magnet subsequently held in relation to Mr Cooper's conduct, that the prices he was quoting were unmanageably cheap and that he was not authorised to put forward such prices. However in circumstances in which an offer was being run, the Fulham branch and Mr Cooper had ostensible authority to propose discounted prices to the trade. The fact that he overstepped the mark is not relevant to transactions with bona fide trade customers.

7. As a result of discussions between Mr Cooper, Mr Bolger and Mr Jon Clements (a co-director in CC Developments and formerly a representative of another building materials supplier) an agreement was struck or agreements were struck which were evidenced by signed manuscript annotations on various flyers. They were as follows:

(i) 18/04/08

"*All prices below agreed for twelve months from 18 April as condition of account in name of Cut Above The Rest Limited being opened as goodwill gesture. No limit of goods or area covered.*" The typed words "*for a limited period only"* were followed by the manuscript addition "*as above"* and additionally it was recorded *"2-3 day lead time on delivery".* 11 items were listed with discounted prices alongside them. The document was signed by Mr Cooper, Mr Bolger and Mr Clement.

(ii) 21/05/08

"Cut Above The Rest Ltd reference 18/4/08 agreed as previous terms written at top of paper". The list on which this was written now contained 20 items including the previous 11 items. The document was signed by Mr Cooper, Mr Bolger and Mr Clement.

(iii) 27/5/08

"*This Agreement is incentive for Abode West Ltd to open account with Magnet. Costs below are for noted and signed/agreed period. Free delivery anywhere in UK."* Following the typed words "*Limited period only"* were the manuscript words *24 months from 27/5/08"*. The document was signed by Mr Bolger and Mr Cooper.

(iv) "*Cut Above The Rest. Encon/Magnet will not charge delivery for full loads or large orders. In the case of small orders for example 1 to 2 pallets, will be charged for at a cost of a minimum of £50."* The document was signed by Mr Cooper. This document was essentially a piece of blank Magnet A4 sized paper but carried the Magnet Trade "logo".

(v) 6/6/08

"In addition to the previously agreed discounted goods supplied by Magnet I state that in addition all products have been agreed firstly by the Magnet Management and agreed here in addition". An additional 4 items were listed and countersigned by Mr Bolger and Mr Cooper. After the typed words "*Limited period only"* were added in manuscript the words "*from 6/6/08 ending 27/5/11"*.

8. Both CATR, on 25 April 2008, and AW, on 29 May 2008, opened trade accounts with Magnet, with a credit limit of £5010. CATR opened a "streamline" account with Nat West, which I understand to be a sort of factoring arrangement. CATR made a few small orders for materials totalling in the region of £2,500 (the copy invoices are very difficult to read) which were delivered, but on or about 7 or 8 June 2008 Magnet informed Mr Bolger that no further goods would be supplied and that the accounts were being closed.

9. Magnet's actions appear to have been driven by pressure from Knauf, the manufacturer of the plasterboard and internal pressure from Magnet management about the levels of discount being offered and the periods in question.

10. On 17 June 2008 Mr Cooper was disciplined for gross misconduct for "*signing documents that could have negative financial implications"* (according to the hearing)

or *"you signed off fliers and promised prices to customers which had not been authorised and may result in excessive costs to the company"* (according to the letter convening the disciplinary hearing). The result of the hearing was a final written warning to Mr Cooper for gross negligence.

Discussion

11. In my view, in the absence of collusion or dishonesty (which was never alleged against Mr Cooper) there is good evidence of an agreement between Magnet and the two companies to charge discounted prices for the specified products. I would say that the chances of establishing that agreement are high.

12. The next issue is whether there was a binding agreement to supply product that the companies requested. The fliers were all footnoted with the words "*all offers are subject to availability while stocks last"*. However, the availability of stock is unlikely to have been a problem except for absolutely vast supplies.

13. Although the existence of a price list is not a binding contract to supply anything, I think that in the absence of some very substantial reason (e.g. outstanding unpaid invoices or suspicion of fraud, or computer breakdown or bankruptcy of supplier) a company which advertises prices at which it is willing to sell to any trade or other customer, is not entitled simply to refuse to sell when a perfectly good offer to purchase is made. In my view the way such a price list is to be interpreted (in particular where a specific discount is being offered to a specific person) is that, in consideration of the customer making a bona fide offer to purchase at the quoted price, Magnet promise to accept the offer and supply the goods subject to some vitiating circumstance (i.e. the reasons suggested above or the unavailability of stock).

14. The next question is whether the time limits were binding. In other words, could Magnet peremptorily or on reasonable notice bring the discount arrangement to an end? Plainly, but for the additional words added in manuscript the words "*for a limited period only"* were sufficient to entitle Magnet to bring the offer to an end on short notice. Also, if the price list contained no words, then Magnet could amend the price list at any time (subject to two conflicting price lists being put forward at the

same time when legal issues could arise). But in the absence of collusion or dishonesty, the time limits are on the face of it binding.

15. Thus far therefore I consider that the merits are with the two companies: there was an agreement for a specific period which was breached by Magnets's peremptory termination of the relationship.

16. In my view there are, however, two related problem areas. The factual backdrop to both is the same. Ultimately they affect the measure of damages. It is Mr Bolger's case that his intention was to buy plasterboard and re-sell it (presumably at a mark-up) to other trader customers, including entities such as GO Interiors and even massive players such as Travis Perkins with whom he had serious discussions, which would have generated hundreds of millions of pounds of turnover per annum.

17. The first problem is this. How could Mr Bolger reasonably have believed that a salesman in the Fulham branch had authority to commit Magnet to the supply of hundreds of millions of pounds of sales at what he must have realised were knock-down prices? Whilst Mr Cooper in my view had apparent authority to offer products at discounts to trade customers and the turnover from such customers might be quite high, did he have apparent authority to commit Magnet to the discounted sale of plasterboard for a significant proportion of the UK and even foreign markets?

18. The second, related problem is in relation to remoteness of damage. It is not clear to me how much Mr Bolger or Mr Clement told Mr Cooper about their plans. The disciplinary evidence is very equivocal. But if, at the time of contract, Mr Cooper and therefore Magnet did not know that Mr Bolger's intention was to become in effect a wholesale re-seller of Magnet's plasterboard rather than a trade customer using product for building projects, loss of profit on re-selling and distributing the product would not have been within the contemplation of Magnet as a foreseeable consequence of breach and such damages would be too remote (Hadley v Baxendale (1854) 9 Exch 341).

19. A third, causation problem is that it would have leaked out as it did that Magnet was the source of the prices and any major customer learning of that would be likely to go direct to Magnet in order to cut out the middle man. Magnet did not on any view of

the facts, promise not to offer these prices to anyone else. This argument is in my view factually significant. I disregard for the purposes of this argument the conduct of Knauf.

20. Given that CATR and AW were also companies that carried out or could have carried out building projects, using intelligence, contacts and information from CC Developments the answer to the conundrum may be as follows. Whatever Mr Bolger's private ambitions, the objective reasonable person would have concluded from the parties' words and conduct that Magnet had agreed with CATR and AW to supply to them as trade customers all the plasterboard that they required for the prices quoted and for the period stipulated. This is in line with some of Mr Cooper's disciplinary answers. The consequence of such a conclusion would be that the companies could recover damages for breach of contract covering losses associated with not being able to use the discounted plasterboard in building projects. They would not but not for loss of re-sale profits from the supply of plasterboard a commodity.

21. In my opinion therefore the recoverable damages are much less certain than the claim for breach. The highest and indeed the best way that the case can be put if the profit on resale claim is advanced is that the companies suffered a loss of opportunity to realise such sales in the market place. The lost opportunity would in very rough terms be valued as a percentage of the profits which they might have made having regard to causal issues such as that referred to in paragraph 19 above. I would rather not guess the quantum of the claim but in my opinion even as a gut instinct, figures of tens of millions of pounds are unrealistic. I suspect that getting witnesses to back up what Mr Bolger says about his conversations with Travis Perkins will be very difficult. And there are arguments that this head of loss is not recoverable, as recorded in paragraph 19 above.

22. It would presumably be possible to compile a claim for damages on an alternative basis, namely that the two companies would have carried out or organised construction projects which would have made profits derived or increased by the plasterboard agreement. However, there is no trading history and the companies have been effectively defunct.

23. Whilst if a Claim Form is issued a claim can be included against Knauf, I do not really see much advantage in proceeding against them: (i) if Magnet are in breach of contract then they will be able to satisfy and award made against them; (ii) if they are not in breach of contract then Knauf did not induce such a breach; (iii) it is possible that other economic torts may be capable of being alleged but I am concerned that joining a second international giant will create a very large costs downside. If two companies are joined security for costs (see below) will be doubled.

24. I should mention in Mr Bolger's favour that whilst the claim is very stale there have been several attempts to put forward or to mediate the claim so it is not a case which has only been raised at the very last minute.

Conclusion

25. The merits of the claim that there was a contract, that prices were agreed and that the duration of the discount was fixed are good. The case may well be dirtily fought with allegations that Mr Bolger effectively hoodwinked Mr Cooper into signing the agreement but that allegation has never been made clearly. On the information before me at present the basic position seems significantly to favour the companies and the nature of the disciplinary proceedings against Mr Cooper appears to confirm that Magnet were worried by what had occurred.

26. The quantum of the damages claim is much less certain. I am concerned about the issues of remoteness and causation as already indicated but do not rule out the prospects of a loss of opportunity claim. There also exists the prospect of compiling an alternative measure of damages based on the profit that could have been made on building projects in which the two companies or CC Developments might have been involved.

27. It may also be the case that Magnet would wish to settle the case on the basis that there is a real litigation risk as to quantum. Certainly, when they have responded to allegations it has been on the simple assertion that there was no contract, without any further analysis.

28. However, it is my view that an application for security for costs is likely to be made against the companies which may well succeed. The first tactic will thus be to apply for security and only if it is provided to contemplate settlement.

29. The best advice I can therefore give is that the prospects of a finding of breach, on the basis of the facts before me, hit the 60% rule of thumb level. Quantum however needs to be treated with caution. I do not regard the figures propounded by the accountants as realistically attainable.

MICHAEL DOUGLAS QC

8 May 2014