IN THE SUPREME COURT OF NEW ZEALAND

SC 25/2006

IN THE MATTER of civil appeals

BETWEEN **PAPER RECLAIM LIMITED**

Appellant

AND **AOTEAROA INTERNATIONAL LIMITED**

Respondent

SC 28/2006

AOTEAROA INTERNATIONAL LIMITED

Appellant

PAPER RECLAIM LIMITED

Respondent

Counsel G J Judd QC, D A Webb and A G Rowe for Paper Reclaim Limited
A F Grant and A A Sinclair for Aotearoa International Limited

Hearing 5 March 2007

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Gault J

CIVIL APPEALS

10.02am

Judd Yes may it please Your Honours, I appear with my learned friends Mr Webb and Mr Rowe for Paper Reclaim Limited which is the appellant in the first appeal and respondent in the second.

Elias CJ Yes thank you Mr Judd, Mr Webb, Mr Rowe.

Grant And Your Honours I appear with my learned junior Mrs Allison Sinclair for Aotearoa.

Elias CJ Yes thank you Mr Grant, Mrs Sinclair. Mr Judd we thought it would be convenient to take your appeal first and so we would invite you to start.

Judd Thank you Your Honour. It's fortunate because my learned friend Mr Grant and I had discussed it and we had decided to the Court's agreement that probably was the best way of approaching it. Your Honours I think I need to start by addressing Aotearoa's submissions that Paper Reclaim should not be permitted to advance what is claimed to be a new argument and in my submission there is no substance in that point for the following reasons. Leave to appeal was granted on Paper Reclaim's application upon the ground that whether the Court of Appeal erred in its approach to damages to be awarded to Aotearoa. The approach to damages to be awarded to Aotearoa has not been argued in the lower Courts at all. The High Court trial was confined to liability and to the extent that the issue of damages was touched on at all in either the High Court or the Court of Appeal, it was counsel by counsel for both sides that Paper Reclaim's liability for damages would be as the Court of Appeal expressed it in para.65 of the judgment, for lost commissions etc between 2 February 2001 and the end of whatever period was held to be a reasonable period of notice. The findings by the Court of Appeal, which are appealed against, were made in the context of the issue of determining what was a reasonable period of notice. The Court of Appeal held, and it did so with respect correctly, that the determination of what is a reasonable period of notice is to be made by reference to the circumstances pertaining at the time notice was given. That led the Court of Appeal on to considering what was the relevant date and in making that consideration the Court decided that the assumption which my learned friend and I had proceeded upon was wrong and that in fact the correct date was the date of cancellation. A date which hadn't specifically been ascertained, although the Court of Appeal observes that my learned friend Mr Grant indicated that it would at latest be a letter of I think March 2002 I think it was. The date is given in the Court of Appeal's judgment.

Blanchard J So this was a point that the Court of Appeal came up with of its own volition?

Judd Yes.

Blanchard J Well you must be able to appeal against that.

Judd Well that's my position Your Honour, and

Blanchard J And in fact that's what we thought we granted leave on.

Judd Yes.

Blanchard J I mean it's a done deal really. We granted leave.

Judd Yes, well that

Tipping J The issue is whether time runs from that date whatever it is or from that February, the year before that.

Judd The February 2001 letter, yes.

Tipping J Yes, that's the issue.

Judd That is the issue, yes that's correct. But what my friend objects to I think is that in preparing our argument for this Court we have in carrying out the analysis which was never carried out before, come to the conclusion that the proper way of putting the matter is by reference to the revocation of Aotearoa's Agency which is what the letter of the 2nd February did, and I think that is what my learned friend objects to.

Tipping J But the reason why no attention was given to that in the Court of Appeal was that no one in the Court of Appeal other than Their Honours were focused on that point.

Judd Exactly Your Honour, exactly.

Tipping J I can't understand what the problem is myself, but

Judd That being the case I will depart from that issue and only come back to it if I need to in reply.

Tipping J Yes.

Judd I should say that as Your Honours pre-empted me in terms of the order, I didn't go on to say what else my learned friend and I had agreed upon subject to the Court's approval as to the way in which we should deal with it. We thought that the sensible thing to do was for me to make my submissions in support of Paper Reclaim's appeal and for my learned friend then to make his submissions in response to mine and then while he's still on his feet to make his submissions in support of his own appeal and then I would reply on Paper Reclaim's appeal and make my submissions in response to his appeal and then he would have a right of reply and that would mean that we're not sort of jumping up and down, but I mean we of course are quite

Elias CJ Well the points are quite discrete. I must say that I would find it more helpful to conclude all argument on your appeal Mr Judd before moving on to the next one.

Judd I'm perfectly happy with that Your Honour. I just thought that I should indicate that that's what we had proposed.

Elias CJ Well I think it would be much easier for us in understanding the argument to hear your appeal first and then go on to hear the second appeal.

Blanchard J It may be we'll want to hear each matter discretely, because the question of costs in particular may be heavily influenced by the view we take on one or more of the earlier points.

Judd Yes, so Your Honour is suggesting that the three appeals by Aotearoa be dealt with sequentially as well?

Blanchard J That would be my preference but I have not talked to

Elias CJ Well perhaps we can discuss that but you're forewarned that that may be one possible outcome, but in any event your appeal can now proceed and we'll deal with it in full.

Judd Yes thank you Your Honour.

Elias CJ Thank you.

Grant Your Honours just mentioning this, in terms of the argument about my friend raising something which was not mentioned at the trial, would it help if I just clarify what it is that my concern is?

Elias CJ Well is it not that this argument has only just been developed Mr Grant?

Grant In short it's this, it is impended in the new submission that that was a revocationable authority which had a legal effect. To have a revocationable authority implicitly assumes that there was an agency agreement between the parties. It was Paper Reclaim's case at the trial through its witnesses that there never was an agreement and confirmed in their letter of

Blanchard J Well isn't this a matter for your response. We may never get to consider the revocation of agency point. I myself think that there is another analysis so it may not be central to the appeal.

Grant Yes Sir, I wasn't intending to take too long, merely to say this that the evidence was all conducted on the basis that there was no contract. If it is now said that there was a contract that would have affected substantially the cross-examination of their witnesses and so forth and the whole trial was conducted on the basis that there was no contract of the type which they now in these submissions to this Court say it did exist.

Gault J Are you directing that to the question of a contract at all or a contract that can be characterised as a principal and agent arrangement?

Grant Well Your Honour I'm addressing it to a contract which can be in the matter characterised as a principal and agent, because you can't revoke something which doesn't exist. Their evidence was

Gault J Well I understand they argued that there was no contract but their fallback position was if there was it was terminable on reasonable notice was sort summarily or something so that they did contemplate there being a contract in the alternative so that the only new point would be characterising it as a principal and agent arrangement.

Grant Well Your Honour it's correct that that was the fallback argument which they ran but if they had said well we're entitled to evoke the authority that revocation predicates that there was a contract on the day.

Tipping J Can't we just simply hear Mr Judd and you can tell us what's wrong with Mr Judd's argument

Grant I'm in your hands Your Honours. I have merely said this so that you understand the nature of the concern.

Elias CJ Yes, thank you.

Grant I don't wish to take more time than is necessary to tell you that.

Elias CJ Yes, no thank you that's helpful to have it flagged. Yes Mr Judd.

Judd So getting then to the substance of the matter, Paper Reclaim's first argument as to why the Court of Appeal was wrong is that the cause of action sued upon by Aotearoa arose when Aotearoa was excluded from acting as Paper Reclaim's commissions agent.

Tipping J Isn't a much simpler way of putting it that the letter, was it Feburary 01, terminated the contract without there having to be an acceptance of the so called repudiation?

Judd Well I

Tipping J This focus on cause of action struck me as being rather unconventional. I mean the question is did that bring the contract to an end?

Judd Well the issue that Paper Reclaim has been given leave to appeal on is whether the Court of Appeal erred in its approach to damages

Blanchard J Well its approach to damages depends upon (1) the appropriate period of notice, and (2) when it runs from.

Judd Yes.

Blanchard J So you go directly to that point.

Judd Yes, and my point in the first contention is that the time runs from when the course of action arose, and the course of action arose when Paper Reclaim sent its February 2001 letter.

McGrath J Is that the same as saying that time runs from breach rather than when the contract is terminated?

Judd Yes.

McGrath J And you're saying damages should be fixed in relation to the breach?

Judd Yes, yes.

McGrath J Time to run from then.

Judd Yes, yes Your Honour.

McGrath J Yes, I'd say that.

Judd And putting it shortly, the relevance of cancellation is that it terminates the obligation of the parties to give further performance and that was the position

Tipping J But aren't the damages measured by how much the notice if you like was short of what it should have been?

Judd Yes Your Honour.

Tipping J And the breach then in your terminology adopted by my brother is giving a notice that was too short?

Judd Yes, that's right.

Tipping J So it comes to the same thing in the end doesn't it?

Blanchard J You wouldn't argue that cancellation had any significance if hadn't occurred till say two or three years out, because you're saying that the period of notice on any view was less than that.

Judd Well I

Blanchard J So I don't see what the relevance of cancellation is, which helps you.

Judd Well with respect, I agree, but the Court of Appeal saw it to be relevant and that's

Blanchard J But it's surely a situation akin to the classic one of notice being given; you're entitled to give notice, but you don't give a long enough notice, and the Courts for very practical reasons don't say oh well that vitiates the notice completely. They say well you didn't give a long enough notice, you'll have to compensate the other side accordingly for the period of notice that should have been given. Now here no period of notice was given. They simply said that it was all over and the relationship could only continue on a totally different basis, but I can't see why it should be different where there's no period of notice given than it would be if the period of notice had been 24 years or a week.

Judd Well with respect I agree Your Honour that that is exactly what we argued in relation to that particular issue and in my submission the position was very succinctly put by Lord Justice Buckley in the *Gunton* case which I've quoted three paragraphs from on page six of our submissions and in the italicised part of the judgment His Honour is saying essentially I think what Justice Blanchard and Justice Tipping were saying to me.

Tipping J But there can't logically be, semi repeating what my brother has said, but there can't logically be a difference between a case where one minute's notice is given and no notice is given if you like just to make the point very very vivid. I mean the fact that no notice is given is still a case of the notice being short. It's the same concept or principle as an eleven-month's notice when it should have been twelve.

Judd Yes.

Tipping J And that I think is inherent in all the authorities which you've cited. Well perhaps not absolutely all but most of them.

Judd Well I think it is inherent in all that I've cited. Even the *Decro-Wall* case which the Court of Appeal relied on and of course my learned friend relies on it, although the only one of Their Lordships who addressed this particular point was Lord Justice Salmon, but probably the most convenient place to find the *Decro-Wall* case is that it's attached to my learned friend's submissions

Blanchard J Tab 7.

Judd In any event it's in tab 6 of our bundle of authorities at page 370 of the report Lord Justice Salmon refers to the

Elias CJ Sorry, page?

Judd 370 of the report Ma'am, and about three lines down His Lordship says 'if the master in breach of contract refuses to employ the servant it is trite law that the contract will not be specifically enforced. As I hope I made plain in *Denmark Productions* case, the only result is that the

servant albeit he has been prevented from rendering services by the master's breach cannot recover remuneration under the contract because he has not earned it. That's the important point. He cannot recover remuneration under the contract because he has not earned it. He has not rendered the services for which remuneration is payable. His only money claim is for damages for being wrongfully prevented from earning his remuneration, and like anyone else claiming damages for breach of contract he is under a duty to take reasonable steps to minimise the loss he has suffered through the breach. He must do his best to find suitable alternative employment. If he does not do so he prejudices his claim for damages. I doubt whether in law a contract of service can be unilaterally determined by the master's breach', and then I think we can then leave the rest of it which is not really relevant. But the point that His Lordship is making there is that the servant can't receive wages unless he's done the work for which the wages are to be paid, and in the present case the commissions which Aotearoa is seeking for not having received, are commissions which would only be payable once Aotearoa had earned the commissions by arranging the exports as Paper Reclaim's agents. So even if requisite notice was not given, and as a result Aotearoa was wrongfully prevented from being able to earn the commissions, it doesn't alter the fact that Aotearoa didn't do what it had to do to earn them, and so what it has to do, all it can do, is to seek damages to compensate it for having been put in the position of not being able to earn the commissions in exactly the same way as where a servant who was wrongfully dismissed is entitled to damages to place a servant in a position the servant would have been in had appropriate notice been given.

Elias CJ But there's no difference between the parties on that is there? The Court of Appeal acknowledged that, but we're not at the damages hearing – we're not at that point.

Judd Ah well

Elias CJ You're talking about the adjustment that would have to be made in calculating damages?

Judd No, what the Court of Appeal seemed to be saying was that Aotearoa was entitled to receive commissions up until the date of cancellation and then it was entitled to damages from the date of cancellation. That's what the Court of Appeal seemed to be saying. And I'm saying that's wrong because Aotearoa could not be entitled to commissions unless it had earned them.

Tipping J And that's why the contract is actually terminated, even though the notice is too short, and it's a question of damages not remuneration or award if you like under the contract.

Judd Well the possibility of that being the case Your Honour is dealt with in our

Tipping J Does it matter here? It matters only in order to persuade us that the Court of Appeal was wrong in giving remuneration if you like under the contract up to cancellation and damages thereafter, because you say there was no contract anymore following the letter that you received. Is that the point?

Judd I say either there was no contract or the contract was devoid of content which is relevant to Aotearoa's claim. We've dealt with this commencing at page 10 of the submissions under the heading 'summary determination of contract?' because there has been divergence of view as to whether or not a contract of employment where this has usually arisen can be summarily terminated and the weight of authority seems to be in favour of the fact that it can't be summarily terminated, that a contract of employment is the same as any other contract and a repudiation or a serious breach does not automatically bring the contract to an end. Under the common law there had to be an acceptance to bring it to an end. Under the Contractual Remedies Act there has to be a cancellation to effectively bring it to an end.

Tipping J But doesn't a notice which is too short bring the contract to an end but give a right to damages for the shortness of the notice? I may be entirely wrong but that's always been my understanding.

Judd I'm very happy to adopt Your Honour's view

Tipping J Obviously, well it may be a poisoned chalice Mr Judd.

Judd But what I say is that it doesn't matter.

Gault J Mr Judd can I just intervene for a moment to get a point clarified that is just in the back of my mind? You seem to have been very anxious, at least in this Court, to characterise this arrangement as akin to master and servant or principal and agent, but as I understand the findings in the lower Courts, this was a somewhat comprehensive contractual arrangement, which included also the 50/50 arrangement, so it wasn't solely a principal and agent relationship as I understand those judgments. Does that have any bearing on the way you wish to characterise this?

Judd In my submission it doesn't. The 50/50 arrangements were only of relevance if one or other of the parties sourced

Gault J I understand what the arrangement was, but wasn't it part of the comprehensive agreement that the Judge found to have been made and had all those terms in it? There weren't two separate agreements.

Judd Well that's really why I was equivocating as it were in answer to Justice Tipping's questions, because plainly the contract as found by

the Judge did involve things other than the principal and agent aspect of it, but the principal and agent aspect of it is the only part of it which is relevant to Aotearoa's claim. Aotearoa

Tipping J Whatever the terms of the contract were, whatever its content, haven't the Courts below concurrently now found that it was terminable on reasonable notice?

Judd Yes.

Tipping J So whatever the obligations and so on mutually were, they were terminable on reasonable notice

Judd Yes.

Tipping J A notice was given but it was demonstrably too short on anyone's view of it.

Judd Yes.

Tipping J So the principles that apply to contracts terminable on notice surely must apply to this contract as a whole and that would be at least provisionally

Gault J My only query in relation to that is just trying to get clarified in my mind is that this letter which it is said may have constituted notice albeit short, too short, made no reference to the 50/50 arrangements at all. It referred only to those shipments.

Judd Well the 50/50 arrangements only provided a framework, or a template, to be utilised if an only if

Gault J But you said that there was only a template for the payment of commissions of Paper Source from Paper Reclaim. It's all about how you label these things, and the Judge found there was a comprehensive.., they chose an expression which I don't think is an accurate description of joint venture, but they did see it as more than a principal and agency arrangement.

Judd Well I still come back to the point that I make that one actually has to look at what the claim is for. There is no claim based on anything to do with the 50/50 arrangements.

Blanchard J Had there been any sourcing from third parties?

Judd Over the years?

Blanchard J Yes.

Judd Yes there had been and it's way back in the late 1980s

Blanchard J So there hadn't been for the period immediately before this notice was given two or three years or sourcing from third parties?

Judd I can't answer that off the top of my head. Certainly there may well have been but the way it worked was this. Let's say Paper Reclaim found a third party who had waste paper to sell. Paper Reclaim would then get Aotearoa to export it and they would share the profits 50/50. In that scenario the benefit one could say would be Aotearoa's benefit in the sense that it would be entitled to share the profit. The other possibility is that Aotearoa found the third party waste paper supplier and exported it and Paper Reclaim was able to share 50/50 on the profit on that particular export. Now, if the contract was brought to an end then of course Aotearoa would be at liberty to source waste paper from third parties and to take 100% of the profit. Likewise I suppose if Paper Reclaim was to source waste paper from third parties it would be able to take 100% of the profit, but Aotearoa has made no claim. It is no part of Aotearoa's that it has somehow been deprived of something in relation to the 50/50 deals. The sole content of Aotearoa's claim is in relation to its having been prevented from acting as agent in the export of Paper Reclaim's paper.

Gault J It's not about what's claimed, it's about whether this letter constituted notice of the contract which was in existence.

Judd Well it's fairly obvious that

Gault J Well it may be but it just seems that's a point you have to address isn't it?

Judd Well it's a point I have to address if I were putting forward the argument that Justice Tipping was putting forward, and it's one of the reasons why I haven't done that, because if you look at the letter which in the terms of it are set out in para.3 of our submissions, plainly what it does is to revoke authority to act as agent, that's what it does. So it doesn't refer

Tipping J Well 'we now write to advise you formally that given that there is no long-term contractual arrangements between us', isn't that speaking of contractual arrangements in general terms? I don't know but that's how I read it but the point is a perfectly valid one.

Blanchard J I must say I'd read it the same way as Justice Tipping that this letter said there's no arrangement between us now.

Tipping J It's all off, whatever 'it' was.

Judd Yes alright well

Blanchard J And that would be explicable if there hadn't in fact been much in the way of 50/50 deals.

Judd Yes, I think whether there were 50/50 deals in the period a few years immediately preceding February 2001, I don't they were of any great significance. The really significant ones occurred at the end of the 1980s when there was a glut of paper on the New Zealand market and Paper Reclaim made arrangements with New Zealand Forest Products as it then was to be able to source waste paper from people who had contractual entitlements to sell waste paper to Forest Products, and as a consequence a very large quantity of paper was collected and was exported mainly I think to Peru and they were large exports and they were lucrative exports for both parties.

McGrath J Mr Judd are you coming to the Contractual Remedies Act provision which I think you rely on as part of your analysis of repudiation, not cancellation?

Judd I was going to come to that Your Honour but I have to say I've fairly significantly derailed the

McGrath J Look come to it in your own due time if you prefer but it seemed to me that that might well be relevant to this analysis.

Judd Yes, I think the other aspect that I need to cover off in relation to the first argument, what I've called the 'immediate answer', is the point which is made by Lord Justice Buckley in the first of the three quoted paragraphs on page 6, and that is that the date when the contract would have come to an end must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself, that is to say that he would have determined the contract at the earliest date at which he could properly do so and His Lordship cites his authority for that, passages from *McGregor* in the 13th edition and at some point, in fact in para.25 of our submissions where I'm referring to the revocation of the authority to act being also possibly a breach of contract, at the end of that paragraph I have given the references to the paragraphs of *McGregor* in the current edition which correspond to those relied on by Lord Justice Buckley in the 13th edition, and the paragraphs that His Lordship relied related specifically to employment and I've given the reference in the current edition to the general principle, because it's not a principle which is applicable just to employment. It is generally applicable and the point is of course that if one doesn't proceed upon the basis that the party who is giving notice of, or short notice, or no notice, if that party is not treated as being entitled to bring the contract to an end in a way most beneficial to himself, then it is really departing from the over-arching principle in relation to contractual damages that the innocent party is to be compensated, but only compensated, and if the matter is approached in an artificial matter which I submit is the

way in which the Court of Appeal's approach would be, then the consequence is that the innocent party will be getting a windfall.

Tipping J Can the point be put this way that if a contract is terminable on say 12 months notice the damages can never run for more than 12 months?

Judd Yes Your Honour, yes.

Tipping J Sounds logical. There may be a flaw in it but it sounds logical.

Judd That's right and really Justice Robertson referred to that same point in the passage quoted from the *Robertson and Fletcher Residential* case in para.44 of our submissions where he said that the contrary view did not appear to accord with either logic, common sense or legal principle. And I respectfully adopt that as part of my submissions. Now

Tipping J How did the Court of Appeal deal with that proposition Mr Judd, or was it not directly addressed?

Judd It wasn't directly addressed.

Blanchard J They really based themselves on their view that the letter was not a giving of notice and they don't seem to have considered what the position would be if it was a giving of notice or if regardless of whether it was a giving of notice it actually started time running.

Judd Yes, the Court hasn't addressed that and perhaps that's an appropriate point to

Tipping J Could I just ask for your help on this? If, whatever it is, whether it's a giving of notice or a repudiatory breach or an ordinary breach, it must follow mustn't it from general principles that the damages can't run for more than 12 months from that time because the contract could have been brought to an end by that 12 months notice given on that same date?

Judd Yes Your Honour.

Tipping J I just don't understand how the Court of Appeal got itself into the position of in effect double counting, but that's your essential complaint.

Judd Yes it is my essential complaint and I think really the Court of Appeal was seduced by *Decro-Wall*, which of course was a case which was of quite different facts. Now I think that's maybe an appropriate point to come to Justice McGrath's question about the Contractual Remedies Act. The point that I sought to make in relation to that arose from sections 8, ss.4 and ss.10, subsection 1. Subsection 8 sets out the rules applying to cancellation and subsection 3 provides that subject to the Act, when a contract is cancelled the following provisions shall apply

(a) 'so far as the contract remains unperformed at the time of cancellation no party shall be obliged or entitled to perform it further'. So really it's adopting the common law position I think probably analysed by Lord Diplock, and that's *Secure Corp* case about primary obligations and secondary obligations and so forth, and then, and this is the important point, ss.4 says 'nothing in ss.3 of this section shall effect the right of a party to recover damages in respect of a misrepresentation or the repudiation, or breach of the contract by another party', and s.10, ss.1 is to the same effect. It says 'subject to sections 4 to 6 of this Act a party to a contract shall not be precluded by the cancellation of the contract or by the granting of relief under s.9 of this Act from recovering damages in respect of a misrepresentation or the repudiation, or breach of the contract by another party'. So the point what I seek to draw from those provisions is that the Contractual Remedies Act is confirming that the right to damages is given by misrepresentation, because that's brought in by s.6, or repudiation, or breach, and the right to damages is not given by cancellation. In some circumstances cancellation may be necessary to permit a claim for damages and that will be so where the breach is anticipatory, where the time performance hasn't arrived. So if we take the leading case in this area which Your Honours will I'm sure be familiar with the *White and Carter Councils Limited* in *McGregor,* thank you, and of course what had happened in that case was that there had been a contract between an advertiser and the appellant by which the advertiser was permitted to put up advertising material and to be paid for it.

Blanchard J Was that a fixed term contract?

Judd It was a contract entitling the advertiser to be paid when it did the advertising and the advertising was to be done at some time in the future – three months I think from the date – three months into the future from the date of the contract. Immediately after the contract had been made the appellant said that it wasn't going to perform. That the person who had made the contract on behalf of the appellant didn't have the authority to do so and the advertiser waited for the three months period and then did what the contract said it was entitled to do and having done that it asked for payment and when payment wasn't forthcoming it relied on a provision of the contract which accelerated the right to payment for the whole term of the advertising agency and sued

Blanchard J So it was a contract for a term?

Judd Well let me just check on that.

Blanchard J In other words it was not a contract terminable on reasonable notice?

Judd No, it was a contract, yes it's not directly to do with reasonable notice Your Honour but

Blanchard J I know but my point is I'm trying to see whether it's a contract in a different context. In other words where two parties are bound for a period, a fixed period, not a contract like this one which is terminable on reasonable notice.

Judd It was for a fixed period but the point which I'm seeking to address is the relevance of cancellation or under the common law the relevance of acceptance of repudiation, and

Blanchard J Well your point is that you don't get damages from cancellation or for acceptance of repudiation, and that's got to be right, because that's your Act. You're the innocent party. You get the damages for the antecedent event which gives you the right to cancel.

Judd That's right.

Blanchard J And that's the repudiation or the breach.

Judd That's right, and

Tipping J I think you're making it far more complicated than you need quite honestly. You can't get more than 12 months because that's what you could terminate on. That's your king-hit point isn't it. I'm not saying whether it's right or not but it can't be put any better than that from your point of view can it?

Elias CJ No but you're addressing the cancellation point or the repudiation

Blanchard J Well I don't understand the cancellation point. You can't get damages for a cancellation.

Judd No.

Elias CJ No, well I think Mr Judd we're accepting the proposition you're putting to us but your point is that it's basic principle and *White and Carter* is authority for it.

Judd Yes and the point that I'm trying to make is that cancellation may be important in certain circumstances where performance has yet to come.

Elias CJ Yes, you can't bring your claim.

Judd Yes, so in the *White and Carter Council* case the advertiser could have accepted the repudiation immediately and then sued for damages.

McGrath J Yes.

Judd Right, and before the time performance had arisen it couldn't sue without cancelling the contract, that's the point.

McGrath J Yes.

Elias CJ Yes.

Judd And that's why cancellation may be important.

McGrath J But all it could sue for in the end was damages for the repudiation or breach.

Judd Well no

McGrath J After they cancelled.

Judd No, no, what happened in *White and Carter Council* was that they went ahead and performed. It was one of those unusual cases where the ability to perform lay completely in the hands of the innocent party

McGrath J Yes

Judd So it was able to go ahead and render the performance, which is a contract provided for, and then to say I have rendered the performance, you must pay me.

Blanchard J Would it have been able to do that if the contract had been cancelled upon reasonable notice?

Judd No, it's got nothing to do with reasonable notice in the *White and Carter Council* case.

Blanchard J I understand that Mr Judd, I'm asking a hypothetical question. Would it have been able to take that stance if the contract had been terminable on reasonable notice and notice had been given?

Judd No it wouldn't have been able to.

Blanchard J Yes, I think that must be right, and that's the distinction between the two cases. That's why I'm saying the *White and Carter Council* doesn't really have much to do with it.

Judd No, I only raise it because Justice McGrath asked me about the Contractual Remedies provisions in relation to cancellation and I'm just endeavouring to draw the Court's attentions to the case in which, the circumstances in which cancellation may be relevant, and in the *Gunton* case, at page 6 of my submissions in the italicised part at the end Lord Justice Brightman said 'the subsequent acceptance of the repudiation would not create a new cause of action, although it might affect the remedies available for that cause of action'. I apprehend that His Lordship was referring to the sort of situation which I've just been referring to where the performance is in the future.

McGrath J That's in the middle paragraph?

Judd No, no, in the third paragraph in the italicised part 'his cause of action would have arisen when he was wrongfully excluded from his employment. The subsequent acceptance of the repudiation would not create a new cause of action'.

McGrath J Yes, yes, thank you.

Judd Now in our submissions commencing at page 8 we deal with the principle that the authority of an agent is revocable. I submit on the basis of the material contained in those submissions that there is no doubt that as a matter of law that is the position and so Paper Reclaim was entitled to revoke Aotearoa's authority to act as agent, and once it had done that then Aotearoa could no longer act as agent, but if in doing so Paper Reclaim failed to comply with an obligation to give reasonable notice, then it would be liable for damages for failing to do so, and that seems to be as well as the general propositions set out in *Bowstead and Reynolds* that the point is dealt with by the New Zealand 1927 case of *Mahood and Geange*.

Tipping J Is the force of this point that you could get rid of the agency on no notice albeit you would have to pay damages for the lack of what was an appropriate notice?

Judd Exactly Your Honour, and the reason is pretty obvious. If somebody is entering into a contract on behalf of a principal, he's got to have the authority to do it and if the principal says you no longer have my authority then that's it. Maybe you've done it wrongfully and you have to pay damages for doing it wrongfully, but nevertheless the authority has gone. Then the next section of our submissions are the 'summary determination of contract?' and I don't that I need to dwell on this because it's already fallen the subject of discussion with the Court but it's probably worth drawing attention to the observation made by Justice Richardson in the *Hewin* case which is referred to para.32, and I've set out there what His Honour said. 'If so the other party is entitled and where, as under a contract of employment it is a confidential relationship may be obliged to accept the repudiation and treat his own obligations under the contract as at an end', and that would seem to be one way of reconciling the desirability of a contract of that sort being brought to an end summarily by notice with the general principle that where there is a repudiation it doesn't affect the existence of a contract until it's been accepted or under our law until there's been cancellation pursuant to provisions of the Contractual Remedies Act. So in my submission it's not in fact necessary in this present case to decide the question as to whether in some circumstances a repudiation will bring the contract to an end because even if in the present place it didn't bring the contract to an end immediately, it makes no difference because it was the agency

relationship under the contract which gave rise to the claim which Aotearoa is making.

Tipping J But even if it was a simple breach, not a repudiatory breach, and forget all connotations of agency, if the contract is terminable on 12 months notice I don't see how you can get more for the breach than whatever you would have got over that 12 months.

Judd And that Your Honour is our submission. The next section of the submissions at page 12 is under the heading 'notice effective even though purportedly of immediate effect', that has already been discussed and I think the only additional point that I would wish to make is that, oh well two points really I suppose. The first is that the approach that Your Honours have been suggesting of this letter being effective as a notice is generally supported by the Privy Council's decision in the Australian *Blue Metal Ltd and Hughes* case, but specifically the point made by Lord Devlin for the Privy Council, which is referred to in para.42 of our submissions, and that is this that because we are talking here about an implication of a term into the contract, the implication being a provision that the contract may be terminated only by reasonable notice, if it was going to be necessary for the notice to contain a date when termination would be effected or a time, 12 months notice or six months notice or whatever, then that would be necessary to be part of the implied term and Lord Devlin makes the point in the passage quoted in para.2 that it would be unusual to find that the parties had in mind the further requirement of a dated notice, and of course in our case there's been no finding by the High Court or the Court of Appeal that the implied term requiring reasonable notice also incorporated a requirement for the notice to be a dated notice. Now I think that I have probably in fact covered all that I need to cover. There were a few matters that I was going to mention which effectively arose from my learned friend's submissions but I think given that the discussion that I've had with the Court, there's probably no need to do that and if anything does arise I can deal with it in reply, so unless Your Honours have any further matters you wish to raise with me I think that I can hand over to my learned friend.

Elias CJ No, thank you Mr Judd. Mr Grant.

Grant Your Honours I'd like to take you at the outset to the actual document, the letter of 2 February 2001, which is volume 5, page 1352

Blanchard J It's quoted in the judgment below isn't it?

Grant I'm not sure if it's fully quoted.

Blanchard J Alright, volume 5?

Grant It's the red one.

Blanchard J The red one.

Tipping J Red backing.

Gault J Which page please?

Grant 1352.

Blanchard J It looks more brown than red to me.

Elias CJ Oh you're colour blind.

Tipping J He's only colour blind.

Grant 'We have offered various contractual agency arrangements to Aotearoa International Limited over the last few years, but these have been rejected. Matters have continued on a deal-by-deal basis with numerous disputes between us. We now have to advise you formally that given that there is no long term contractual arrangements between us and the disputes between us over the terms upon which you have acted on individual sales that henceforth all instructions by Paper Reclaim as principal of Aotearoa's agent will be on a sale by sale basis and such instructions will apply only to the particular sale upon which you have been instructed. You are hereby advised that except when acting on the specific instructions Aotearoa is not to hold itself out as Paper Reclaim Limited's agent and when instructed is only to hold itself out as Paper Reclaim Limited'' agent only in respect of the particular sale where it has been instructed'. And the obvious thing to note there is that it does not acknowledge the existence of the contract, the joint venture, the oral contract found by the trial Judge. Justice Gault spoke about the 50/50 transactions as being an integral part. They were an integral part of the way in which these two companies blended their businesses. In essence the two companies which were competitors baling, sourcing, supply and exporting decided to chop their businesses in two as it were, with Aoteara focusing on the exports and Paper Reclaim having the facilities to store or getting the sourcing and supply contracts and so forth, and the 50/50 deals were part of that, and in fact they were a substantial part of that and there were substantial 50/50 sales in the few years leading up to this letter. Now If I can try to explain this shortly, it is our contention, and it was the Court of Appeal's understanding as I read the judgment, that this did not constitute a cancellation of the contract; this was a letter which was a repudiatory letter, which it was open to Paper Reclaim to accept or not, and it did not bring the contract to an end and it was for that reason that Paper Reclaim sought specific performance. It was never suggested as I understand it that it wasn't entitled to specific performance and if the case had come to trial a year or so later and there was still the request for specific performance, it would not be contended that there was no longer a contract because this was a notice

to cancel in 12 months and had expired or a period of notice. In essence as in the *Decro-Wall* case, was a document which if you like

Elias CJ I'm sorry I don't quite understand that submission. Why would not the claim for specific performance be met by an argument that this had been notice of determination of the relationship which was reasonably available?

Grant Well Justice Nicholson found expressly that it was repudiatory conduct which didn't bring the contract to an end and

Tipping J It was a breach wasn't it, but whether you characterise it also as repudiation, what does that matter for damages purposes Mr Grant?

Grant Well Your Honours, alive to damages issue as to when time runs from.

Tipping J Yes, yes, what does it add to call it repudiation, on top of it being a breach?

Grant Oh it's repudiatory conduct is what I mean. It's repudiatory conduct which is capable of acceptance or not.

Blanchard J It was a breach, but what was it a breach of? It was a breach of the obligation to give reasonable notice.

Grant Well as I understand the judgment in both

Blanchard J Well never mind the judgment, we're looking at what is an appropriate analysis of this.

Grant Well it's a breach in this sense that Paper Reclaim is saying we're not intending to carry on fulfilling our obligations under the contract

Blanchard J And they should have, they should have said we're giving you reasonable notice and we think reasonable notice is 'X'.

Grant That's right, well they didn't say anything in this letter about reasonable notice.

Blanchard J So their breach was in failure to give reasonable notice?

Grant No Your Honour with respect, the breach was in renouncing their obligations under the contract.

Blanchard J And what were their obligations? Their obligation was not to renounce the contract except on let us say 12 months notice.

Grant Well Your Honour directly their obligations under the contract were to supply paper for export and so forth and they were in this

Blanchard J But they were not held that for life. On the findings we have now, they were entitled to bring that arrangement to an end by reasonable notice. Well they didn't. They tried to do it immediately but their breach is no more than the failure to give the notice.

Grant Well Your Honour in the *Decro-Wall* case there was a letter which similarly didn't refer to a period of notice and didn't say we are hereby terminating. It gave a statement by a party which was in truth renouncing its obligations under the agreement and the English Court of Appeal said this document does not start time running. This is not a notice which talks of several months or years before the contract will come to an end and this is not to be interpreted in that way. It does not express itself to be such and it cannot objectively be construed in that way, and what happened is that the party which gave the notice in that case, then gave a notice subsequently, and it was that notice which brought the contract to an end. But the letter which it wrote, in which it effectively indicated it wasn't going to comply with its obligations was not interpreted. If I can take you to

Blanchard J But I have difficulty with that line of analysis with all due respect of the Court in question. If it's good enough to give a notice where you get the length of time wrong, why is it not good enough to give a notice which doesn't specify any particular period of notice, but just indicates that the contract is as far as the writer of the letter is concerned is off?

Grant Well there is different consequences and here for example

Blanchard J But why should there be different consequences? It doesn't to me make any sense.

Grant Well if the letter is as in the *Decro-Wall* case interpreted not as giving it notice but as a document which was unjustified and could not bring the contract to an end by constituting the beginning of notice, then the party's entitled to specific performance and the other remedy is there. A different regime applies and

Blanchard J But how can you be entitled to a specific performance where there's an ability to bring the contract to an end by reasonable notice? It's not a *White and Carter Council* case where the contract was for a fixed period.

Grant So far as the Court of Appeal is concerned, and I was concerned, the *Decro-Wall* case is reasonably clear on this subject.

Tipping J Can you just tell me where do I find *Decro-Wall*

Grant *Decro-Wall* is in my friend's volume, which is bundle of authorities for the appellant in respect of this appeal at tab 6.

Blanchard J Seven.

Grant No, no, six Your Honour.

Blanchard J Well it's seven in mine.

Elias CJ And mine.

Blanchard J Oh a different bundle is it? Oh that's right, yes.

Grant I think it's also in mine but I haven't got the Weekly Law Report version so my friend has got the official version.

Tipping J Right, so it had Lord Justice Buckley in it too?

Grant Yes. If I take you to the

Elias CJ Sorry I still haven't got there.

Blanchard J I haven't found it so far.

Grant I'm sorry Ma'am, I'm sorry Sir.

McGrath J It's the piece we were looking at earlier.

Grant It's tab 6 of I think it's a slightly fatter volume. I'm sorry it's bundle of authorities for the appellant and Paper Reclaim is the appellant on the backing sheet.

Tipping J In my volume to that same effect it's actually tab 7 Mr Grant.

Grant Well I'm not quite sure whether mine's been rebound or something but does Your Honour have the

Tipping J I've got the All England Reports.

Elias CJ No that's his bundle.

Tipping J Oh wrong bundle.

Grant I think mine might have been rebound because there is a lot of cases missing.

Tipping J Ah, I have it now in the Weekly Law Report. Is that the one?

Grant That's the one I was

Tipping J Is that the one?

Grant Yes.

Tipping J Right.

Grant Can I ask if the others of you have that?

Blanchard J Yes.

Gault J At last.

Grant If I take you to Lord Justice Sachs at page 377, bottom right. He says under a heading "Did the April 9 letter operate as a notice? On behalf of the defendants it was submitted that the 12 months should run from the date on which a notice was actually given after the trial. That's July 17. The plaintiff's case is that the letter of April 9 operated as a notice to determine the relationship and that the 12 months should run from that date. An issue which I haven't easy to resolve. In favour of the plaintiff's submissions is first a reluctance to introduce into commercial transactions any of those complications which attend the giving of notice in landlord and tenant cases, etc. As against that it can be balanced first the practical and undesirable difficulties that could arise if businessmen were entitled by giving a wrongfully short notice to determine a contractual relationship – or indeed by determining it without notice – to place the opposite party in a position of great uncertainty and yet retain the same benefits as if they had given a correct notice. It may well be better that they should feel impelled to give a longer notice rather than be entitled to cause such confusion. To that can be added the legal difficulties in the instant case of deeming something which is an unlawful repudiation of the contract to be a lawful notice given under the contract. In the end I come to the conclusion that in principle a repudiation of a contract cannot operate as a notice given under it and a fortiori a letter wrongly purporting to accept a repudiation that hasn't occurred cannot so operate. Accordingly the defendant's contentions must succeed unless anything the *Bellotti* case precludes the conclusion" and nothing did in that case. And then Lord Justice Buckley deals with this on page 381 at the bottom, the paragraph beginning "I come to

Elias CJ He goes on though to cite at 378 some cases which – I haven't read this – so don't seem to be quite as, not trying to be as cut and dried.

Blanchard J And significantly he doesn't cite *Australian Blue Metal Industries* which doesn't appear to have been before the *Decro-Wall* Court. And *Australian Blue Metal Industries* is interesting because it deals with the policy reasons which are against you. Namely the share difficulty for the notice giver. Lord Justice Sachs adverts to it but looks at it from the point of view of the person receiving the notice, but it doesn't seemed to be recognised that there's a real difficulty from the notice giver's point of view as well.

Grant Well Your Honour asked me, this is Your Honour Justice Blanchard, a few moments ago what was the significance of this all and so forth and I would ask you to go back, I think it's the last line of Lord Justice

Sach's on page 377. He says 'As against that can be balanced the practical and undesirable difficulties that cold arise if businessmen were entitled by giving a wrongfully short notice to determine a contractual relationship or indeed by determining it without notice, to place the opposite party in a position of great uncertainty

Blanchard J That's the exact point I was making. In *Australian Blue Metal Industries* the Privy Council's concern is the other way around. They're concerned that the position of the notice giver, who doesn't know exactly what period of notice to give, and maybe caught up in a situation where they under-estimate the period of notice and it takes quite a while for the Court to determine the matter and they then find that the period of notice isn't long enough and so they have to give the notice all over again, and in the meantime the contract is preserved, and the Privy Council quite clearly were setting its face against that.

Tipping J You could end up de facto getting pretty well twice the length of notice you're entitled to under that scenario.

Grant Well one of the ways by which people handle that is to give sometimes without prejudice and they say 'well I believe I've given you, you're not entitled to any notice but if I'm wrong without prejudice here's a two year period of notice or whatever it may be.

Elias CJ Well why is it sound policy to encourage that sort of thing?

Grant Well to the extend that it may be said to be difficult for parties to predict what a Court will say as to the length of notice, then the person who wishes to terminate the arrangements but doesn't know isn't stuck in a terrible quandary saying I haven't a clue what to do because it's all so hard, I don't know what the Court will do. It can do as in the *Paperlight* case and say well I think you're only entitled to one year but I'm going to give you two years notice.

Blanchard J But then if they're right about the one year, they've been forced to give a two year notice and that seems to be grossly unfair, whereas from the recipient's point if they are disadvantaged by a notice which is too short, they can get appropriate damages. The giver of the notice can never get damages, so the *Blue Metal Industries* case makes perfect sense and with respect to *Decro-Wall* it's per incuriam.

Grant Well with deference to Lord Justice Buckley's judgment even if it is per incuriam and take you to the

Tipping J Well you can say it's per incuriam but it's nevertheless right.

Grant I certainly wouldn't concede that this judgment is without good merit.

Gault J The difficulty I have is whether or not this brought the contract to an end, it was undoubtedly a breach for which damages may be claimed,

and in assessing the damages one has to give the party liable the benefit of having been entitled to give reasonable notice, so that limits the maximum quantification of damages.

Grant Well this case, as I read it, says and that in essence if you wish to bring a contract terminable by reasonable notice to an end by giving notice, then do so

Gault J It's not about whether the contract was terminated, this is my trouble, it's what is the quantum of damages for the breach?

Grant Your Honours I was going to go on to say that if you choose not to give a notice saying I believe that you should be entitled to a period of 'X' years, I'm giving you the notice starting from today, but the party says instead I'm not going to give you any work, then if it's liable for damages for not giving any work, that's a separate issue which is brought about by the way in which it chooses to, if you like, breach its contract and there's no hardship morally to that company if it says well I'm not giving you notice to terminate, I'm just not going to give you any more work, and if it chooses to do that I say then that's what it wishes to do and if there are damages consequences for that then there are.

Blanchard J So you're in a worse position if you do that than if you say I'm giving you 24 hours notice?

Grant Well you are if the 24 hour notice is held to be wrong and there's an entitlement to a longer period, yes, and that's what happened in this case.

Tipping J Would it matter Mr Grant how much it was wrong? If you give us 24-hour notice when it should be 12 months that should have the same effect of total invalidity as if you'd given 11 months notice when you should have given 12 months.

Grant Well Your Honour it is of course artificial because no one ever gives 24 hour notices and so forth.

Tipping J No, no, you can't with respect, you can't avoid it like that. Let's make it more realistic. Let's make it one month when you should give 12 months as opposed to 11 months. Are they both equally invalid? Are they both repudiatory? When does it become repudiatory and when does it come a valid estimate which you've just had the misfortune to undershoot?

Grant If Paper Reclaim's letter had said on the 2 February 2001 we believe that there is a contract and we're entitled to terminate and that one month is the right period of notice and we hereby give one month starting from today, I would have thought it likely that Justice Nicholson would have held that time began as from the beginning of

that notice because it was made clear that it was terminable, the assertion was being made, that it was terminable by reasonable notice, and that notice was to begin from that day and one month may seem unreasonably short and so forth but

Tipping J But how can you ever get more than 12 months worth of damages on the principle that Lord Justice Buckley himself espoused in that case Mr Judd cited? What was it – *Gunton and McGregor* – and the general principle from *McGregor* which we were told was the same? I would assume it's the same but lets just, unless you want to challenge that. It's the top of page 6 of Mr Judd's submissions. Admittedly it's directed to a servant wrongfully dismissed, but the argument against you is a general proposition and it said that *McGregor* espouses that as a general proposition you must assume that the person undershooting if you like, or shooting wrongly, was entitled to and would have given a proper 12 month notice and therefore you can't get more than 12 months damages.

Grant Well I come to that shortly but just dealing with this case which is open in front of you and if look at what Lord Justice Buckley said there on page 382 he deals with this. The paragraph beneath letter C beginning 'where a party to a contract'. 'Where a party to a contract gives notice to determine it pursuant to an express or implied term in that behalf, he is exercising a contractual right arising under that term of the contract. Where on the other hand the party who asserts that the contract has been determined has not in form given any notice determining the contract and has done nothing which can rationally be treated as an exercise of a contractual right to determine the contract unilaterally. I find it hard to see how he can properly be treated as having exercised his contractual right of termination'. And then a few lines lower down between E and F there's a sentence beginning 'in the present case, on the other hand, the letter of April 9 is in my judgment incapable of being construed as a notice determining the agreement between the parties. It didn't by its terms purport to be such a notice nor did it forbid further performance of the contract either immediately or after an interval. I merely intimated that the plaintiff company would not further perform the contract'. So, I go on 'regarded as an acceptance or attempted acceptance of a supposed repudiation of the agreement by the defendant, the letter was clearly not an exercise of a contractual right under the agreement to determine the agreement but was an act outside the agreement'.

Elias CJ Look I'm sort of way behind I think. I think that Justice Gault's question is the critical one. Why does it matter, and he goes on to say that a repudiation notice of determination are clearly different things. You've got a finding of repudiation. The only question here is how is damages to be assessed. What does it matter what form the letter was in if it is held to have been repudiatory?

Grant Because it depends whether it starts time running. If it's repudiatory in the form as in *Decro-Wall*

Elias CJ Well I don't think it's got anything to do with that. I mean you're seeking damages for the breach which is the repudiation.

Grant Well so that one doesn't get confused with language, when I talked about repudiation

Elias CJ Yes I shouldn't have used repudiation, yes.

Grant I mean that by repudiatory conduct which is capable of acceptance as cancelling a contract under nomenclature and our statute or the innocent party can say no I don't accept but I wish to have specific performance, and repudiatory conduct doesn't bring the contract to an end, it merely gives the other party an entitlement to bring it to an end, and the significance is that if you have a letter that it is a notice giving notice to terminate, sorry Your Honour I just wasn't quite sure what that tapping was.

McGrath J I think I fixed it, yes.

Grant Then time doesn't start until the contract is cancelled in the

Gault J It doesn't matter whether time starts to run or not, it's a matter of quantification of damages. In the *Decro-Wall* case they sought a declaration that the contract was on foot. Here it doesn't matter whether the contract ended at that point or not. What we're dealing with is in quantification of damages for the breach and in assessing the quantum you have to take into account the possibility that it could have been terminated on notice. It's not a question of whether it was, it's in quantification of damages you have to give the party liable the benefit of having taken that step. That's as I understand it.

Grant Well with respect Your Honour if I follow the reasoning I respectfully disagree. As I said before, if contracting party A says I'm not going to do this and then a year later the Court says well you're entitled to terminate by giving notice and they then give notice. In my submission it's not entitled to damages, I'm sorry, there are damages flowing from the first act, whatever that may be. Whatever that breach may be and it may be that different damages would flow from that as opposed to the giving of notice. It depends what the breach is.

Gault J On your argument then if this cancellation by your client had not occurred, time would not yet have started to run?

Grant No, because by letter dated 3 May 2003, Aotearoa formally cancelled the contract.

Gault J I'm saying if they had not taken that step they could simply have waited until now and said time still has not started to run.

Grant Yes that's right, but in the cases

Blanchard J Well that can't be right.

Grant Well Your Honour this case is an illustration of it where

Elias CJ Well, but it's been put to you that it's quite a different case.

Grant Well I'm going to need to read *Australian Blue Metals* because I didn't read it with

Tipping J But it's *Decro-Wall* that's a completely different case - the issue there not being quantum of damages but whether the contract still existed.

Grant Well with respect Your Honours I say that the letter in this case is an allergist to the letter of the *Decro-Wall* case which did not refer to the giving of notice and a period and so forth and even if the Court held there that it wasn't to be construed as a notice, so the same applies in the present case.

Elias CJ Alright well we'll take the morning adjournment now thank you.

11.30am Court Adjourned
11.48am Court Resumed

Elias CJ Thank you. Yes Mr Grant.

Grant I'm assuming Your Honours don't wish to hear more on *Decro-Wall* at this point?

Elias CJ Anymore on?

Grant *Decro-Wall*.

Blanchard J Yes.

Elias CJ Yes, I think that's right.

Grant I was asked about *Gunton* and will take you to my submissions on this if you will give me a minute. If I can say this in passing that the argument which has been raised by my friend in his submissions for this hearing differs substantially from the way this case has proceeded to date and I've put out some of that in my submissions and I don't propose to repeat them but Your Honours will note in para.3, point 11 of my submissions that in support of its application for leave to appeal

my learned friend said 'it's correct that Paper Reclaim's repudiation did not bring the contract to an end and that could only happen as a result of the repudiation if Aotearoa exercised its right to cancel'. As I understand the way Your Honours are thinking from the questions you have been asking, I wouldn't necessarily agree with my friend's statement there

Tipping J I don't think I tentatively do but ultimately I don't think it matters.

Grant I don't want to waste your time on history if we're dealing with a different way of looking at the case. Section 5 of my submissions on page deals with the *Gunton* case. Perhaps rather than read this if I just speak because I might be able to do it quicker. In essence as I understand *Gunton*, it says that there is an exception to cases which say that repudiation doesn't bring a contract to an end, it requires acceptance and the exception is in employment cases and the reason for the exception is that you can't generally speaking get specific performance to force an employee to work for an employer and if you can't do that then there doesn't seem much point if you like prolonging the contract, so that the repudiatory act by the employer will of itself bring the contract to an end. And what I said in my submissions was that that is therefore confined to employment law and in para.5.4 I set out the judgment of Lord Justice Shaw on that where he said 'it is trite enough that the wrongful repudiation of a contract doesn't in general determine the contract. It's for the innocent party to decide whether he will treat the contract as an end and seek redress by way of damages, or whether he will regard the contract as still subsisting and call for performance in accordance with the contractual terms'. Going back to Justice Blanchard's point, if the conduct were to be in a letter, we would then have uncertainty as to whether the contract could be performed and if so for how long.

Tipping J It's not this aspect of *Gunton* that I asked for assistance on Mr Grant, it was that part of the paragraph at the top of page 6 of Mr Judd's submissions where I think it's Lord Justice Buckley – it's the point my brother Gault raised, namely, can you ever get more than 12 months when a contract is terminable by 12 months notice putting it in its sharpest and simplest form and His Lordship there, certainly in an employment context, has said that *McGregor* supports it on a general basis but you assume that the contract will be terminated on 12 months notice as on the date when the letter is written. Say it doesn't constitute notice, it could have, therefore that limits the damages. That's the proposition that I'm, and I think my brother Gault and other members of the Court wondered whether you could give further assistance on.

Grant Your Honour I'm sorry I hadn't focused on that passage in the judgment to respond immediately on that but I may just

Tipping J But that's the crunch point in this case, it doesn't matter how you characterise it, whatever that letter is, it's a breach.

Grant Well I think, if I can interpret what I understand your thinking is, is where you have a letter in the form sent here, that's to be interpreted as meaning time will run no matter if we've got the wrong words and it may be

Tipping J No, it's not quite that, it's not an interpretation point, it's a damages point. The damages are capped by the proposition that a 12 month notice could then have been given and for damages purposes it is assumed in favour of the wrongdoer that that is what the wrongdoer has done.

Grant Well if one takes the *Gunton* case and the bits that I have put in my submissions as I understand that what is being said in that judgment is that if it weren't an employment contract, what I'd call a repudiatory conduct, would not bring it to an end and time would not run as from the date of the repudiatory conduct, if I just take you to that second paragraph of Lord Justice Shaw's judgment which I've summarised, well set out on page 8 of my submissions, 'the practical basis for according an election to the injured party has no reality in relation to a contract of service where the repudiation takes the form of an express and direct termination of the contract in contravention of its terms. I would describe this as a total repudiation which is at one destructive of the contractual relationship. There may conceivably be a different legal result where the repudiation is oblique, but I can't see how the undertaking to employ on the one hand and the undertaking to serve on the other can survive an out-and-out dismissal by the employer or a complete and intended withdrawal of his service by the employee. It has long been recognised that an order for specific performance will not be made in relation to contracts of service. Therefore as it seems to me there can be no logical justification for the proposition that a contract of service survives a total repudiation by one side or the other. And in that case if one then transfers it across not into the master servant regime but another regime then that reasoning doesn't apply and the repudiatory conduct doesn't bring it automatically to an end. Your Honours probably read this but Justice Megarry criticised that *Gunton* form of reasoning where it says that employment contracts can be terminated by what Justice Megarry says is the doctrine of automatic determination actually, and if I just take you para.5.6, he's disputed the validity of the case law which suggest that an act of repudiation by a master or servant can bring a contract of employment to an end. He said 'counsel accepted the general rule that a contract wasn't determined merely by the wrongful repudiation by one party and it was for the innocent party to decide whether to treat the contract as having determined or as continuing in existence. That rule didn't apply to contracts of employment, for they were subject to a special exception. Under the exception any contract of employment could at any time be brought to an end by either party repudiating it. This

exception was itself subject to an exception and that was where, despite the repudiation, the mutual confidence between the parties remained unimpaired. In that exceptional case the normal rule for contracts still applies and the contract remained in being unless the innocent party elected to treat the repudiation as terminating it'. And if I may say, that remained in being, if it were to remain in being but with uncertainty as to whether the document was actually the starting of time beginning to run for a period of notice, there would then be substantial uncertainty in the commercial community unless this Court were to say that any document by which someone purports to repudiate their obligations under a contract and where there was reasonable notice, will be interpreted as being the start of running of time, however expressed, otherwise you'll end up with a kind of uncertainty as to what the outcome is, so as I say in Justice Meggary, if the normal rule of contract still applied, the contract remained in being unless the innocent party elected to treat the repudiation as terminating it.

Elias CJ Well this contract didn't continue in being and the question is what damages flow from the breach, so it does seem to me that you need to answer the question that's been put to you is whether the proposition at the top of page 6 of Mr Judd's submissions represents general principle that you assume that the party in breach would have exercised any power they may have had to bring the contract to an end in the way most beneficial to them. I would have thought that was a general proposition in damages.

Gault J Have you got *McGegor* there?

Elias CJ I'll get it

Gault J It might take a little looking to find the corresponding paragraphs but I think it's a general proposition in damages. I don't think it's in anyway limited to employment contracts.

Grant Well the *McGregor* paragraphs, sorry I wasn't totally on top of the oral submissions, but it's in Chapter 27 Contracts of Employment and

Blanchard J Well that's not the passages that Mr Judd has referred us to, unless I misunderstood something here.

Grant Can I just ask, are Your Honours referring to the first paragraph on page

Elias CJ Yes.

Grant Because that

Elias CJ Paras.884, 886 and 888.

Grant And *McGregor* on damages, the 1970 edition which I have. I don't know if you've got it but it's actually headed 'Contracts of Employment' and these paragraphs these two or three on these pages.

Elias CJ On this.

Grant Yes, they're just confined to contracts of employment.

Elias CJ Where is it?

Tipping J But Mr Judd refers us in his para.25 bottom of page 8 to the most recent edition and the general principle he says is dealt with at 8-060 to 064. Now I took from that that counsel was telling us that the general principle is the same as that in employment which sounds right. The question is do you or do you not accept that?

Grant I'm sorry because I have the current edition here in my notes too and it's headed 'contracts of employment' but

Elias CJ Sorry, where are they, which bundle?

Grant Well I don't know that they are. I mean I can get a copy but were did my friend say that it was

Blanchard J Bottom of page 8 of his submission.

Grant Yes I see, yes 28-002 and so forth. Well it's equivalent and I'm sorry I didn't show you that but

Blanchard J But his last line is the general principle is dealt with at 8-060 to 8-064. I mean I would have thought you'd have checked this.

Grant No I regret that I haven't checked that and I don't have a copy and it's not in my friend's bundle.

Tipping J Probably the key point in the case I would suspect.

Gault J Could we get a copy of the current

Elias CJ I've sent an email to my clerk, yes.

Grant I'll try to get it at lunchtime, but certainly the only passages there are employment. I set out in para.5.7 of my submission Justice Megarry's concern at the doctrine of what he calls automatic determination and if I could just take Your Honours very quickly to page 10 if I may at the second line 'if cases of master and servant are an exception from the rule that an unaccepted repudiation works no determination of the contract and instead are subject to what I have called the doctrine of automatic determination. The results would be that many a contract of employment would be determined forthwith on the commissions of a

fundamental breach or a breach of a fundamental term, even though the commissions of this breach was unknown to the innocent party, and even if had he known he would have elected to keep the contract in being. Why should a person who makes a contract of service; have the right at any moment to put an end to his contractual obligations? No doubt the Court will not decree specific performance of the contract not will it grant an injunction which will have the effect of an order for specific performance; but why should the limitation of the range of remedies for the breach invade the substance of the contract? Why should it deprive the innocent party of any right to elect how to treat the breach except perhaps in remainder and subject to the wrongdoer's prior right of election, and with submission there's a lot of logic in that, because it does lead to uncertainty where you have a letter which does not say its notice; it has repudiatory conduct of one sort or another. On a scale of 1 to 100 it could be anywhere between 10 and 90 and is the recipient of the note to say whether it's phased as 10 to 90 that this obviously means the contract is over; time is beginning to run even though they haven't said it, with the uncertainty that will import, and even if I take it down on the scale of 1 to 100 where it's a 1 or a 2, does that bring the contract to an end? Is the recipient supposed to file an application for a declaration as to whether the contract is alive or not? Surely the sender, it's an easy thing to say, I hereby bring the contract to an end; I'm entitled to give reasonable notice; and I think it's going to be 'X' months or years and notice begins as of today. Why should that person get the benefit of giving an oblique letter which doesn't say that and which the recipient doesn't interpret in that way, and reasonably doesn't interpret in that way, and then find that the contract actually had time running against him or her all along. In my submission the policy issues here are quite simple. If a person wishes to bring a contract to an end where it's tenable on reasonable notice, it's within their power very readily to say I'm entitled to terminate on reasonable notice and notice starts today. I believe the time should be 'X' but if I'm wrong we'll find out. My submissions went on for a section on *Decro-Wall* which I'm not going to go through because I think we've canvassed that. My friend's submissions proceed as you will have seen all along on the assumption that this is a relationship of principal and agent. I'm not sure if Your Honours have got it clearly that Justice Nicholson held expressly that that was not the relationship between the parties. It was one of joint ventures. He expressly determined they were not in a principal agent relationship, and that may also be another concern with a recipient of a notice where given they're addressed as an agent when they never regarded themselves as an agent and again on my scale of 1 to 100 it's all very odd. There are calling me an agent – it's not true. They know very well we made a contract way back in 1984/85 as to what was going on and we're joint ventures and so on and I'm not a mere agent with the rules which may apply to them. And similarly the Court of Appeal held that this was a joint venture and I've put the references in my submissions there. I don't know that I need to remind you of that. My friend criticised the Court of Appeal for placing what he said was 'a

wholly unreasonable burden' on, if you like, a repudiating contracting party and that it had to 'attempts to ascertain the proper length of notice', well I think we've dealt with that and Justice Robertson's response which I have said was sensible from that Robertson case. I therefore conclude my submissions in response to my friend by if I may just repeating the way human conduct is that it's always on a continuum. On a spectrum of 1 to 100 you may find something which is a 95 and which may not even be expressed as a notice to terminate but this is very clear or it could be like that, but there will be whole lot of other cases and if that's just a general rule that repudiatory conduct by one contracting party is deemed to start time running for a period of reasonable notice, well it says nothing of the sort. It describes a relationship which a Court holds is quite different from the true relationship and so forth then I would suggest that there will be an importation of considerable uncertainty into the commercial community. Unless Your Honours wish to hear further from me on that, those are my submissions.

Elias CJ No thank you Mr Grant. Mr Judd would you like to be heard in reply? Did you have a question?

Judd I think only on one point Your Honours and that's the last point that my learned friend made when he said it wasn't a principal and agent contract but a joint venture, and at para.7.5 of his submissions he set out a quotation from Justice Nicholson's judgment which he relies on for making that claim. Now I don't know that it really makes any difference given the way Your Honours have suggested it should be approached, but I would simply make this point that you don't create legal rights and obligations by putting a label on something. If you think it's going to be helpful to put a label on something, then you look at the rights and obligations created by the contract and having looked at them and seen what they are you then decide what label you should put on the relationship and if you look at the incidents of the relationship described by Justice Nicholson in the quotation in para.7.5 of my learned friend's submissions, I submit you can't get joint venture out of that. Now it hasn't really mattered up until now what the relationship has been called because the issue was simply whether or not there was a contract. Well that was the primary issue, but if it is important whether or not there was a joint venture, it possibly might become important when we get to Aotearoa's appeal in relation to fiduciary relationships, then my submission is that you've got to look at the incidents of the relationship and if you accept that they are as Justice Nicholson described them, then that's not a joint venture. The major incident of the relationship between the parties was in fact the entitlement of Aotearoa to act as agent and to be paid commissions in respect of the sales that it arranged as agent. That's all I wish to say in reply Your Honours.

Elias CJ Yes thank you. Right Mr Grant.

Grant Your Honours I'll only address you on the first three appeals on the basis that you may wish to having heard them proceed with that one.

Elias CJ Yes thank you.

Grant I'd like to say at the outset that I imagine that you seeing a case where an 8 year period of notice was awarded would have said to yourselves this seems unusual, because common lawyers are sufficiently familiar with their practices generally to know that periods of notice are commonly substantially shorter than that.

Blanchard J Even conveyancers knew that.

Grant Your Honour I meant no suggestion to the contrary. Your Honour's knowledge in most areas exceeds that of most common lawyers or almost all. I put in my submissions a reference to the way the Court of Appeal hearing ran and I do think it's important to say this at the outset. This case was set down for four days. Two days were spent with an application to receive further evidence and thereafter strict timetable orders were given for submissions, and it's my recollection and I don't think I've got notes to check the accuracy of it too much that something like 15 minutes or so I was given on this one topic of period of notice and I recall Justice Chambers saying to me 'please don't look at the clock, this is an important topic', and I was looking at the clock because I still had with about half an hour to go another series of substantial topics to deal with and the Court of Appeal had none of the kind of detail that you have. You will have seen in his decision, in the judgment he wrote that he says that he was surprised that neither counsel had referred him to the cases and so forth, and I think this is conjecture, but the reason why there was not a great deal of case law given was that for the one party seeking a period longer than has been awarded before, if you put up authorities for lesser periods it doesn't look good and for someone seeking a notice period of one week or a month or whatever, putting up notices which are six months or a year or longer or two whatever, doesn't look good either, so the end result is that neither party because of their positions gave the Court a lot of detail. Now I can't speak for my friend in saying that but I suspect that that may have been a factor. Having said that I have, as you will have seen, appended as an appendix to my submissions a summary of the cases and I've put them in chronological sequences because I have thought it important, particularly in view of the fact that the Court of Appeal judgment complains that there wasn't enough law being given to the Court to really discern what are the true underlying principles and how they should reply, that I should remedy that defect and therefore give you much more of the law. So far as the, I'll come to my submissions in some more detail shortly but just generally you will have seen that this area of the law is common in employment cases. I haven't put in any submissions but there is actually a two-year period of notice which was awarded in an employment case in New Zealand which was the highest award – a case called *Palmer and Lees*

Power SED Limited – a decision in December 1995 by Judge Finnigan. I've got a copy of it but I don't propose to take you to it – essentially to say that with employment context the parameters were probably about a month out to two years in New Zealand. I see this that the principles for establishing periods of notice are well established and the Australian *Blue Metal* case as you would have seen, has been cited repeatedly in cases on this topic and in particular there are two terms which are used and which have been repeated in the subsequent cases. They are that the period of notices to act as a cushion, and secondly is to give the other party a time to make similar arrangements to those which are being terminated. Now it is a reality that the highest Court in a jurisdiction often attracts the most unusual cases, and this case could be described as being one of factual extremities in the law on this topic. And I'll illustrate that by referring to my friend's submissions in response just with two passages. In para.53 of his submissions he says 'it may be that there is no market in New Zealand for such a brokerage, in which case Aotearoa must be expected to use the proper notice period to direct its resources to alternative ventures'. Now forget for the moment brokerage and I'm going to come to that so there's nothing to do with brokerage, but what he's saying is that maybe there is no market in New Zealand now that it has solidified over the 16 years that these parties were working where Paper Reclaim has 20% of the national market and is well entrenched. Therefore this concession it may be there is no market for such a brokerage. In other words it's as I read his submission an acknowledgement that there may be no credible business for Aotearoa to sell waste paper sourced from New Zealand offshore. And secondly I'll take you to para.65 of the submission where he says in the first sentence 'it is also wholly unrealistic to expect Paper Reclaim to shoulder the risk that alternative business opportunities do not exist for Aotearoa'. Now as you will have seen, and I'm not going to take you to it, the Court of Appeal said well if the business of selling waste paper is so well entrenched and you're not going to make any progress there, then you should go out and do something different, and the Paper Reclaim response is it's also wholly unrealistic to expect Paper Reclaim to shoulder that alternative business opportunities don't exist. So you have here an extraordinary case of which I have found no precedent in any of the books which is why there is this length of period, where the parties worked together collaboratively. Instead of being competitors, they blended their businesses so that the one focused on export, the other acquired premises where it would store paper, have paper baling facilities; paper sorting facilities; the second owned Paper Reclaim would buy baling equipment which is expensive, it would buy a fleet of trucks, and Your Honours will have seen their trucks up and down the country. It would buy cages which you will have seen outside supermarkets and liquor shops where all the cardboard boxes go and so forth, and through the course of this venture, through the division of responsibilities, Paper Reclaim invested in their part of the venture which was to source as much paper as it could; to build up the machinery, the equipment, the staff, and also the contracts of supply so

that it would then enter into contracts with suppliers and there are many companies which produce paper of various sorts, and waste paper is sold in quite a large number of different grades, and they would enter into contracts of supply from these businesses, so that by the end of the 16 years in 2 February 2001, you have Aotearoa, which by that stage has a relatively small office; it doesn't have baling equipment; it doesn't have land for storing paper, because its focus is all on export, and you then have Paper Reclaim, well established, with its substantial depot in Auckland and Penrose; with all of its baling equipment, fleets of trucks to be based, and so on, and its contracts of supply, and the market by this point is well settled. Carter Holt has 60% of the market. That figure has been put in the evidence and was never disputed and Paper Reclaim is now well established with 20% of the market and with the long term contracts of supply; the infra-structure which it's got and the general strength. It seems clear from its own evidence – it doesn't really refute it – and from my friend's submissions it seems likely that Aotearoa will have great difficulty getting back into that market. Now in my summary of the cases which I appended as an appendix to my submissions, I summarised the other cases and they are in fact most of the major cases on this topic I think are from Canada, the UK, New Zealand and I think elsewhere, and there is no case that I have found where it is said by the recipient of a notice that at the end of that period I will have huge difficulty getting alternative business of a type that I had before, and I wish to emphasise that Justice Nicholson didn't say I will give 8 years to put you back in the same position you were, he used the words from Australian *Blue Metal* to have alternative business of a type that was had before. I'll come to the wording but he used the precise words from *Australian Blue Metal* and you therefore have this unique case where the Judge was persuaded on the facts and I'll take you to what he was given that in fact it would take many years to enable Aotearoa having regards to this big division of responsibilities within the joint venture to be able to get alternative business of the type that it had been doing, and if you step back and think well on the day that this venture was created, would this have been something which would be foreseeable. I would submit that clearly on day one if two parties say well why don't we divide our responsibilities up you focus on exports and we'll focus on supply, that if the venture came to an end, the one which had been focusing on exports would then be without land, without fleets of trucks, without expensive baling machines – and I think they're half a million plus each – and without the contracts of supply which are long-term contracts, you simply can't go and break people's contracts, and clearly a market participant with 20% of the market has substantial economic power and could afford to buy at better rates and so forth and you therefore have this conundrum that when the letter of 2 February 2001 was sent, Aotearoa was a slimmed-down organisation which was focusing on exports. Mr Cash's evidence was he spent several months a year on the road visiting countries all over the world. He was given some I think export award for the places he found to sell the paper.

That was in evidence, and he spent well over $100,000 a year many years ago, travelling around

Tipping J But Mr Grant could I just interpose at this stage and ask for some assistance as to where you're heading. It's a well-known feature, and I think Lord Justice Buckley in one of those cases said 'what's a reasonable notice is largely a matter of personal opinion'. Are you suggesting that the Court of Appeal erred in principle in any respect because if you are I think it would be helpful if we were led fairly soon to that, because it being so much a matter of what you might call discretionary assessment in the Court of Appeal. Admittedly you say they shouldn't impose their assessment on top of Justice Nicholson's. That's one of your primary arguments isn't it? But are you saying that that's the fundamental error they made that they shouldn't have in effect interfered with the trial Judge's what you're equating with a discretionary decision? Because we can be told about the facts for quite a long time I'm sure, but I just want to know what error of principle you're suggesting the Court of Appeal fell into.

Grant Well they interfered without good cause. If one takes the

Tipping J They interfered without good cause in the trial Judge's

Grant Finding

Tipping J Assessment of what was a reasonable period.

Grant Yes, my reason for giving you this is just an overview of the venture so that you understand more when you get into the facts of the cases precisely what had gone on. The reality is, and it would be naïve of me to think otherwise, that coming to a Court and seeking a period of 16 years many people would say it's ridiculous.

Tipping J Is that what you were asking for originally?

Grant I did, I asked for that and I gave the evidence for it and the

Tipping J And 8 years just happen to be half of 16.

Grant Oh well it was slightly than that Your Honour, but in essence Justice Nicholson awarded 8 being a far shorter period than was sought and I understand the natural scepticism and I will Your Honours to the evidence which caused Aotearoa to seek a lengthy period of notice of that length, but in determining

Tipping J You're not asking for more than the trial Judge's 8 years are you?

Grant No, not at all, I'm asking for reinstatement of the trial Judge's award of 8 years.

Gault J While I don't want to get into the facts unnecessarily at this point but you seem to place some emphasis on Paper Reclaim having made investments and secured what you described as long-term contracts of supply. Did the evidence go so far as to indicate that they would not have done that or been able to do it but for the arrangement they had for exporting?

Grant I'm just trying to think of evidence on the topic but there's nothing expressly on that

Gault J Oh you can come back to it. It seems to me when you're looking at reasonable notice you look at it from both sides and

Grant Your Honour one of the realities was that Mr Cash was able to get, he was the first person to really get serious prices for paper and

Gault J Well now you're on a quite different point for my question.

Grant But what I'm saying is partly through that process this venture earned substantial sums of money so that Paper Reclaim was able to invest in those facilities.

Gault J Clearly the business built up but the point is you would need to go so far as to say they couldn't have done, they couldn't have built it up but the for the export expertise that they had contracted for, and then you could say well that made it a pretty long-term sort of arrangement but

Grant Well with respect I don't know that I have to say that they could not have succeeded without Aotearoa. They've been especially successful at exporting, but it was never suggested that Aoteara was anything other than especially good at exporting. It was if I may say so almost taken for granted that the company was that and in evidence, I don't think it's in this bundle, I think it's important that it got export award because of the extraordinary way in which it found markets all over the planet at prices which were way above local market prices.

Elias CJ Yes well I'm a little bothered that the submission that you're advancing to us almost, well it drives off the success of Paper Reclaim rather than the detriment to your client. It's almost a claim for an equity in the business and I'm not sure how you get there on the authorities.

Grant No, I'm not seeking just to focus on Paper Reclaim. My reference there to their assets in the company, and contracts and all that is merely to describe what grew up over the course of time. I'm not seeking to just focus on that. What I'm saying in relation to all that is that what happened was the best outcome that could have been conceived in 1984/85, that whereas these two competitors, and the figures were in evidence, with very modest earnings, I think that I can find out at lunchtime that Paper Reclaim's earnings in the first years were doubled. It wasn't just a 5 or 10% increase, it was huge and it was all

attributable to export growth. I can give you those figures but the figures were huge, and that was attributable to Aotearoa finding markets at very good prices. But going back to Justice Tipping's

Elias CJ But sorry, where does that take you in terms of assessment of damages?

Grant Well Your Honour I'm not sure that that of itself

Elias CJ Or period of notice, because the period of notice

Grant Of itself it doesn't take the Court far at all I don't think, but I think that in terms of assessing period of notice the Court has a broad discretion to look at what all the circumstances of the case, and part of that is to see what the contracting parties did together and it would be quite wrong for you or the other Courts to make a determination without knowing the material background, and I really put it forward I think on that basis. Justice Tipping's question what was I saying about the Court of Appeal, and I say that they ought not to have overturned Justice Nicholson's careful decision where he had heard all the evidence and I'm not going to repeat how long, you know how long that the case took and so forth. I'm not aware that it's been said that he overlooked some relevant fact or circumstance or that he took something irrelevant into account

Blanchard J Well that's treating it like the exercise of a discretion and it isn't, it's a matter of applying judgment to a set of facts and the Court of Appeal was entitled as a Court of first appeal to look at that exercise of judgment and decide whether it agreed with it or not and it didn't.

Tipping J That was really where I was leading to Mr Grant.

Grant I'm sorry Your Honour

Tipping J No, no, I'm just saying that we're all on the same point because I just wondered whether you're supposed discretionary approach was entirely correct.

Grant No, I think I'm slightly out there, but I'll draw this straight to the nub. I mean the Court of Appeal, as I've put in my submissions, went through a series of cases saying essentially that the periods of notice in periods of notice cases are about a year. Then it found two cases of itself, neither of which I contend is anything like this case, and said in general terms if you look at the cases it can be seen that period of notice are generally of the order of one year – we will give one year, and if that means that Aotearoa has to go and find something quite different to do well so be it and I contend that that isn't a cushion, that doesn't apply the principles. The principles approach is to take the *Australian Blue Metal* case and say how do you determine a period of notice? – answer: two of the most compelling factors which a Court

must take into account, and for many years are (1) that there should be a cushion and I contend that a one year period drawn from mainly distribution cases where a distributor can find another manufacturer's product to use and so forth and other cases of that ilk that doesn't reflect the application of the principles. It is not a cushion for Aotearoa in its present circumstances.

Tipping J I think you're effectively saying Mr Grant are you that what you call first, second and third reasons in 6.8, 9 and 10 of your submissions, the Court of Appeal misdirected itself in law or erred in principle, because if that's the nub of your case

Grant Your Honour, yes, it misdirected itself in concluding that an appropriate period of notice was one year in the circumstances like the present that it misdirected itself by relying on cases, particularly distribution

Tipping J So the first reason is there was no such comparability in the cases as the Court thought?

Grant Yes.

Tipping J The second reason I don't think I can encapsulate so succinctly and nor with the third, but it's all built around those three reasons is it? You're saying we should come at this to the third level again. We should exercise in effect our own judgment and coincidentally come up with the same figure as Justice Nicholson?

Grant Well I say that you should reinstate his decision on the basis that the Court of Appeal erred when it put the period down to a year.

Tipping J Yes I think I didn't fairly put it from your point of view. Yes, that justifies Justice Nicholson's, but what if we think he's too long anyway? Surely if we disagree with the Court of Appeal, does that automatically mean we go back to Justice Nicholson?

Grant Well coming back to the way you're summarising this

Tipping J I'm just trying to get a handle on what sort of issues of principle or quasi principle we are being asked to address.

Grant I will over the break give you the summary but certainly the Court erred when it concluded for example that the cases which it said were comparable, were comparable and

Blanchard J Are you saying there's really no comparable case?

Grant There is no case which I have found, or which anyone has produced to this Court, the Courts below I'm sorry, where the adversely affected party would take so long as a matter of fact to be able to find

replacement business of the type that's been lost. That's the critical factor.

Gault J Why must it be of the type that has been lost? *Australian Blue Metal* doesn't say that does it?

Grant I think it does Your Honour.

Gault J It says arrangements of a similar sort. Now you can apply that all levels of obstructions to selling waste paper recycled from New Zealand to becoming a marketing agent. I mean why do you say it has to be in that very type of business? When it started out, presumably Aotearoa had some international sales connections and openings but a lot developed subsequently. Is it not such that Aotearoa now could be expected to find markets in other products, or other commodities? Now why must it be this commodity? If it were a patented product for example you could never do it till the patent expired. If it's very specialised with only one supplier you could never do it, so it must be more general than that.

Grant In the hope that I can go back to my written submissions later I'll answer that. Aotearoa gave evidence that it had four aspects to its operations. It was involved with the sale, exporting of waste paper; it was involved with the sale of waste plastic, scrap plastic; it was involved with the sale of scrap metal and it had had one or two dealings in waste glass. Waste glass it says is a problem because there's a machine which you have to have to get rid of all the labels and metal and anything else and I think only one company has got the machine because it's so expensive. So it basically has those three as viable things. It gave in its evidence its own statement in waste paper – and this is all grades of waste paper, just even more broadly rather than no suggestion that it was just a few grades of waste paper – all types of waste paper, that the market was well-established. It was 60% to Carter Holt, 20% for Paper Reclaim and the balance of it was all pretty well settled amongst a lot of minor players and that there was very little prospect that it would be able to get into that market. Paper Reclaim gave no evidence to refute that. It said of scrap plastic that it had at present a certain percentage of the market. I can't quite remember, but it may be 5 to 10%

Gault J I'm having real difficulty in seeing the relevance of those other activities.

Grant Well if I understood Your Honour correctly, the company has been trying, using its areas of competence to work in the areas which it was in.

Gault J Well the contract that is an issue in this case did not intrude upon such activities as Aotearoa may have had in relation to glass and other products as I understand it, so I don't see the relevance of that. What

we have is a company expert in international marketing. How much more detail does your arrangement of a similar sort have to be?

Grant Well Your Honour I don't know how detailed it has to be.

Gault J I still don't see that it has to be in waste paper.

Grant Can I ask you Sir, were you meaning some other quite different commodity.

Gault J No, I'm not the expert in international marketing.

Grant No I just wondered whether you meant beyond paper?

Gault J Yes I do mean beyond paper.

Grant Well that's partly why I referred to the other areas of its business which were in scrap metal and in plastic, that it said in its evidence that these were areas which would work and I think in relation to plastics, because in my submissions it said it would take them four or five years before it could make any substantial inroads into that market for example to try to get compensatory revenues. Because if you look at the essence of *Australian Blue Metal*, the giving of the notice is intended as I understand it, to give the recipient a chance to find if you like replacement business, and it may not be precisely the same business so that in the Harrap French English Dictionary in Quebec, if they couldn't find in a year, I think it was a year, French English Dictionary, it was a publisher which did other works and there was no suggestion in the judgment they wouldn't be able to find other works which they could sell or publish, so it didn't have to be a French English Dictionary. Many of the distribution cases, it's possible to get replacement work of the same type, and Justice Blanchard did the case with the carpets and the recipient of the notice was able to have other carpets to sell because there is a number of suppliers and if you like generic commodities. The difficulty with paper is that as this industry was analysed in the evidence the market is very well settled in New Zealand and Justice Nicholson found after examining the evidence that it would take a period of eight years to enable Aotearoa to find replacement business of the type that was being lost.

Gault J Yes, thank you.

Tipping J Mr Grant could I just, while you have your mind diverted if you like, just signal that I'm not entirely sure that I'm immediately convinced by the Board's Lord Devlin for the Board's dictum in *Australian Blue Metal* of a sort similar to. I know that won't come as music to your ears but I just think you should treat that as being on the table to. I mean I certainly don't see how it can be confined to waste paper, but if you've got a right to terminate an arrangement, does it necessarily imply that you've got to give them enough time to get going in a

similar business, or just to adjust if you like to the fact that this business is coming to an end, because the dictum is to make alternative arrangements to those which are being terminated and then the qualifier is of a sort similar to. I don't know. I have no pre-conceived view on this at all but I just think you should be guarded against this. I at least necessarily would accept that aspect of it.

Grant Yes well I'll deal with that in more detail, but in broad terms I would say the substance of the test is not to leave the recipient out in the cold with no revenues and with nothing else to do.

Tipping J One of the key phrases if we're going to read this a bit like a statute, which we must guard ourselves against, is against sudden change. Now, this is page 342 of *Australian Blue Metal*. I'm looking at the All England at letter E. I'm looking at the version that's in tab 5 I think of the bundle of authorities for the appellant in respect of its appeal – that's Mr Judd's. I'm just focusing on precisely

Blanchard J It's at page 99 of the other report.

Grant Oh 99.

Tipping J On precisely what Their Lordships said in *Blue Metal*. But the focus seems to be on the question of sudden change. It mustn't be sudden. You've got to give them a cushion. That's the context in which the cushion metaphor is used. And then we have this dictum about similar sort – sort similar. You've got to read it as a whole flavour of what's required and I'm not wholly convinced that the sort similar necessarily is part of the equation, but just in fairness to you, you should be on your guard if you like against that possible thought.

Grant If I come back to what I said in answer to Justice Gault's question – he asked why was I talking about plastic and scrap and so forth – but in practical terms I didn't think it very likely that a Court hearing this case would say if paper's tough, what about other commodities? Can you make it up in other areas of your business so that if you're short of your revenues in the one stream of your activity, can you go out and build them up and replace them elsewhere, because to me

Tipping J But if you could never really replicate, because Justice Nicholson seemed to be approaching it almost on a replication basis. If you could never effectively replicate, you couldn't give a reasonable notice at all.

Grant Well he held that it would take eight years to make alternative arrangements for sort similar to those which were being terminated. He held having heard all the evidence.

Tipping J Yes quite but

Gault J It seems to me that this is really an attempt to ameliorate a less than advantageous contractual situation. If a party contracts to withdraw from a particular activity to its good reasons and enters into a long term arrangement, then the wisdom of that shouldn't be revisited by saying well they're entitled to get back into that business that they voluntarily elected to give up.

Grant Well Your Honour with respect, I find that a dispiriting proposition where you have two parties working co-operatively for their joint good and where the relationship is brought to an end to be told that the one can walk off into the sunset with a well-established business and the other can just suffer in the gutter because

Gault J Well that may reflect upon the wisdom of the arrangement.

Grant Well Your Honour it's my submission *Australian Blue Metal*, which has been applied in the cases, as I think the major case with this passage here, has shown how it's been applied by the Courts.

Blanchard J But *Australian Blue Metal* was decided in a context of an arrangement that was regarded as being terminable in a very short-term way. I don't know that Their Lordships were ever putting their mind to this kind of situation. It seems to me that where parties decide to contract on a basis where one side can say to the other I'm terminating on reasonable notice, then the period of the notice can't be so long as a period which in practical terms will mean that the notice giver can never afford to give the notice. That it seemed to me was a fundamental flaw in Justice Nicholson's decision on 8 years. An 8 year notice period was so long. No one knowing that would ever be able to give it.

Grant Well

Blanchard J And that's why it seems to me the cases have come out almost universally with relatively short periods. It is just a function of having contracted on a basis of termination on reasonable notice.

Grant Well Your Honour if I take you to *Paperlight*, if I understand Your Honour's reasoning, you would say that Swinton being the insurer in that case would not have wanted to terminate if it had known that it would be ruled they'd have to give five years notice to a host of franchisees. It would say five years is ridiculous and that's the Commercial Court in London applying these principles. Now I can take you to that case. It was regarded as fair and reasonable that the franchisees in that case could not be just chopped off at the knees. That they were entitled to a lengthy period of notice and similarly in that *Tui* case involving the licensing of a Trademark Fern leaf, that it was regarded as reasonable that the company have three years notice, and it might be thought that *Anchor* would think well three years to give a notice is ridiculous, but the Court said no, three years is a reasonable period, that's the length of time applying the principles, and

Justice Penlington went through the authorities in that case and those cases are much more analogous to the Paper Reclaim/Aotearoa case because they actually deal with non-typical cases in this field. They don't deal with employment; they don't deal with distributorships and agencies arrangements. They do deal with one-off more unusual contractual situations and in those cases the Courts have actually given lengthy period of notice.

Elias CJ But for myself I would be assisted in being taken to these cases because I too am troubled by where all of this heads. What you're talking about is so far removed from the *Blue Metals* context and the period of adjustment that was contemplated here, which is why I said earlier that it's almost an equitable interest in the business that you're putting forward.

Grant Well that's another way to look at it, which is the second course of action, as to whether it's the interception of the business.

Tipping J It may be an area in respect of which it's important to know whether there was a fiduciary relationship.

Grant Of course.

Tipping J Yes, but we're talking at the moment on the basis that the relationship is purely contractual.

Grant The first submission is purely on a contractual basis. It's looking at what in the law of contract where there's notably a defined term

Tipping J There's no equitable overload?

Grant Yes, yes. What is a reasonable period of notice – whether it's tenable on reasonable notice, purely that.

Gault J Can I just, I'm sorry I'm keeping you from your argument, but there's a factual question that seems to me would be helpful. The nature of the marketing overseas, I gather it was more sort of spasmodic one-off marking opportunities rather than long term supply arrangements, is that fair?

Grant I think in general terms yes. In general terms Aotearoa, and Mr Cash particularly, would go offshore for months at a time scouting out different people. Now there are some markets which became reasonably well-established as the years came by so that for example there are some larger mills in Australia, and I think from the evidence it was, that Paper Reclaim, after 16 years found it convenient to sell into some of those established mills without having to go to the effort in finding, as in the *Rhodes* case where it might go and find other markets which paid much more for the paper. There was a

convenience factor. But the market matured a fair bit over the course of that time.

Gault J And the expertise was in finding purchasers overseas who were prepared to pay attractive prices.

Grant Correct. I think with that I'll go back to my written submissions.

Blanchard J You are at some stage going to take us to *Anchor* and *Paperlight* are you?

Grant Yes Your Honour if I may I will do. I think in the light of the Chief Justice's comment it may be helpful if I try to take you through this more in the way in which I had intended to develop it. I in para.5.2 put out Lord Devlin's citation from a judgment which has been the subject of some discussion just now. I don't need to take you to 5.3 since I – well perhaps I do – there's not much written about it, and my third bulletin 5.3 that some text on Employment Law have sections on reasonable periods of notice and then the last bullet, apart from employment cases the most common area where it has arisen is in distribution/agency arrangements and in general terms the Courts have in these cases assessed a reasonable period as being one which is sufficient to enable a distributor to find an alternative product to distribute and to recoup any unusual expenditure which had been made in anticipation that the distribution arrangements would last longer than they did, and I haven't found any case on a joint venture. I don't propose to read the cases in the schedule or to take you to them particularly certainly at this moment, but I put them in the summarised form to assist you when you come to these cases to see what they say and what the periods of notice are and what were the critical factors. At para.5.6 I say in these submissions that cases 2 to 7 in those summaries and those cases which are summarised are all the cases which are referred to in the High Court and in the Court of Appeal and they include the two cases which the Court of Appeal got by its own research. And the longest period of notice for the agency/distribution arrangements was 12 months, and I say that's understandable. Within that time a distributor or agent will almost invariably be able to enter into arrangements for the sale or distribution of products of the same or similar type to replace the product which is no longer able to sell. And I say in 5.7 that they are fundamentally different to the joint venture with Aotearoa and Paper Reclaim. The distribution agreement has two separate businesses. The distributor owns and retains its separate business; the manufacturer's got its separate business and when the distribution arrangement terminates they will each go their separate ways with their businesses intact. It's unlike what's happened here with Paper Reclaim which sort of blended up its baling, land owning, contract sourcing arrangements. Aotearoa focused its effort on exploring export markets and obtaining the best price and Paper Reclaim focused in the ways that I've explained to you with its land, its contracts, its machinery, its trucks, its cages at supermarkets and so on.

5.8 ‘on the termination of the joint venture Paper Reclaim was left with all of that equipment, whereas Aotearoa was left with modest offices, no storage facilities, no baling equipment, no collection facilities, and great difficulty in obtaining supplies of waste paper’. And I then refer to the consolidation within the industry with Paper Reclaim with Carter Holt having 80% of the business, and I say ‘a period of notice which is typical in distribution agreements of six to 12 months would be quite inadequate to enable Aotearoa to acquire replacement business’. But in a further *Paperlight* case, there a franchisor, which I think was subsequently taken over by Sullivan

Blanchard J Do we have that case?

Grant Yes you do Your Honours, it’s in my bundle and it’s tab 3. It’s a decision of the Commercial Court in London.

Elias CJ There are three different categories of franchisee.

Grant Yes and the Court in this case was concerned only with the third category who’s terms

Elias CJ Third or the first?

Grant No, the third category, who’s terms haven’t expired. If I just explain – It’s facts get a little complicated in *Swinton Group* had franchise for a insurance broking business and as you have in a franchise, we have people coming in at different dates and so forth; people were in different categories here, but there came a time when *Swinton* was taken over I think by *Sun Alliance* and maybe someone else and they decided they’d work in the house and get rid of the franchise. The franchisees, of which I think there were about 40, were divided into three categories for the purposes of litigation and the Court was only concerned with the third category for the purposes of a reasonable notice. Categories 1 and 2 were held to have express movements which would roll on, and so far as the category 3 franchisees were concerned it was held they were entitled to a period of five years notice. Now because their contracts began on different dates, some got slightly more than five years and the others got less than five years and the Court took a broad brush approach and said well all of you in this category will give five years. I may be wrong in my notes when I say the 42 franchisees a two-year period with these three categories. It certainly gave a two-year period of notice, saying that one was appropriate and this is dealing in the event the Court finds that the category 3 people who are entitled to a reasonable notice. The franchisees sought 10 years and this at the top of page 6 of my notes – Justice Clarke held that the franchisees were entitled to a five-year period of notice. He referred to the fact that the reasonable notice cases from employment and agencies were of lesser use as precedents in different factual disputes. He said ‘the authorities relate in the main

to contracts of employment, contracts of agency. They are of assistance as far as they go – counsel for the plaintiffs correctly submits that none of them was considering a case like this' and I say the same in this case that it's quite unlike the 12 month periods of notice given in most of those cases. Now I'll take you to the way Justice Chambers distinguished this case. Because he said that there were distinguishing features which meant that it was not of much use to the parties here and in my submission his attempts to distinguish that case from the facts of this was not compelling. I don't know whether Your Honours wish to break for lunch now?

Elias CJ Yes we will. I have a meeting so we'll take the luncheon adjournment now and we'll resume at 2.15pm.

1.00pm Court Adjourned
2.20pm Court Resumed

Elias CJ Yes Mr Grant.

Grant If I could take Your Honours to the *Paperlight* case which was tab 3 and to page 1686 where it begins 'category 3' and this deals with the category of the franchisees who got the five-year notice. At the bottom of page 1686 the paragraph 'it follows that the category 3 franchisees don't have an express contractual right to a new contract etc' and at the top of the next page, the paragraph 'It is however common ground that they are entitled to continue in the business of franchising under their existing contracts until the expiry of a reasonable period notice and the question is therefore what is a reasonable period of notice having regard to the circumstances at that date. And the claim was for 10 years whereas it was submitted that it should be one year but *Swinton* had given two years'. And then it has a paragraph 'Mr Carr has referred me to a number of authorities which he says point to a period of no more than about a year. The authorities relate in the main to contracts of employment and to contracts of agency. They are of assistance as far as they go, but they stress that it all depends upon the circumstances of the particular case, and then *Rhodes, Hamlyn, Winter Garden* and the three cases namely *Martin-Baker, Australian Blue Metal and Decro-Wall*, and he says Mr Freedom correctly submits that none of them was considering a case like this. I'm going to ask you if you wouldn't mind to turn to Justice Chambers' judgment in the second volume, 1.2 where at para.72 on page 293 and there it says 'we asked Mr Grant what authority he could point to in support of a lengthier notice. He conceded he hadn't been able to find any case of that length. The longest he could find was five years, that was the period imposed in *Paperlight*. We looked at that case carefully. It contains a number of very special circumstances which Justice Clarke referred to on this page and the next two and I'm going to take you to them. His Lordship accepted that the period fixed in most cases was

no more than a year. For example *Winter Garden, Martin-Baker and Decro-Wall*, and you'll see from that paragraph which Justice Chambers was referring to that counsel for the franchisees said the authorities relate in the main to contracts employment agency. They were of assistance as far as they go but it all depends on the circumstances. Then for these three cases the three cases referred to namely *Martin-Baker* etc, Mr Freedom correctly submits that none of them was considering a case like this. Yet Justice Chambers says that the Judge, Justice Clarke, accepted that the period fixed in most cases was no more than a year, to an extent that you're looking at the paragraph that the Judge has accepted that those cases are not regarded as parallels for this kind of case or for *Paperlight* case.

Elias CJ Well, he's already made the point that *Paperlight* had a number of very special circumstances. I think you're reading too much into this Mr Grant.

Grant Well if I can go down to E on page 1687, there's a sentence beneath a couple of lines. 'Mr Carr submits that in these circumstances the purpose of the notice if to give the franchisees a reasonable opportunity to prepare for their withdrawal from franchising', but that didn't stop them being involved as insurance broking but not as franchise insurance brokers. 'I accept the submission that this is one of the purposes, perhaps its main purpose, but it is I think right to take all the circumstances into account, including the nature of the contract and the legitimate expectations of the franchisee at the time the notice is given. It is also of course important to take account of the position of the franchisor and not to focus only upon that of the franchisee. What then are the relevant circumstance considerations here and what would be a reasonable period? Mr Freedman relies upon the following factors in support of his submission that a reasonable period would be ten years. (1) - I'm just giving them number here - the long-term nature franchising, the expectation that the franchisee would be able to build up an equity for the future both in earning income and by realising capital, and I interpolate that in a case like this where the parties have been in contract for 16 years, clearly it was intended there was to be a long-term. The one would not forsake its activities in baling and sourcing its supplying for a short-term benefit. Next, the fact that *Swinton* will be acquiring available asset from the franchisee. No in this case *Swinton* was to buy back these businesses and there's a parallel here because Paper Reclaim got all the business to itself. The restrictions imposed by the franchisee, by the contract on its termination, and it's not clear from the judgment what those restrictions were that I could find. The difficulty facing a franchisee and starting up his own business because the goodwill which is

Blanchard J Well the answer to that Mr Grant if you read the report a little earlier, is that there was some restricted covenants applying for about two years.

Grant Oh was there. Were they geographic Your Honour?

Blanchard J Yes.

Grant So beyond the geography they

Blanchard J Ah yes I think they were geographic and relating to the type of business.

Grant So presumably these people could set up as insurance brokers outside the area?

Blanchard J I can't remember the actual detail of it.

Grant The difficulty facing franchise etc the goodwill he's built up isn't his own goodwill but that associated with the *Swinton* name, which I submit doesn't have any parallel in our case. The difficulty for franchisees in making it advantageous arrangements with the leading insurers without the assistance of *Swinton* and the problems of competing with *Swinton* and that it would be hard for them to get business as favourable business – it's not saying that they couldn't do it – but it would be even more problematic, unlike this case. These all seem to me to be relevant considerations. In addition Mr Freedman relies upon figures which suggest that *Swinton* expect to make a large profit out of taking over the franchisees, and there's a reference there to some profits and so forth and in the present case clearly Paper Reclaim, by being able to take out a co-venturer which was being paid 10% and taking half the profits of other transactions is benefiting. Then over the page he refers to the years, a reasonable period of rather more than the one or two years suggested but rather less than the 10 years asserted by Mr Freedman. It is no doubt perceived as in *Swinton's* economic and financial interests to cease franchising, and he says I don't think these considerations – this is between B and C – provide either side with a compelling argument in favour of a longer or shorter period of notice beyond taking account of the fact that this is a case in which *Swinton* intend to continue in the retain insurance broking business. Mr Freedman further relies upon the undoubted fact that the franchisees were being strung along in the sense that *Swinton* gave them the impression that over a long period that the new contract would be ready for signature and didn't keep them advised of the possibility that it might withdraw from franchising but sprung it upon them. I don't think that fact is of any real relevance to the appropriate length of the period of the notice save for this. It does seem to me that it is relevant to have regard to the fact that until November 1997, the franchisees had a legitimate expectation that they would be offered a new contract, and I submit in the present circumstances where the parties have been in a relationship for 16 years or so, Aotearoa have a legitimate expectation that it would be carrying on in that relationship.

Blanchard J It hadn't been told that though as had happened with the franchisees here who had been encouraged not to renew contracts under rights of renewal on the basis that there was likely to be a new form of contract for ten years. There's nothing here comparable to what you find in *Paperlight* in that respect.

Grant Your Honour I can see there's no letter of that sort but nevertheless I don't resile from a submission that the company had a legitimate expectation in view of the way the two companies had been trading, there would be a continuation. The next paragraph

Elias CJ Isn't that contrary to the finding that it was able to be terminated on reasonable notice?

Grant Well the fact that a contract can be terminated on reasonable notice doesn't mean to say that the party is of the belief that it won't be terminated. I mean Mr Cash's evidence was, and it was the first course of action, that it was a contract of indefinite duration, but he didn't expect it would come to an end and that fought in and failed, but it was his evidence that it was for the future that why he had put all his eggs if you like in one the one basket.

McGrath J Apart from the fact that there was a contract and that it continued to run for 16 years, were there any events during the term that gave rise to the legitimate expectation, or do you just rely totally on the fact that there was a contract and it continued to run?

Grant I just have to give some thought to that if I could.

McGrath J It seems to me that you have to have something more than that basic contractual continuing situation to say there's a legitimate expectation.

Grant If I can come back later. Your Honours will understand there's a lot of evidence here. I think I was at H. I don't think it would be right to hold that the period of reasonable notice should be anything like as much as ten years. It is also important to have in mind that the initial period of seven or ten years was enough to enable franchisees to recoup their initial outlay and indeed to earn a profit.

Blanchard J You jumped over the preceding paragraph.

Grant Its also relevant to take into account that as appears from the schedule the effect of the agreements made with category 1 and 2 franchisees is that *Swinton* will be contractually bound to remain in franchising for some years and will thus have continuing contractual obligations to support franchisees. It follows that there's no need to choose a short period of notice in order to facilitate a clean break. Against those considerations Mr Carr submits that it's wrong in principle on the one hand to hold that franchisees have no contractual right to a further agreement and on the other hand to award them a further term under

the guise of reasonable notice. In principle I submit that submission and it is mainly for that reason that I think that the 10 years is too much. And then at the bottom of the page I agree to the conclusion that while a period of 10 years is too long, a period of two years would be too short. The case isn't like any of the cases referred to in the authorities, which show that the Court should take into account all the circumstances of the case. I have found this a particularly difficult exercise, but having regard to the various factors relied upon by Mr Freedman set against those stressed by Mr Carr, I have reached the conclusion that I should fix a period of five years from the date of the announcement. That was to the announcement to all of the franchisees of a withdrawal from franchising. It follows that the contracts that would have expired before 23 November will be extended to that date and that the remaining contracts will expire on their contractual expiry dates.

McGrath J Mr Grant if you go back to H of the previous page, that point doesn't help you does it, when Justice Clarke saying that you have to have in mind that the initial period was enough to enable franchisees to recoup their initial outlay and indeed to earn a profit because you've certainly have had that sort of time haven't you?

Grant Oh well I'm going to come to that topic, but in terms of that kind of proposition I'm might be able to point you to some evidence which will show that Aotearoa would never have entered into this if it wasn't permanent, because it would mean sacrificing the sourcing of supply, the baling, and it would have been all

Blanchard J That isn't permanent, you've got a finding against you.

Grant I understand that but in terms of that company's expectations as to what was to happen, it was anticipating that this was I'll call it a long-term, arrangement. I accept that the finding was that this wasn't a contract of indefinite duration, but I say that so that you understand why that was pleaded, that was Aotearoa's understanding, but it's been ruled against Your Honour and I accept that.

McGrath J Yes but we have to fix what's a reasonable notice at a particular time, namely the time of the breaches, is that right?

Grant Yes.

McGrath J So it seems to me that what might have been a reasonable notice 12 months out, or two years out, might be a longer period than it is 16 years out because of this factor.

Grant Because the expectation was or are you saying no reasonable expectation

McGrath J Because of the amount of time in which the company had been profitable was more than enough to cover the initial outlay that was involved, including letting the baler go and abandoning the paper collection and processing business.

Grant Well Your Honour I am going to come to that but I say now there was no evidence, there was no cross-examination about this as to whether Aotearoa had received adequate compensation, what it had received, the position it would be in and so forth and this is something which has arisen, actually it was raised by one of the Judges in the Court of Appeal hearing, it wasn't mentioned at all at the trial. There was no evidence about it at all. There was no suggestion in the context of a fallback defence of reasonable notice that the company had received adequate compensation and if there had been that suggestion, evidence would have been called and given as to what compensation had been received and what the detrimental situation of the company was as a result of it all. But in my submission it is unreasonable for my friend to contend at this point that Aotearoa has been sufficiently rewarded. There is no evidence that I'm aware of which says that that is right and if it was to be contended I submit that Aotearoa ought to have been put on notice so it could counter it with evidence.

McGrath J Yes, well this point's expressed by Justice Clarke. I really comes back to recouping your outlay and earning a profit. It's not a question of sufficient reward.

Grant But you have here people who have then been trained up as always happens in franchises, who knew nothing about insurance broking before, they then got their business, they've been in it for, in this case 7 to 10 years or something, so that they are getting a return on their capital. They are also then trained as brokers and can go off broking in their own way, and they can't do it under the Swinton name, if there's a two year geographic restraint, they can't do it in the two years, but there they've still got the business they can go on with which is different factually from the Aotearoa case in the way I outlined at the outset of my submissions.

McGrath J Thank you.

Grant Now Your Honours I've taken you to that in some length because if you go back a few pages to open with Justice Chambers' judgment on page 294, he refers to the *Paperlight* case and says on the first line of line 294 'we have looked at that case carefully. It contains a number of very special circumstances, which Justice Clarke referred to at pages 687 to 1689. His Lordship accepted that etc'. Now in saying that there are very special circumstances, I assume that what he means to say is that it's readily distinguishable from the fact that reasons given, but I have taken you to those reasons precisely because the Court of Appeal said looking at those pages, that case could be readily distinguished for the reasons which I have taken you to.

Tipping J Just while you have the judgment of the Court of Appeal open, would you be good enough to go on to para.80 and the reference to Justice McHugh's observation in *Crawford Fitting* which the Court of Appeal adopted? Do you have any quarrel with that Mr Grant?

Grant I don't know if Your Honours noticed that if you look at the second to last line, the first word is 'distributor' and this was a distribution contract and the judgment is preceded at the very first paragraph of the judgment says 'this judgment is involved with the determination of periods of notice and distribution agreements' and the fact is

Tipping J Well I'm looking at the termination of his business whenever it occurs. Are you saying that this was confined to a particular type of business, this observation? It seems to me to represent persuasive approach that there's no sort of inherent guarantee that the notice period will allow the person to whom it is given to sort of carry on in the same state of profitability for some lengthy period. I'm looking at page 296 of the casebook, para.80 of the Court of Appeal's judgment and the citation from Justice McHugh in *Crawford Fitting*. Now I just wondered what you might wish to say about it, because the Court of Appeal clearly relied on that proposition and prima facie it seems to me to be reasonably sound.

Grant Well Your Honour I'm happy to go to that case

Tipping J No, I don't want you to go to the case, I just want you to go to the proposition.

Grant Well I'll go to the proposition. If you turn to tab 11 where you have been looking at *Paperlight*, you'll get the *Crawford* case and you will see that the judgment begins on page 441 'the principal question in this appeal is one of considerable commercial importance. In determining the reasonableness of a period of notice terminating a distribution agreement, is it ever relevant to take into account expenditure or effort of the distributor which has created opportunities etc'. And this judgment is focused on distribution agreements and factors which are relevant to distribution agreements, and as I said at the outset, distribution agreements tend to be of six to 12 months notice because the distributors tend to be able to find alternative products to sell. Now if you go to page 445 of the judgment

Tipping J So are you in effect saying that the Court of Appeal wrongly applied this approach to a contract to which it wasn't applicable?

Grant I certainly said it to the extent that the Court of Appeal places much reliance on distribution cases, yes, because they're a different species of contract and I was taking you to page 445 at the bottom right between F and G 'it will often be a common purpose of a distributorship agreement that the relationship will continue for long

enough after giving it notice to enable the distributor to recoup any extraordinary expenditure or effort, otherwise the distributor would have no incentive to make or outlay additional effort or expenditure' and that's been picked up in other cases, and over the page. I'll just go down to the bottom of the page because this passage here has been repeated in other cases and it has not been readily understood it would appear by some of the Judges that its been said in the context of distribution agreements. G 'inability to reap the benefits of ordinary expenditure or effort incurred during the course of the agreement may be regarded as a business risk which a distributor takes when he enters into an agreement. If the nature of the business produces a lapse of time between effort or expenditure, a certain amount of such effort or expenditure will go unrewarded whatever period of notice is given. Extraordinary effort or expenditure by the distributor incurred with the actual or tacit authority of his principal is in a different category. An appropriate

Tipping J Well granted that this was said in the context of a distributor's case, but why should it not be of general application?

Grant Sorry, I just want to go back to see what the Court of Appeal said of this case.

Tipping J Well the Court of Appeal treated it as a general application and you're challenging that. Now I want to know why you say the general thrust of this should not be of general application?

Grant Your Honour's talking of the extract 'unnecessary that the recipient should do as well in the first few years in new business as he did in his old business?

Tipping J That's the passage.

Grant Well I say first that that is directed as you've seen from the judgment to distribution arrangements.

Tipping J I just managed to grasp that Mr Grant.

Grant And I think as with *Paperlight*

Tipping J Do you not recall what my question was? My question was granted that it was said in that context. Why should it not be regarded as a proposition of general application?

Grant Well Your Honour my answer is this, and it's not as direct as you would prefer. It is as you've seen in the *Paperlight* case, Justice Clarke dealt more broadly with the principles which are applicable on the termination of agreements which are not of distribution of character and he then refers to some of these, several interesting in so far as they go and I therefore would not wish to elevate a proposition like this

taken from that category of cases being necessarily appropriate as an important principle for the Aotearoa/Paper Reclaim case.

Tipping J Well isn't it a necessary corollary of having a contract terminal on whatever period of notice, reasonable or defined. The essence of that is that the one party can bring it to an end without having to in effect guarantee to the other party some sort of continuation of profitability.

Grant Well Your Honour I would accept that as a proposition it is not necessary that at the end of the notice period the recipient must be in a position where it has got the same revenues as it had before. I accept that.

Gault J Just help me. Why do you say this is so markedly different from a distribution arrangement?

Grant Your Honour because in a distribution agreement you have distributor, separate company, staff and so forth who are in the business of selling. In this case they were items of plumbing I think.

Gault J But there are all sorts of distribution arrangements as a species. There may be a distribution a distribution of a single product or a single range of products. There may be no other business.

Grant Your Honour the short answer is that it was a joint venture. It was held to be a joint venture where Aotearoa

Gault J Well that doesn't mean anything, that's a label to me.

Grant Well Your Honour if I go back then factually into this case. Before 1984/85 Aotearoa had sold Paper Reclaim's paper. It had exported it. In fact it was solely responsible in that era for exporting all of Paper Reclaim's paper, so the 16 years is pre-dated by about five years of exclusive selling, but it did that as Aotearoa International Limited competitor. It kept its own business running with its storage facilities arranged for baling and had its own network of suppliers and so forth.

Gault J So it elected to cease doing that and to become a marketer?

Grant Well Your Honour is not in favour and I'm not quite sure why, that this was a joint venture. It elected to enter into a joint venture where it would give up the baling, sourcing and so forth and focus on selling.

Gault J Well if you label it as a joint venture, that's alright, but it's still the particular contractual attributes that matter and simply because they've entered into this arrangement, does that carry with it a guarantee that at the end each will be reinstated to the position they would have been had they not entered into, together with any development of that?

Grant No.

Gault J It can't can it?

Grant No, not at all, I don't say that.

Gault J That's pretty much what you're arguing.

Grant Well then I'm not expressing myself well. I go back to the principles as articulated in *Australian Blue Metal* which don't say it like that. They talk of the cushion and they talk of replacement business of the sort that's been lost.

Blanchard J But they're not contemplating this kind of case when they're doing that in *Australian Blue Metal*. I mean they were coming to the conclusion that a very short-term mining venture could be brought to an end at will.

Grant But it wasn't.

Blanchard J Now they are surely talking about relatively short periods for tidying up the consequences of a notice being given.

Grant Well Your Honour it may be that that's all that was intended but the principle has been taken in subsequent cases to extend beyond that.

Blanchard J And in hardly any has the notice period been more than a year.

Grant Yes, but if one looks at the cases which are being reported, they are essentially employment and distribution cases and there are very few cases

Blanchard J You have only been able to point us to I think two cases where there was a period longer than a year. One of them is this insurance case, and having read it over lunchtime, it seems to me it's a totally different sort of case, for the reasons that Justice Clarke gave, and the other one is *Tui* which is a sort of a ex-post factor look at things on a somewhat unreasoned basis where it didn't much matter what period was actually ascribed.

Grant Your Honour as I understand this jurisprudence, it has at its base implied terms of contract and *Australian Blue Metal* is articulating that its implied term, it's not expressed in this way, but that's as I understand the jurisprudence that behind it all, underlying it, is the notion that it's not reasonable, that people can give a notice and basically that's the end of the relationship. But you have to give a reasonable notice and the notice therefore is to fulfil a purpose, and it's clearly to act, if you like, as the cushion, to enable the recipient to have a reasonable time to find alternative business and that's a very logical and understandable thing for the law to do. Not just to allow the immediate severance of contractual relationships.

Blanchard J Well there are questions and questions. Some of them are big and fluffy and some of them are quite thin. I suggest to you we're talking about the thin sort here.

Grant Well I'm not quite sure why Your Honour's saying that it must necessarily be a thin cushion

Blanchard J It's because we're talking here about the tidying up exercise of the dissolution of a contract – and I'm using that term deliberately neutrally – where the parties have chosen to give each other the ability to terminate on reasonable notice.

Grant Well I'm not sure that I understand Your Honour correctly but one could take this

Blanchard J Well we may just have to agree to

Grant One could take that on the basis that there is no need for a cushion at all

Blanchard J I wasn't saying that, I was just saying that the cushion in my view is a relatively thin one. It's still a cushion.

Grant If one were to adopt the stance that here are two corporate entities which have chosen in 1984/85 to adopt this particular method of operation, that was a business decision they took. If it comes to an end, that's the end of it. Whatever the

Blanchard J The cushion might have needed to be a bit fatter if the notice had been given in the early stages, but this is 16 years later.

Grant What, if I may ask, would the cushion be slimmed down through the process of time.

Blanchard J Could well be.

Grant Well I'm not sure why that should be and I therefore won't go down that path. In fact what happened in this case the longer the alliance in the venture the two companies have gone in their co-operative ways and in short for Aotearoa to go back to a viable business of the type that it started out with is very very problematic and the Judge therefore gave the lengthy period of notice in recognition of that reality.

Tipping J In the *Crawford Fitting* case the New South Wales Court of Appeal largely through Justice McHugh, seems to have carried out a pretty exhaustive examination of the authorities, both in England and in Australia and this is what 20 years ago but they refer to a Western Australian case with apparent approval where it seemed to have rather similar facts for these *WK Witt Pty Ltd,* bottom of page 444 of the

Crawford Fitting report. I'm not trying to multiply instances Mr Grant but I'm just looking to see the general flavour, if you like, of the New South Wales Court of Appeal's approach and there they upheld a four months notice of termination against a claim that it should have been 12 in a case where an agent had expended time and money in developing overseas markets and securing orders. Now leaving aside the danger of just reasoning from facts barely reported, and just glancing through Justice McHugh's survey of the authorities, I must confess anything more than 12 months in these sort of circumstances would seem to be pretty unusual to say the least. Have you had a look at the Australian position?

Grant Well I haven't looked at that case, but as described it is an agency case and I put agent's distributors in the same category and it's that category of case.

Tipping J Well it seems that in that case the person against whom the termination notice was given was carrying out a business rather similar to your clients in the present case, and I immediately guard myself against too easy reasoning on fact, but it's just the flavour. We want some sort of consistency here don't we? We don't want rogue decisions.

Grant Well a major difference between that kind of case and the present is this that if Aotearoa was a stand-alone company, offering its services as someone which could sell Paper Reclaim's paper offshore, it would not have gone and told it who the buyer was because agents don't say that. It would not have gone and said what the end price was going to be because it generally negotiates the price which it pays to the supplier and there was a transaction after these events when Aotearoa as a stand-alone agent got some of Paper Reclaims paper and evidence I think was given about this. It did so via an intermediary, but Paper Reclaim has no idea who the end customer is or the end price. It doesn't know the shipping arrangements; it doesn't know the details of the freight rates and the most advantageous shipping rates and so forth because agents don't give that information to principals, and the distinction between the typical agents case of the type that you're referring to here and this case is that Aotearoa gave all of its information away which is why it ceased to have any role as an agent anyway with Paper Reclaim because it had given all the information in the trusting

Tipping J Have I perhaps misunderstood the essence of the arrangement? I thought your client's role was to look for overseas markets for the paper that was being collected if you like and putting it very simply and crudely via Mr Judd's client? Is that seriously wide of the mark?

Grant No it did that, but as part of the joint venture it worked so co-operatively with it that it disclosed all of the vital information to do with selling in a way that agents don't ever do.

Tipping J Is this

Blanchard J What do you mean by agent in that sense? This was an arrangement wasn't it for remuneration on commission?

Grant There are in this country people who will go if I have some paper to sell I can ring him up and say I've got paper of category 'X', can you sell it, and they will buy it off me and on-sell it to somebody.

Blanchard J Yes, but that wasn't this arrangement.

Grant No it wasn't and the

Blanchard J So I don't see how your client could possibly have kept all this secret.

Grant My point in responding to Justice Tipping's question is that he asked me if you like what's the distinction between the *WK Witt* case and this case and the answer is that that would appear to be a classic agent situation of the type I just described as opposed to the joint venture which was held to exist where the information flowed through

Blanchard J Well in fact it's the difference between a distributorship and an agency. What we have here looks like an agency, whereas the buy and re-sell situation is a distributorship.

Grant Well I'm happy if Your Honour chooses to categorises that way

Blanchard J Then you can call it joint venture but frankly that's a meaningless expression and one has to look at the actual nature of what was happening in order to see what the rights and obligations are.

Tipping J You were selling on behalf weren't you; you weren't buying and re-selling putting it the crudest possible way?

Grant There are two types of transactions. There were the ordinary ones where there was a 10% payment to Aotearoa described for convenience by both parties as commissions because in the days of export incentives if something could be categorised as a commissions there was an export incentive payment, but for that reason described as commission. Aotearoa, for those sales sold offshore buyers generally.

Blanchard J But it would have to disclose who it was selling to and at what price.

Grant As part of the venture with Paper Reclaim

Blanchard J Well simply so that it could be remunerated on an appropriate basis.

Grant Well and agent wouldn't necessarily show the identity of the person who buys it.

Blanchard J It would be very odd for that to be the case where you had a remuneration calculated on the basis of a commission.

Grant Well I'm hesitant to distract from answering Justice Tipping's question. There are two forms of remuneration. There's the 10%, where Aotearoa sold to buyers and there was the 50/50 deals where it found buyers and after deducting I think $5 a ton the proceeds were divided 50/50. Now generally says that if Aotearoa went and found buyers – there may have been, I can't recall any evidence of selling into an intermediary. Germany had sold to people offshore - to mills and so forth.

Tipping J Title passed directly from Mr Judd to the overseas buyer presumably. They didn't come through you. But just so we can get the picture clear. You weren't a buyer from Mr Judd.

Grant Not at all, no, absolutely, absolutely. Paper Claim send their paper down to the wharf – the buyer will be such and such and they negotiate and there's a general accord. I'm sorry I got distracted from Justice Blanchard's question. I don't mean to be inconsiderate if I've not answered

Blanchard J Well it's an area we may re-visit under the fiduciary argument if you are going to be pursuing that.

Grant Your Honour I am going to be pursuing that. I was going to take you to the *Tui* case and it's obvious Justice Blanchard has read that during the break. It's at tab 4 of the volume of the cases we're looking at, page 124 where under the heading 'what period of notice was reasonable' reference is made to Justice Tompkins in the *Silhouette* case which I'll take you take you to. But he says 'what constitutes reasonable notice has to be determined having regard to the facts existing when the notice is given and is not to be determined at the time when the contract was made'. Reference to *Australian Blue Metal and Decro-Wall* and then the reference to line 20 'that the length of the notice must be determined in the light of the interests of both contracting parties etc, and then para.2 up from the bottom of 38 'clearly the recipient of the notice must have a reasonable time to make alternative arrangements of the sort similar to those which are being terminated'. See also *Joftaa Holdings and Cavalier Bremworth*, a case of Justice Blanchard involving the sale of carpets. *Crawford Fitting* which we've looked at. Relevant matters might include carrying out existing commitments, giving notice of the termination of supply to existing customers, bringing current negotiations to fruition and where appropriate obtaining the fruits of any extraordinary expenditure or effort' and that's taken from the *Crawford Fitting* case in that passage to which I took you about 10 minutes ago which is in the context of distribution agreements where the distributor for example goes out of its way to invest in some special promotion or something and is entitled to the extra time. 'A matter however which is not on the

authorities a relevant consideration is the possible adverse trading consequences of the recipient's replacement trading situation and in *Crawford* Justice McHugh said' – that's the passage Justice Tipping I think was referring to.

Blanchard J So that's being applied here in a case that doesn't involve a distributorship?

Grant Yes it is, well it's been referred to that, but Your Honours are aware that that arises in that context but I said quite plainly to Justice Tipping that I'm not saying that the recipient has to be put in the same position as it was. I mean that was just not practical to say that if you have a revenue stream of 'X' that you must be given a period of months where you get the same revenue stream or net revenues or whatever. Then 'the case for the plaintiff is that 12 months notice was reasonable and in that time had been running'. In this case there had been a 12-month notice which had been given quite a while back – three years, eight months back – prior to the judgment. Line 15, 'the case for the defendants on the other hand is that a lengthy notice be ordered having regard to the defendants long support of the Fernleaf brand; the running down of the defendants other brands in reliance on Fernleaf being perpetually renewable, and difficulties associated in introducing a new brand in a mature market. When I asked Mr Paine, who was counsel for *Tui*, to elaborate on he contended that as the party had been at arm's length over termination, five years notice would be reasonable in the circumstances of the case, etc'.

Tipping J I don't understand at all how the fact that they were at arm's length could have had any relevance to the length of the notice, because if they're not at arm's length I mean it just doesn't seem to follow at all, but I don't suppose that matters Mr Grant.

Grant Your Honour I didn't understand it

Tipping J Well it's very appropriately candid of you. At least we agree on one thing.

Grant Sorry, I come then to the paragraph 'has the notice been effective since 4 May. I deal with the question of whether the notice has been effective since it was given on 4 May. Mr Paine did not submit any authority in support of the submission that the notice had been ineffective. The plaintiff made his position quite plain as early as the letter of 2 February, and that letter asserted that the user agreements were terminable on reasonable notice'. Now this comes back to what we were talking about this morning with this notice. This 2 February 2001 doesn't refer to termination; doesn't refer to reasonable notice. In this case just out of interest in that letter it asserted that the user agreements were terminable on reasonable notice. The letter of 4 May was unequivocal in its terms. It gave the defendants 12 months notice of termination. The receipt of the letter is admitted in the defendant's

statement defence although of course at the time the contents were ignored and that situation continued down until the time of trial. They admit that they have used the Fernleaf mark since the expiration of the 12 months notice on 5 May. They had deliberately chosen to take the risk of an adverse finding etc'. And then there is a find in line 44. 'The notice has been effective since 4 May, except that they've had almost four years notice. As I say I think it was three years, eight months. And then if I just take you over the page to line 15 where he concludes 'taking all these factors into account, and in particular the facts existing when the notice was given and the intention of both contracting parties, I have reached the conclusion that three years notice would have been reasonable – indeed more than reasonable – for the termination of the user agreements as at 4 May 1993. In fact the defendants have had approximately three years nine months effective notice. It therefore follows from these conclusions that the plaintiff has given reasonable notice etc'.

Tipping J Well if three years is more than reasonable, I wonder what His Honour would have regarded as reasonable?

Grant Well

Blanchard J Did it matter in this case? I didn't in reading it quite pick up why the exact period of notice would have been of significance and this makes it look as though it isn't of particular significance.

Tipping J And what business has he in fixing a more than reasonable notice?

Grant Your Honours have

Tipping J I mean with great respect this isn't much of an authority.

Grant Well.

Tipping J It's a very helpful discussion of all the cases, but the jurisprudence is

Grant Pretty thin.

Tipping J Pretty thin.

Grant Yes, I mean that's it and if in fact one was to bury down beneath what one might describe as some relatively thin jurisprudence and get back to implied terms and so forth which wasn't done and if that is the true origin of it all then underlying it is a notion of fairness in giving a person time to adjust sensibly and reasonably and fairly without undue difficulty if you like. That's what underlies this so that the employees get enough time to get a job. The distributor gets enough time to get another product and so that's how the Courts have interpreted it.

Elias CJ Well I really still have difficulty with that, and I notice that, because all of this seems to be levered off *Australian Blue Metal* and that one line about alternative arrangements for sorts similar to those which are being terminated, and yet Lord Devlin goes on to say that he's talking about periods of notice and periods of grace, it's law and equity at 102, and a case like the present, and of course it was a Mining case, the main object of reasonable notice would be to prolong for a limited period the right to mine. Nothing about finding an alternative place to mine or something like that.

Grant Your Honour I thank you for giving me that comment because it helps me and what I'm going to do then with your permission is to take you quickly to my appendix if I can, and when I say my appendix, I mean

Elias CJ Yes

Grant I mean what's appended to these submissions in case that gets typed up.

Blanchard J It's too late.

Grant Now these are all in day sequence because I just chose to do it that way. If I could go briefly through. This is *Australian Blue Metal*. I won't go through them all, just some of them. You have to determine whether a mining licence could be terminated summarily or whether reasonable notice had to be given. There was a non-exclusive licence to mine magnesite and part of the reasoning there for Lord Devlin, you're dealing with a non-exclusive licence. It's not even a lease. It was a casual document which didn't impose any obligation on the licencee to conduct any mining at all, and the Judge said it was open to the respondents to reduce the magnesite obtainable by the appellants, maybe very considerably, by resuming work themselves or creating any number of other licensees. No large initial expenditure was necessary before mining could begin. The appellants had mind unsuccessfully and renegotiated the licence a short time beforehand and at that time they threatened to pull out by the end of the month. In threatening to pull out they didn't say that the licensor was entitled to a period of notice and none was asked by the mine owners. In these circumstances Their Lordships are satisfied that the agreements which led up to it, nothing more than an ad hoc arrangement whereby the labour and equipment which the appellants had available might be employed on the respondent's land to their mutual advantage as long as it suited both parties. So those were the facts, very unusual facts, where they'd been mining for a long time and suddenly a month after they sort of pulled the plug and said we're not interested in this any more, we can't get anything out of this mine. They found something and they then got a notice and with this non-exclusive it was held that notice could be given. That's the context in which the Lord Devlin was made.

Tipping J On the premise presumably that someone else could be licensed?

Grant Yes, they could licence an indefinite number of people and so forth.

Tipping J Just by the way was there anything in the contract which regulated how much product Mr Judd's client had to supply to your client?

Grant No.

Tipping J So you didn't have any expectation of any particular turnover; no minimum guarantees of throughput or anything, so you could have got one mouldy bag of paper a year.

Grant Well one could say that the parties had a reasonable expectation as to what was going to happen

Tipping J Yes but

Grant Well it never got a mouldy bag in year after year.

Tipping J Mustn't that be relevant? I mean if there was no contractual obligation on Mr Judd's client to supply your client with any particular amount of product upon which you could earn commission, how does that fit with the idea that there had to be a long period of notice, like longer than 12 months, like eight years? I just find that awkward.

Grant Well evidence was given of the volumes of the earnings and certainly so far as the reality is concerned, there's no notion of a mouldy container of paper

Tipping J No, I'm looking at the contractual arrangement, I'm not looking at equity at the moment, I'm looking at the contractual arrangements. Now if Mr Judd's client had no obligation to provide you with any paper, never mind there might have been you know some underlying commercial expectation, that must affect the term of the notice mustn't it?

Grant Your Honour I'm just trying to think back to the facts because this goes back a fair way. The circumstances when the contract was negotiated where the prices were being, big prices were being got offshore for paper, and the paper was going to go offshore where the big prices could be got. It wasn't that there was a big domestic market if you like, it was the overseas market and figures showed that that's where the money came from and I'm sorry I can't as I stand here give you some references and the evidences to

Tipping J It's not so much what actually happened but what you were entitled to contractually.

Grant I appreciate that but I can't as I stand here

Tipping J I've read nothing in the papers to suggest that there was any sort of minimum throughput or minimum guarantee, it was just whatever paper they chose to put your way wasn't it?

Gault J But it was exclusive so it would have to be all the paper.

Grant And when you have here what was steadily becoming a major participant in the NZ industry

Tipping J Yes, one's got to be a bit realistic about it I suppose. The reality is that they would be cutting their own throats as well as yours.

Grant Absolutely, in fact you see the prices are all fixed by offshore because the buyer from then is Carter Holt

Tipping J Sorry, if it was exclusive I think that was the step I'd overlooked.

Grant Yes well it's exclusive for them both.

Tipping J It doesn't necessarily provide the whole answer in my mind but it certainly provides some of the answers.

Grant Well this contract was oral and there was nothing agreed that there would be a minimum ex tonnes of this product or that product and so forth.

Tipping J What are we actually being asked to do Mr Grant by you're going through all these cases? What is the purpose of your exercise? To demonstrate that eight years is by no means out of the way or what?

Grant Well I don't think there was one purpose in doing this and for turning to this now I did say because the Chief Justice indicated when looking at Lord Devlin's judgment in this particular case that the Court didn't seem overly sympathetic, and I wanted to point out from this case that it was a, I'm sorry I don't wish to mis-characterise what Your Honour said, but to show that this was a mere licence, a non-exclusive licence and it wasn't a case of the kind of exclusive contract which we have here.

Elias CJ No I was more pointing to the slight dissonance between what Lord Devlin was saying when he made the remark that everything seems to be invested and about making alternative arrangements similar to those which are being terminated, and then later says that the main object is to prolong for a limited period the right to mine, which is not the same as saying that it's in order to set up this miner somewhere else or to allow him to set up somewhere else.

Grant No, what I was going to say is over the page actually. There was no suggestion in the judgment that following the expiration of a

reasonable notice that *Australian Blue Metal* wouldn't have another mine on which to operate or a lack of appropriate business opportunities.

Elias CJ But it wasn't an inquiry that the Court felt it necessary to embark upon and I really am not so much interested in the facts of these cases, I'm fishing for the principle that's being applied, and where it suggested that somehow the period of notice has to be set to enable someone to re-establish themselves in the same sort of business, which is I think the thrust of the submission you're making to us, because I see that again going ahead the *Crawford* case, it's this bringing to an end in an orderly way the relationship. It's re-arranging its affairs in the *Clarke* case, the *Harrap Dictionary* case. Those don't seem to be nearly as ambitious as the argument that you are advancing to us.

Grant Well Your Honour I may then have not expressed it correctly. Before lunch I was speaking in answer to a question from Justice Gault about the different strands of business which Aotearoa had - its plastic and scrap metal and so forth and in my submission an appropriate principle is not that Aotearoa has to get the same revenues out of waste paper as it did before but has to be given the time to re-establish itself with what it's losing, and one of the ways to re-establish itself is to increase its sales of waste plastic

Elias CJ Well where do you get on the authorities, what's your best shot at the purpose of the notice to give sufficient time for a business to re-establish itself?

Grant Well it's the *Australian Blue Metal* case.

Elias CJ Yes.

Grant Yes, the common purpose is frequently derived from the desire that both parties may be expected to have to cushion themselves against sudden change, giving themselves time to make alternative arrangements of a sort similar to those which are being terminated. Now it says similar to those being terminated. Now take some of those distribution agreements. I mentioned that *Clarke Irwin* couldn't get another English French dictionary, but it was in the business of publishing a book distribution. You could find another book or something to fulfil. Another one of these cases coming up if I go through it which looks increasingly unlikely is a case involving furniture where a Canadian company sold a famous brand of English furniture and it was about 3% I think of its business and it was given time to find another item of furniture. It didn't have to sell the same sized furniture but it was other furniture.

Tipping J I think what's happened is that everyone has applied what Lord Devlin said as if it were a statute applying to all, if everything, whereas it

should be read according to the circumstances of that case. People have quoted it since as a kind of mantra.

Grant Well Your Honour

Tipping J I'm not blaming you Mr Grant at all because it's in your client's interest but it's just not going to work. But that puts a huge emphasis on the interests of one party as against the interests of the notice giver party.

Grant Well if it is correct that beneath this layer of words which Your Honour might consider it could be a kind of mantra, if beneath this layer of words is an implied contractual obligation between the parties that they shall not just sever the relationship like that, it's unfair, it's unreasonable. You're then left with what these words are, because these words essentially are articulate but they may be a little narrow if you like, so that where it says time to make alternative arrangements are a sort similar to those which are being terminated. In a case where there's evidence which is accepted if you like that it be very hard to get volumes of paper without a lengthy period of time, then to re-establish itself so that it can actually stay in business and so forth may mean going with the areas of business, and as I'm going to come shortly, it said we may be able to get our scrap metal and plastic businesses out and so forth and that's

Tipping J If you enter into a contract of this type, don't you take a commercial risk that if the other side gives you notice you might be seriously in difficulties?

Grant Well Your Honour the answer is yes on the one hand there is a commercial risk and the commercial risk may be best captured under the fiduciary duty side of things and in equity. It may be that's where, if you like, the safety net arises. If this principle is set to be inappropriate or insufficient in some way to assist, but it may be that where you have a contract where there are equitable obligations, fiduciary obligations, that that's where the major support comes. But I don't contend that. I contend that the articulated statement of Lord Devlin which is almost surprisingly, it's unusual to see a doctrine which is so broadly followed and it doesn't have a great articulated base to it, but if the base is, well let's be reasonable to these people because it was an implied term that no-none is expecting that the whole relationship is going to be terminable instantly. There's got to be a reasonable time for him to try to re-establish their own situations fairly- that's what it comes down to.

Gault J This re-establishment bit keeps re-occurring. I thought that there was a very helpful summary by Justice McHugh in that *Crawford Fitting* case at 448 where he says 'the chief purpose of a notice'. About line E. It talks about an opportunity to enter into alternative arrangements, not

a guarantee and it seems to me that read overall it rather postulates a limited winding-up sort of structure.

Grant Well, Your Honour I say briefly in response to that that I would submit that this is particularly tailored to a distribution agreement where conventionally in these cases there is never perceived to be difficulty in finding alternative products. It's a question of whether it takes three months, six months to find an alternative source of product to sell and so forth, and to bring in and in an orderly way you will find the factors lower down there which have been recited in the cases. Orderly means carrying out existing commitments so if the distributors got, and some of them have, they have repair responsibilities we've they've got mechanical machinery or something, I think even beds. They have repair responsibilities, carrying out current negotiations so if they're

Elias CJ I think really what's being put to you Mr Grant is that what's said here is that it's the opportunity to enter into alternative arrangements.

Gault J As contrasted with sudden cut-off.

Grant Well the difficulty as I said at the outset in this case is that if you go into alternative arrangements for a company which has expertise in four areas of business which one is written off because there's only one company which has apparently got a machine to go in there, you then go into what are the alternative arrangements and it was not suggested in evidence by Paper Reclaim who had all this evidence that Aotearoa had any other area of business which it could practically go into. That was opened to Paper Reclaim to say well we've seen what you say about your four areas of competency, but you could do this, you could do that, and you could do the other. There was no suggestion whatsoever at the trial that this company had any competency in anything else, and it was aware that this was all about periods of notice; it was aware of the lengthy period of notice that was wanted, that was being sought. If it wanted to say well you have got these various opportunities, then we shouldn't be having a lengthy period of notice because you can do X, Y and Z. They didn't do that. No-one has done that and that is the unusual unique feature of this case.

Gault J Then if there were no other competencies it would never be terminable. The person's expertise was so confined to that particular deal, there were no other alternatives, it would never be terminable.

Grant Well I answer that by saying this that this is not the conventional *Crawford Fitting* case where you have two distributors in two states distributing fittings and they've got alternative stock before the notice is expired. This is a company which has blended its activities up and in the way that these two parties have chosen to conduct their business over the previous 16 years, they have chosen to say that Aotearoa should focus on the exports and not buy the equipment; not invest in trucks. It's not a question of not having a period of notice, but having a

period of notice which gives it the time to find some alternative. Now in a case which is so unusual as this, if the party giving notice considers that there are other competencies, one might expected it would have said so, but that hasn't been the case.

McGrath J All the Court is saying is concerned it's concerned to do though is to provide a cushion against the impact of sudden change. You're really making this a guarantee that there will be no impact of sudden change.

Grant No Your Honour I must make that, no I'm not saying that there would be no impact, that would be quite unrealistic to consider a company which can go into precisely the same role, precisely the same income and so forth, that doesn't happen; it's not an experience of life. It's got to be given an opportunity to re-establish itself somehow – may be with other competencies it's got or to

McGrath J Why do you limit this to its own competencies? I mean it seems to me that perhaps exporting is as specific as one should be getting in this respect.

Grant Well

McGrath J And I see no guarantee that the alternative similar arrangements will actually be achieved. I think that's why the word 'opportunity' is a fatal one. It's a chance to do something. Some time to do it, so it's not suddenly preventable I think in your terms 'cut off at the knees', but there's no guarantee that in the end it will be able to reach alternative similar arrangements because if there were such a guarantee it wouldn't be terminable on reasonable notice.

Grant That's right and it may be that with an eight years it can't either, but been given the period of notice and six years at least have gone by to date since that letter was given.

Elias CJ Well I wonder Mr Grant whether we haven't really exhausted, there may be some other points you want to make on this, but I think we do understand the arguments you're making and it does seem that perhaps some of the points you are putting to us might be more readily put if you're successful under the fiduciary duty point, so unless there's anything you want to say to conclude the argument perhaps we could move on to that.

Grant Aren't Your Honours going to wait for afternoon tea. I don't know if you do or not.

Elias CJ Well we normally sit till 4pm and stop at 4pm. Sorry, I'm being reminded that the arrangement we had proposed that we'd now hear from Mr Judd in response to this argument and I think that would be helpful.

Grant Could I then, look I hesitate in view of that request to go on.

Elias CJ Well I don't wish to pre-empt you. If there's more that you want to say to us on this

Grant Yes, yes I'll go to some more facts if I may. 513 of my submissions. Para.513 on page 7. Mr Cash gave evidence

Blanchard J You've dealt with this haven't you?

Grant Well I

Blanchard J I remember you going through the statistics before.

Grant Anyway Your Honour for scrap metal I don't think I did. He said 10% of the local market for scrap. It was the market share it had and they said I they think it likely that in the short term you won't get too much and perhaps will not likely increase its market share during the next five years or more which is up to a year or so ago by a 10 to 20% and said that the increase would only absorb a small amount of the revenue. The waste plastic he said 5% and spoke of the options in that market. Now Your Honours Justice Tipping asked me this morning what I was saying about the Court of Appeal and was I saying that in essence would they have given the reasons 1,2,3 and 4 that the Court erred in its adoption of those reasons, I think the answer is yes, because they are most of the reasons given by a Court for choosing the one year.

Tipping J I noted your argument as being essentially that the Court of Appeal were wrong on the comparability of the case law; they were wrong in adopting Justice Penlington's approach in *Anchor* and they were wrong on the approach they took to replication of the same business.

Grant I'm sorry Your Honour, wrong in relation to *Anchor Butter*?

Tipping J I may not have an accurate note Mr Grant, but whatever you've said on that I've got it fully, it will be in the transcript, but those were the three areas, sorry. The three areas were comparability *Anchor Butter* and this whole point that we've just recently been discussing.

Grant It's paras.72, 74 to 77 I think which are the relevant paragraphs that a Court of Appeal reaches those conclusions. 72.

Tipping J Is there anything beyond what's in your written submissions that you want to say? I mean it's all there really.

Grant No, it's in my submissions, no.

Tipping J It's just a matter of winnowing it out.

Grant Yes, yes.

Elias CJ Right Mr Judd, are you wanting to be heard?

Judd Well no I've yet to make my

Tipping J It's inherent in your point that it should be less isn't it.

Elias CJ Yes.

Tipping J We don't need to hear you twice. I mean if it should be less then clearly Mr Grant's horribly on the wrong track.

Judd Well this is my learned friend's appeal on the length of notice on which I have yet to be heard.

Elias CJ Yes indeed.

Judd So

Tipping J You are wanting it to be less aren't you?

Judd Yes.

Tipping J So you want to have two goes. One saying it shouldn't be more and another go saying it should be less?

Judd Yes, but I haven't argued 'it should be less' part because that came as part of my learned friend's appeal. What I argued this morning was the question of how you calculate or whether in support of the ground of appeal, that the Court of Appeal erred in relation to the way in which it calculated damages.

Elias CJ Yes Mr Judd.

Judd Yes, may it please Your Honours, the written submissions on behalf of Paper Reclaim in relation to the length of notice point are in the submissions called 'respondents submissions in reply in SC28/2006' and in relation to this particular part or this particular appeal by Aotearoa, the submissions at pages 3 to 13 and what I want to do is to focus on some particular aspects which have arisen on the dialogue which has taken place with my learned friend, and the first thing I want to do is to go to the *Australian Blue Metal* case at tab 2 of my learned friend's bundle of authorities and to page 99, and in a sense my learned friend's whole argument has been derived from the reference by Lord Devlin to giving themselves time to make alternative arrangements of a sort similar to those which have been terminated. Now the first point that I want to make is that those words really have to be read in the context of what goes before and what goes afterwards

Blanchard J I thought that was a point we were putting to Mr Grant at some length. Do you think we haven't understood it?

Judd Well I just really wanted to reinforce it Your Honour by

Blanchard J Well there's no point in thumping matters that have already been thumped by the Court.

Elias CJ But if you have something additional Mr Judd, draw our attention to it.

Judd Yes, the

Blanchard J You've really got to try and persuade us it should be less than 12 months.

Judd Look all I wanted to say in relation to that particular point as it might perhaps be of assistance to the Court is that Lord Devlin was simply giving an example when he said 'giving themselves time to make alternative arrangements' because if you go back a few lines he says 'the common purpose is frequently derived from the desire that both parties may be expected to have to cushion themselves' and then in the next paragraph he says that the question which the Court has to ask itself is whether, something that he mentioned in the previous sentence was the fact which would have been operating in the minds of the parties and so forth. So that's the only point that I want to make there.

Tipping J Are you saying in a sense that it's over to dictum because it's not really directed to the point in issue?

Judd Well I don't think I'm saying that Your Honour, I'm saying that the point that Lord Devlin is making is that you have to consider the common purpose for which notice was required and then he says what the common purpose is frequently derived from. He's not, as one or more of Your Honours have said, saying something that should be treated as part of a statute, he's just giving an example, and

Tipping J He puts it more succinctly at the bottom of the page doesn't he. 'Time on the one hand for the appellants to deploy their labour and equipment profitably elsewhere and on the other for the respondents to find another licensee, and that's all he saying.

Judd That's all he's saying, yes Your Honour, and I submit that that rather than the few words that my learned friend relies, those words are actually much more important, and

McGrath J Yes, I think that we've got that. That's just really a question of why that should lead to the short-term of notice that you urge, the three months?

Judd And without taking Your Honours to it, can I just say that the passage from Justice McHugh's judgment at page 448 which Justice Gault referred to is to much the same effect and the paragraph earlier on the same page goes engages in analysis of the same concept, and what it really shows is that the notion that Aotearoa should be in some way entitled to replicate a business which it might have had if it had chosen to do something differently when the contract was made, is fundamentally flawed, and

Tipping J Even allowing for your proposition, which I'm inclined to find persuasive, that the purpose of the notice is as you suggest, one month seems extraordinarily pre-emptory Mr Judd.

Judd Well my learned friend was critical of reliance being placed on the *Crawford* judgment because he said it is a distribution agreement. The aspect of distribution agreements which is important is that the distributor will frequently engaged in capital expenditure to set up the distribution network and so forth and so on, and so I would say that a distributor will generally speaking be expected to have a longer period of notice than somebody like Aotearoa, and the reason for that is there is no capital investment in Aotearoa's business; it's essentially personal exertion by Mr Cash; there are no long-term arrangements to be unwound, he simply goes overseas, as Your Honours have in my respectful submission, correctly already noted in dialogue with my learned friend. He simply went overseas, found buyers and on behalf of Paper Reclaim as Aotearoa's principal, entered into contracts with those buyers, and it's my submission that because that is the essential nature of the business which is being carried on pursuant to the contractual arrangements that a short period of notice is appropriate, and in my submission 12 months is a long period of notice in the context and that's why I say, I submit, that a month is more like it, as was observed by one of the Judges in the *Decro-Wall* case, essentially deciding what the notice period is, is a subjective exercise, but it is as I think Justice Tipping observed to my learned friend, it is a matter of judgment and in my submission when you apply that judgment to the nature of the contractual relationship which was brought to an end in this case that a month or something like is much more appropriate than the year which the Court of Appeal found.

Gault J Is it reasonable to take into account how the Court's below characterised this particular arrangement? A joint venture is not a good description but they certainly seem to accept that it was a collaborative exercise which would have necessarily given rise to some inter-dependence commercially. It might justify a longer unwind than a simple distribution or agency arrangement.

Judd I accept that Your Honour but in the normal course of events a straight agency arrangement could be brought to an end without any notice at all. It's only because this contract, or the agency aspect of this contract, was within a wider context that the Courts below have held

that reasonable notice was required, and of course my client has now accepted that, but the question really is whether there is a case for extending that notice significantly beyond what would normally be the case for an agency relationship, which is no notice at all, has been made out, so I think really those are the

Blanchard J I don't think you can say the agency can be just terminated like that. It may be that the authority to act as agent goes but the compensation for having it taken away from you without an appropriate period of notice may still be payable.

Judd Yes and I accept that and my submissions plainly acknowledge that in reference to the *Geange* or however it's pronounced, case which is mentioned in that aspect or that part of our submissions. But I think I have succinctly as I can summarised why my client contends that the notice period should be significantly shorter than the 12-month period which the Court of Appeal indicated to be appropriate. I have no further submissions on this point unless Your Honours have any questions.

Elias CJ No, thank you Mr Judd. Is there anything arising out of that Mr Grant?

Grant Your Honour in the light of what you've heard at length this morning and after lunch, I don't propose to address you on shorter periods than 12-months in a situation of 16 years and so forth.

Elias CJ Thank You.

Grant The suggestion that the relationship can be severed so abruptly is in my submissions contrary to all of these cases.

Elias CJ Mr Grant we'd like you to get underway if that's alright on the next. You won't get very far

Tipping J In chronological terms I think Your Honour means.

Grant Right, I'm going to go to the start of my submissions. *Chirnside* is obviously in anyone's mind dealing with this topic, but I'll just give you some facts. In para.7.1 of the submissions, I've got an extract there from Mr Cash's evidence. Justice Nicholson also put this in his judgment I believe 'because I was so confident in the certainty for the contractual arrangements with Paper Reclaim, I disclosed everything to the company about Aotearoa's freight costs, transportation arrangements, customers, markets, etc. I used to speak on almost a daily basis with either Grant Taylor or Kerry O'Rourke and would tell them virtually everything of consequence in the industry. It is this information which has enabled them to export their product with Aotearoa's assistance. The information was provided to Paper Reclaim in the belief that the relationship was both permanent and exclusive and would not be used against Aotearoa's interests'. And I've said 'it can

be recalled that by its agreement to forego the purchase and baling of paper, Aotearoa and Mr Cash, and this is Justice Nicholson, submitted themselves to the escalating vulnerability of being unable to obtain waster paper for export if Paper Reclaim did not honour its contractual liability to supply that paper'. Now my friend says that the information which has been given in that first quote was free to be used by Paper Reclaim. He says that if there was a duty of loyalty it ceased as from the day when the contract was terminated and paper Reclaim was free to use all of the information about freight cost, transportation, customers, contacts and all the rest of it. In my submission that is not so and I've referred here to Lord Woolf's judgment in the *Attorney-General and Blake* where he talks of the 'quite different fiduciary relationship is that of confidentiality which arises whenever information is imparted by one person to another in confidence. It is often perhaps usually imparted in the course of another fiduciary relationship such as that of employer and employee. If so the duty will survive the termination of that other relationship, for it isn't derived from it'.

Blanchard J Well that's no doubt true, and the point is made in Justice Tipping's judgment in *Chirnside*, but the question is whether there's any fiduciary obligation, either or loyalty or of confidentiality in circumstances of this kind, or whether it is simply a contractual arrangement between two commercial parties. Insofar as your client was acting as agent for a principal, there was no doubt a fiduciary obligation by your client to the principal, but there wouldn't be one in reverse.

Grant Well Your Honour, dealing with that proposition, Justice Nicholson held that there was not a relationship of principal and agent between these two parties as an express finding. The Court of Appeal held with Justice Nicholson that there was a joint venture and there was no relationship of principal and agent. In the Court of Appeal Justice Chambers for the Court said that there was a joint venture and referred to it on about three occasions and firmed. He uses in his judgment the term agent. I would submit that he uses it loosely.

Blanchard J I would submit he uses the term joint venture loosely. It's far too easy approach matters from the wrong end, to say ah we have here a joint venture and then it follows that there are certain consequences, but really one has to look at the detail of the relationship first in order to see what the consequences are. The label 'joint venture' is a just a convenient label which gets applied and in my view gets applied far too often. This looks like classical principal and agent in relation to the matters with which we are concerned.

Grant Well Your Honour with respect, where the two companies in 1984/85 said that we will cease to be competitors and we will work together in a co-operative way, and I could use the word 'venture' there because that's what it is. There's a finding that there was the meeting and the

contract was made and there's lots of evidence that there had been lots of discussions leading up to it and so forth, that they were working out how they might work together co-operatively and what the terms would be, and they decided that instead of competing against each other in the whole gamut of activities, it would be more sensible if they could find a way to agree upon it that they would work co-operatively in the venture in which Aotearoa would do X and Paper Reclaim would do of activities, it would be more sensible if they could find a way to agree upon it that they would work co-operatively in the venture in which Aotearoa would do X and Paper Reclaim would do of activities, it would be more sensible if they could find a way to agree upon it that they would work co-operatively in the venture in which Aotearoa would do X and Paper Reclaim would do Y, and X was exporting essentially, and then the 50/50 as part of it as to what would happen with new business created from within New Zealand, and it was held that Aotearoa could keep the revenues from some existing customers. All new business went into the venture and Aotearoa would get a sum per tonne of paper for some costs associated and the rest the venturers would share equally, or in my other documents, they would share the gains and the losses; that's the document sometimes characterises document B, and in terms of a venture where the two parties are sharing in the gains and the losses as I understand it, if one takes away the labels and goes into the substance, the sharing of losses and gains as I understand it is an indication of a fiduciary relationship. Now just forgetting for a moment whether it's a joint venture

Blanchard J But we're really only concerned about transactions on which a commissions was payable.

Grant Well the evidence says that there was a comprehensive agreement, and I mentioned to you the term 'commission' was used for the purposes of export incentives if they were characterised in that way, and the parties agreed that they would do for this reason and there would therefore be an incentive for both of them in terms of government grants or whatever. But they were co-equal participants in the business venture where they decided that instead of competing they would marry their businesses up in their way and then work with a two-ways for making money insofar as Aotearoa was concerned. One, Aotearoa would get 10% and the evidence was concerning this term 'commission' it seems to some Judges convenience, and Justice Chambers had this case for the interim injunction hearing where again 'commission' was used as the term, but there were two methods of remuneration. It would get the 10% for the sales of paper sourced from Paper Reclaim; it would get 50% of revenues from sales of paper which it sourced from elsewhere in the country. Evidence was given that when the contract was entered into Mr Cash didn't think he would be able to find many other sources of paper and that he was quite surprised of how he managed to find so much paper which was used as part of the 50/50 deals. I won't be a moment; I'm just looking for the document which is my notes

somewhere. If I can take you to document which is volume 5, or I think it's 5, yes.

Blanchard J I'm having difficulty finding it. Oh this must be it. Sorry, what page?

Grant 1308. It is my recollection of the evidence that this arose from discussions when the prices were low. The previous page is the manuscript version of this document and this is a typed up version of it. And there's two paragraphs. One deals with the 10% regime, and I'm going to go down to the second one, para.2, which is the 50/50s, and this is the agreement between them on all 50/50 deals share equally gains and losses after Aotearoa's $5 per metric ton commission. No deal is to be negotiated expecting a loss. And there are two exceptions there to 50/50's and their suppliers where Aotearoa would have all the revenues because that was part of the original arrangement that Aotearoa could keep some existing suppliers for itself – a small number. So when you say well one joint venture is a vague term and is this a joint venture, you have here, however you choose to categorise it, two companies who are working together and they've resolved the basis upon which for the first part of material, the called commission here will be based, and the second that they'll get their equal gains and losses, and there were losses. Aotearoa made losses on some of these transactions and in other ways of which evidence was given.

Blanchard J But that's only on the 50/50 deals

Grant Oh well it made losses in other ways in relationship too, I mean it incurred losses when for example Paper Reclaim said that it didn't like a deal and it wouldn't supply the paper, and

Blanchard J But those were its losses. There was no suggestion of sharing losses.

Grant Well the losses are shared on the 50/50s which are an integral part of the arrangements.

Elias CJ Well they may be but it may be that there is a joint venture in respect of each of the 50/50 deals, but in respect of the other dealings, which are completed of course, in respect of the other dealings between the parties, this is a commission arrangements. How do you overcome that in saying that fiduciary obligations arise out of the commission arrangement?

Grant Because the word 'commission' in this context is if you like a convenient term which doesn't express the two-substance relationship.

Blanchard J But it fixes the amount that you're going to get in terms of damages. How does the fact that there might be a breach of fiduciary duty assist you there?

Grant Well Your Honour there are different ways there. One is that fiduciary duties gives equitable damages, and equitable damages are

Blanchard J But how can you get greater damages than the commission that you were entitled to?

Grant Well if the interception of the venture by Paper Reclaim is perceived by a Court to have given it an unfair level of profit

Blanchard J But it won't have. It will have only given it its 90%, minus of course its expenses.

Grant Well predicates levels of compensation and equity which I know post-*Chirnside and Fay* are

Tipping J Well I don't understand how you can get more in equity than you can at law in this context.

Gault J What is the equitable duty you say gives rise to this equitable compensation?

Grant To respect the confidences of the information given about

Gault J Well breach of confidence is it seems to me a matter that it can be said to be of fiduciary obligation. It can also be said to be contractual or tortious obligation, but its criteria are really well-established and you've already referred us to them – disclosure and circumstances of confidence, and there's an obligation not to misuse, but that seems to be almost a separate cause of action from this other fiduciary obligation you say not to take over the whole operation. Now if you're contending for some duty other than breach of confidence, I haven't yet identified it.

Grant Well Your Honour the pleading's been amended post the trial to allow a claim for loss of profits.

Blanchard J But what profits other than the loss of the commissions?

Gault The only profit that your client would have made.

Blanchard J Assume that the information was confidential; assume that Paper Reclaim were naughty and they used that information in order to get themselves some deals which would otherwise have been done through you, they would still have to account to you on the same basis. In other words they would have to pay you the commission you would have earned if they hadn't taken the information and done the deal themselves.

Gault It may be that the remedy for breach of confidence could extend beyond the termination of contract.

Blanchard J I don't think it's pleaded.

Gault J That's the other point. That's why it's necessary to identify the duty and then see whether you've pleaded a breach of that duty.

Grant Well para.7.6 of these submissions gives you the pleading.

Tipping J It's very similar to what was the third cause of action in the fourth amended statement of time. I'm not quite sure but there must be some subtle difference, but it looks very similar.

Blanchard J In respect of what period is that pleaded?

Grant Well that's not pleaded in respect of a period.

Blanchard J Well I had the impression from the Court of Appeal judgment that this claim related to a period, is that not correct?

Grant The findings did relate to a period, and if I can explain how that arose. The letter which you have seen of 2 February 2001 was the letter which caused the cessation of supply of paper. Discovery was given in the period prior to the start of the trial – I may have a month or two out – but through to something like March 02, and the information given in the judgment about misuse of information or the appropriation of that information by Paper Reclaim, dealt with a period in respect of which discovery had been given, and Aotearoa said we've seen all of the transactions, the sales which have made, during this period of time prior to the beginning of trial and that the customers, all of which we introduced except for this one or two, with the freight rates with one exception where the explanation is this and so on and the Judge held having heard the evidence of Mr Cash, and in fact it's quoted at the top of the page, oh no I don't think it's going to be elsewhere, but anyway there's a finding of fact that for that window during which discovery had been made Paper Reclaim had used that information. Now the Court of Appeal says well but the Judge didn't make any finding beyond that date in 2002. The reason was that there had been no discovery beyond that point to know what sales had been made and so forth, and we have no access to that information except by discovery. So that's

Blanchard J Well didn't you protest about that at the time?

Gault J Is this left for further hearing?

Grant Well at this point this is only the liability hearing. The quantum is yet

Elias CJ But this isn't about liability, this is about the basis of the cause of action and you're pleading – this is under 16 – you're pleading is that the fiduciary duties were owed in the implementation of the joint

undertaking, and so is this claim simply for sales between 2 February 2001 and the cancellation?

Grant Well it's beyond the cancellation and that later date.

Elias CJ Well why, if the duties are said to be in the implementation of the joint undertaking? There isn't a claim here for misuse of confidential information.

Gault CJ Mr Grant the Judge found there was misuse of confidential information but on the basis of such limited informations he had, there was to be further discovery and then he allowed the pleading to be amended to expressly claim breach of confidence that you referred to in your para.7.6, so is not the position then that there is a finding of breach of confidence which would normally carry with it an inquiry as to damages in respect of which there might need to be some further discovery?

Grant Yes Your Honour, the issue I have with this is that the claim for the misuse of the information arose right from the outset when when Aotearoa was excluded it was assumed that all the information was being used and then discovery was got for the following period of about nine months or a year. It was confirmed that it was and confirmed by the trial Judge but there's been nothing of detail beyond that particular date in 02 which may have been March 02. In once sense one can look at this as the interception of the venture by one party just taking the information, closing Aotearoa out, taking all its information and walking off with the venture, and there's a question of whether this amendment may allow a broader plan for recovery

Elias CJ Well what's before us on the appeal?

Grant What you have

Elias CJ But this hasn't been determined yet, is that what you're saying?

Grant Yes, it was a liability trial only with quantum to be held at a later date and what's happened here is that the liability has been appeal all the way up to the Supreme Court with the quantum being held back until this is all resolved as to what the extant claims are and so forth.

Gault J I can understand that in relation to the alleged breach of confidence that it's not determined; it's not appealable; it's subject to further consideration and perhaps an inquiry as to damages with further discovery, but then you're seeking a whole new point are you that quite apart from the obligation of confidence, there's a duty not to appropriate the business?

Grant Yes I would like to contend that Your Honour.

Gault J Well how can we deal with that on the basis of what's gone before?

Grant Well that is how the pleading is at present.

Gault J Well I can understand that but is this really something that has to be tried?

Grant I acknowledge that the pleading speaks of information which has been used in a particular period, and I obviously do that because that was what we had evidence on it to prove, but as it's become apparent over the course of time the whole venture effectively got highjacked.

Tipping J Is it a correct analysis that the trial Judge allowed you after the liability judgment to raise a separate cause of action for breach of confidence, potentially beyond the end of any contractual relationship, because frankly if that is the case that may entitle you to get out of the timeframe and out of the fact that the contract defines the damages, but if that's all you're saying then I don't see how you can add to the damages in equity, other than through a wholly different cause of action which apparently you've been allowed to raise, but is that being investigated on appeal, or is there no appeal against that, or

Elias CJ What statement of claim did you go to trial on?

Grant Well you just give me a moment because I think it was the fourth, but it was numbered the third. It's the third.

Gault J The fourth was introduced after trial wasn't it?

Grant Yes, no I'm sorry, it's the third.

Tipping J It's the third.

Elias CJ Well we've got a notice of application to file and serve but do we have the third amended statement of claim itself?

Tipping J No it's been skipped.

Grant Well what happened was that there was an application for leave to file it and it was next to the application, but by oversight it was never filed, and so one finds the application to file it . I understand that twelve is, yes that was the application of the pleading which went to trial is attached to it, ahead of draft third amended statement of claim.

Tipping J What page do we find that on?

Grant 119.

Tipping J And on 124 the duties were confined to those owing in the implementation of the joint undertaking, so they can't have survived

the joint undertaking, but you apparently are suggesting that those that you are now raising in the fourth amended statement of claim do survive the joint undertaking. Well that's pretty fragilely signalled, because the fourth also has this in the implementation of the of the joint undertaking, because I

Elias CJ The pleading is not really different, it's just that you've added a disgorgement of profits claim.

Tipping J How can you say you're pleading a fiduciary duty outside the scope of the joint undertaking, or arising after the joint undertaking is at an end, i.e, once the 12-month's notice has run its course? Because during that period surely you're protected by the damages ala-commission. If you want more if you've got to plead something that goes beyond the joint expiry, the joint undertaking.

Blanchard J I think that was what the Court of Appeal was essentially saying at paras.103 and 104 of their judgment.

Tipping J And unless you can get out of the joint undertaking, in other words a free-wheeling, if I can put it that way, cause of action that is not in any way limited to the joint undertaking and what you've lost under that, I don't see how in equity you can get more than at law, never mind whether there's got fiduciary duties all over the place, because the parties have in effect defined what the missing profits are for your client.

Grant Is Your Honour saying that if in contract there was held to be a reasonable period of notice of one month, that equity would never be able to go beyond the one month?

Blanchard J Yes.

Tipping J But you haven't in any way pleaded have you that in equity you're entitled to more notice than you are at law? These are what you might call a rather broad allegations of owing fiduciary duties and then there are rather more pointed allegations of breach, but they're all in the implementation of the joint undertaking. You're not saying that you're entitled to greater notice in equity, even if that were tenable proposition.

Grant Yet in your judgment of *Chirnside and Fay* you talk about giving notice and

Tipping J Well it's really just you're not alleging it, you're not saying but in equity they had a duty to give you a longer notice than they had at law.

Elias CJ Mr Grant, perhaps this is something that you can clear up over the evening adjournment, but the argument you seem to have been addressing to us seems wider than the pleadings, and what I'm

concerned about is that we're not entertaining an appeal on something that hasn't proceeded to trial, and it seems that because you seem to arguing that there is a misuse of confidential information. That isn't what seems to me to be pleaded and I'm not sure that the pleading effectively goes any further than the claim in contract for reasonable notice. That's the issue really.

Grant I'm sorry, I'm not sure when you're retiring

Elias CJ Well I'm proposing that we take the adjournment now unless there's anything you want to say to conclude?

Grant No, if I can come back to that.

Elias CJ Right, we'll take the evening adjournment.

4.21pm Court Adjourned

TUESDAY 6 MARCH 2007 - DAY 2

10.07AM

Elias CJ Thank you. Yes Mr Grant.

Grant Your Honour I thought it would be helpful to start today by just going back to look at the relationship between these parties for the purpose of seeing how it can be categorised. Briefly in volume 3, I just want to take you to one page.

Elias CJ What page?

Grant Page 571.

Elias CJ 5?

Grant 71.

Elias CJ Mine has four numbers.

Grant The bottom right.

Elias CJ Oh I see, yes I see, thank you.

Grant This was the first affidavit which Mr Cash swore and it was in support of the interim injunction and I just want to take you to the paragraphs

5.1 to 5.6 there where in 5.1 Aotearoa was the only company which had developed other markets for the sale of waste paper from New Zealand. It was able to pay significantly higher prices than NZ Forest Products at the time. Its ability to pay the prices was attributable to the negotiations which he had with the freight carriers and he got as much as 60% off the prevailing rates. That was a real advantage to Paper Reclaim. It enhanced the company's profitability. It was able to increase in size and profitability quite quickly and it has continued to grow to the point where it dominates the local market. Until a few weeks ago Aotearoa was solely responsible – this was written in March I think – for all of Paper Reclaim's exported products. The arrangement had been very beneficial as the company is now worth many millions of dollars. As a result of Aotearoa's dedication to the business relationship, Aotearoa is dependent upon the company's business. About 70% of the income is attributable to Paper Reclaim's business and Paper Reclaim is well aware of it. And over the course of the last 18 years or so Aotearoa has continually searched for new markets. In general, it's spent more than $100,000 a year on travel in its attempts to find new markets, and he refers to the markets which he's found in Bangladesh, Saudi Arabia, Vietnam and China which are productive markets and so forth. I'd next like to take you just to a document in volume 5 at page 1304

Elias CJ What does volume 5 look like?

Grant Sorry, it's that one. The backing is brown.

Elias CJ Oh that one, yes. Page?

Grant Page 1304.

Elias CJ Yes, thank you.

Grant This is a note of a meeting which was held between the executives from the to companies and it was to do with short paid commissions, i.e. where as you will see from the first sentence, 'an expansion on the original contract attached, and there was nothing attached to this document, in reference to short paid commissions, i.e. less than 10% of FOB return'. And the next sentence 'the discrepancy occurs when the return is not sufficient to cover the base price for the commodity etc', and having sufficient return to meet the full 10% of the FOB for commission'. And then the last paragraph I just take you to 'there is still in place as per our original agreement the right to supply for export paper at a marginal return or loss, on agreement by both parties on return and commission pertaining to that particular shipment. This would not be retrievable from future shipments'. Now I refer to this document to show the nature of this as a joint venture. It had the two components and I took you yesterday to a document which shows that so far as the 50/50 deals were concerned it was anticipated that there would be profits and possibly losses. It is one contract, not two, but

from the comments which some of Your Honours made yesterday, it sounded as though it might have been understood that there are almost two separate contracts, but it was one contract and so far as the 10% regime was concerned, as you will see here, the reality that the 10% wasn't being paid uniformly and here the parties were trying to make an arrangement for short payments. And I say this to show you the nature of this venture between the two businesses and that it wasn't a mere principal and agent. Agents don't take less than a commission, if they charge 10% they get 10% and if the deal doesn't work out well they still get their 10%, but here

Blanchard J Sometimes they don't if they want business to continue.

Grant Well Your Honour I'll take you to some evidence about this document which may respond in part to that observation.

Elias CJ Sorry, but what is the point you're asking us to take from this, that these parties were what blending their businesses?

Grant They were blending their businesses and working co-operatively together in these two strands of their businesses together for their mutual benefit. I have in mind the definition of a joint venture from UDC case where it was an association of persons for the purpose of a particular trading undertaking with a view to mutual profit with each participant usually contributing running property or skill.

Elias CJ But there were defined profits that they were taking from this under the contractual arrangements between them.

Grant There were defined profits but in the sense here you'd find that the profits would not uniformly be the 10% in that sense and similarly with the 50/50s if the transaction turned out badly then it might not be like that, but in that sense they would be defined. But the definition in the UDC case doesn't refer to defined costs and yesterday some of Your Honours observed that the term 'joint venture' is very vague and I'm not quite sure what Your Honours have in mind as a meaning of a joint venture, but when Justice Nicholson held that there was a joint venture and the Court of Appeal held that there was a joint venture, I have assumed that partly because the UDC definition was given to Justice Nicholson as one of the definitions of a joint venture, that that is an applicable definition for that term. But my reasons for referring you to this, and there's not much to go on this, is to show you the nature of their relationship, because if the Court is concerned with the substance of it and whether fiduciary duties arise from it, if it was to be categorised as a mere principal/agent relationship, indistinguishable from the conventional one, then that's one thing but if in fact it is a true venture where the parties are co-operating for their mutual profit and benefit in the ways I'm describing, then I submit that it's another. The next volume – I'm sorry to take you to these – there are two more volumes – volume 4.2 which is a transcript volume, to page 948, and

here is a question of Mr O'Rourke about the recovery of losses at the bottom of the page, line 36. Just staying with page 1076.1 for the moment, three paragraphs from the bottom 'Mr O'Rourke you see that there is a reference there to the recovery of losses being recovered from future excesses of the same type of waste paper. Is that what was agreed?' Answer: 'No I don't think anything was agreed. We found it difficult to get any final agreement. These notes just record Grant's thoughts – that's Grant Taylor – about the meeting where again attempting to get a resolve on certain situations'. And then the question 'the fact is that Aotearoa did assist you by securing sales of your product and in doing so did not make any profit or receive payment didn't it?' Answer: 'There are instances I think where Paul may have done shipments for no payment' and then if we go across to page 1051, the third line. 'Does it concern you that a simple commission agent with no expectation of future work was providing you services without any reward?' 'I think the way Paul always looked at it was how much he made at the end of the year. Paul was never one to narrow things down to whether he made a profit and loss on every shipment and quite often he was very happy to take losses for future business or gains he had previously made. Paul would quite often do business that way'. Now the sincerity of that answer was questioned further but you will see there, there is a concession by Mr O'Rourke that Aotearoa quite often made losses on shipments. And the next volume, the last of these I'm sorry is volume 4.3, which is the transcript volume, and I take you to page 1176 and this is the examination of Mr Bland

Blanchard J Sorry what was the page number again?

Grant 1176 Your Honour.

Tipping J It's Mr Taylor

Grant Mr O'Rourke, this is line 14. Mr O'Rourke said this in his evidence. 'I would ask if you agree with what he said. It's from page 277. Paul was never one to narrow things down to whether he made a profit or loss on every shipment and quite often he was quite happy to take losses for future business or gains he had previously made. Is that your opinion too? 'Yes, it is. There were situations which were recognised as early as our original contract, and that's going back before 1984/85 that stated without reference to it that we should try to maintain a minimum of $5 a tonne but it could be negotiated. We were aware of these situations that could develop but we would try and resolve them as quickly as we could and push forward to the next sale and hope that it was going to be a profitable one. As Paul has said, it isn't always easy to order the material, gain an order for material at a price that is in complete harmony with the market. By the time we receive the order the market could have moved, but we had made the commitment at that particular time. There was some intricacies in our agreement that said that we must be aware if there was going to be a limited return, as try

and maintain this $5, that we should talk about it but it could happen from time to time that that was the case'. So there you have the other co-owner of Paper Reclaim confirm that there were losses which were made on some of these shipments.

Gault J When he talks about intricacies in our agreement I thought he was maintaining there was no agreement.

Grant Your Honour that's correct. Both of them maintained that there was no agreement except for individual transactions as and when they arose.

Gault J Thank you.

Grant With that background from the evidence I would like briefly to take you to Justice Nicholson's judgment in volume 1.1, at page 167. In para.5 on page 167 Justice Nicholson summarises the arrangement pleaded at line 4 by which they would modify the way they conducted their respective businesses and work together in a co-operative strategy which would have the following components: Aotearoa would cease to bale waste paper; it would cease to buy waste paper and export on its own behalf except in respect of a handful of customers; it would have the exclusive responsibility for arranging the export

Tipping J Is this a finding or just a narration of what the cause of action was?

Grant This is his narration of it at this point Your Honour. I'm going to take you from the narration through to the findings.

Blanchard J Well what he's been narrating is the pleading.

Grant Yes, well I thought I would take you just briefly because His Honour Justice Gault yesterday commented late in the day about there being exclusive responsibility and I just wondered whether some of these details might have got a little lost in some of the other material that you have seen, but I'm happy to take you beyond this.

Elias CJ Well I must say that I'm finding the detail is sort of getting in the way of my understanding of the points that you're making here Mr Grant. What's the finding that you want to take us to?

Grant Para.68. There are five or six paragraphs I'm going to take you to but para.68 first. 'Looking at the commercial realities I accept Mr Cash's evidence that Aotearoa wouldn't have given up the collecting of baling of waste paper and put all its waste paper eggs in the export basked if it hadn't got the benefit of a contract which obliged Paper Reclaim to make all export of its paper through Aotearoa.' Then at para.164 which is on page 206 'clearly Aotearoa and Paper Reclaim each intended to retain and exercise autonomous business management and control and to contribute to the venture only to the extent of performing their contractual obligations relating to waste paper.

Tipping J It's not a very helpful sentence from your point of view Mr Grant.

Blanchard J No.

Grant Well if I can just carry on if I may Sir. 'There was no agreement for the sharing of the combined profit of the venture, or for the sharing of overall loss. This was restricted to transaction loss. There was no intention or agreement that either would be responsible for the acts of the other and apart from the contractual limitation on what each would do with waste paper; there was no restriction upon the range of business that the other could carry on. In the circumstances I consider the relationship between them as one of joint venture only and not of partnership or principal and agent'.

Blanchard J That sentence seemed somewhat disconnected with what comes before it.

Grant Well, this is his finding that the relationship is not that of principal and agent.

Tipping J Well with great respect if that's all there is the reason is just non-existent. There's a biting of trawl everywhere but I mean that doesn't take us anywhere.

Gault J His reference to the joint venture there in the light of what's gone before can mean nothing more than a contractual relationship.

Blanchard J It's a typical example of loose years of language, applying a label, where applying the label merely creates mystification. This is just a straight contractual arrangement.

Tipping J And the first sentence in 164 says exactly that.

Grant Well Your Honour if I may I have only a few of these paragraphs I wish to take you to. The next one is the following paragraph, 165. 'The relationship between joint ventures is not necessarily fiduciary. Whether or not it is depends on the form which the particular joint venture takes and upon the content of the obligations which the parties have undertaken, relying on the *UDC* case and *Arklow*' and then down the page, para.168, 'in deciding whether there is a fiduciary duty in a joint venture, the appropriate test is that of mutual trust, confidence and loyalty. Taken from the *UDC* case and *Arabco*'. And at para.169 'the nature, terms and object of the exclusive export contract required that Aotearoa and Paper Reclaim act with mutual trust, confidence and loyalty in the performance of that contract and the joint venture relationship that it created. It was implicit that each would act with reasonableness and good faith to the other. I consider and find that such mutual obligations existed not only as fiduciary duties in equity, but also as an implied term of the contract'. And then finally just over

the page, para.172, about four lines from the bottom you will see a sentence beginning 'I prefer the evidence of Mr Cash to that of Mr Bland and find that before February 2001, Paper Reclaim received commercial information of a confidential nature from Aotearoa in circumstances importing an obligation of confidence, about markets, customers, transportation costs, transportation routes and other information relating to Aotearoa's role in the joint activities and has used that information in breach of a continuing duty not to do so as alleged in paras.10(c) of 18 of the amended statement of claim'. And those are the paragraphs I wish to take you to.

Tipping J Mr Grant, the paragraphs leading up to this I found quite curious. 155 and 156 records counsel's submissions in relation to a claim for breach of confidence, and it was all to do with confidential information, and then suddenly from no-where leapt a statement that the Courts had not defined a relationship of joint venture. Where does all this fit together? The Judge is discussing breach of confidence and misuse of confidential information and he goes without anything to joint ventures. I find it very hard to follow this part of the judgment. I mean you can pick out disjointed paragraphs which may be helpful to you one of them, the other of them is distinctly unhelpful, but the whole structure of this I find very curious and was the argument for fiduciary duties based essentially on misuse of confidential information, because if it wasn't I can't see how it applies to effect the position in contract that the parties have.

Grant In essence yes, yes, it relates to the information, which the Judge recited at

Tipping J But your pleading doesn't allow that. We've got nothing in the pleading which allows a claim for misuse of confidential information outside the terms of the contractual arrangement. This is where we were at last night, just before we broke, and I am wholly mystified at the moment as to what this fiduciary aspect is said to add in your client's favour to their contractual rights.

Gault J Well is there some hint of this in the finding in 172 that Paper Reclaim misused some confidential information in the joint venture with Carter Holt which was during the subsistence of the contractual relationship that of course the Carter Holt matter is not before this Court?

Grant Your Honour I am grateful for that observation because I hadn't gone on to the next sentence which is what Justice Gault has referred to but the Judge refers to para.10(c) of 18 of the third amended statement of claim there which is the first cause of action and the breach of fiduciary cause of action.

Blanchard J Well 10(c) is about contract isn't it?

Grant Yes.

Blanchard J And we looked at the other one last night?

Grant Yes, Your Honour I propose to come to that topic that you questioned me on which I propose to turn to next if I may, and that is your judgment in *Chirnside*.

Tipping J Mine?

Grant Ah well both

Tipping J Both of our judgment?

Grant Yes both of your judgment.

Blanchard J Which Justice Gault effectively concurred in.

Grant Well.

Gault J Yes.

Tipping J Don't let's go there. What part of this judgment is it that you're wanting to rely on?

Grant This is just dealing now with fiduciary duties because your judgment has been very helpful in elucidating in a way our law has lacked for a long time the kind of detail which you have given, and the Chief Justice in para.1 has said that she agrees with the other members of the Court except that the reasons differ slightly 'that joint ventures owe each other fiduciary duties of loyalty and that the appropriate remedy for breach of duty is disgorgement of profit through an account'. Now it is apparent from the questions and comments made yesterday that the term 'joint venture' where it appears in this and probably these judgments, may not be as clearly understood as some people understand.

Elias CJ Well I'm certainly, repent me of that one, but there's more later on about how ambiguous the term is.

Tipping J But what profits are you asking to be disgorged here?

Grant Well if I may come to that in a moment. First of all I'll just refer to joint ventures owing fiduciary duties to each other, so that where you have a finding of a joint venture, then as one might simplistically look at this, and I understand from Her Honour that it may not be correct to say that it can be taken so straightforwardly.

Elias CJ Well it depends on what you mean by joint venture.

Grant Well that's obvious to me now as the results particularly of yesterday, but can I just then go to Justices Tipping and Blanchard's judgment, para.80,

Elias CJ Look, in fact if you look at my para.14 I indicate what's meant by that. And the question here is if one were adopting that terminology is were these in fact separate business operating at arm's length profits taken separately and directly, instead of by the venture itself, and on that approach this isn't a joint venture within that sense. That's the argument.

Grant Can I then, I understand that, because that sentence in para.14 of your judgment is nice and clear where parties joined together with a view to sharing the profit gain. Their relationship is inherently fiduciary within the scope of the venture while it continues and here you have the venture, now the paragraph I gave you earlier from the judgment which Justice Tipping thought might not be so helpful to me, referred to these companies having their own separate components of their businesses. Many joint ventures are like that. Company A joins with company B; that they will embark upon a venture and proceed. They keep their own businesses but for the venture their two businesses co-operate in part to run that particular venture. And here you have Paper Reclaim with its business on the one hand, Aotearoa on the other, agreeing that they will as part of their business operations form this particular venture for the exporting of paper and the supply of paper, and for sharing

Tipping J Sorry Mr Grant, but really the Judge has found that the parties intended their relationship to be governed by their contractual obligations only. To the extent that this judgment relates to the now more sophisticated and detailed approach which *Chirnside* evinces, the Judge has found precisely the sort of arrangement that the Chief Justice was referring to just a moment ago. I mean I don't understand how you can extricate yourself from that finding. I mean there are all sorts of diverse findings through this judgment but the material one for present purposes I would have thought was that one. It leaps off the page. Only to the extent of performing no contractual obligations relating to waste paper.

Grant Your Honour's referring to para.164 I assume?

Tipping J I am indeed. I may be being unfair and if that's so please assist me, but it just seems to me to be a rather stark finding that the parties were in a contractual relationship only. Well that's the effect of it to my mind.

Grant If I may say with respect the Judge nowhere says that this relationship is bound by contract and equity could never intervene, or did not intervene, I'm sorry, equity had no possibility of intervening in the relationship.

Tipping J They were to contribute to the venture only to the extent they were contractually bound. I mean then there's loose concept of joint ventures and fiduciary obligations deriving from them but that is fairly firm finding isn't it, but it's contract here, not equity?

Grant Yes because a contract which equity has an involvement in. Maybe I misunderstand the judgment if I just take the first sentence of para.14

Elias CJ Oh don't, move on to the majority reasons if you must.

Gault J Mr Grant I'm sorry that I don't see where this is going. That's what's troubling me. I wonder if I could just interrupt you for a moment. There seem to be two allegations here rather mixed. One is that there are fiduciary obligations of loyalty and good faith during the course of this relationship, whatever you call it, and insofar as there might be any equitable obligations there, they end when the relationship ends and the remedy can be no different from the loss of profit in the sense of loss of commission that you claim in any event. Then there is the separate allegation of misuse of information - confidential information - which may be a separate fiduciary obligation and can in certain circumstances continue beyond the expiry of the relationship. Now the finding of the Judge was of misuse during the relationship in connection with the Carter Holt thing, but it seems to me that it's at least arguable that your pleadings also allege a continuing use of that information in paras.18 and 19 of your third amended statement of claim that we were looking at, in the sense that you say the information was received during the implementation of the contract, but is continuing to use to its commercial benefit would seem to relate to a period after the relationship ended. In relation to that there could be conceivably a claim dependent on as yet undisclosed material by way of discovery, which is something we can't deal with. That would have to go back, and you've been allowed it seems to amend your pleading subsequent to trial to include a claim to a loss of profit. That would be an account of profit should I say as a result of this misuse of information. But that is not before us. It can't be because we don't have the discovery yet. So it seems to me all this is going nowhere so far as its loyalty in breach that's ended and will be taken care of in the claim that you have for commissions. In relation to the confidential information it is undeterminable at this point, so I'm lost, I don't know where we're going.

Grant Well Your Honour, firstly in your helpful analysis of where the fiduciary duties would come into the contract in the two-fold analyses of the loyalty and in the position of the duty of confidentiality, the judgment of Lord Woolf and the Attorney-General Blake, is confirmation of that and that's a statement on which rely. So far as where it goes I'm just about to turn to that now, it goes here that there was a claim for a breach of fiduciary duties and for damages and the High Court said that there were fiduciary obligations, the Court of Appeal said no and we're saying that finding should be restored. Now

you were not able to determine what damages might flow from the breach of the fiduciary duties, what is in my submission important only is to know that there is potentially a difference between the award which might be made for a breach of fiduciary duties and an award which is made for breach of contract, because the Court of Appeal gave two reasons for saying that this was not a case where there should be fiduciary obligations. The second one was that there was no difference in the, if you like, the monetary outcome and therefore

Gault J As I understand it that is a point that I'm unable to see as different in that be it the profit that would have been made as a result

Grant Your Honour can I answer that now

Gault J Of breach of the duties of loyalty and other fiduciary duties if they exist would have been the profit gained by not paying the commissions to your client. What other profit could have been made from that breach of loyalty than the profit of retaining commissions it should have paid.

Grant Well there are some slightly more complicated elements in that; one which is whether they got a soft price or a right price to know whether the 10% was proper calculated; whether they

Blanchard J Well that's just a matter of accounting isn't it?

Grant Well that's an element which comes into that equation.

Blanchard J I mean it would come in on a contractual accounting.

Grant Yes Your Honour that would presumably come in on a contractual basis to, but there is now, the amended pleading has a claim for exemplary damages in equity which has been allowed, and the Court of Appeal, and that's on page 139 of volume 1.1.

Tipping J So you need this finding of breach of fiduciary duty as a peg to hang your claim for exemplary damages on do you?

Grant I do, yes.

Elias CJ What is the breach fiduciary duty that we're arguing about here? This is really I think what Justice Gault was putting to you. Is it the misuse of confidential information or is it something else and if so what?

Grant No it's the wrongful utilisation by Paper Reclaim of the information which is set out in the judgment.

Elias CJ So it's the misuse of confidential information which you haven't gone to trial on yet?

Grant Well as I said yesterday, at the trial which began in 02 that had been discovery of several months worth of sales and the Judge held in relation to those sales that they had been got by the use of the confidential information, and certainly in relation to that there are findings of that information being misused in relation to all of those sales.

Blanchard J Is that Carter Holt?

Grant No, no Your Honour, I can't remember how many but there were a large number of sales of paper which had been made between 2 February 2001 and I think it was January 2002 and Mr Cash gave evidence, having seen all of those sales, that the buyers had been introduced by him; the freight rates which could be seen from the documentation were his freight rates, and so forth and the Judge upheld that evidence.

Elias CJ Where's the Judge's finding on that? Is that the one that we just looked at, at the end of

Grant Yes it's para.172. 'In his evidence, Mr Bland claimed that the information about the people to whom Paper Reclaim made export sales after 2 February 2001 came from a directory

Elias CJ No, it's the finding at the end isn't it? It's the one we've just looked at.

Grant Yes well that is referring

Elias CJ Misused some of the confidential information.

Grant That is referring to the sales between 2 February 01 and when discovery ceased before the trial.

Elias CJ I see.

Blanchard J Where's his finding that the information is confidential?

Elias CJ It is 172 is it?

Blanchard J Well no, he refers to commercial information of a confidential nature but where's his finding about why the information is confidential?

Grant Can I ask my junior to look for that rather than

Gault J It must be in 172.

Elias CJ Yes I think so.

Blanchard J But he doesn't explain why it's confidential.

Tipping J I think the misuse finding seems to be confined to the Carter Holt affair.

Elias CJ No, no.

Tipping J He seems there to simply assume that the information is confidential. He's clearly making a finding preferring the evidence of Mr Cash to that of Mr Bland that Paper Reclaim has received commercial information from Aotearoa, but he doesn't actually say why the circumstances imported an obligation of confidence.

Grant Well at para.18 of the costs judgment, which is at para.231 he summarises his judgment as you'll see.

Gault J I'm sorry, which page?

Grant Page 231, para.18.

Blanchard J Yes, but there he's plugging it into the contractual obligation of confidentiality.

Elias CJ Well the third cause of action is the fiduciary duty.

Blanchard J Is it?

Tipping J Yes.

Blanchard J Oh, alright, you're right. But he never at any stage explains why it is confidential.

Grant Your Honour there was a lot of evidence as you would imagine over three weeks of the significance of information about shipping rates and so forth and I have a quote which I would like to give you shortly where Mr O'Rourke effectively concedes the sensitivity of it all, where he says in relation to information it's in, I prepared some draft responses to my friend's submissions because he dealt with quite a number of newish topics and I've put some notes in there, including an extract from the evidence of

Tipping J Is part of the problem Mr Grant that this claim for breach of misuse of confidential information hasn't been, if you like, separated out discreetly from the claim for the 12-months, 8 years, 1 month, whatever it is, failure to give notice. It can't affect the quantum there can it? It is simply that in addition you say you have a cause of action for misuse of confidential information. Is this why this has all got so difficult and convoluted because no one has actually carefully severed out the equitable claim and closely delineated what it relates to? It's just beginning to emerge for me what you're trying, or your client is trying to achieve here, i.e., completely on top of the 12-month, 8 years,

1 month damages, you want some more because there was misuse of confidential information. Is that a fair potted version?

Grant Well Your Honour this pleading grew

Tipping J No, never mind the wretched pleadings, is that a fair assessment of what your client is about?

Grant Well I'm not sure what it is Your Honour, but not sure that it's seeking double recovery. If Your Honour's talking of double recovery

Tipping J Well I'm not, I'm thinking for once there might be a glimmer of something in your favour, because so far I've been mystified as to where this equitable thing fits in, but you say that quite apart from the contractual damages which you're entitled to on the 12-month basis as it stands at the moment, you are entitled to something more for breach of the equitable duty of confidence.

Grant Yes for the misuse of the information which has been appropriate.

Blanchard J But for the misuse of the information after contract came to an end.

Tipping J It must be that.

Grant Well after the 2 February Your Honour 2001.

Blanchard J I don't see how you can claim it for the period of notice.

Tipping J The two must run together surely during the period of notice. The only advantage to you client is to in effect extend, using that word loosely, the period of notice by changing the cause of action to one in equity for continuing misuse of confidential information. I think that's what it has to be.

Grant Well Your Honour yes, but if I take it in two stages so as to answer Justice Blanchard. If 2 February 01 is the letter and the cessation of supply, from there if Your Honours were to give whatever period of notice ends up as being the period of notice, there is an overlap with the misuse of information and sales made from it and the Court has made a finding in respect to about nine months of that period, or something like that. Justice Tipping is quite correct, that if there is confidential information it doesn't lose its confidential status unless it goes into the public arena or whatever, and if it continues to be used after the end date of a notice, then there would be a claim for that wrongful use of the confidential information beyond that date.

Tipping J But how can there be during the period of notice a duality both for missing commissions and loss deriving from misuse of confidential information?

Grant Well Your Honour I think that that's hard except to the extent that there is the claim for exemplary damages during that period.

Blanchard J Well that is drawing a hugely long bow to say you get exemplary damages in relation to that period.

Grant Well that's obvious a question for the quantum trial as to whether

Blanchard J Well I wouldn't want to encourage you, put it that way.

Tipping J That's close to being, well perhaps I won't say that.

Elias CJ Well the pleadings frankly are most unsatisfactory. There's no time indication in them and we are talking about different periods.

Grant Yes well that's a matter of such regret because this case was given a priority fixture and

Elias CJ Well what judgment do you say you got on this third cause of action?

Grant I say I got a judgment for the damages which flow from the sales which were the subject of evidence of which Mr Cash and Mr Bland gave evidence where there is the finding here that the sales were affected with the information.

Elias CJ In what period were they concluded.

Grant Your Honour, my friend may be able to do that, but it's

Blanchard J It's prior to the expiry of any period of notice.

Grant Any 12-month period of notice.

Blanchard J Yes.

Grant If my friend succeeded in getting a month then

Blanchard J Well I don't think you friend has a great expectation of that.

Grant Yes, I think

Blanchard J Let's assume it's 12 months

Grant I think it's within the 12-month period because it was 01

Blanchard J Well you can't get more than the claim for commission less any saving and expenses.

Grant Well let me then

Gault J Not theoretically you couldn't. It's a pretty long shot but if you could get an order for an account of profits and you could show that they could not have made such profits as they made but for using the particular information, you might get an account of that. You can't have that and damages.

Grant Well Your Honour that's why the pleading was amended after the trial, because it was my understanding and certainly my understanding from

the *Chirnside* judgment was that where you have the equitable claim, then you're not looking at the contractual damages, but you're looking at equitable compensation and that's for the Court to decide whether – I'm sorry Your Honour?

Gault J Well you'll consume far more than you could conceivably recover by pursuing this in my view.

Grant Yes well if I say with my understanding of the *Chirnside* judgment, that it's focused at the equitable claim has, it equitable reasons, focus it on the compensation and Your Honours are very familiar with what you wrote there and it's not looking at the losses of A, but the gains of B. Now the quantum trial is yet to be held, so that it may be that a Judge hearing a claim

Blanchard J But you'd have to show that they gained more than they would have gained if they had adhered to the contract. In other words you'd have to say wow, during the 12-months they did a much better job than we would have done, using the same information.

Grant Well not necessarily. I mean it's strictly they gained if you like the 90% less the costs, but a Court may say well we don't think

Blanchard J Well they would have got that. If the period of notice had been given and Aotearoa went out and loyally performed its duty as agent during the 12-months, using that information.

Grant But as I understand it the Court has a discretion on this. The Court is not bound to say the quantum for all these claims must be confined to the 10% and that if it thought here that Paper Reclaim's conduct was very poor, that it could say well we think that some of the profits should come back; some of your profits, not just

Tipping J It's not penal.

Grant Well it's clear that there are aspects of

Blanchard J You don't take away from people what they would have got anyway and you have deposited a scenario comparing what would have happened if the contract had been properly performed by both sides, as against what has actually happened. I just don't see that this is taking you anywhere.

Elias CJ As indeed the Court of Appeal said.

Grant Yes, but if I may say with respect that exchanges here are of greater insight than

Elias CJ No, I feel in the dark.

Blanchard J You're finally getting the message.

Tipping J I suspect Mr Grant that all your client can hope for is something more beyond the period of notice, beyond what the contract would have provided. I understand my brother Gault's point, but in reality, and I think he accepts it's a very long shot, it's theoretical rather than real; all you can hope for in equity is topping up if you like beyond the 12-months.

Elias CJ But that's not what you pleaded the third cause of action which I think is something I drew your attention to yesterday, because it's in the implementation of the joint undertaking that you've pleaded.

Grant Yes but

Elias CJ Sorry

Gault J And that relates to the receipt of the information but he then goes on in the next paragraph and alleges continuum misuse.

Elias CJ Well is it continuum, or continuing to misuse, yes.

Gault J Yes.

Grant Well I contend that where there is a claim for. Oh, go back. Justice Blanchard's observations may see after a further review of this litigation that it may not be worthwhile to pursue that but that's something to be discussed

Blanchard J But my observations were only related to the 12-months, not to the possibility of a claim after the contract has come to an end when you're saying effectively give us back our information and account to us for using it, after the contract has come to an end when you didn't have any right to use it.

Grant Yes.

Blanchard J That's the argument. I'm not saying it will necessarily succeed, I'm just trying to articulate it.

Tipping J It's not misuse while the contract's on foot, actually or notionally.

Grant Yes and if it continues beyond that date of discovery then

Tipping J Then is becomes misuse.

Grant So that's where the claim continues as it does also with the amended pleading with the claim for exemplary damages which the Court of Appeal expressly left open. Your Honours may recall it in the Court of Appeal. It was held there's no right to exemplary damages in the

contract but the topic was in this particular pleading for this statement of claim was left open with the Court of Appeal saying they expressly didn't make any ruling on it. That's para.184 of the Court of Appeal's judgment. 'We also leave for another day whether exemplary damages can be claimed for breach of fiduciary duty. We found that Paper Reclaim didn't owe fiduciary duties and so forth.

Gault J Mr Grant, unless you're able to persuade us that the Court of Appeal was wrong in what it did in relation to costs, would you accept that exemplary damages are really not a possibility?

Grant No Your Honour I wouldn't accept that because it might depend on why you didn't uphold the costs award.

Gault J Well basically the Court of Appeal said this is not so outrageous and contumelious as the Judge saw it and therefore we think it was not an appropriate case for indemnity costs. Now if it's not that bad, are you likely to get exemplary damages?

Grant With respect, that's not as I understand the Court of Appeal's reasoning. The Court of Appeal's reasoning was how could he have been so satisfied that there was untruthful evidence given.

Gault J I didn't think it was narrow as that myself. Well we are yet to hear you on that.

Grant Yes, I will take Your Honours to that, but the Court wasn't satisfied that Justice Nicholson could have been so accurate in his assessment, so the answer is Your Honour I don't accept that a claim for exemplary damages is doomed to complete failure, that a Court seeing these facts may consider that it is an appropriate case for exemplary damages, whatever that may be.

Blanchard J You'd have to show that they knew the information was confidential and yet went on and deliberately used it. Now that might be quite difficult in a situation where you don't have a written contract.

Grant Your Honour yes, but that's an evidential matter.

Blanchard J Well I'm just flagging the difficulty for you, and you'd also have to recognise that in this country traditionally exemplary damages have been a fairly limited amount. Do you also have a claim for ordinary equitable damages for the misuse of the confidential information after the end of the contract?

Grant I'll just go there.

Tipping J 161.

Elias CJ 161. Is that the new cause of action.

Tipping J The new cause of action, the plea, under the fiduciary cause of action. No it's only from account.

Blanchard J Oh well you could claim in account.

Elias CJ But the misuse of confidential information is also pleaded in 10(c), and in fact the Judge refers that to 10 (c), in the finding you're relying on. It's also pleaded as breach of contract, so you're almost indicating that they're co-extensive which again makes the idea of exemplary damages a bit of a strain doesn't it?

Grant Well Your Honour it may make it a strain but my client I submit ought not to be deprived of the right to go to the Court to make that claim if it's available in law.

Gault J It raises an interesting question doesn't it, exemplary damages are parasitic on compensatory damages and you've now seemingly dropped your claim to compensatory damages and elected an account of the profits.

Elias CJ You couldn't have both. I suppose that it's conceivable that the pleadings will be further amended.

Blanchard J Yes.

Grant In the light of these exchanges it's very likely Your Honour.

Elias CJ But this has been useful because at least we have clarified what I did not appreciate

Grant I understand

Elias CJ That there is a claim for misuse of confidential information irrespective of the period of notice.

Tipping J And practically, practically only sounding beyond the period of notice. I think we've established that, such to exemplary damages. You haven't conceded

Elias CJ But you haven't conceded it but you've the heard that

Grant I understand the difficulties I would face.

Tipping J Well it's impossible.

Elias CJ And that point is one that we would be entitled to make in the judgment.

Grant To make some observations on that?

Elias CJ Yes.

Blanchard J Well no doubt

Elias CJ We have to clarify what it is that the Court below has to deal with.

Grant I think that would be helpful in the light of the way the case has unravelled.

Tipping J And although it may be very fragile thought, once we've done that it's maybe possible for the parties to come to terms on this outstanding issue.

Grant Your Honour if I may.

Blanchard J Well they're very foolish if they don't.

Elias CJ Alright, well have we exhausted this second argument, second appeal?

Grant Not quite Your Honour, but we're largely through it I think. I'd like to go to, there's one more page of my submissions, so I can go back now to page 18 of my submissions at para.7.10, and in this paragraph I recite the two reasons which the Court of Appeal gave for saying that the fiduciary duty, the Court's finding about the existence of the fiduciary obligation, should be reversed. Firstly at para.7.10 'The Judge should not have held there was a fiduciary duty because "it was open to the parties to include in their contract whatever terms they thought necessary to protect their respective positions and there was accordingly no need for equitable intervention in this standard commercial contract".

Tipping J I don't think the Court of Appeal had a perception that the fiduciary duty was actually confined to misuse of confidential information. I don't read their judgment in that sense at all.

Elias CJ And it does occur to me that I wonder really, and this is something that we'll hear Mr Judd on, whether therefore the Court of Appeal has dealt with an aspect which was appealed.

Grant I'm sorry.

Elias CJ Well whether there was misuse of confidential information beyond the period of notice is a matter that is quite slightly dealt with in the judgment of the High Court and I would have thought might have been challenged on appeal.

Grant Your Honour my friend will obviously answer your questions on that. So the first part there I have dealt with. The second one given by the Court was to describe the contract between Aotearoa and Paper

Reclaim as a standard commercial contract is, and I've said with respect, surprising. It was an oral contract entered into by three people who had no legal training or legal skills without the assistance of lawyers at a time when they are in their mid-thirties. The Court of Appeal relied in support of its proposition on the well-known *Hospital Products* case and that case involved substantial corporations and the use of a standard form of distribution agreement which had been prepared for the manufacturer, and I submit that that's not a good distinguishing factor to avoid the High Court's decision. Now I think I'm going too quickly here. 7.11 was the paragraph that deals with no need for equitable intervention and that's the one we've dealt with in detail, and 7.10 was the first reason given and the first one therefore is a contract – it was a standard commercial contract. Well this case has now reached the highest Court in the land as an oral contract that might signify itself that it scarcely be described as a standard commercial contract.

Tipping J I think you're just beating an unnecessary drum here Mr Grant. It's quite clear the Court of Appeal were not engaged and I have gravest of sympathy for the them, because I've only become engaged quite recently in what this is really all about.

Blanchard J To what extent did the judgment below ever get to grips with the notion that there is an ongoing breach of confidentiality, ongoing beyond the end of the contract? I mean was it ever put to the High Court on that basis and that's my first question, and my question is what were the circumstances in which the latest amendment in the statement of claim came to be made? Is that really related just to the damages trial?

Grant Yes, the first question was how was it put. I can't

Elias CJ But because your pleadings are not particularised, we don't even know whether the evidence was only directed at misuse of information within the period of notice.

Grant Your Honour during the morning break I'll try and find it and I'm pretty confident that they will be in here and I can point you to the evidence elsewhere anywhere dealing with the precise period of which discovery was made of the transactions after 2 February so that you'll know the dates, and I think I saw it last night. It was I think a date in January 02.

Blanchard J But was it ever put to the High Court Judge that this was a claim for misuse of confidential information after the contract came to an end?

Grant Well there were very extensive written submissions in this case and I would have to refer back to that, but this was all about the misuse after the event, with Mr Bland saying this was not confidential. The information could have been got by us from this directory or that. Mr

Cash saying no, I've been through it all, the customers were all my customers with this one exception and so forth and the Judge made a ruling. It was all to do with post-2 February 01 facts.

Tipping J Well it's not 2 February 01, it's 2 February 02. That's when the 12-months expire.

Blanchard J The Judge's finding of course is related to before February 2001.

Grant Well I haven't given you detail of the hasty way in which this case was put together despite the years that it's taken to get here, but it was given a priority fixture and there's a huge amount of discovery and things unravelled very quickly in the period prior to the trial and that's reflected in effect in the decision. Your Honour I will give you those dates when I can extract them from here but those are my submissions on this appeal. Unless you wish to hear anything further from me?

Elias CJ No, thank you Mr Grant. Mr Judd.

Judd Yes may it please Your Honours may I just first correct a factual matter. My learned friend referred the Court to some evidence at volume 4.3, page 1176 and Justice Gault remarked on the fact that Mr Taylor, who I think was being cross-examined, was referring to an agreement, but my learned friend didn't take Your Honours to line 34 where

Elias CJ I'm sorry, I've only just found the volume.

Blanchard J Oh that's the fact that it was the 1982 agreement?

Judd Yes.

Blanchard J Yes, I had noted that.

Judd And it may help if I just tell Your Honours that the 1982 agreement is dealt with at para.21 of Justice Nicholson's judgment and it was an agreement between Paper Reclaim and Mr Cash personally, and so that's what the reference was, and part of our argument was that when that other document that my learned friend referred you to, document B, referred to the attached agreement that it had to be that 1982 agreement being the only agreement of an agency nature ever made between the parties. Now the second point that I want to refer to is this issue of the nature of the claim being made by Aotearoa in the third cause of action, and the first thing I need to do is to correct my learned friend in relation to the status of the amendment to the statement of claim which was made post the liability judgment. Now that judgment of Justice Nicholson allowing the amendment to the statement of claim, was dated the 3 September 2004 and it is referred to in judgment H of the Court of Appeal, before we get to the reasons, and the Court of Appeal the appeal against the High Court decision dated 3 September

2004 is allowed. Now in allowing the appeal against that judgment amending the statement of claim the Court of Appeal dealt explicitly with the exemplary damages aspect of it. It didn't deal explicitly with the part of the amendment which was to the third cause of action to change the cause of action in relation to the fiduciary duty claim, but for the obvious reason why the Court of Appeal didn't deal with that is because it had found that on the substantive judgment that the third cause of action could not be sustained. So the relevant pleading

Elias CJ Sorry, which judgment are you referring to?

Judd I'll take Your Honours to Justice Nicholson's judgment

Elias CJ No, no, the Court of Appeal judgment.

Judd The Court of Appeal judgment, the second page of the judgment where they've set out in A

Blanchard J Have you got a paragraph number?

Judd No this is in the judgment

McGrath J The commencement is it?

Elias CJ Oh yes, I see.

Judd In the judgment of the Court, A to H and you'll see H, the appeal against the High Court decision is allowed.

Tipping J So that means that statement of claim was gone for whatever reason it's gone?

Judd Exactly.

Tipping J For whatever reason it's gone.

Judd It's gone, and of course there was no application for leave to appeal to this Court.

Elias CJ So you're going to take us to the High Court decision dated 3 September, is that the one?

Judd Yes I'll do that. That's at volume 1.1, tab 20, and you'll see that's the High Court judgment of the 3 September 2004 in respect of which the appeal was allowed, and the first request of amendment is described in para.4 of that judgment.

Tipping J Does this matter now that it's gone?

Judd No, well it doesn't matter, but the Chief Justice asked.

Elias CJ Yes, I'm interested I'm afraid in what has been cleared away.

Tipping J I'm sorry, I'm sorry.

Judd So we don't need to worry about the exemplary damages aspect, but if you go to page 5 of the judgment His Honour gets on to the third amended statement of claim and he sets out what the claim for relief is in the existing third amended statement of claim and of course that was for damages for breach of fiduciary duty, and then in para.8 His Honour sets out the amendment which was requested and it was to substitute the claim for damages by a claim for equitable damages or an account of profits and then exemplary damages. So that's the amendment which was allowed and our appeal against the Judge in allowing that amendment was allowed.

Blanchard J Sorry, where do I find that Mr Judd?

Judd You find it in the second page of the Court of Appeal's decision.

Blanchard J That's the main decision?

Judd The main decision.

Blanchard J What paragraph?

Judd It is in the judgment of the Court at the beginning.

Elias CJ Well where are the reasons for this judgment?

Judd The Court of Appeal gave extensive reasons for finding that exemplary damages were not available in contract.

Blanchard J Which volume is it?

Judd Oh, the Court of Appeal's judgment Your Honour.

Webb 1.2.

Blanchard J Thank you.

Judd Volume 1.2, page 273.

Elias CJ Is there are any identifications in this judgment of the causes of action, which have failed or been finally disposed of?

Judd Well yes, in the earlier part of the summary of the judgment you will see in D 'the findings in favour of the respondent on the third and seventh causes of action are set aside. On those two causes of action, judgment is entered for the appellant'. And E relates the fifth cause of

action, so the Court of Appeal has clearly identified what it's been doing and the only thing it hasn't done is in the body of the judgment given any specific attention to that aspect of Justice Nicholson's judgment of the 3 September which amended the statement of claim, or gave leave for the statement of claim to be amended in relation to the third cause of action in relation to the fiduciary claim.

Elias CJ Because that's gone, so the issue for us is simply whether they were right to allow the appeal in relation to the third cause of action and there's the overlap issue which has been perhaps almost done to death, but there's the issue of whether there is any claim for the period beyond the notice in terms of misuse of confidential information.

Judd Well there may be an issue but in my submission there's not because it's not open on the pleadings. The Court of Appeal

Elias CJ You'll have to show us why that's so.

Judd Yes I'm going to, I will certainly do that Your Honours.

Tipping J Is it the draft third amended statement of claim that was the effective pleading at trial?

Judd Yes, the effective pleading is the draft amended statement of claim which is under tab 12 in volume 1.1, but just before I go to that can I take Your Honours to the Court of Appeal judgment at para.109 where the Court of Appeal recorded that it was unnecessary to consider my complaint that Justice Nicholson interpreted this cause of action as if it were a breach of duty not to make use of confidential information, a breach which Mr Judd asserted had never been pleaded. And I could then take you to Justice Nicholson's judgment at para.155 and one of Your Honours referred to that paragraph yesterday. It's where I had referred to the *AB Consolidated* case and the requirements that were necessary in relation to a claim for confidential information, but it's necessary to go back to understand why I made that submission at par.153. 'Mr Judd then submitted that the second breach alleged in para.18 of the third amended statement of claims would need to be an allegation of misuse of confidential information. Aotearoa would need to plead and prove that the information questions are confidential and that it was imparted by Aotearoa to Paper Reclaim in confidence and was misused. He submitted that it was not sufficient for Aotearoa to say there was a fiduciary relationship, therefore Paper Reclaim may not use any information it received during the course of that relationship. If there was a fiduciary relationship, it might be a breach of the duty of loyalty for the information to be used during this existence of the relationship, even if it was not confidential imparted in confidence, but there would be no breach of a duty of loyalty by use after the relationship had ceased. Misuse of confidential information could be the only cause of action. Then His Honour records what I submit it would have to be pleaded and proved, and despite that His Honour

goes on to consider the issue as if it were the duty of loyalty type of fiduciary obligation and does not turn his attention at all, apart from the concluding paragraph where he makes conclusions as to whether or not the ingredients were established, and the whole reason why this aspect of the case is in such a mess today in my submission is because if Aotearoa was going to make a claim for misuse of confidential information, then it had to plead it properly, and then everybody's attention would be directed to identifying the confidential information, identifying the circumstances in which it was imparted to ascertain whether it was imparted in circumstances importing a duty of confidence and then finally to whether or not there was misuse and in that aspect of the case the considerations that Your Honours have raised with my learned friend concerning the relevant period and so forth and so on, would have come up. But none of that happened, and it didn't happen because the case was

Tipping J The heading to the cause of action shouldn't have been breach of fiduciary duty; it should have been misuse of confidential information really.

Judd Absolutely, and that has been my position from

Tipping J And I'm not saying that's absolutely fatal, but it certainly diverted everyone's attention from what the essence of this is apparently now said to be.

Judd Yes.

Elias CJ Because of the view that this was a joint venture and that any passage of information was on a confidential basis and could only be used for the purposes of the venture?

Judd I think probably that's the case. In other words it's been treated as

Elias CJ Because that's why there's the jump to joint venture which I think Justice Gault said is an odd

Tipping J That was me.

Elias CJ Oh it was you. Is an odd jump.

Tipping J It was from the left anyway.

Elias CJ Yes.

Judd Yes, in that paragraph where His Honour describes the incidents of the arrangement which point to exactly the opposite of joint venture. So I simply submit that at this stage of the game it is not open to Aotearoa to be saying that well you know, our claim was really for misuse of confidential information and that's the way Your Honours should

approach it. So that's my main answer to that point but I do have a couple of subsidiary points. The first of those

Elias CJ Sorry, in the Court of Appeal, or am I getting confused, but in the Court of Appeal you, yes I see.

Judd I maintained my position in the Court of Appeal

Elias CJ And they found it unnecessary because they've dealt with it on the basis that the Judge dealt with it which is that it all flowed from the joint venture fiduciary relationship?

Judd Yes, and they dealt with it in that way because that's the way my learned friend put it in the Court of Appeal and the way in which my learned friend was putting it to Your Honours until curial discussion persuaded him that that was perhaps not the right way of doing it.

Tipping J And I think what you're saying Mr Judd has some support from the actual pleading in the third statement of claim – the one in which it went to trial - because it does seem to be constructed on the basis that if there was a what's-called here a 'joint undertaking', any information received ipso facto becomes subject to a duty of confidence.

Judd Yes, well Your Honour is quite correct in my respectful submission and if you go in tab 12 to page 124, the first relevant pleading is para.17 'the defendant owed fiduciary duties to the plaintiff'. Right well the question which has to be asked there is what were those fiduciary duties and that is answered in the rest of the sentence " to act reasonably and in good faith in the implementation of the joint undertaking". So that is the fiduciary duty which is being alleged. A duty to act reasonably and in good faith, and it is defined in terms of time; it's in the implementation of the joint venture. And then para.18 goes to breach and the allegation of breach is of breach of the fiduciary duties, so that refers back to para.17, and then it goes on to say that there's been a receipt of information which the defendant has used and is continuing to use to its commercial benefit and to the detriment of the plaintiff.

Tipping J It's not even described as confidential information

Judd No, and that in my submission really flows from the misguided way in which it has been approached, because it really has been treated as a breach of the duty of loyalty, because if there truly was a fiduciary relationship then the duty of loyalty, whilst the relationship subsisted, would probably prevent the parties from using the information, even if it wasn't confidential. So there has been no focus in the pleading on the elements which are necessary to be focused on and as a consequence of that there's been no focus on them by Justice Nicholson, and of course as Your Honours well know, nothing at all

about it from the Court of Appeal, because the Court of Appeal wasn't asked to look at it in that way.

Blanchard J What do you say about the words 'and is continuing to use' pleaded as at June 2003?

Judd Well I guess the words mean that as at June 2003 it's alleged that the defendant was continuing to use the information which is described in the preceding terms; I think that's reasonably plain, but my point is that it doesn't get Aotearoa anywhere

Blanchard J Are you saying effectively they were pleading an obligation not to use information which was in fact not confidential? That they were simply pleading that the duty of loyalty continued to run?

Judd Yes, and in my submission the pleading can't be read in any different way, and that's why I said to Justice Nicholson 'this is all misguided – if they want to make a claim of this nature the only way they can do it is to make a claim for misuse of confidential information and they haven't pleaded such a claim'.

Tipping J Well there's no plea of a breach of a duty of confidence here.

Judd No.

Tipping J It may be implicitly a plea of a breach of a duty of loyalty.

Judd Yes, and as I said before

Tipping J Although that's, yes I suppose you can reasonably and in good faith, you can probably spell that out of that, but the governing paragraph is 17 really.

Judd Yes.

Tipping J Which encompasses loyalty, but I wouldn't have thought, it's very difficult to spell out a discrete cause of action for breach of confidence out of this.

Judd Yes Your Honour.

Blanchard J So you're saying once the duty of loyalty fell away when there was no longer a contractual relationship, the plea relating to continuing to use in breach of duty of loyalty simply had nothing to found on?

Judd Exactly.

Elias CJ And that's what the Court of Appeal said, that's why they said it wasn't necessary to deal with your point about the pleading?

Judd Yes.

Elias CJ Yes. Alright, is it convenient to take the adjournment?

Judd That's a convenient time Your Honour.

11.35 am Court Adjourned
11.55 am Court Resumed

Elias CJ Yes Mr Judd.

Judd Your Honours in light of the dialogue which has taken place between Your Honours and my learned friend, all I want to do is summarise my position in really two short points. The first is this that Paper Reclaim had no obligation to export any paper. It could sell all of its waste paper on the domestic market if it wanted to. It was only if it decided to export that it was obliged to use Aotearoa as its agent, and if it did then it was obliged to pay a commission of 10% of the FOB price, and that is shown by document B, which my learned friend took Your Honours to yesterday. It's a document at volume 5, page 1308 and Your Honours will recall that that document had two sections – the first section dealt with the 10% commissions and the second section dealt with the 50/50 transactions, and the only thing I want to draw Your Honours' attention to in relation to that document, apart from saying that it illustrates the two aspects of the relationship, is that it is the document referred to in para.157 of the Court of Appeal's judgment, and that's the costs part of the Court of Appeal's judgment where the Court of Appeal notes that it was shown in evidence that this document wasn't created until 1992 and so it's important that Your Honours should realise that given that this contract is said to have been made in the mid to late 1980s, and so far as Mr Cash's argument is concerned, in the period between November 1984 and the 31 March 1985, that this document wasn't part of the contractual relationships. But nevertheless it does as I say illustrate the two aspects. So that's really the first point that the obligation to pay the 10% only arose if Paper Reclaim chose to export. The second point is this that it is clear that aspects of a relationship may be fiduciary whilst others are not. Now the 50/50 transactions were profit sharing transactions and when one was done there might have been fiduciary duties as between the parties. We don't need to concern ourselves with that because no 50/50 transaction is an issue that needs to be considered by this Court. And the other aspect of the relationship as shown by that document B was the export of Paper Reclaim's paper where Aotearoa acted as agent, and in my submission the position in relation to that aspect of the transaction is that yes there were fiduciary duties but they were fiduciary duties arising out of the general rule in relation to the principal agent relationship whereby the agent owes fiduciary duties to the principal, and in the context of this case there are therefore no

relevant fiduciary relationships, and the last thing I would perhaps add there is that coming back to the confidential information aspect, is Your Honours will see from the pleading such as it is, the information is information which arose out of that principal agency relationship and not claimed to be confidential but commercially sensitive or something. I can't remember the exact word but one of Your Honours drew attention to the actual wording in the pleading. In the normal course of events any information which is generated in a principal agency relationship is information which belongs to the principal, so one would say that even if the confidential relationship argument could get any traction at all given the state of the pleadings, it is a pretty strange claim given the origin of the allegedly confidential information. Your Honours I don't think that there's really anything more that I can usefully add. Our position is set out extensively in our written submissions and Your Honours can find further detail about that there if you want it but in my submission those two aspects of the matter really encapsulate the position and demonstrate why this appeal should be dismissed.

Elias CJ Yes thank you Mr Judd. Right, costs appeal Mr Grant.

Blanchard J Well he may want to reply on that.

Elias CJ Oh I'm sorry, do you want to reply? Yes, I'm sorry.

Grant Your Honours I mentioned earlier that when I got my friend's submissions I actually prepared a summary of responses to the three of them for my own purposes because there's quite a lot of material and I have copies of them which I can give you which will simplify what I would say and I won't have to speak too much

Elias CJ I'm sorry, is this in relation to the costs?

Grant No it's in relation to all three actually because

Elias CJ Well we've gone well beyond that haven't we Mr Grant?

Grant My friend in his submissions of 21 February have quite a lot of new material in there and it related to all three

Blanchard J But surely you've dealt with that while you were on your feet in relation to the matters we've already covered.

Grant I've dealt with the first one Your Honour and I don't need to take you to that but the other two are here in summary form.

Elias CJ Well the point is you've been invited to reply to any argument you've already developed and that Mr Judd has responded to, so perhaps we'll just stick with that I think. Those submissions presumably are developing the appeal are they?

Grant Your Honour they're just in response to his written submissions, because he's been

Tipping J He's made two point in reply to you. Can you not address them orally.

Grant Your Honour I can, but first let me see what's in his written submissions, which I haven't dealt with, because he gave you quite lengthy submissions

Blanchard J But you should have dealt with that when you were on your feet before.

Grant Well I was hesitant to do that for fear that I would lose a right of reply.

Blanchard J But you wouldn't lose a right of reply.

Elias CJ If there is anything additional Mr Grant that you want to raise with us please do so.

Grant I will. First in relation to the reference in the notes of evidence to the agreement being the 1982 agreement, I said that that was the case Justice Gault asked me a question about, but I didn't notice that in your transcript. I say this about the pleading in cause of action three, it was clear with the parties that it was regarded as confidential information. Mr Cash gave evidence about the transactions and the dates for the discovered documents were for transactions between 2 February 2001 and the end of October 2001, and Mr Cash gave evidence about those

Elias CJ Sorry, what was the second date? The

Grant The end of October.

Elias CJ End of October.

Grant In Mr Cash's evidence, in his second brief of evidence at about para.6.15 onwards, Mr Bland refers to that in his brief of evidence these transactions in paras.5.13 and onwards. I'm not going to take you to that. The way the, I say that the information, the actual information given during the course of the venture is protected by fiduciary obligations pursuant to Justice Woolf's judgment in the *Attorney-General and Blake* case where information of a special type given to someone in the context a relationship continues on after the end of it in a similar way to an executive who gets a corporate if you like during the course of his time in the company and then subsequently takes advantage of it after leaving. Beyond that it was actually contended as being confidential information and you have seen from the Judge's judgment that that's how he described it and he described my friend's comments about it as being confidential information. What has happened in this long running which went from

a series of hearings as you'll have seen, is that it wasn't actually clarified with a kind of detail as would ordinarily happen. It was put on the priority fixture and documents came out of it. It unravelled if you like as it went along, but there was no doubt in the way the case was being run that this information was being contended as confidential information. I'll come then to costs. This was para.8.1 onwards in my submissions of 5 February, and I began by saying that the lion share of all the expenses were spent in relation to whether there was the exclusive export contract. I then referred to the rules on costs and 8.4, well if I go to 8.3, the factual issue of whether an oral exclusive export contract was made at a meeting with Mr Cash, Mr O'Rourke and Mr Taylor was fundamental and crucial to the success or failure of all of all the major causes of action and Mr O'Rourke and Mr Taylor repeatedly denied on oath – in affidavits and in oral evidence – that they had met with Mr Cash and negotiated the contract. And I've set out Justice Nicholson's conclusion that they had given false evidence about that. And he said 'I didn't come to this lightly but only after careful consideration of a massive amount of oral evidence, documents and submissions'. And I've referred the length of time that the Judge actually saw and heard the witnesses. My learned friend, as you would imagine, produced detailed submissions on all of the so-called errors in Mr Cash's evidence and Justice Nicholson said that having seen them none of them caused me to have any substantial doubt about the credibility and reliability of his evidence, and in particular as to whether the exclusive export contract was made. The Court of Appeal said this 'the assessments of credibility and reliability were not just impressionistic. His Honour carefully explained why he preferred the evidence of Mr Cash to the others and that impression is not likely to be set aside'. If Your Honours could just give me half a moment. In the application for leave to appeal I set out an extract from Justice Thomas's decision in the *Rae and International Insurance Brokers* where Your Honours are probably reasonably familiar with

Tipping J I think I am Mr Grant.

Grant Your Honour there's another one of yours which I refer to

Tipping J Oh dear. I'm familiar with what Justice Thomas said in *Rae* because I wrote the majority of the decision in *Rae.*

Grant Yes. Well Justice Thomas, if I may just read it? It was in my application for leave for appeal but it is worthwhile to have it in mind. 'The advantages possessed by the trial Judge in determining questions of fact are manifest. Of paramount importance of course, is the fact the trial Judge hears and sees the witnesses first hand over a matter of days, or even weeks, and that happened here. He or she can form an impression of reliability of witnesses and where necessary their credibility, although in deference to the witness's feelings the Judge may not always express an adverse conclusion. It clearly contemplates that the Judge may, and Judges do, obviously on occasions.

Tipping J Well wouldn't you be better employed Mr Grant in attacking the Court of Appeal's reasoning rather than reading out platitudes?

Grant Well I wouldn't regard that as platitudinous but

Tipping J I mean of course, we all accept that the trial Judge has an advantage, but the Court of Appeal gave reasons why it took a different view. Now surely you have to attack those reasons and show that they were unsound, rather than just hammer the basic principle.

Grant Well Your Honour said in *Moodie and Agricultural Ventures* that the charge was plainly wrong.

McGrath J Insofar as that goes to the rejection of the evidence Mr Grant you've got a point, but I think where the Court of Appeal was concerned was that the Judge elevated that into a finding that false evidence had been given. That lies had been told as I understood correctly.

Grant Yes, yes.

McGrath J Now I don't know that the *Rae* line of authority provides advantages of that kind. That's really where I think the Court of Appeal became concerned at the Judge's finding, and it does seem to me as Justice Tipping suggests, if you go to the essence of their reasoning we'll know what the real issue is on this branch of the case.

Grant Well in para.8.10 of my submissions you will see

Tipping J Why don't you move to para.8.16 because we've read all this

Elias CJ We have read the submissions Mr Grant.

Grant I don't wish to rehash what you've read and if you've

Elias CJ And it's usefully collected the factual cases which we'll have with us.

Grant Well on the assumption that Your Honours are familiar with the material I've put in there, I'll go to the three reasons which are at 8.16. Where he said that the claim has failed in numerous respects because I've said that effectively, except 90% of the costs, were associated with that one aspect of the trial, and so I submit for the reasons which I've given there that that's not a relevant reason for setting aside the indemnity costs. If those costs were spent proving a fact and it's found that the fact was wrongly and untruthfully disputed, then I would submit that the first reason is not a good reason.

Tipping J But wasn't one of the key points that your client lost on the basis that this was a contract of indefinite duration?

Grant Your Honour the Judge said in his

Tipping J Wasn't that the primary focus of your case?

Grant Your Honour

Tipping J Strange as it may appear to be alleging a contract of indefinite duration, but there was the issue of whether there was a contract at all, but that would seem to me to have been a rather subsidiary issue, was the nature of it wasn't it?

Grant In the cost decision as I recall it, Justice Nicholson deals with your question and effectively as I understand it there was no dispute between the parties that the dispute was on whether the contract was made, and that's where the days and days of evidence with the witnesses in the witness box for weeks on end was about.

Blanchard J Yes but your client alleged a contract of indefinite duration, or alternatively one which was only terminable on a very long notice. That must have affected the attitude of the other side to the way in which they went about defending. If the claim had been, dare I say it, a little more realistic, things might have been considerably different. It might even have settled. We're down to a situation where the Court of Appeal was looking at it on the basis that all you'd established was a contract terminable on reasonable notice which they said was 12-months, and it may in fact be that they have over-calculated the period anyway because of the methodology they used. So the Court of Appeal had before it a totally new situation to look at. I don't see why they couldn't revisit the whole thing in those circumstances, and if the matter goes back to them now, and if Mr Judd's appeal succeeds, they'll have to look at it on an even less favourable basis.

Grant Well Your Honour in terms of the amount of time that was spent on the claim that the contract was

Blanchard J But they thought it was spending it worth spending the time because the claim was so big, unrealistically big.

Grant Well that's not something that they've ever said.

Blanchard J Well it stands to reason.

Tipping J It depends what you're facing; how much you put into it.

Grant Well

Elias CJ I wonder whether though, whether it's a right approach to look at it quite in this sort of way. You were claiming on an oral contract, and establishing the terms of the contract were what took the time and you didn't, well perhaps this is another way of putting what's been put to

you already, that you didn't establish all the terms of the contract that you were contending for. I mean it just seems to me that it was inevitable that this was going to take a long time to litigate, and so you really need to look to the success on the claims as the Court of Appeal suggests, rather than what took the time in the evidence.

Grant But with respect Your Honour I find that hard to accept. Assuming that you were to accept that the Judge was reasonable to find that the evidence was untruthfully given, denying it, and you have here the case of two people against three deciding that they would not tell the truth and you therefore have the burden as plaintiff, of trying to establish what is the truth with two to one against, and therefore a huge amount of time is spent, and that's where the lion share was.

Elias CJ So is your submission really is does it hang off the findings of untruth?

Grant Yes it does, it does, pure and simple.

Tipping J So they should be treated more firmly if you like in relation to costs, irrespective of outcome, because they told lies?

Grant Not irrespective of outcome, except for this outcome. If the outcome is there's a finding that there was the contract and you didn't tell the truth about it and the plaintiff is now being put to huge expense to show that there was in truth the oral contract, yes.

Tipping J Well, it might sound naïve but I mean there was inevitably going to be a finding that there was a contract, it was what the contract terms were surely. I mean people dealing with each other commercially over this length of time, the idea that there was no contract seems far-fetched, and the issue was as to how it could be terminated if at all.

Grant Your Honour it may seem from your perspective sitting behind there that these things are straightforward and will be found. From the citizen's point of view facing a claim that what you're saying never happened and so forth, and having the burden, it is a completely different

Tipping J The untruthfulness that's found was primarily as to the happening of a meeting wasn't it?

Grant It was that there had been a meeting and agreement had been reached and there evidence given on other topics to show a dishonest propensity which was the Arthur Anderson audit and the other matters which you heard about in the applications a few weeks ago.

Tipping J Yes.

McGrath J Justice Nicholson really summed it up in the passage you've cited at 8.14 didn't he?

Grant Yes,

Tipping J Was the real issue whether it was a running contract or whether it was a one-by-one contract, because I can't understand how it could be alleged there was no contract.

Grant Well Your Honour it was alleged that there was no contract. It was said that there was absolutely no contract and that any job that Aotearoa got was on a job-by-job basis at the grace of Paper Reclaim.

Tipping J Yes, but it was a one-by-one, yes.

Grant If it got a job today it was lucky because it had happened to be given the job. That was the case that they had and it was not until

Blanchard J But it was not being suggested that every time a job came along they had to renegotiate all the terms. It was surely admitted that there was a basic framework.

Grant Well Your Honour they spoke of, they didn't talk about negotiating different terms for each one if you like, but the case was very, it was like a mantra that was a transaction by transaction basis and that was it. There was never any contract. It was stark.

Blanchard J In other words if could be put an end to simply by saying well we're not doing the next deal?

Grant Correct, that was the case.

Tipping J And there was no exclusivity?

Grant No exclusivity, nothing. It was purely fortuitous that it meant exclusive.

Tipping J Well that was quite important that it was exclusive vis a vis export, but there didn't have to be another deal did there?

Grant There evidence was if you've got a job tomorrow you've got a job but you had no entitlements to it and therefore had all this evidence about how do they make up losses. Well, and they had lots of answers about how you could have making up losses when you were only getting jobs on a light transaction basis. It was not until the Court of Appeal when Justice Chambers if I can put it, leant on my friend, that it was conceded well okay well there was a contract, we'll concede it. At the trial there was absolutely no concession. It was there was the oral contract on the day in late 84, early 85, whenever it was, which the parties couldn't identify on the day, completely denied, no such meeting.

Blanchard J Sounds like both sides were equally unrealistic.

McGrath J As I see it Mr Grant, that what was plain is that the Judge saw it all came down to the question at the end who was telling the truth.

Grant Yes.

McGrath J Someone was lying.

Grant Correct.

McGrath J He rejected the evidence of your clients and he preferred the evidence of the other side and he then went on to say

Tipping J Other way round.

McGrath J Sorry, yes, of course, but he then went on to say lies were told here and that was the crucial element of the improper conduct wasn't it?

Grant Yes.

McGrath J Rather than the argument over exclusivity to the extent that it didn't turn on when it was told the truth.

Grant No it was simply that there was a flat denial held to be untruthful that there had been a meeting where this was all discussed.

McGrath J Yes, but what it really seems to me is that the Judge's decision on costs in the High Court really turned on the second reason. The first reason that the Court of Appeal gives is a far more incidental one but this second question of deliberately false evidence is the key to all of this.

Grant It is the key.

McGrath J And the Court of Appeal set that aside in effect, because while they thought there was an ample basis for the Judge to prefer the evidence of Mr Cash over Mr O'Rourke and Mr Taylor, there wasn't a basis to say that they had lied.

Grant Yes.

McGrath J And I think that really to my mind, I think we can really move on to that second reason, because that's really what you've got to show was wrong, the Court of Appeal was wrong in reaching that decision. As I see it they've already said there was just no proper basis for Justice Nicholson to say that Mr O'Rourke and Mr Taylor had lied here.

Grant In essence they didn't use those words but that's the gist of it.

McGrath J And that's what I think you've got to take Justice Chambers' judgment on in that respect. It seems to me to succeed on this part of your appeal.

Grant Well I'm grateful for Your Honour's assistance.

McGrath J It's just the way I see it.

Grant Yes, I'm grateful. The reasons I've set out and you've seen them in my written submissions, the first and second and third and so forth, but as a background to them you know that Justice Nicholson saw these witnesses for days, and you say at 8.13 he says 'the reasons for his finding of untruthfulness are a combination of witness credibility, prior conduct, probability, post-event documents and post-event conduct' a whole host of things. This isn't something that he just thought Oh well. No Judge is ever going to do that. No Judge makes a practice of making a finding of dishonesty Your Honours. No Judge is likely to be very satisfied in his own mind or her mind that that's correct, and it then comes to the reasons at para.8.16. This is what I've mentioned. The claim has failed in numerous respects. Well that last exchange may have been quite helpful to help you understand how the case was run. It was – there was a contract. There had been a contract in 82 which had expired in 85 and the parties had negotiated and the Court was given drafts of agreements which had passed between lawyers for a newer contract, but no document was ever negotiated. I may say there had been before that some unique one-off transactions, so if Aotearoa was exporting a consignment of 3.4 tonnes of some commodity then there was a unique one-page thing. There are a few of those. Surely

Elias CJ But it wasn't just unique was it, because I've only looked at the first statement of defence, but it does concede that there was a relationship to, or there was to be inferred from the conduct of the parties an agreement that when sales were made they would be done on this basis, so the real difference was whether there was an ongoing relationship. So it was about the terms of the contract, the disagreement between the parties

Grant Your Honour it may seem like that reading some aspects of these papers, but I just emphasise, the evidence repeated if I may say it like a mantra by Mr O'Rourke was that there was a transaction-by-transaction basis

Elias CJ Yes but there was a framework within which those transactions occurred.

Grant This is correct that there was a framework, so that if Aotearoa was lucky enough to get the next job then there would be a framework within which it would export the paper and what the paper work would

be, but this was a case where they denied that there was any ongoing contractual entitlement for Aotearoa to have any work at all.

Tipping J It's the exclusivity that was the key point wasn't it?

Grant Not just exclusivity Your Honour

Tipping J Because without that exclusivity they needn't have given you any work at all in the export front. That was the key.

Grant Well it wasn't that exclusivity was insignificant, they said that there was no contract. There is none.

Elias CJ Well they pleaded that the parties conducted their commercial relationships upon the basis that if and when the plaintiff made a sale, the plaintiff would be doing so as agent for the defendant and would be paid commission at 10% FOB. That doesn't sound like a total denial. It's a denial of the terms of the agreement that you were alleging.

Grant I can understand why Your Honour might say that having seen that but that's not the way the evidence was and if and when they made a sale, i.e. we give you one and you make it, it will be on this particular format and so forth.

Elias CJ What is pleaded here isn't if the defendant gave them work, it was if the plaintiff made a sale the defendant would agree that it was as agent.

Grant Well Your Honour the evidence over most of this time all these days was all to do with there being no contract. It was all a transaction-by-transaction, and if they got it then it would be done in that form and that was the stark division and when Justice Tipping says, well this doesn't seem to have an air of reality, you would think that the Court's going to find that there is a contract over a period of time, that's not the way it was given in evidence.

Gault J Mr Grant the way I'm inclined to look at it is this way, is an appeal to the Court of Appeal on fact and law? The Court of Appeal, going from their judgment, had a pretty careful look at the evidence and reached the conclusion that a particular factual finding, that of deliberate lying, was not justified. Now that was something they were entitled to do giving deference to the findings of the Judge and the advantages he had, which they acknowledged. When it comes here isn't it our role to determine whether the Court of Appeal has erred in principle?

Grant Your Honour in my submission, yes it is.

Gault J Well where has the Court of Appeal erred in principle.

Grant Well if I take you to these reasons, the reasons they gave and tell you why I believe they've erred in principle in respect of each of these reasons

Tipping J But you're saying they were wrong. That's quite different from saying that they erred in principle.

Gault J It's not a question of our mediating these two views it seems to me. We're not going to have another look at the evidence and arrive at a third view are we? Our role is to consider what the Court of Appeal did and determine whether it was in accordance with principle.

Grant Well in my submission where a Judge hears for three weeks witnesses on this and then concludes that on this critical issue the two witnesses have told untruthful evidence and prolonged the hearing for that reason, the Court of Appeal errs in principle when it says for example that there are numerous aspects of the claim which weren't successful and therefore it should be cut down because the indemnity costs

Gault J That's not their finding. Their finding was they did not accept the conclusion of the Judge that these two men necessarily lied.

Grant Well I have put in my submissions, and this is para.8.19, it's the second reason Your Honour. 'We don't accept the Judge's conclusion that the evidence of Messrs O'Rourke and Taylor was deliberately false insofar as they denied it' and then they give four matters to support that. And the first one in para.8.21 was that the first statement of claim suggests that the contract or pleaded the contract had occurred 1982 'this suggests that Mr Cash's memory of the circumstances surrounding the making of the joint venture was hazy'. And then I've put down there Mr Cash's explanation that the company's records had been lost and he'd tried to get documents before the onset of litigation but the only document that he got was document B which was one of the documents I took you to and he says over the page at the top 'as a result of the discovery and inspection which has taken place in this litigation and during the last few weeks', which threw up all of these prior draft agreements in 84 and 82 and so forth. 'I've seen a considerable number of other documents and that helped me to be more precise about the dates'. I say that the Court of Appeal's reasoning ignores the following aspects that Justice Nicholson took into account all of these other elements - the prior conduct, the probability of the making of such a contract - which is Justice Tipping's observation to me I assume a short while ago but they denied it. 'The impressions I formed from seeing and hearing Mr Cash and the witnesses over many days was very helpful in assessing their relative credibility' and I submit that the Court of Appeal is not in a position when a Judge has seen witnesses for days and days and days; been cross-examined about consistency; been cross-examined and examined on all of the inconsistencies with their case and so forth that the Court of Appeal is not in a good position where it can say well we find

Tipping J It was mindful of all that but nevertheless I have it happen to me as a trial Judge in reverse. I refused to find fraud and the Court of Appeal found fraud. Now in spite of all the advantages I had as a trial Judge, now okay, one can agree or disagree but wherein lies the error of law or principle as opposed to just saying they got it wrong?

Grant Well it's an error to assume from the fact that Mr Cash got a date wrong, that therefore he must have been mistaken about the existence of the meeting because that's the nature of

Tipping J But have they misdirected themselves as to their proper role? They seem to me to have been very mindful of their proper appellate role, but if they were all convinced that this was a finding they couldn't accept, they had a duty to overturn it.

Grant But if one can take that into bits, they can't accept because Mr Cash made a statement at an early stage of the litigation which was factually wrong, ok, so that's what's being said here. Mr Cash made a factual error

Elias CJ Well they're pointing out that given the length of time, given that this was an oral agreement, it's understandable that people's recollections will be hazy and in that instance Mr Cash's hazy recollection. It clearly isn't more than that is it?

Grant Well except that that's given as one of the matters which justifies overturning the finding.

Elias CJ Well they're pointing out that their real reason is that this was a long time ago and it was an oral contract and you can't conclude from the fact that the Judge found that there was an oral contract, that people were lying.

Grant Well Your Honour if I may with respect take that reasoning further just to extrapolate our argument. If that were the only factor it would mean therefore that if a Judge, any Judge in any case, thought it appropriate to say I find that a person has given untruthful evidence, if any error could be found in the other side's evidence, that the decision would be completely vulnerable to

Elias CJ Of course, because we have appeals by way of re-hearing on fact and law, and the Judges on appeal will take into account, as the Court of Appeal did here, the advantage that the trial Judge has had from seeing and hearing the witnesses, but they are going to look very closely at the context and that's their obligation.

Grant Well I've put down in 8.22 that Mr Judd had informed the Judge about the inconsistencies and it didn't shake him from reaching that conclusion.

McGrath J Mr Grant I think the point that really the Court of Appeal found the Judge wrong on is at para.61 of Justice Nicholson's judgment when he said there is no room for mistake or failure of memory. Now that does seem a rather surprising comment to make given the length of time since this oral contract was entered into. The complete lack of any documentation in relation to the matter, and while as I say the Court of Appeal was respectful of Justice Nicholson's ability to see and hear the witnesses and to prefer Mr Cash's evidence, it just thought that that was an error of principle on Justice Nicholson's part, not to recognise the circumstances that cried out for some misunderstanding as to what exactly the arrangement entered into all that time ago was.

Grant Well if I could get a bit of background on that. Mr O'Rourke and Mr Taylor said in evidence that there had been in 84 a sequence of discussions between the parties about forming a venture; there had been draft agreements prepared by lawyers as to how such a venture might come together, and then if you like the paper trail on the agreements went cold. Mr Cash's evidence was that there was a meeting on a day in their office in Penrose and they denied it. They admitted that there had been prior meetings but they denied that there had been any meeting at which they had reached an agreement. They didn't produce any document to show an agreement. By 1986 they were writing a letter which I think I've referred you to where Mr Taylor writes 'in accordance with our agreements these are some of the people you can work for without being in breach of our agreements, and they then give answers which Justice Nicholson said is just completely unintelligible. What are the agreements which you refer to in this letter of 1986, and they

McGrath J I think all of this has come through in the course of reading of the judgments. The real point is that Justice Nicholson really concluded in the end that they just had to remember it. It was such an important agreement, but they had to remember it and the Court of Appeal is really saying, well they might have got it wrong but why did they have to remember it so clearly that their assertions were lies.

Grant Well as I was saying, this document by the way, it's at page 1303, which is volume 5, is written not long after. You have the sale of the Aotearoa baler; you have this document coming along not long afterwards, this is to confirm our discussion in relation to the customers. You reserve the exclusive right to manage their paper waste without there being any infringement on the existing agreements between our companies. With Mr Taylor saying there were no agreements, and his answer to that is oh it all goes back to the past and this is what we're trying. Justice Nicholson set out the answer and you can see for yourself that it doesn't make sense if I come up with a completely unconvincing answer. The evidence is given of the revenues which Paper Reclaim receives and my recollection is I can get it for you. The revenue almost doubled within the year from export in

85 - the revenue shoot-up. They're writing about agreements and so forth. At Court they're saying there never were any agreements. We never had an agreement with Aotearoa and the other the other answers given are just completely unconvincing. It's not down on the thesis that there may have been a meeting, which we've forgotten, it was, there never was such a meeting. If they had said, yes, we had met many times and there may have been a meeting which we agreed at, of course Justice Nicholson would never have been entitled to say what he said, but there was no such suggestion. It was black and white. There was never a meeting at which any agreement was ever reached. It's all on a transaction-by-transaction basis ever since and then you go through all of these other documents to try to show the inconsistencies and you get improbable answers to them all, and Justice Nicholson I believe was saying look these people made a contract, it's quite clear in about 85, because the revenues flow through greatly, and it's export revenues which were identified and they are in the financial statements and so on, and there was a lot of revenue in later years. Clearly something happened at that time to cause all of this increase. Mr Cash's evidence was that he was a competitor and so forth and he wasn't going to give this all up unless he had an agreement and the 50/50s were the stumbling block. He didn't want to give over the customers he'd got in New Zealand for the benefit of getting their export work and in the negotiations it was the 50/50 aspect which took the most time to sort itself out, but once it sorted itself out, the paper went offshore in bulk, and it all happened so the Judge knew

Gault J Mr Grant, the Court of Appeal upheld the finding of Justice Nicholson accepting Mr Cash's evidence that there was an agreement. They upheld that but nonetheless went further in relation to this costs award and said that the further findings were not justified, so they upheld that. So you are really just now arguing that the Court of Appeal were wrong

Grant Well what I'm trying to do Your Honour, sorry

Gault J And it seems that's not our role.

Grant Your Honour I'm trying to answer Justice McGrath's decision as to why the Judge would say that at paragraph

McGrath J Paragraph 61 I think it is – 'the point I put to you is at the conclusion there was no room for mistake or failure of memory.

Grant Yes, there are numerous factors of this type

McGrath J Yes.

Grant Which is what I believe caused Justice Nicholson to say

McGrath J Yes, I understand that Mr Grant, and I can understand that you having been through all of this have some fairly clear recollection of views of it, and I'll certainly bear in mind what you say, as I'm sure the Court will. Could I just ask you about one other point? The Judge also seemed to be influenced by what he saw as prior dishonesty, I think by Mr O'Rourke, or it might have been one of the others, in relation to dealings with Carter Holt and

Grant Dishonest propensity is described in the *Gate* litigation, yes.

McGrath J Yes, was that a factor that impinged on this particular conclusion? I just have some discomfort about how relevant it would have been.

Grant Well Your Honour, a lot of time was spent on that aspect of the case because evidence which showed dishonest propensity is of some relevance when determining credibility, only to that extent. If a Judge knows that you're dealing with someone who has been dishonest and deceives people it is a factor which may be borne in mind when concluding on another occasion whether anything they did there, whether they have even the propensity to do it, whether they had the propensity

McGrath J Are you saying it's propensity evidence in the sense that if there was a finding that he lied on one occasion, he would have lied in giving evidence to Justice Nicholson?

Grant Not that he would have lied, but merely that it shows this is a person who has in the past acted dishonestly. Now the Courts naturally would never say well because that happened on instance one therefore he has an allegation of saying something which is conflicted, therefore you must be telling the truth. It would never follow like that, but it is merely evidence. One of the cases which I put in my notes is the litigation of the man who made a fraudulent insurance claim – Justice Fisher's case – which went

McGrath J Yes, yes.

Tipping J Gate, yes.

Grant Which went to the Court of Appeal where the Court made some observations on its role in relation to a finding of effectively dishonesty by Mr Gate which I was going to take you to.

Blanchard J Having had Mr Gate in front of me on a couple of occasions, I'm sympathetic. Consistently unreliable.

Tipping J Mr Grant in para.64 of his cost judgment the trial Judge said he considered that Paper Reclaim acted improperly in defending the proceeding, that being the statutory criteria – acted improperly in defending the proceeding, but the immediately preceding paragraph,

and this really follows up on something my brother McGrath has raised with you, but also caught my eye with some anxiety. He seems to have facted into his reasoning the fact that in the period leading up to the litigation Paper Reclaim had applied commercial pressure improperly, or tried to, now I'm not sure quite how that fits into acted improperly in defending the proceeding.

Grant Your Honour I put this in my submissions and it may not have sprung out to you

Tipping J Well no it hasn't.

Grant One of my friends defences was to say that if there was a contract then Aotearoa was comprehensively in breach of it and the alleged breaches are contained in, actually it's not in the main pleading. It's several pages long, and the Judge went through all of that

Tipping J I don't think you followed my question

Grant Of well

Tipping J Which is very simple. What business had the Judge with the conduct prior to the commencement of the proceedings which they improperly defended?

Grant Well Your Honour it was part of the litigation if you like. If you like as I see that there are two elements in the litigation. One is the denial of the contract then which they were party to and the other was that they then put up by way of a defence a whole variety of claims which were all rejected and which when viewed objectively showed that they

Tipping J Stop. You're not answering my question and I'm not giving you another chance.

Grant Well I submit that in relation to the broad discretion which a Court has when awarding costs that it can take account of those matters, especially if it concludes that the conduct which ostensibly was wrong, had all been brought about by the goading, which was Justice Nicholson's term to try to winkle Aotearoa out of the contract. That's the gist of it, to get them out of the scene, that they had made life hard in a host of ways. That's a euphemism for what took place then.

Gault J The Court of Appeal has said that that was an improper consideration that if there was some wrongdoing there the remedy was in damages.

Grant Your Honour I think when the Court of Appeal said that it was not aware that this was something which had been the subject of litigation and which Justice Nicholson had heard and determined. This I think arose from the very short

Gault J Well that rather emphasises what they said that that was a matter to be determined elsewhere, it wasn't a matter to be taken into account in respect of costs in conducting this litigation.

Grant Yes but if the Court of Appeal thought that there had been some wrongful conduct prior to litigation but it hadn't been the subject of contested evidence of the sort, or contested evidence, then I would completely agree with the Court of Appeal, but if the Court had been aware that the conduct concerned was the subject of a defence which consisted of a host of allegations against Aotearoa – saying it had erred in this, it hadn't completed these documents in this form and so forth

Gault J There are two quite different points here. One is unsubstantiable defences in the litigation which is appropriately addressed in costs, and the other is trying to winkle him out of the contract by prior conduct, which seems to be unrelated to the conduct of the litigation.

Grant Well Your Honour in one sense it may be thought to be unrelated, but in another it may be thought to be related and I submit that it is in the first instance of the first of the two options you give there that where a Court hears evidence of that type it is entitled to take it into account as a factor when deciding whether to make an award of indemnity costs.

Blanchard J Costs have to relate to the litigation, they can't relate to prior conduct.

Grant Well Your Honour it's

Blanchard J Prior conduct is dealt with by damages. If the prior conduct was a breach of contract or was tortious.

Grant Yes Your Honour if I have misunderstood that, yes I accept that of course, I accept that, and I don't believe Justice Nicholson intended that. What he was saying was they had put all this evidence up which he had been through and then dismissed and furthermore it didn't actually show a very creditable view because all of their conduct had arisen through them trying to goad him out of their lives. That's, as I understood, his reasoning, not

Gault Well that might be better than assessing credibility, but that's all surely.

Grant Your Honours will appreciate that you've seen the sums. Running a case of this type where one spends weeks trying to determine what the facts are, that it's hugely expensive and the reality is that the sum we've recovered on our conventional order of costs, gives very little compensation in relation to the actual costs.

Blanchard J Well that is one of the risks you take when you bring an over-inflated claim. It's going to be defended doggedly. If the claim is more

realistic, it may not occupy nearly as much time. This was an unrealistic claim in relation to the rights under the contract.

Grant Well if the claim had been defended on the basis (a) there might have been a meeting, but I can't remember it, and yes I now acknowledge that there was one, although I denied that there was one; that one thing, but it wasn't defended on that basis and there's no suggestion that we the defendant would have agreed there was a contract but for the definite duration bit, and with respect Your Honour, if that were to be an important factor, then it's important that it should come from Paper Reclaim, but it adopted the most extreme position which Aotearoa had to spend weeks trying to get the crack, saying there never was a contract. Not just an indefinite duration of any type. It was all a transaction-by-transaction basis, and you have that passage which was recited in the Court of Appeal by Justice Chambers where I asked Mr O'Rourke where I say 'you're saying he's given you all the information travelling the world, doing this, that and the other, and it's all a transaction-by-transaction basis, yes.

Blanchard J Well confronted by a claim that there was a contract which was indefinite in the sense that it went on forever, you would be inclined to indulge in trench warfare and take every point you though might be available to you, because the consequences of losing are very, very severe.

Grant Well when under pressure from

Blanchard J And your client has been found to have brought an unrealistic claim and yet gets an award of partial indemnity costs.

Grant He's been found to have produced a claim which to that extent failed and is therefore

Blanchard J Well it's a major failure.

Grant But he got ordinary scale costs; well we'll get costs against him for that.

Blanchard J But it's like - this is not a direct analogy – it's like suing for a million and recovering $100 thousand.

Grant Well Your Honour when the Court of Appeal said to my learned friend that it seemed you know just ridiculous to contend there's no contract and a concession is made oh well there is a contract. It is not that there was a meeting of it and they made one, but that something evolved over time and it's not agreeing that there was the meeting. There's a quite different form of concession.

Blanchard J We of course don't know what award of costs the Court of Appeal might substitute and how they might factor in the degrees of unrealism on both sides.

Grant Well Your Honour if I can say to that, that I would not be confident that it would factor in a lot unless this Court were to give some hint to that extent.

Blanchard J I'm not sure that this Court will want to embark on that exercise at all.

Tipping J I don't think we hint. We either decide or remit.

Elias CJ Mr Grant does that complete the submissions you wanted to make.

Grant No, that was the first of two. The second matter is on page 27, which is a statement that Mr Cash asserted. Immediately after the meeting something was typed up, and this is document B and I've said that that was wrong. He never said it was immediately after the meeting and I'd given the date sequence. That wasn't given to Mr Cash and for years later it was undated so he never knew when it was given, and that's I believe just factually wrong. The third matter is in para.8.26 that Mr Cash found it difficult to recollect exactly what had been said at the meeting in 84/85, and he says this 'Mr Cash at no stage prior to the commencement of proceedings referred in correspondence or in conversations to the agreement meeting with the oral agreement allegedly made', and I've then set out document upon document upon document, where he did. And this with respect to the Court of Appeal is attributable to the way in which the case was run where they sadly only got you know half an hour on some of these topics, and that is just if I can say with respect to the Court, plain wrong, and I was looking at an extract from the transcript the other day, or last night I think, where Mr O'Rourke was saying that he complained to us on many occasions 'all I want is my original agreement' and Mr O'Rourke was confirming it in his evidence, but here you have documented quite contrary to what the Court of Appeal said, that there was this complaining from 99 onwards when the relationship was breaking down. Now I submit here where the Court of Appeal says that this is quite wrong, and to be fair to the Court of Appeal, if they had thought that there had been no mention of this prior to the filing of proceedings, any Judge would be pretty sceptical, but that isn't the case. The Court was quite simply wrong, and there's an issue there of how much did that kind of thing colour their perspective on other issues? And then para.8.27 I've put there that Mr Cash was criticised that he couldn't recall exactly what it was that was said at the meeting, and see I've said that, and the very few of us, and I'm certainly one, but I couldn't recall what happened 20 years ago in a meeting. I couldn't recall the words, but if I take myself out of the equation, how many people can recall exactly what is said at a meeting, and Mr Cash, and you will see as I've put that half-way down the page 29, is not a sophisticated suit and tie businessman. Plain dressing, plain speaking entrepreneur etc, and he gave further

evidence that he doesn't take file notes, so I submit that there's an error in principle in saying that someone is supposed to remember exactly what's been said 20 years ago. There's an error in principle when you say that there have been no contemporaneous if you like, complaint, when there had been numerous of them about the existence of the contract. And then you have the fourth one which is 8 – I don't know if Your Honour wants to go on here. I'm slightly over time I see

Elias CJ Well I had wondered whether we might in fact complete if we sat a bit longer but I'll ask my colleagues. Alright well Mr Grant we have read the submissions so when we resume at 2.15pm if you can confine yourself to the additional emphasis that you want to make.

Grant Yes Your Honour and I'm sorry if I seem to have said more than you would have preferred, but it is helpful I know when you've read it to have some of these exchanges to know where there are some gaps in the understanding.

Elias CJ Yes, thank you. Alright we'll resume at 2.15pm.

1.00pm Court Adjourned
2.15pm Court Resumed

Elias CJ Thank you.

Grant Your Honours I will be brief. Viscount Haldane's statement from *Knockton and Lord Ashburton* is well-known where he says 'it is only in exceptional circumstances that Judges of Appeal who haven't seen a witness in the box ought to differ from the finding of fact of the Judge who tried the case'. I was asked to express a principle and I'd say this. The four factors given by the Court of Appeal all have to do with errors which Mr Cash made in his evidence, or is wrongly said to have made and I submit that as a matter of principle, if a witness's errors are point out to him or her, and the witness is cross-examined on them, an Appeal Court ought not to upset the Judge's decision concerning the witness unless there is some other compelling evidence beyond the matters, or unless the Judge took something into account which he or she ought not to have done or failed to take into account a matter which was material and I submit that in relation to those four matters there is no matter which Justice Nicholson failed to take into account or ought to have taken into account in the decision which he reached.

Elias CJ Yes thank you Mr Grant.

Grant Unless you

Elias CJ No, I think that's fine thank you. Right Mr Judd, do you want to be heard in response?

Judd Only if Your Honours have something specific that you would like to raise, except perhaps to give Your Honours a reference

Elias CJ Yes.

Judd The Chief Justice referred to the statement of defence. There is a further statement of defence which is under tab 10. The paragraph which corresponds to para.6 that Your Honour referred to is para.8 and it is exactly the same so far as I can see but it is also in my submission worth – these are all in volume 1.1 – it's also in my submission worth looking at, at para.3 of the statement of defence because that sets out Paper Reclaim's position in relation to the allegation of a contract and I would simply observe in relation to para.8, which is responding to the allegation that the contract was indefinite in duration. There's a fairly close similarity to what the Court of Appeal held would be the position if in fact there wasn't an express oral agreement made at the agreement meeting. So really in a sense as its alternative position, the Court of Appeal essentially really adopted what Paper Reclaim had been saying in that statement of defence. That's all I wish to say Your Honours.

Elias CJ Yes, thank you Mr Judd. Mr Grant is there anything arising out of that?

Grant No.

Elias CJ Well thank you counsel. We'll take time to consider our decision on the appeals.

2.20pm Court Adjourned