IN THE SUPREME COURT OF NEW ZEALAND

SC 25/2006
[2007] NZSC 26

BETWEEN	PAPER RECLAIM LTD Appellant
AND	AOTEAROA INTERNATIONAL LTD Respondent

SC 28/2006

AND BETWEEN	AOTEAROA INTERNATIONAL LTD Appellant
AND	PAPER RECLAIM LTD Respondent

Hearing: 5 and 6 March 2007

Court: Elias CJ, Blanchard, Tipping, McGrath and Gault JJ

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

Judgment: 1 May 2007

JUDGMENT OF THE COURT

A The appeal by Aotearoa International Ltd is dismissed.

B The appeal by Paper Reclaim Ltd in relation to the calculation of damages is allowed.

C The proceeding is remitted to the Court of Appeal for it to fix the costs in the High Court.

D Paper Reclaim is awarded costs in this Court of $20,000 together with its reasonable disbursements, to be fixed if necessary by the Registrar.

E Aotearoa is awarded costs of $2500 on Paper Reclaim's first application to have further evidence admitted in this Court.

REASONS

(Given by Blanchard J)

Introduction

[1] Aotearoa International Ltd is claiming damages from Paper Reclaim Ltd following the termination of a longstanding contract between them, under which Aotearoa undertook the export of Paper Reclaim's waste paper on an exclusive basis and was entitled to be remunerated by a commission at the rate of 10% of the sales price to the overseas buyer. In the High Court[1] Aotearoa was successful in establishing that, contrary to Paper Reclaim's denial, all work done by Aotearoa for Paper Reclaim in arranging sales of paper was pursuant to an oral contract made at a meeting of representatives of the two companies which had occurred either in late 1984 or early 1985. It is also no longer in dispute on the present appeal that the contract was terminable on reasonable notice. Nicholson J found that eight years' notice of termination was required. The Court of Appeal[2] disagreed and said that the proper period of notice was 12 months.

[2] Paper Reclaim did not give any period of notice. Instead, on 2 February 2001, about 16 years after the contract was made, it wrote to Aotearoa advising that it believed that no long term contractual arrangements existed between them; that any further instructions to Aotearoa would apply only to the particular sale on which Aotearoa was instructed; and that Aotearoa was not otherwise to hold itself out as Paper Reclaim's agent. It was not until 3 May 2002 that Aotearoa, which had in the meantime not been given any such instructions and so had not arranged any sales, gave a notice of cancellation of the contract in reliance on Paper Reclaim's repudiation 15 months earlier.

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1 *Aotearoa International Ltd v Paper Reclaim Ltd* (High Court, Auckland, CP 117-01, 19 March 2004, Nicholson J).

2 *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188.

[3] The issues which this Court is called upon to determine are:

(a) *The period of reasonable notice*. Aotearoa continues to assert it was eight years whilst Paper Reclaim says only a month's notice was needed to bring the contract to an end.

(b) *How Aotearoa's damages claim should be calculated in these circumstances.* Quantum of damages has yet to be determined by the High Court but the Court of Appeal, attempting to give some guidance, has said that Aotearoa is entitled to claim for commissions it would have earned before 3 May 2002 and for damages for the succeeding 12 month period. The Court is said by Paper Reclaim to have thereby fallen into error.

(c) *Whether Paper Reclaim owed any fiduciary obligations to Aotearoa, and, if so, whether it was in breach and the consequences for Aotearoa's damages claim if that were so.* The Court of Appeal rejected Aotearoa's claim on this ground.

(d) *Whether the Court of Appeal was wrong to set aside the award of indemnity costs made against Paper Reclaim in the High Court.* The reasons for the High Court's award and why it was set aside by the Court of Appeal can be deferred until this issue is dealt with later in these reasons.

The period of reasonable notice

[4] In *Australian Blue Metal Ltd v Hughes*[3] the Privy Council said that the question of whether a requirement of reasonable notice is to be implied in a contract is to be answered in the light of the circumstances existing when the contract is

[3] [1963] AC 74.

made. In the present case that question has been concurrently answered in the affirmative in the lower courts and this Court has not been troubled with it. The Privy Council then went on to say that the length of the notice, if any, is the time that is deemed to be reasonable in the light of the circumstances in which the notice is given. In a well-known passage the Privy Council said this:[4]

> That does not mean that the reasonable time is the time during which one party or the other could reasonably wish for the contract to continue. It is unlikely that when the notice is given the parties could agree on that. The reasons which moved one party to desire a long notice would move the other to desire a short one. The implication of reasonable notice is intended to serve only the common purpose of the parties. Whether there need be any notice at all, and, if so, the common purpose for which it is required, are matters to be determined as at the date of the contract; the reasonable time for the fulfilment of the purpose is a matter to be determined as at the date of the notice. 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.

Although this authoritative passage has often been cited, the discussion of common purpose should not be read as if it appeared in a statute. It must be understood against the background of the particular facts which were before the Judicial Committee, where all that was being considered was a revocable permission to mine on a non-exclusive basis. The Privy Council does not appear to have had in contemplation a situation similar to the present case.

[5] Until the oral contract between Paper Reclaim and Aotearoa was made in 1984/85, Aotearoa had its own, comparatively small, baling operation and was in competition with Paper Reclaim for supplies of paper, although the parties had cooperated to an extent for some years. When the contract was made Aotearoa gave up its collection and baling operation. Its role under the contract was almost entirely confined to that of an agent for the sale of Paper Reclaim's paper.[5] By February 2001 Paper Reclaim had built itself a substantial paper collection and baling operation. The evidence from Aotearoa was that the market was dominated by Carter Holt and Paper Reclaim and that the cost of establishing a competitive

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4 At p 99.

5 If it purchased any paper from a third party and exported it, Aotearoa had to share the profits 50/50 with Paper Reclaim. This seems to have happened only infrequently in recent years.

operation for Aotearoa would not be less than $3m, which was well beyond its financial resources. Aotearoa did have in 2001 an ongoing business as a dealer in scrap metal, plastics and glass but it was unlikely to be able to replicate from the development of that business the revenue it had been earning under the contract with Paper Reclaim. Mr Cash of Aotearoa said in his evidence that if it had not entered into the agreement with Paper Reclaim in 1984/85 it would have retained its baling operation and contracts with suppliers and would have obtained new supply contracts.

[6] The trial Judge accepted a submission from Mr Grant, for Aotearoa, that in fixing the appropriate period of notice the emphasis should be on the time necessary to create a replacement trading situation: in the words of Lord Devlin in *Australian Blue Metal*, "to make alternative arrangements of a sort similar to those which are being terminated".[6] The trial Judge considered that this would require considerable effort and "a time span of about half the time that elapsed between the making of the exclusive export contract and its termination",[7] which led him to fix a period of eight years.

[7] The Court of Appeal disagreed. It said that the bulk of judicial authority suggested that in comparable circumstances the courts had fixed notice periods of about one year. In its view, that is what a lawyer would have advised if asked what notice period should be given. The Court agreed with the observation of Penlington J in *Anchor Butter Co Ltd v Tui Foods Ltd*[8] that relevant matters in determining the period included 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 carried out within the scope of the agreement. The first three of those matters, the Court of Appeal said, would point to the need for a short notice period. It was difficult to see the last factor as being relevant. Aotearoa's expenditure and effort could scarcely be described as "extraordinary"; in any event it had been reaping the fruits of its expenditure and effort for many years. The Court of Appeal also considered that the

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6 At p 99.
7 At para [123].
8 [1997] 3 NZLR 107 at p 124 (HC).

Judge was wrong to think that Aotearoa must be given sufficient time to become a major player in the waste paper business. The likelihood was that Aotearoa would never be able to replicate its role in the venture with Paper Reclaim and it would have to move into a different business activity. The Court pointed out that Paper Reclaim was not under any contractual obligation to provide Aotearoa with the same level of business for future years. It also observed that whilst Paper Reclaim must have invested many millions of dollars to achieve its present market position, Aotearoa had not had to spend in the same way in order to secure the financial rewards it enjoyed up to 2001. It noted that the baler which Aotearoa had owned in 1984/85 had been sold for $15,000 and was clearly completely different from and inferior to the sort of baler Paper Reclaim now has. Had the two companies not entered into the venture, the Court said, Aotearoa would have had, at some point, to make the kind of investment Paper Reclaim had made.

[8] We agree with these observations. We have not been persuaded that the Court of Appeal misjudged the position when it concluded that the appropriate period of notice should not be longer than 12 months. The Judge erred in divorcing from its factual context Lord Devlin's dictum that parties may be expected to have to cushion themselves against sudden change, giving themselves time to make alternative arrangements "of the sort similar to those which are being terminated". As we have said, that observation was made concerning facts quite unlike the present where all that needed to be done was to move the mining operation to a different site, which it seems could readily be done. In our view, the Privy Council could not have been intending to suggest that a reasonable period of notice must necessarily be sufficient for the recipient to be able to build up a business comparable to that which it enjoyed under the contract or before the contract was entered into. If that was what had been desired, Aotearoa should have taken steps at the outset to obtain express contractual protection by the stipulation of a fixed term or a fixed period of notice. Instead, by making an informal arrangement of a kind which can only sensibly be understood as being terminable on reasonable notice, it took the risk that it might be disadvantaged to some extent when and if notice were given. It is, in the words of McHugh JA in *Crawford Fitting Co v Sydney Valve & Fitting Pty Ltd*,[9]

[9] (1988) 14 NSWLR 438 at p 453 (CA).

quoted by the Court of Appeal,[10] a risk which someone who enters into an agreement terminable at any time "inevitably runs". The courts do not effectively rewrite such contracts by requiring an extended period of notice merely because the recipient of the notice may be deprived of the advantages it was enjoying under the terminable contract.

[9] In *Crawford*, McHugh JA was prepared to allow that it might often be a common purpose of the parties that their relationship would continue for long enough after the giving of the notice of termination to enable the recoupment of any extraordinary expenditure or effort but, as the Court of Appeal said, we are not concerned with a situation of that kind in the present case. Although Aotearoa devoted much time and trouble to the obtaining of export contracts and no doubt did its work skilfully, its efforts did not involve capital expenditure and cannot fairly be called extraordinary. Aotearoa did benefit from its hard work. It was or would be fully compensated by the commissions which it earned on the sales which it arranged, including sales resulting from ongoing work finalised during the period of notice. To the extent, if at all, that there may have been an inability to reap the benefits of that ordinary expenditure or effort, that may be regarded, as McHugh JA said in *Crawford*, as a business risk which a distributor takes when he enters into an agreement terminable at any time.[11]

[10] We respectfully express our agreement with the summation from McHugh JA's judgment in *Crawford*:[12]

> The chief purpose of a notice for a reasonable period, therefore, is to enable the parties to bring to an end in an orderly way a relationship which, ex hypothesi, has existed for a reasonable period so that they will have a reasonable opportunity to enter into alternative arrangements and to wind up matters which arise out of their relationship. Matters to be wound up will include carrying out existing commitments, bringing current negotiations to fruition, and, where appropriate, obtaining the fruits of any extraordinary expenditure or effort carried out within the scope of the agreement. The line between ordinary recurrent expenditure and effort and extraordinary expenditure and effort will not always be easy to draw. But in general it will be determined by what the parties would reasonably have contemplated was extraordinary effort or expenditure.

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10 At para [80].
11 At p 445.
12 At p 448.

It is to be noted that McHugh JA speaks of a "reasonable opportunity" to enter into alternative arrangements. Someone whose contract is terminable on reasonable notice cannot expect to be given a period of notice which may assure them of success in such an endeavour.

[11] In our opinion, a period of 12 months would have given Aotearoa sufficient breathing space in which to take stock of its situation, complete ongoing work under the contract and to explore any opportunities which might exist for it in the waste paper market or another line of business. For its part, Paper Reclaim was entitled to bring the contract to an end after such a period of notice, thereby making a clean break from an arrangement that was no longer satisfactory to it. It could not be expected to have to remain in the relationship for a longer period simply because Aotearoa might be disadvantaged by its termination.

[12] We have not overlooked the authority upon which Mr Grant most relied, *Paperlight Ltd v Swinton Group Ltd*,[13] a judgment of Clarke J in the Commercial Court of the Queen's Bench Division. In that case the reasonable period of notice for the termination of some franchise agreements was held to be five years, but there were two factors which seem especially to have influenced that result and which are not found in the present case. They are, first, that the franchisees had been led to believe that their previous fixed term contracts would be renewed for a further fixed term longer than five years. There was accordingly an element of legitimate expectation of continuance of the business. Added to this, the franchisor also had agreements with other franchisees under which it was contractually bound to remain in a franchising operation for some years. It thus had continuing contractual commitments to support franchisees. It followed that a shorter period of notice would not overall have facilitated a clean break for the franchisor. In our view, the *Paperlight* case is entirely distinguishable from the present situation.

[13] We have to this point been responding to submissions from Mr Grant that the period of 12 months was inadequate. Mr Judd QC, for Paper Reclaim, was at first

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13 [1998] CLC 1667.

disposed to pursue an argument that, on the contrary, it was too long and that as little as one month's notice would have sufficed. In the end, this suggestion was pursued by counsel only briefly, and rightly so. Substantial business was ongoing under the contract at the time when Paper Reclaim sought to terminate the relationship. After a contract life of about 16 years there was obviously going to be a need for a period of adjustment in the working methods and staffing of both companies. Both needed to take stock of their situation, especially Aotearoa which had not been warned of Paper Reclaim's intention to terminate. An orderly unwinding, including completion of negotiations with buyers and other work in progress, was likely to take months rather than weeks. Just how many months could be considered reasonable in the circumstances is not something capable of precise calculation. It cannot be said that the Court of Appeal was wrong to think that a period of 12 months was reasonably necessary to fulfil the common purpose of the requirement of notice.

The circumstances in which the relationship ended

[14] On 2 February 2001 Paper Reclaim wrote to Aotearoa as follows:

> We have offered various contractual agency arrangements to Aotearoa International Limited over the last few years, but these have been rejected by Aotearoa International Limited. Matters have continued on a deal by deal basis, with numerous disputes between us.
>
> We now write to advise you formally, that given that there is no longterm contractual arrangements [sic] 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 Limited as principal to Aotearoa International Limited as 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 of Paper Reclaim Limited on a particular sale, Aotearoa International Limited 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's agent only in respect of the particular sale upon which Aotearoa International Limited has been instructed.

[15] The Court of Appeal found that the contract was not brought to an end by this letter. It said that the contract came to an end "no later than" 3 May 2002 when Aotearoa, which treated Paper Reclaim's letter as a repudiation, elected to cancel the

contract and notified Paper Reclaim of that decision. The Court of Appeal was of the view that, in consequence, Aotearoa was entitled to commissions on sales of paper before 3 May 2002 "as if Paper Reclaim had continued to use it as agent, as it was bound to do".[14] After that date, Aotearoa would be entitled to damages "because it had an expectation that the contract would run on until someone gave notice and a reasonable period of notice had then expired".[15] However, the Court said, in claiming damages for the post-cancellation period Aotearoa would have to give credit for the money it saved through not having to carry out its obligations under the contract.

[16] The Court of Appeal went on to say that in calculating "post-cancellation damages" regard would have to be had to the fact that, but for the cancellation, each party would have been able to give notice bringing the contract lawfully to an end:[16]

> If the reasonable notice period at the date of cancellation would have been one year, then it may be appropriate when calculating damages to provide a cut-off of one year from the date of cancellation, that is, 3 May 2003. The logic of that is that, but for Aotearoa's act of cancellation on 3 May 2002, Paper Reclaim could have validly given a 12-month notice of termination. Had that occurred, there could have been no liability on Paper Reclaim's part after 3 May 2003.

[17] In our view, the Court of Appeal misconceived the legal consequences of these events. Paper Reclaim's letter of 2 February 2001 could be construed as a notice intended to bring the contract to an end immediately. It stated very expressly that in Paper Reclaim's view there were no "long-term contractual arrangements" between itself and Aotearoa. It directed Aotearoa not to hold itself out as Paper Reclaim's agent unless in respect of a particular sale Paper Reclaim were to instruct Aotearoa to act as its agent. It is arguable that there is no difference in substance between this advice that there was no contract between the parties and a notice purporting to exercise a right of immediate termination. It must, however, be recognised that, contrary to the view just expressed, there is case law in which courts have declined to treat a notification expressly declaring that a party does not regard

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14 At para [66].
15 At para [66].
16 At para [67].

itself as bound by a contract as the equivalent of advice of summary termination.[17] We will therefore treat Paper Reclaim's letter as no more than evidence of its repudiation of the contract as from 2 February 2001, that is a denial of the existence of the contract. As will appear, that does not change the outcome.

[18] It is trite law that a repudiation, unless accepted, can have no legal effect on the existence of a contract. In the words of Asquith LJ in *Howard v Pickford Tool Co Ltd*,[18] it is "a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind". The effect of an unlawful repudiation has nevertheless been the subject of some uncertainty in employment cases in England. At one time, along with contracts of agency, they appeared to be in an exceptional category. In *Vine v National Dock Labour Board*[19] Jenkins LJ had said that in the ordinary case of master and servant the repudiation or wrongful dismissal puts an end to the contract and that the dismissed employee necessarily has a claim for damages and nothing more. That statement met with the approval of Viscount Kilmuir LC when the case went to the House of Lords.[20] But the difficulty of the proposition as a statement of law, as opposed to a statement of practical consequence for the employee, was pointed out by Megarry V-C in *Thomas Marshall (Exports) Ltd v Guinle*[21] where he said that any doctrine of "automatic determination" might have the result that the contract concerned came to an end even though the repudiatory breach was unknown to the innocent party. Megarry V-C said that the limitation of that party's range of remedies should not "invade the substance of the contract".[22] The problem with any such doctrine was obvious when, as in *Thomas Marshall*, it was the employee who repudiated, since any automatic termination and consequent restriction of the employer to a damages remedy would, contrary to settled case law, preclude the employer from obtaining an injunction against the employee to restrain breach of a restrictive covenant.

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17 For example, *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 at pp 371, 378 and 382 (CA).

18 [1951] 1 KB 417 at p 421 (CA).

19 [1956] 1 QB 658 at p 674 (CA).

20 [1957] AC 488 at p 500.

21 [1979] 1 Ch 227 at p 239 (HC).

22 At p 240.

[19] The correct position was confirmed in *Gunton v Richmond-upon-Thames London Borough Council*.[23] Buckley LJ surveyed the authorities, concluding that the doctrine that it takes two to end a contract, "by repudiation, on the one side, and acceptance of the repudiation, on the other",[24] does apply to contracts of personal service as it applies to the generality of contracts. In practical terms, however, the wrongfully dismissed employee had, in the absence of special circumstances, no option but to accept the repudiation and the court should easily infer that had happened.[25]

[20] Buckley LJ then made an observation which is of some moment in the present context. He said that where an employee was wrongly dismissed he was entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of the dismissal to the end of the contract. However, and this is the important point, the date when the contract would have come to an end must be ascertained:[26]

> 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:…

[21] His Lordship gave an example of an employer entitled to dismiss an employee on not less than three months' notice. If the employer purported to dismiss the employee summarily, the dismissal, being wrongful, would be a nullity. But the employee could recover as damages for breach of contract no more than three months' remuneration, subject to mitigation. After giving further examples which are variations on this theme, Buckley LJ posited an employee who did not accept the summary dismissal until the end of 10 weeks. He said:[27]

> In such a case, if I am right in supposing acceptance of a repudiation to be requisite in master and servant cases, the master would be guilty of a breach of contract continuing de die in diem for refusing to offer the servant employment from the date of exclusion down to the date of acceptance, and

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23 [1981] 1 Ch 448 (CA).

24 At p 467, quoting Viscount Simon LC in *Heyman v Darwins Ltd* [1942] AC 356 at p 361.

25 At p 459. Buckley LJ was speaking of the position under the general law. The position under a statute governing employment law, such as the Employment Relations Act 2000, can be quite different.

26 At p 469.

27 At pp 469 – 470.

> thereafter for damages on the basis of a wrongful repudiation of the contract. Could the servant properly claim damages under the second head in relation to a period of three months from the date of acceptance as well as damages under the first head in relation to the 10 week period? In my judgment, he clearly could not. 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, although it might affect the remedy available for that cause of action.

The last sentence is of course entirely consistent with the fact that damages are given, both under the general law and under the Contractual Remedies Act 1979, for the breach, not for the cancellation in reliance on the breach.

[22] In *Gunton*, Brightman LJ expressed his concurrence in Buckley LJ's conclusion. He said that "by necessity" the employee's remedy is confined to damages:[28]

> An unlawful dismissal is ex hypothesi a premature dismissal. The damages recoverable, having regard to the plaintiff's duty to mitigate his damages, are the moneys needed to compensate the plaintiff for his net loss of salary or wages during the period for which the defendant was bound by his contract to employ the plaintiff. In the case of a fixed term contract, the assessment will extend over that fixed term. In the case of a contract terminable by notice, the assessment will extend over the period which would have had to elapse before the defendant could lawfully have dismissed the plaintiff.

He too regarded the invalid notice as a nullity but said that it should be assumed that a valid notice would have been given "at the earliest permissible date". He made it clear that he regarded termination of a contract for an agency as being governed by the same considerations. He added that once there has been a wrongful repudiation of the agency, the agent can no longer hold himself out as still being the agent of the principal, even though the contract of agency continues.[29]

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[28] At p 473.

[29] At p 474 – 475. That has long been recognised in New Zealand. The Court of Appeal held in *Mahood v Geange* [1927] NZLR 780 that unless an agency is coupled with an interest – which is not suggested in the present case – it is determinable at any time even if expressed to be irrevocable, but subject to an action for damages if the determination or revocation amounts to a breach of contract.

[23] The assumption made by Brightman LJ, that a valid notice would have been given at the earliest possible date, is simply an application of the well-settled general principle in the assessment of damages that, as McGregor puts it:[30]

> [W]here the defendant has the option of performing a contract in alternative ways, damages for breach by him must be assessed on the assumption that he will perform it in the way most beneficial to himself and not in that most beneficial to the claimant.

[24] Mustill J said in *Paula Lee Ltd v Robert Zehil & Co Ltd*[31] that the inquiry always involves a comparison between the claimant's actual position in face of the breach, and the position the claimant would have occupied if the contract had been performed. He said it must involve an identification of the promise (which here is an implied promise not to terminate on less than reasonable notice) followed by a valuation of its promised worth to the promisee. Each part of the inquiry may involve considering a choice which would have been open to the promisor. That means a choice which was reasonably open to it. The choice reasonably open to Paper Reclaim was to terminate the contract upon expiry of a reasonable period of notice, in the meantime not revoking Aotearoa's authority to act as agent for export sales.

[25] So Paper Reclaim could have met its contractual obligations, and thereby fully performed the contract, by giving Aotearoa 12 months' notice of termination and continuing to abide by its contract with Aotearoa during that time. In accordance with principle, therefore, damages for Paper Reclaim's repudiatory breach of contract should be assessed on the assumption that, if it had adhered to the contract, it would have chosen to give 12 months' notice on 2 February 2001, and that the contract would have terminated upon expiry of that period.

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30 *McGregor on Damages* (17 ed, 2003) at para [8-060]. See also *Chitty on Contracts* (29 ed, 2004) at para [26-041]. In *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 at p 294 (CA) Diplock LJ said that the assumption to be made is that the defendant has performed or will perform his legal obligations under his contract with the plaintiff and nothing more. The principle goes at least as far back as *Cockburn v Alexander* (1848) 6 CB 791; 136 ER 1459 and has recently been affirmed by the Supreme Court of Canada in *Hamilton v Open Window Bakery Ltd* [2004] 1 SCR 303. The plaintiff is entitled only to the performance by the defendant which is the least burdensome for the defendant: *Hamilton* at para [20].

31 [1983] 2 All ER 390 at p 393 (HC).

[26] In the present case the Court of Appeal came to its contrary view citing only the decision of the Court of Appeal of England and Wales in *Decro-Wall International SA v Practitioners in Marketing Ltd*.[32] The members of the Court in *Decro-Wall* were all of the opinion that a distribution contract had continued in existence after the manufacturer repudiated it by notifying that it had appointed another distributor. The contract would not come to an end until 12 months after the manufacturer had served a notice of that length, which was what was required as a reasonable period in the circumstances. The focus in that case was on when the contract actually terminated, not on the assessment of damages for repudiatory breach. The judges considered an argument that a notice of summary termination brought the contract to an end on the expiry of a period of reasonable notice, but they determined that the notification in that case should be construed not as a notice of termination but simply as a repudiation. In arriving at this view the Judges distinguished as sui generis the decision of the Court of Appeal in *Minister of Health v Bellotti*.[33] In that case it had been held that the time allowed by the Minister's notices to vacate certain premises was unreasonably short. But the notices had nonetheless been effective to determine the licences to occupy the premises. Lord Greene MR said that the fact a notice included a threat to remove licensees from the premises before the expiration of a reasonable period of time, did not prevent it from being a good notice to determine the licence. The proceeding by the Minister had not been instituted until after the reasonable time had elapsed.[34] In *Decro-Wall*, Sachs LJ said he had not found the issue easy to resolve. He was much influenced by a concern that someone should not be able to give a "wrongfully short notice", thereby placing the opposite party in a position of great uncertainty, yet retaining "the same benefits as if they had given a correct notice".[35]

[27] In our view, however, the greater difficulty is likely to exist for the party which is endeavouring to exercise a right to terminate upon reasonable notice but does not know precisely what length of notice will later be found to be reasonable in

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32 [1971] 1 WLR 361 (CA).
33 [1944] 1 KB 298.
34 At p 306. See also *Australian Blue Metal* at p 100.
35 At pp 377 – 378.

the particular circumstances. If the law were actually to be as stated in *Decro-Wall*, the consequences for the erroneous notice-giver might be dire, for, as happened in that case, the recipient of the inadequate notice would be entitled to all contractual benefits until the required period of notice had been ascertained, perhaps only after a court judgment, and then proper notice had been given and run to its expiry point. On the other hand, if, as in *Bellotti*, the notice is treated as effective to bring the contract to an end after a reasonable period, the notice-giver avoids that peril and the recipient is not disadvantaged because, subject to mitigation, damages will be awarded for any benefit of the contract lost because of the failure to allow a reasonable time.

[28] The Court in *Decro-Wall* appears not to have been referred to the decision of the Privy Council in *Australian Blue Metal* which recognised the problem for the notice-giver and was sympathetic to it. The Judicial Committee was obviously reluctant to see imposed upon someone entitled to give reasonable notice any requirement that they must give what Lord Devlin called a dated notice, namely one which names a termination date or specifies an exact time by reference to which the date may be ascertained. He thought that it would be unusual because when such a requirement is made:[36]

> the party giving notice has put upon him the burden of fixing a period which must be reasonable in the light of circumstances of which he may have only incomplete knowledge.
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> …
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> Even when all the circumstances are fully known differing assessments can easily be made of what is a reasonable time and the judge who has in the end to decide it often finds that there is almost as much to be said in favour of one assessment as of another.
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> Thus the burden of specifying the time with precision may be a very difficult one to discharge. Their Lordships cannot imagine the licensors in a case such as the present agreeing to bear it. It would mean in effect that if when they gave notice they guessed wrong, the licence, instead of continuing for a few months, might continue for years, maybe until after the information elicited in a law suit enabled them to make a more accurate estimate.

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[36] At p 101.

In rejecting the view that there was any fixed rule that a notice must be a dated notice, the Judicial Committee relied on *Bellotti*, appearing to treat it as a case of general application.

[29] It follows that, even on the assumption that Paper Reclaim's letter of 2 February 2001 was in law no more than a repudiation of its contractual obligations, the outer limit of the period in relation to which Aotearoa's damages are to be calculated is the date upon which a reasonable notice (12 months) would have expired. And it is to be assumed that Paper Reclaim would immediately have taken the opportunity of giving such a valid notice. The position is therefore in this respect no different from when a notice of termination is actually given but either no period at all is stipulated in it or the notice-giver undershoots the required period. Nor does it make any difference whether the purported termination is immediate or on one day's notice, one month's notice or 11 months' notice. As the period of reasonable notice in this case was 12 months, it expired on 2 February 2002. The period for calculation of damages must be regarded as having come to an end on that date.

Breach of fiduciary duty

[30] The Judge found that the relationship between Paper Reclaim and Aotearoa was a joint venture rather than a partnership or an agency and that each party had been required to act towards the other with mutual trust, confidence and loyalty in the performance of the contract and the relationship, "with reasonableness and good faith to the other".[37] Counsel for Aotearoa submitted that Paper Reclaim had been in breach of this fiduciary obligation. He said that the Court of Appeal had been wrong to overrule Nicholson J on this head of claim. He contended that the Court of Appeal's decision had deprived Aotearoa of the ability to claim an account of profits or additional damages. He pointed out that the Court of Appeal had also called the relationship a joint venture.

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[37] At paras [164] and [169].

[31] The Courts below were too ready to label as a joint venture an arrangement that was in aspects relevant to this litigation no more than a contract of agency. To style a contractual relationship as a joint venture may be apt to distract. It is a term to be applied with caution. When parties have formed a contract the correct approach is first to decide exactly what they have agreed upon. Only then should the court consider whether any particular aspect of their agreement gives rise to a relationship which can properly be characterised as fiduciary, imposing an obligation of loyalty on one or both parties, which supplements the express or implied contractual terms. It is not enough to attract an obligation of loyalty that one party may have given up more than the other in entering into the contract or that the contract may be more advantageous for one party than for the other. Nor is a relationship fiduciary in nature merely because the parties may be depending upon one another to perform the contract in its terms. That would be true of many commercial contracts which require co-operation. A fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement, express or implied, to act on behalf of another and thus to put the interests of the other before one's own is a frequent manifestation of a situation in which fiduciary obligations are owed.[38] Partners are the classic example of parties in that situation. Their position is different from that of parties to a contract who may have to cooperate but are doing so for their separate advantages.

[32] The particularised allegation in the statement of claim on which Aotearoa went to trial was that, in breach of a fiduciary duty, Paper Reclaim had sold paper for export other than via Aotearoa. In doing so it had misused information obtained from Aotearoa about markets, customers, transportation costs and routes and other information relating to Aotearoa's "role and activities". It was also pleaded that Paper Reclaim was continuing to do so. That pleading made no claim of confidentiality and seems to have been taken by Nicholson J to have related to sales made by Paper Reclaim to Carter Holt said to have been in breach of its contract with Aotearoa and in breach of a fiduciary duty of loyalty. He made a finding of misuse of confidential information in the context of the Carter Holt allegation (which

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[38] *Chirnside v Fay* [2007] 1 NZLR 433 at para [85] (SC).

is not before this Court) but did not indicate why he regarded the information as confidential in the hands of Paper Reclaim. The Judge also made a finding that each party 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. He recorded that there was no agreement for sharing profits or losses or responsibility for the acts of the other and, apart from the contractual limitation on what each could do with waste paper, no restriction on the range of business either could carry on.[39] He acknowledged that the relationship between joint venturers is not necessarily fiduciary and depends upon the form of the venture and the content of the obligations which the parties to it have undertaken.[40] He then proceeded directly to the conclusion that there was, between the contracting parties, an obligation to act with mutual trust, confidence and loyalty. He did not explain why that might be so. This conclusion, as with the pleading, seems to overlook the fact that the obligation not to misuse or disclose confidential information, although sometimes described as fiduciary, has different characteristics from the quite separate obligations of trust and loyalty between fiduciaries.

[33] It seems to us very doubtful that any obligations other than of a contractual nature governed the relationship between these parties except Aotearoa's obligation of loyalty to Paper Reclaim when acting as its agent. That facet of the relationship was certainly fiduciary. Agency gives rise to an obligation of loyalty. But the obligation is owed by agent to principal, not the other way round. An agent may be under an obligation not to misuse for its own benefit information it has gathered in the performance of its duties. However, since it is gathered by the agent for the benefit and use of the principal it can normally be used by the principal as it sees fit. If the principal acts in breach of the contract of agency it may be accountable to the agent for the remuneration which the agent would otherwise have earned under the contract, or more correctly, for the loss of the opportunity of earning it, which in practice often produces the same result for the agent. We can see nothing in the terms of the contract found to exist between Paper Reclaim and Aotearoa requiring the implication of any greater obligation upon Paper Reclaim than this. It was able

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39 At para [164].

40 At para [165] citing *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at p 11 (HC); *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1 (PC).

to use the information for its own purposes but had to honour the exclusive nature of the agency or pay damages for failing to use Aotearoa as its agent while the contract continued.

[34] Even if Paper Reclaim had owed Aotearoa some duty of a fiduciary character, Aotearoa would still face another obstacle to its claim to a greater sum via the fiduciary route. It limited its pleading to an allegation of breach of a duty of loyalty by Paper Reclaim in the implementation of the joint undertaking; in other words, misusing information during the time when the contract was on foot. There was no allegation of misuse after the contract came to an end. The allegation that Paper Reclaim was "continuing to use" information was made only in the context of a pleading that the contract had either not been terminable at all or had been terminable only on very long notice, which had not been given. It was apparently directed to use of the information during the period of the notice which should have been given. If Aotearoa wanted to allege that information remained its property, and was subject to an obligation of confidentiality on the part of Paper Reclaim, after the termination of the contract, it needed to have pleaded that explicitly.

[35] So Aotearoa's claim was necessarily limited by its pleading to things done by Paper Reclaim during the 12 month period running from 2 February 2001. The Bench explored with Mr Grant what this might amount to over and above the entitlement to commissions which Aotearoa was deprived of the opportunity of earning because Paper Reclaim repudiated the contract and revoked the agency without giving proper notice. Mr Grant was unable to suggest any measure of damage exceeding that claimable in contract. An accounting for profits would not advantage Aotearoa since, once commissions are accounted for, Paper Reclaim would be left with nothing it would not otherwise have received.

[36] The Court of Appeal was therefore correct to reach the conclusion that the claim for breach of fiduciary duty failed.

Costs

[37] In a separate judgment,[41] Nicholson J awarded Aotearoa costs on an indemnity basis, reduced by 20% to reflect the fact that Paper Reclaim had not been completely successful. The Judge took this course because he considered that Paper Reclaim had acted improperly. He decided that two of its directors had given false evidence in denying the existence of the oral contract. That question had taken up a good deal of time at the trial. The Judge said that there had been no room for mistake or failure of memory given the importance of the contract. He was also influenced in fixing the level of costs by his adverse view of Paper Reclaim's conduct towards Aotearoa prior to the writing of Paper Reclaim's letter in February 2001.

[38] The Court of Appeal overturned the costs ruling. It said it would fix the appropriate costs if the parties could not agree on them. It took the view that, for three reasons, it could not possibly be said that Paper Reclaim had acted improperly in defending the proceeding in terms of r 48C(4)(a) of the High Court Rules. First, Aotearoa's claim had failed in numerous respects. The cause of action alleging an agreement of indefinite duration had failed. So had its fall-back claim that the contract could only be terminated on notice of 13 years ten months (when Mr Cash of Aotearoa would have turned 65). The claim for breach of fiduciary duty had failed, as had three other causes of action with which this Court has not been concerned, two failing in the Court of Appeal after Aotearoa had succeeded in the High Court. Paper Reclaim had also succeeded on a counterclaim and that had not been appealed by Aotearoa.

[39] The Court of Appeal's second reason was that it did not accept the Judge's conclusion that the evidence of the Paper Reclaim directors was deliberately false.

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[41] *Aotearoa International Ltd v Paper Reclaim Ltd* (High Court, Auckland, CP 117-01, 30 August 2004, Nicholson J).

Having examined the evidence, the Court of Appeal was not prepared to go further than saying that it was probable that there was a meeting as alleged by Mr Cash at which the oral contract was made. If there was such a meeting it was entirely possible they had forgotten it. The three men were meeting all the time and it was clear to the Court of Appeal that the relationship evolved over time. Furthermore, the crucial term under which the contract was terminable on reasonable notice was an implied term. The Court of Appeal traversed various matters which suggested to it that the Judge could not be so sure the Paper Reclaim representatives were lying when Mr Cash was himself uncertain about various aspects of the oral agreement.

[40] The third reason was that it had been wrong for the Judge to take into account Paper Reclaim's conduct prior to February 2001, before any proceeding was issued. Any remedy for that must be in damages and the only matter relevantly pleaded was one in respect of which the Court of Appeal had reversed the trial Judge's finding in favour of Aotearoa. Paper Reclaim's conduct during that period could not be relevant to the question of costs.

[41] Aotearoa seeks in this Court to have Nicholson J's costs award restored. It cannot dispute the Court of Appeal's first and third reasons. The Court of Appeal has been upheld in all respects on Aotearoa's appeal and, in fact, as Paper Reclaim's appeal is to be allowed, Aotearoa is overall even less successful now than it was before the Court of Appeal. The Court of Appeal was plainly correct on its third reason. Conduct prior to the commencement of a proceeding is not misconduct in defending the proceeding or a step in the proceeding.

[42] Mr Grant therefore focused his argument on what he said were flaws in the Court of Appeal's analysis of Mr Cash's evidence which had led the Court of Appeal to say that he too had been uncertain about aspects of the oral agreement. There may be something in all or some of the specific points Mr Grant made but the argument does not address what, in agreement with the Court of Appeal, we see as the more general difficulty with Nicholson J's costs ruling. The Judge was entitled to conclude that the two Paper Reclaim witnesses were wrong when they denied the occurrence of a meeting in 1984/85 at which an oral contract was made, some

17 years before the trial, but the Judge gave no explanation at all for his blunt assertion that there was no room for mistake or failure of memory. He thereby provided no foundation for a very severe assessment leading to a penal infliction of costs. It was therefore incumbent on the Court of Appeal to re-examine the evidence. Having done so, it was entitled to take a different and more charitable view of the witnesses.

[43] Moreover, reverting to the first reason given by the Court of Appeal, in light of the major difference in the result of the case after the appeal, the Court of Appeal was obliged to review the quantum of costs. Aotearoa had by then fallen so far short in its claims that, for that reason alone, the Court of Appeal could properly have considered that costs should not be fixed on an indemnity basis. It is true that Nicholson J had made an allowance for lack of success but he was assessing the situation on the basis of a judgment for Aotearoa which would have required very sizeable compensation to be paid for a deficiency of eight years in the notice period. That no longer stands. The amount at stake is now much reduced.

[44] The Court of Appeal correctly concluded that the High Court costs judgment could not be supported. In view of Nicholson J's retirement, the Court of Appeal should now fix the costs, taking into account both the respective positions adopted by each party at trial concerning the existence and terms of the contract and the degree to which Aotearoa has succeeded in establishing liability.

Result

[45] We dismiss Aotearoa's appeal and allow Paper Reclaim's appeal in relation to the calculation of damages. We remit the matter to the Court of Appeal to deal with costs in the High Court. We do not disturb the refusal of any award of costs in that Court.

[46] We award Paper Reclaim costs in this Court in the sum of $20,000, together with its reasonable disbursements to be fixed by the Registrar if the parties cannot agree upon them.

[47] Costs were reserved in this Court on Paper Reclaim's first, unsuccessful application to have further evidence admitted in this Court.[42] We now award costs to Aotearoa on that application in the sum of $2,500. There will be no costs on its further applications in relation to that evidence which this Court has found it unnecessary to determine.

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[42] [2006] NZSC 59.