

BETWEEN

AGI Ltd

APPLICANT

AND

ZVN Ltd

FIRST RESPONDENT

AND

ZVM

SECOND RESPONDENT

Date of Order:

25 October 2013

Referee:

Referee McKinstry

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZVN Ltd and ZVM are jointly and severally to pay AGI Ltd the amount of \$7,008.25 within 28 days of the date of this order.

Facts

[1] On 22 August 2012, ZVN Ltd contracted with AGI Ltd for the supply of confectionary products. ZVM provided a personal guarantee. The contract provided that payment was to be made on the 20th of the month following the date of the invoice. The contract also provided for interest of 2.5% per month for late payment.

[2] ZVN Ltd placed their first order in August 2012 and paid following receipt of the invoice. They placed a further order in September and October 2012 and were invoiced accordingly. To date those invoices have not been paid.

[3] AGI Ltd seeks payment of the invoices and interest. ZVN Ltd claims that the products were not acceptable as they did not have a 12 month expiry date which ZVN Ltd had expected.

Issues

[4] The relevant law is the law of contract. The issues are:

- (i). Did ZVN Ltd breach the contract by not paying the invoices when due?
- (ii). Was ZVN Ltd able to reject the goods?

Decision

Did ZVN Ltd breach the contract by not paying the invoices when due?

[5] ZVN Ltd does not deny that they received the products they ordered or that they received the invoices. The explanation provided for the non payment of the September and October invoices was that the products had not yet been sold. However, the sale of the

products by AGI Ltd to ZVN Ltd was not provisional or conditional upon ZVN Ltd selling those products.

[6] ZVN Ltd said they discovered a problem with the expiry dates of the products in February or March 2013. However, this does not explain the non payment of the invoices till that time.

[7] AGI Ltd says they tried to contact ZVN Ltd by phone and also by text and email. However, the only response they received back was a text sometime around June 2013 saying that they should collect the product. AGI Ltd claim they received no advice from ZVN Ltd that they had concerns about the product until the matter was brought to the Tribunal.

[8] Having heard the evidence presented by both parties, I find that on the balance of probabilities, ZVN Ltd breached its contract with AGI Ltd by failing to pay the invoices on time.

Was ZVN Ltd able to reject the goods?

[9] ZVN Ltd's position is that they could reject the goods due to problems with the products' expiry dates. They produced photos of three items which were taken in February or March 2013 when they discovered the problem. ZVN Ltd claimed these photos show discrepancies between the expiry dates on the products and the expiry dates on the boxes they were packed in.

[10] For instance, the rocky road photo purports to show the box having an expiry date of 30 August 2013 but the products inside having an expiry date of 14 February 2013. ZVN Ltd state that they expect products to have a 12 month expiry date and therefore, they have received product with only 6 month or sometimes 4 month expiry dates.

[11] AGI Ltd says that most product have 6 months expiry and are stamped accordingly. The rocky road box showing an expiry of 30 August 2013 is most likely from the August 2012 order. This would mean the product inside, with the expiry date of 14 February 2013, would be 6 months after August 2012.

[12] The same argument is put forward for the Russian fudge and the marshmallow fish photos.

[13] AGI Ltd cannot explain why the boxes have a different expiry date. It may be an error on the stamping or any other reason but, AGI Ltd maintains that regardless of the box date the product dates are correct.

[14] Once a buyer accepts goods they lose the right to reject them. Acceptance is determined by whether the buyer has kept the goods for a time which is longer than necessary to reasonably reject them. ZVN Ltd received the products in late 2012. They say they noticed their concerns with the expiry dates in February or March 2013 and advised AGI Ltd by phone. AGI Ltd argues they never received a call from ZVN Ltd and that their numerous calls and emails to ZVN Ltd went unanswered. AGI Ltd claim the only communication they had was a text about June 2013 asking them to collect the product with no reference to any problems.

[15] When asked why they did not send the photos they took of the product in February or March to AGI Ltd, ZVN Ltd said that AGI Ltd ignored their concerns over the expiry dates and so they did not send the photos.

[16] Having heard the parties on this point, I prefer the evidence from AGI Ltd. AGI Ltd were the ones trying to communicate with ZVN Ltd and ZVN Ltd never raised concerns about the expiry dates until the matter was before the Tribunal. It is difficult to find that, taking photos of the product and not sharing those with AGI Ltd until a few days before this hearing, is consistent with their position that they raised their concerns with AGI Ltd previously. Accordingly, I find that in leaving it so late to raise any concerns about the product, ZVN Ltd is unable to reject them.

[17] This does leave open the possibility that ZVN Ltd can pursue a claim in damages should the product be faulty.

[18] ZVN Ltd has provided no evidence that the product was to have a 12 month expiry period. The photos ZVN Ltd has provided do not prove any of the products had expiry periods of less than 6 months.

[19] The position between the parties can be summarised as follows:

- (i). There was a contract whereby ZVN Ltd would pay on the 20th of the month following the date of the invoice.
- (ii). ZVN Ltd was outstanding on the payment of the September and October invoices for at least 3 months.
- (iii). The contract provides a personal guarantee from ZVM.
- (iv). The contract also provides for interest of 2.5% per month for late payment.
- (v). There is no evidence provided by ZVN Ltd that the products are to have a 12 month expiry date.
- (vi). There is no evidence provided by ZVN Ltd that any of the products has less than a 6 month expiry date.
- (vii). ZVN Ltd has produced no evidence that they raised concerns about the expiry dates until this hearing.
- (viii). ZVN Ltd has no reasonable explanation as to why they would take photo evidence of the expiry dates in February or March and not provide that to AGI Ltd.
- (ix). ZVN Ltd has no evidence that it rejected the products within a reasonable time of when they say they discovered a problem with the expiry dates.

[20] Effectively, ZVN Ltd has no reasonable explanation as to why they did not pay the invoices and their explanation about the expiry dates is not compelling.

[21] Accordingly, I find that on the balance of probabilities the applicant has proven their claim and award them the amount of the two outstanding invoices and 2.5% interest on each as follows.

- (i). $\$3,136.28 + \940.88 interest (2.5% for 12 months being $\$78.40 \times 12$) = $\$4,077.16$
- (ii). $\$2,298.90 + \632.19 interest (2.5% for 12 months being $\$57.47 \times 12$) = $\$2,931.09$
- (iii). Total being $\$7,008.25$

[22] The order is made against ZVN Ltd and ZVM jointly and severally.