**IN THE DISPUTES TRIBUNAL** **[2016] NZDT 922**

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| **BETWEEN** | **ED LTD**<br>APPLICANT |
| **AND** | **UW LTD**<br>RESPONDENT |
| Date of Order: | 1 July 2016 |
| Referee: | Referee ter Haar |

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that ED Ltd's claim against UW Ltd is dismissed.**

**Facts**

[1] In 2013 UW Ltd purchased Company B from Company A. In the process of purchasing the business UW Ltd was assigned the license and supply agreement that Company A had with ED Ltd. ED Ltd now brings a claim in the Tribunal against UW Ltd for $15,000.00.

[2] This matter was heard over three hearings. ED Ltd was represented at all three hearings by Mr A. UW Ltd was represented at the first two hearings by Mr B. UW Ltd was not represented at the third and final hearing.

**Issues**

[3] The issues to be determined are:

A. Did UW Ltd breach cl 8.4 of the licence and supply agreement?

B. Did ED Ltd breach cl 8.3 and if so, is that a defence to a breach of cl 8.4?

C. What is the impact of cl 4.7 on the interpretation of the agreement?

D. If UW Ltd has breached cl 8.4 then what is the appropriate remedy?

*Did UW Ltd breach cl 8.4 of the licence and supply agreement?*

[4] Clause 8.4 of the Licence and Supply Agreement provides that "The Licensee shall not acquire stock of a variety generally supplied by Company B from another supplier without the prior consent of Company B, which consent shall not be unreasonably withheld if Company B cannot deliver Products of that variety within 5 days in accordance with clause 8.3".

[5] Mr B stated that UW Ltd did not breach cl 8.4 because he only purchased stock from suppliers other than ED Ltd if ED Ltd did not have the items in stock or if the previous licensee, Company A, had established a supply arrangement with another supplier. He said that if there was a previously established relationship and that item was also stocked by ED Ltd then he would variously obtain the stock from the established supplier or ED Ltd.

[6] However, I find that UW Ltd breached cl 8.4 by failing to always first ascertain whether ED Ltd had the items in stock before sourcing them from another supplier. That the previous licensee, Company A, had obtained stock from other suppliers without first ascertaining whether the goods were available from ED Ltd is no defence to their own breach of cl 8.4.

*Did ED Ltd breach cl 8.3 and if so, is that a defence to a breach of cl 8.4?*

[7] Clause 8.3 of the Licence and Supply Agreement provides that "Where Company B anticipates that delivery of Products will not be made until after 5 days following ordering, Company B shall use reasonable endeavours to supply Products from an alternative source, and shall advise the Licensee of the alternative supply prior to confirming orders with the alternative suppliers".

[8] Mr B stated that because ED Ltd breached cl 8.3 by failing to use reasonable endeavours to supply stock from an alternative supplier when it did not itself have the item in stock, then that meant that UW Ltd could source the stock from elsewhere.

[9] I accept that ED Ltd breached cl 8.3. Mr A accepted that it had. However, I find that this is not a defence to a breach of cl 8.4 which in essence requires UW Ltd to first ascertain whether items could be supplied by ED Ltd before sourcing them from elsewhere. Whether ED Ltd tried to obtain these items from an alternative source on their behalf is a separate issue and does not impact on UW Ltd's obligation under cl 8.4 -that is, to source their products from ED Ltd unless ED Ltd did not have the items in stock.

[10] I therefore find that ED Ltd's breach of cl 8.3 is not a defence to UW Ltd's breach of cl 8.4.

*What is the impact of cl 4.7 on the interpretation of the agreement?*

[11] Clause 4.7 of the Licence and Supply Agreement provides that "The Licensee shall be entitle[d] to adopt the same or similar practice to that of the current owner to purchase stocks from Company B or otherwise." This clause was inserted into the agreement when Company B sold the business to Company A in 2010 so that at that time the licensee referred to in cl 4.7 was Company A and the current owner was Company B.

[12] At the hearing on 4 March 2016, the Tribunal raised the issue of 'contra proferentum'. It was explained to the parties that this rule applies in situations where the words in a

document are truly ambiguous in which case the words are interpreted against the drafter of the document. The hearing was adjourned, in part, for the parties to consider this principle.

[13] Further to this, the Courts in New Zealand have said that the interpretation of a document such as a contract, is an exercise in ascertaining the meaning which the contract would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. This 'background' includes anything which would have affected the way in which the document would have been understood by a reasonable person and has been held to include the nature of an industry and common practice, relative states of knowledge and experience of the parties, the legal background, the origins of the contract and its commercial purpose.

[14] Mr A's (ED Ltd) view was that the term 'current owner' in cl 4.7 refers to himself as the current owner of Company B when it sold the business to Company A and that as the current owner of the business he purchased stock exclusively from ED Ltd unless it was unavailable, thus abiding by cl 8.4. In other words, cl 4.7 means the same as cl 8.4 – that is, that licensees were to always source stock from ED Ltd unless it was unavailable.

[15] The main thrust of Mr A's argument was that it was not feasible that licensees would be permitted to have flexible buying options because that would then negate the whole purpose of having a licence and supply agreement. ED Ltd also stated that if the principle of contra proferentum applies, then Company A could be viewed as the drafter of the document since it was Company A's requirement to include the clause and it should therefore be construed against Company A.

[16] Mr B (UW Ltd) stated that Company A had negotiated cl 4.7 into the agreement because it had paid a premium price for the business and that in return it was afforded the flexibility of buying from alternative sources. This view was supported by an affidavit from Mr L, the director of Company A. Mr B also said that since Company A purchased products from sources other than ED Ltd then UW Ltd also ought to be able to do so, given that at the time UW Ltd bought the business UW Ltd was the 'licensee' and Company A was the 'current owner'. He said that UW Ltd was therefore also entitled to the same flexibility because UW Ltd was now the licensee referred to in cl 4.7.

[17] I find that ED Ltd has not been able to show that more likely than not its interpretation of cl 4.7 is correct. I say so for the following reasons:

A. Clause 4.7 was inserted as a specific clause when Company A purchased the business from Company B; and
B. Its insertion on that occasion must have meant that it was to be treated as having a different meaning than cl 8.4, otherwise there would be no point in having it especially included; and
C. The insertion of cl 4.7 also supports the evidence that its inclusion was in exchange for a premium purchase price for the business. No evidence was provided to show any other reason for its inclusion; and
D. On its plain and ordinary meaning cl 4.7 allows a licensee to purchase goods from ED Ltd "or otherwise" – that is, licensees are entitled to flexible purchasing options; and
E. The clause refers to the "licensee' and the "current owner", not specifically to Company A and Company B. There was therefore no evidence produced to show that this clause was not meant to include subsequent buyers of the business; and
F. While Company A may well have negotiated the inclusion of cl 4.7 into the contract, this does not negate the fact that the document was drafted by ED Ltd. Therefore, if the principle of contra proferentum applies, then it should be construed against ED Ltd.

*If UW Ltd has breached cl 8.4 then what is the appropriate remedy?*

[18] I have already found that UW Ltd breached cl 8.4 of the Licence to Supply Agreement. However, I have also found that cl 4.7 means that UW Ltd is entitled to flexible product sourcing options.

[19] Given this contradiction and ambiguity I have again applied the principle of contra proferentum and have construed the contract against the drafter of that contract, ED Ltd.

[20] I am accordingly dismissing ED Ltd's claim for $15,000.00 for UW Ltd's breach of cl 8.4.