

IN THE COURT OF APPEAL OF NEW ZEALAND

CA70/04

BETWEEN

PAPER RECLAIM LIMITED
Appellant

AND

**AOTEAROA INTERNATIONAL
LIMITED**
Respondent

Hearing: 18-21 July 2005

Court: Anderson P, Chambers and O'Regan JJ

Counsel: G J Judd QC and A G Rowe for Appellant
A F Grant and A A Sinclair for Respondent

Judgment: 14 March 2006

JUDGMENT OF THE COURT

- A The appellant's application for leave to admit further evidence is granted only to the extent that the affidavit of John Mark Trevelyan Wells dated 14 July 2005 is admitted for the purposes of the appeal.**
- B The appeal against the High Court decision dated 19 March 2004 is allowed in part.**
- C In place of the High Court's finding that a reasonable notice period would have been eight years, we make a finding that, but for the respondent's cancellation of the agreement (whenever that was in 2001 or 2002), the appellant would have been able to give notice under term 8 and such notice would have had to be at least a year.**

- 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.
- E** The judgment in favour of the respondent on the fifth cause of action (the sale to AMCOR) in the sum of \$16,590.50 plus GST is set aside. In its place, on that cause of action, judgment is entered for the appellant.
- F** The proceeding is remitted to the High Court for determination of quantum in light of the High Court's findings on liability as modified by this judgment.
- G** The appeal against the High Court decision dated 30 August 2004 is allowed and the order for the appellant to pay costs to the respondent in the sum of \$532,115.15 is set aside. If the parties cannot agree what costs in the High Court should have been, this court will fix them. In that event, the respondent must file and serve its submissions on costs on or before 10 April 2006, the appellant its submissions on or before 24 April 2006, and the respondent its submissions in reply on or before 8 May 2006.
- H** The appeal against the High Court decision dated 3 September 2004 is allowed. Unless the proceeding sooner settles, the respondent must on or before 10 April 2006 file and serve an amended statement of claim:
- (a) omitting causes of action which have failed or been finally disposed of; and
 - (b) omitting any claim for exemplary damages.

REASONS

(Given by Chambers J)

Table of Contents

	Para No
An export venture turns sour	[1]
Issues on the appeal	[7]
The alleged oral agreement	[20]
<i>The judge's findings</i>	[20]
<i>The rival contentions as to the parties' relationship</i>	[30]
Reasonable notice	[53]
<i>Term 8</i>	[54]
<i>The period of notice</i>	[60]
Sales to Carter Holt	[84]
Fiduciary duty	[98]
The sale to AMCOR	[110]
Conclusion on the liability appeal	[126]
Application for further evidence	[128]
<i>The additional evidence we are not admitting</i>	[130]
<i>Mr Wells's 14 July 2005 affidavit</i>	[139]
Costs in the High Court	Error: Reference source not found
Exemplary damages for breach of contract	[162]
Costs in this court	[189]

An export venture turns sour

[1] Paul Cash, Kerry O'Rourke and Grant Taylor have, since the early 1980s, made a lot of money together from collecting, buying, recycling, selling, and exporting waste paper. Mr Cash first got into the business in 1975, when he set up his own company, Aotearoa International Limited, the respondent. In the course of his business, Mr Cash got to know Messrs O'Rourke and Taylor, who were, at the time Mr Cash first got to know them, partners in a business which stripped plastic lining from multi-wall paper bags. They sold the paper from this operation to a company then called NZ Forest Products Limited, which later became Carter Holt Harvey Limited. From that beginning they diversified into collecting, recycling and selling waste paper. In 1981 they changed their partnership relationship to that of equal shareholders and co-directors in a private company called G K Taylor and K O'Rourke Limited. That company later changed its name to Paper Reclaim Limited, the appellant.

[2] In 1982, the first formal link between the three men was put in place. They started working in the waste paper field together for the first time. There is no dispute about the original relationship among these players, but what has been in dispute in this litigation is how that relationship developed over time. The relationship continued in some form or other until early 2001. At that stage, Paper Reclaim sent a letter to Aotearoa. The legal effect of that letter is a matter in dispute on this appeal. There is no dispute, however, about its practical effect: the parties thereafter did not work with one another. Their relationship completely fell apart.

[3] Aotearoa unsuccessfully sought an interlocutory injunction in an attempt to hold Paper Reclaim to what Aotearoa said was the parties' joint venture arrangement under which it was Paper Reclaim's sole export agent. Following the failure of that application, Aotearoa regretfully accepted that the relationship was at an end, but it nonetheless persisted with a claim for substantial damages based on Paper Reclaim's alleged repudiation of the parties' oral agreement and its breach of fiduciary duty.

[4] The trial took place in the High Court at Auckland before Nicholson J. On 19 March 2004, His Honour delivered his judgment: *Aotearoa International Limited v Paper Reclaim Limited* HC AK CP117/01. (We shall call this judgment "the liability judgment".) Essentially, His Honour found in favour of Aotearoa. He found an agreement as alleged by Mr Cash and Aotearoa. He held that Paper Reclaim had breached that agreement in several respects. In particular, he held that the parties' relationship could be terminated only on reasonable notice. In the circumstances, he considered eight years to be the period of reasonable notice. His Honour also found that Paper Reclaim owed a duty in equity to Aotearoa to act reasonably and in good faith, and that that duty too had been breached in several respects.

[5] His Honour did not determine compensation as it had been agreed by the parties that quantum issues would be left to a later trial. (That trial has still to take place.)

[6] Paper Reclaim now appeals against the liability judgment.

Issues on the appeal

[7] There are six principal issues on the substantive appeal.

[8] The first is whether there was an oral agreement as found by the judge. Mr Judd QC, for Paper Reclaim, submits that it was not open to Nicholson J to find that Aotearoa had proved the existence of the alleged contract. This issue includes discussion as to the terms of the agreement. A principal issue under this head is whether Paper Reclaim had committed to having Aotearoa as its agent with respect to any paper it wished to export. Paper Reclaim claimed that it had never made such a commitment, but Nicholson J found to the contrary. A further issue under this head is whether an implied term of the agreement was that it was terminable by either party on reasonable notice to the other. Nicholson J found such an implied term. Mr Judd challenges that finding. He submits that the agreement was terminable at will.

[9] If we uphold the finding that there was an implied term that the contract was terminable by either party on reasonable notice to the other, then the next issue is whether the judge was correct to find that a reasonable notice period was eight years. Mr Grant, for Aotearoa, sought before us to uphold the judge's finding. Mr Judd submitted that, if a notice period was required, then it should have been no more than a few weeks. That is the second issue in this case.

[10] An issue arises from Paper Reclaim's dealings with Carter Holt Harvey Limited. Paper Reclaim had dealt with Carter Holt since the early 1980s, but it was its dealings with that company from 1996 on with which Aotearoa was concerned. That was because from mid-1996 Paper Reclaim was supplying waste paper to Carter Holt, knowing that it (Carter Holt) was then exporting it. Aotearoa claimed that Paper Reclaim's act of supplying Carter Holt with waste paper in the knowledge that it would then export that paper was in breach of Paper Reclaim's obligations to Aotearoa under their exclusive export arrangement. This allegation formed the seventh cause of action. Aotearoa put Paper Reclaim's obligation to it in this regard on alternative bases:

- (a) An implied term of the agreement that each party would act with reasonableness and good faith to the other;
- (b) A fiduciary obligation to the same effect.

[11] The issues that arise, therefore, are:

- (a) Was there an implied term to the effect pleaded? Was that term breached by Paper Reclaim selling to Carter Holt?
- (b) Did Paper Reclaim owe a fiduciary obligation to Aotearoa to act towards it with reasonableness and good faith? If so, was that obligation breached by its sales to Carter Holt?

[12] Breach of fiduciary duty was also the basis of another cause of action, the third. The obligation relied on was the same as pleaded in the seventh cause of action, namely an obligation to act with reasonableness and good faith to the other. Aotearoa claimed that Paper Reclaim had breached that duty after February 2001 by exporting paper “other than via [Aotearoa] and at its request”. As well, Aotearoa alleged that, in undertaking these exports on its own, Paper Reclaim had made use of information as to markets, customers, and transportation costs and routes which had earlier been supplied by Aotearoa. Nicholson J found that Paper Reclaim was liable as a fiduciary and had breached this fiduciary obligation after February 2001. Mr Judd challenged those conclusions. He submitted, as he had done when discussing the Carter Holt claim, that Paper Reclaim did not owe fiduciary obligations to Aotearoa. Even if it had once, Mr Judd submitted those obligations had come to an end with the contract’s termination in February 2001. Whether Mr Judd is right is the focus of the fifth issue on this appeal.

[13] The fifth cause of action concerned a sale made to AMCOR, an Australian waste paper processor. That company agreed to buy 525 tonnes of a grade of waste paper called Shoalhaven Whites. In the end, Paper Reclaim supplied only 260.82 tonnes. Paper Reclaim paid Aotearoa its commission on the tonnage supplied, but did not pay commission on the balance never supplied. Aotearoa claimed that

commission was nonetheless payable on the balance. Nicholson J found it was payable. Whether he was right to do so is the sixth issue. This issue turns on the meaning of the commission term in the contract.

[14] That leaves the first, fourth, and sixth causes of action and Paper Reclaim's counterclaim. The sixth cause of action has yet to be heard. It was adjourned pending Aotearoa obtaining further discovery from Carter Holt: the liability judgment at [12]. Aotearoa failed on the other two causes of action and was found liable on the counterclaim. Aotearoa has not cross-appealed with respect to the matters on which it failed. Those matters do not need discussion in this judgment. Anyone interested in finding out about them should read Nicholson J's reasons for judgment.

[15] Apart from the above matters, three further matters were argued before us.

[16] The first of the additional issues was an application by Paper Reclaim to adduce further evidence on this appeal. We heard that application for the first two days of the four day appeal hearing. At the end of those two days' hearing, we announced our decision on that application. We granted it but only to the extent that we admitted the affidavit of John Mark Trevelyan Wells dated 14 July 2005 for the purposes of the appeal. Most of the proposed new evidence was not admitted.

[17] Secondly, on 30 August 2004, Nicholson J delivered a costs judgment in this case. (We shall call this "the costs judgment".) He awarded Aotearoa costs, essentially on an indemnity costs basis. Paper Reclaim appealed against that costs judgment. It submitted that, even if Aotearoa holds onto its liability judgment, an award of indemnity costs was wrong in principle.

[18] The third additional matter we dealt with at the appeal hearing arose from yet a further judgment of Nicholson J, this one delivered on 3 September 2004. (We shall call this "the pleadings judgment".) In that judgment, His Honour dealt with an application by Aotearoa seeking leave to amend further its statement of claim in readiness for the quantum hearing. Paper Reclaim opposed the application to amend, principally because Aotearoa for the first time sought exemplary damages. The

question that falls for our consideration is whether exemplary damages are claimable for breach of contract and breach of fiduciary duty. Even if they are, is it right that Aotearoa was able to amend its statement of claim to include them at that late stage?

[19] We shall deal with those issues in that order.

The alleged oral agreement

The judge's findings

[20] Nicholson J found that in late 1984 or early 1985 a meeting took place between Mr Cash (representing Aotearoa) and Messrs O'Rourke and Taylor (representing Paper Reclaim) at which an oral agreement was made between the two companies: the liability judgment at [67]. (For convenience, we shall call this meeting "the agreement meeting", even though there is dispute as to both whether the meeting even took place and whether any agreement was reached at it.) Subsequently the agreement was varied, again orally. (We shall call the agreement, as varied, "the joint venture agreement", even though there is dispute as to whether the relationship created was technically a joint venture.) That agreement continued to run until 2001, when, Nicholson J found, Paper Reclaim wrongly repudiated it. His Honour found that, among the relevant express terms of the joint venture agreement were the following terms (at [5] and [67]):

- *Term 1:* Aotearoa would cease to bale waste paper.
- *Term 2:* Aotearoa would cease to buy waste paper and export it from New Zealand on its own behalf except in respect of a handful of existing customers.
- *Term 3:* Aotearoa would have the exclusive responsibility for arranging the export of waste paper produced by Paper Reclaim.

- *Term 4:* Paper Reclaim would focus its activities on the sourcing and baling of waste paper to the mutual financial benefit of both companies.
- *Term 5:* Aotearoa and Paper Reclaim will share equally in the profits which will be made by Aotearoa on the export of waste paper sourced from third parties (“the 50/50 deals”) excepting Aotearoa would retain all the profits for those companies who were, at the time, delivering goods ready for export to the order of Aotearoa.
- *Term 6:* The joint venture would have exclusivity in the Auckland market and the only exception would be Domino Marketing.
- *Term 7:* Aotearoa would receive 10% of the FOB price.

[21] His Honour found that there were in addition two implied terms (at [108] and [169]):

- *Term 8:* The contract was terminable by either party on reasonable notice to the other.
- *Term 9:* Each party would act with reasonableness and good faith to the other in the implementation and continuing operation of the joint undertaking.

[22] Of these terms, only terms 3, 5, 7, 8 and 9 are of prime importance for current purposes. Term 3 is the term pursuant to which Paper Reclaim was bound to use Aotearoa as its agent with respect to the export of waste paper produced by Paper Reclaim. This term was hotly disputed by Messrs O’Rourke and Taylor at trial. While they accepted that Aotearoa had been Paper Reclaim’s only agent from at least the mid-1980s until 2001, they asserted that there was no obligation on them to use Aotearoa. They asserted that each export arrangement was a separate contract, which Paper Reclaim was entitled to place with any agent it chose – or, indeed, to

export itself if it chose. Likewise, Aotearoa was at liberty to decline the assignment if it chose.

[23] Nicholson J rejected that construct. He found that there was an underlying relationship between the two companies. An issue on this appeal is whether he was right so to find.

[24] If he was wrong, then clearly Aotearoa's claim must fail. It would follow, if Mr O'Rourke's and Mr Taylor's evidence were correct, that Paper Reclaim was at liberty to cease using Aotearoa as its agent in 2001. Further, the Carter Holt transaction (which we shall explain later in these reasons) could not possibly have been wrongful on Paper Reclaim's part, as there would have been no restraint on Paper Reclaim's supplying paper to whomever it chose. Whether term 3 was agreed is the crucial issue on the contract cause of action.

[25] Term 5 may have relevance when it comes to calculating the loss Aotearoa suffered as a result of Paper Reclaim's repudiation of the agreement. Aotearoa did not allege term 5 had been breached.

[26] Term 7 has relevance with respect to the AMCOR cause of action, the fifth issue on this appeal.

[27] Term 8 was neither party's "preferred" provision as to the agreement's duration and termination. Aotearoa's preferred position was that the agreement was of indefinite duration; that is, it could not be terminated at all except by mutual discharge. Nicholson J rejected that proposition, and there is no appeal from that conclusion. Paper Reclaim's position was that, even if there was an underlying relationship between the companies, that relationship could be terminated at will. The judge rejected that contention too; whether he was correct to do so is an issue in this appeal.

[28] The judge found that the agreement was terminable on reasonable notice. This was, in fact, each side's fallback position.

[29] The only other term which is of current significance is term 9. It was this term that Nicholson J found Paper Reclaim had breached when it entered into its contract with Carter Holt in 1996. Whether term 9 was implied into the contract is therefore of great significance.

The rival contentions as to the parties' relationship

[30] At trial, Nicholson J was faced with sharply different contractual constructs. One, advanced by Aotearoa, was based principally on the evidence of Mr Cash. The other, advanced by Paper Reclaim, was based principally on the evidence of Messrs O'Rourke and Taylor. Their evidence took up most of the trial. The trial took 23 days. Mr Cash was in the witness box for seven days, Mr O'Rourke for six, and Mr Taylor for five. And remember, this was, in the main, only a liability trial: quantum by consent had been left for another day. The major issue at the trial was the nature of the parties' relationship.

[31] Mr Cash's evidence as to that relationship was that, in return for Aotearoa giving up its baling business (term 1) and ceasing to be a competitor of Paper Reclaim, Aotearoa was to be Paper Reclaim's exclusive agent in respect of export orders of paper Paper Reclaim produced (term 3). As agent, Aotearoa would be paid a 10% commission (based on the FOB price) (term 7). In addition, Aotearoa was to have the responsibility of sourcing other paper for export. The profits on any such deals were to be split 50/50 between Aotearoa and Paper Reclaim (term 5).

[32] Messrs O'Rourke and Taylor told a quite different story. They accepted that Aotearoa had been Paper Reclaim's only agent between the mid 1980s and 2001, but said that Paper Reclaim had been free, throughout that period, to use other agents had it wished. They asserted that Paper Reclaim was a mere commission agent employed on a transaction by transaction basis. They accepted that there had been 50/50 deals, but these were, said Mr O'Rourke, "individual transactions proposed by Mr Cash whenever it suited" and "discrete proposals which Mr Cash proposed to [Paper Reclaim] for agreement when he preferred not to effect a sale on the commission basis".

[33] The judge found in favour of a contractual construct based on Mr Cash's evidence. He rejected the evidence of Messrs O'Rourke and Taylor in very decisive terms. He recorded that Mr Judd, in his final submissions, had "made meticulous analysis of and submissions on inconsistencies and contradictions by Mr Cash with other evidence and within his evidence": the liability judgment at [62]. His Honour's response to that submission was as follows:

Having regard to the nature of such inconsistencies and contradictions and the factor that Mr Cash was largely relying on memory of a myriad of events which occurred up to 18 years earlier, although they reflect on the reliability of some of Mr Cash's evidence, they do not cause me to have any substantial doubt about the credibility and reliability of his evidence on main points and in particular whether the alleged exclusive export contract was made and the content of its main terms.

[34] Nicholson J went on to explain in some detail why he preferred Mr Cash's evidence over that given by Messrs O'Rourke and Taylor.

[35] Before us, Mr Judd renewed his attack on the reliability of Mr Cash's evidence. The thrust of the attack was that it simply could not be right that the meeting at which the alleged agreement was made took place when Mr Cash said it did.

[36] Nicholson J had the advantage, of course, of seeing and hearing the witnesses. He formed a very favourable impression of Mr Cash. He found Messrs O'Rourke and Taylor less reliable. Indeed, he found that they, on many disputed matters, "did not give plain answers to plain questions". They were, Nicholson J considered, "deliberately evasive in order to give answers most favourable to their financial interests": the liability judgment at [60]. Later in the judgment, His Honour referred to Mr O'Rourke's evidence on the 50/50 deals as "vague, illogical and not plausible": at [79]. Those assessments of credibility and reliability were not just impressionistic; His Honour carefully explained why he preferred overall the evidence of Mr Cash to that of Messrs O'Rourke and Taylor. That assessment by the trial judge is not lightly to be set aside.

[37] Given the long history of the relationship, the judge was entitled to find that it was simply implausible to suggest, as Messrs O'Rourke and Taylor tried to do, that "at all times Mr Cash and [Aotearoa were] a simple commission agent of Paper

Reclaim on a transaction by transaction basis”. Mr Grant put the following question to Mr O’Rourke in cross-examination:

He’s [Mr Cash’s] providing information to you about new markets, contacts, shipping arrangements, freight rates, and he’s spending six figures a year on travel, and according to you [he is] a mere commission agent employed on [a transaction by] transaction basis. Is that your evidence?...yes.

[38] The judge was entitled to reject that answer. Indeed, its implausibility was demonstrated by the fact that even Mr Judd in his oral submissions before us accepted that it was impossible to sustain. In the end, Mr Judd propounded a contractual construct which was quite different from that which his principal witnesses had asserted in evidence. Mr Judd eventually submitted that it “seemed probable” that an earlier 1982 written agreement between Paper Reclaim and Mr Cash had continued in force after its expiry date, by either express or implied extension and with a novation (again express or implied) substituting Aotearoa for Mr Cash as agent. Mr Judd submitted that that is not what had been pleaded; had it been pleaded, Paper Reclaim would have had available to it certain positive defences arising from express terms in the 1982 agreement. We note that the “novation thesis”, as we shall term it, had never been advanced before Nicholson J and finds no support in the evidence of any of the three principal players. Any extension and novation of the 1982 agreement would have to be implied. We see great difficulty in accepting this construct. The primary significance of Mr Judd’s submission in this regard lies in the fact it was made at all: it was an acknowledgement by Paper Reclaim that the transaction by transaction thesis was at variance with the clear nature of the parties’ dealings from the mid 1980s until 2001.

[39] We are satisfied that the parties’ dealings from the mid 1980s to 2001 show clearly that an understanding was reached that Aotearoa was to be Paper Reclaim’s sole agent with respect to the export of Paper Reclaim’s waste paper, a relationship which could not be terminated peremptorily but only on the giving of reasonable notice. The parties’ relationship evolved considerably from its 1982 beginning. Neither the 1982 agreement nor the transaction by transaction thesis satisfactorily explains important pieces of evidence.

[40] First, it is clear from the mid 1980s on that Mr Cash was scouring the country for waste paper to export. The profits arising were clearly shared on a 50/50 basis. That conduct is really explicable only on the basis that the parties had an understanding that for the foreseeable future they were venturing together in a paper export business. The 50/50 deals cannot be explained by the 1982 agreement, as it made no provision for them.

[41] Secondly, Mr Taylor wrote a letter to Aotearoa dated 2 February 1986. The letter was countersigned by Mr Cash. Nicholson J rightly considered the letter to be of prime importance: the liability judgment at [71]. The letter was concerned with exempt suppliers; it was clear evidence of the exception to the general rule of equal sharing of profits on the 50/50 deals: see term 5. The letter (which, when signed, became part of the agreement between Paper Reclaim and Aotearoa) read in part:

This is to confirm our discussion in relation to the customers that you have reserved the exclusive right to manage their waste paper without there being any infringement on the existing agreements between our companies.

Paper Reclaim will not expect any return from the sale of these customers' products nor will Aotearoa International incur any costs or debit that Paper Reclaim could be liable for in the event of such arrangements.

The customers are: - ...

[42] Mr Taylor's letter is significant in several respects. First, it acknowledges that there are "existing agreements". Secondly, those agreements are said to be "between our companies". It is clear that Mr Taylor cannot have had in mind the 1982 agreement, which was with Mr Cash personally and which had in any event expired. Thirdly, the fact that the exemption had to be given demonstrates that without it Paper Reclaim would have been entitled to a return from the sale of those Aotearoa customers' products.

[43] Thirdly, Mr O'Rourke's view that the 50/50 deals were "individual transactions" and "discrete proposals" simply does not mesh with uncontroverted evidence. In particular, it is inconsistent with a Paper Reclaim document, which became known at trial as document B. In any event, Mr O'Rourke's evidence implicitly does acknowledge an underlying agreement between Paper Reclaim and Aotearoa. Unless there were an underlying agreement, why would Aotearoa ever cut

Paper Reclaim in on a deal which it had put together? Why wouldn't it simply have arranged the export itself, pocketing the whole of the profit? It seems that Mr O'Rourke considered Aotearoa was bound either to do a 50/50 deal or to sell the waste paper it had located as agent for Paper Reclaim on a commission basis. While that is not consistent with the agreement as alleged by Aotearoa, it is nonetheless inconsistent with Mr O'Rourke's other evidence to the effect that there was no underlying contractual relationship.

[44] Fourthly, it is clear that Mr Cash spent considerable time and money travelling around the world finding new markets for the venture's waste paper. It seems unlikely to say the least that he would undertake that work at his company's expense and pass on the results to Paper Reclaim if at any time Paper Reclaim could cut Aotearoa out of the action, either exporting itself or employing another agent.

[45] Fifthly, there is no evidence that at any point between the mid 1980s and 2001 Paper Reclaim either exported itself or employed or tried to engage another agent. As Mr Grant submits, it is unlikely that Paper Reclaim would never have used another agent or made enquiries as to other agents' rates if it truly considered itself to be under no obligations to Aotearoa.

[46] Sixthly, Noel Bland, the general manager of Paper Reclaim, wrote to Government Print on 27 July 1993 with a proposal to acquire that company's waste paper. In the letter he described the relationship between Aotearoa and Paper Reclaim as "a joint venture". That is quite inconsistent with Mr O'Rourke's evidence that there was no underlying contractual relationship.

[47] Seventhly, after Aotearoa raised concerns about certain acts of Paper Reclaim, Mr Bland wrote to Mr Cash acknowledging that Aotearoa had "the first right of refusal on all of [Paper Reclaim's] exports". Mr Cash disputed that that was a correct summation of the parties' relationship. What is important, however, for current purposes is that Paper Reclaim did acknowledge a form of exclusive right on Aotearoa's part. That is inconsistent with the stance adopted by Messrs O'Rourke and Taylor in their evidence at trial.

[48] Finally, while there may be a dispute as to when Aotearoa gave up its baling business and why it did, it is not disputed that Aotearoa from the mid 1980s on did not in fact bale paper itself. The judge was entitled to accept Mr Cash's evidence as to why he had given up baling, particularly in circumstances where that reason was entirely consistent with what we know happened between these parties from the mid 1980s to 2001.

[49] In the circumstances, we consider that the trial judge was entitled to accept Mr Cash's evidence, and other evidence supporting it, and the contractual construct which flowed from acceptance of that evidence. He was entitled to reject the transaction by transaction thesis, which was the consequence of the evidence of Messrs O'Rourke and Taylor. Mr Judd's novation thesis was not before him; even had it been, he would have been fully entitled to reject that, as, with respect to Mr Judd, it is not supported by the evidence of any of the three vital players.

[50] The judge found that the essential terms of the parties' relationship were agreed at a meeting involving Messrs Cash, O'Rourke and Taylor at Paper Reclaim's office. Mr Cash was unable to say exactly when that meeting had taken place, but he knew from Aotearoa's financial statements that its baler was noted as having been sold in the financial year ending 31 March 1985. It was Mr Cash's recollection that he had sold the baler as a consequence of the agreement reached with Paper Reclaim. It was his case that the agreement was reached some time between the end of November 1984 and 31 March 1985. Messrs O'Rourke and Taylor gave evidence that they did not recollect this meeting.

[51] Both at trial and before us (particularly on the application for leave to adduce further evidence), Mr Judd concentrated massive firepower on the question of whether this meeting had taken place, and in particular whether it had taken place when Mr Cash deduced it must have. It was, as Nicholson J recorded, an "important factual issue...strongly contested at the trial": the liability judgment at [31]. In our view, much of this firepower was misdirected. It does not particularly matter whether the agreement was reached over a couple of meetings (as Mr Cash asserts) or over a longer period. Given the judge's finding as to the overall credibility of

Mr Cash, he was entitled to find that the meeting (or meetings) had taken place as Mr Cash asserted. We uphold that finding.

[52] It is only proper, however, that we make clear that, even if we had not been prepared to uphold the finding that the joint venture agreement was *probably* made at the agreement meeting, we would nonetheless have entertained an amendment to the pleadings to recognise that, at some point from the mid to late 1980s, a contractual relationship to the effect of the joint venture agreement had been concluded. We do not consider that any prejudice to Paper Reclaim would have arisen from such an amendment to the pleadings, as the parties' relationship from the mid 1980s was investigated in meticulous detail at trial. In the end, it does not particularly matter whether the parties' understanding was reached at one meeting, two meetings, or over time. What we are clearly satisfied about is that, at least by the 1990s, the parties' dealings, when viewed objectively from the point of view of reasonable persons on both sides, allow only for a finding that a concluded bargain had been reached between Paper Reclaim and Aotearoa: *Boulder Consolidated Limited v Tangaere* [1980] 1 NZLR 560 (CA) and *Meates v Attorney-General* [1983] NZLR 308 at 377 (CA). It is well accepted that the courts are entitled to look at the whole context of the parties' relationship in reaching a view as to whether a bargain was concluded and as to its terms: *BCNZ v Daniels* (1998) 2 NZBLC 103,535 at 103,541 and see further Burrows, Finn & Todd *Law of Contract in New Zealand* (2ed 2000) at [3.3.1].

Reasonable notice

[53] Having upheld Nicholson J on his acceptance of the contractual construct flowing from Mr Cash's evidence, we now turn to the difficult question of how long this arrangement was to continue for and how it could be brought to an end. Aotearoa accepted that nothing had been expressly agreed on that topic. It was a question of implying an appropriate term. Term 8 was what Aotearoa asserted should be implied. Whether term 8 should be implied was a significant issue at the trial.

Term 8

[54] As we have already said, Aotearoa's primary submission on this topic in the High Court had been that the contract was of indefinite duration. Nicholson J had no hesitation in rejecting that submission: the liability judgment at [87]-[95]. With respect, we entirely agree with His Honour. The idea that this arrangement could have been *by implication* of indefinite duration never had any chance of success.

[55] Mr Judd continued to argue, as he had in the High Court, that, even if the parties' relationship was as categorised in terms 1 to 7, that relationship was terminable at will. Nicholson J rejected that submission, for reasons he gave at [99]-[108]. His Honour noted what the Privy Council had said in *Australian Blue Metal Limited v Hughes* [1963] AC 74 at 98:

It is true that it does not require very much to induce a court to read into an agreement of a commercial character, either by construction or by implication, a provision that the arrangements between the parties, whatever they may be, shall be terminable only upon reasonable notice.

[56] This was in our view a classic case where the parties, if asked at the start of their relationship, would both have expressed a desire to have a cushion against sudden change, so as to have time to make alternative arrangements: *Australian Blue Metal* at 99.

[57] Mr Judd's argument was that, although Aotearoa was the contracting party, it was Mr Cash personally who was doing the exporting, and Aotearoa's ability to export depended totally on Mr Cash. He argued that it must therefore have been in the parties' contemplation that, if Mr Cash became unable to provide his exporting services, he would have to be able to terminate his obligations immediately. Because it would not be reasonable for Paper Reclaim to hold Aotearoa to a reasonable notice period and because it would not be reasonable for Paper Reclaim to recover damages if Aotearoa was not able to export through Mr Cash's personal inability, so too it would not be reasonable for Paper Reclaim to be burdened by a requirement to give reasonable notice. It was, in effect, a sauce for the goose, sauce for the gander argument.

[58] But the argument is misconceived, for the reasons Mr Grant submitted. It was Aotearoa which had the obligations to act as agent and to attempt to source waste paper for 50/50 deals. If Mr Cash was personally unable to work or did not wish to work, it would be his responsibility, as Aotearoa's director, to have Aotearoa employ other personnel able to carry out Aotearoa's commitments. If Aotearoa ceased to perform, then Paper Reclaim's remedy would be to cancel the agreement for non-performance. The one-man nature of Aotearoa is, in our view, irrelevant to the issue of the parties' expectation of a cushion against sudden change.

[59] We hold, for the reasons Nicholson J gave, that the agreement was terminable on giving notice. We now turn to discuss what would have been reasonable notice in the circumstances.

The period of notice

[60] The judge considered "that the period of reasonable notice at February 2001 was eight years": the liability judgment at [123]. Mr Grant sought to uphold the judge's finding in this regard. Mr Judd strongly challenged the finding. His fallback position (in the event his termination at will argument failed) was that the reasonable period should have been six weeks.

[61] Before we turn to consider what a reasonable period would have been, we need to be clear about what was happening to the parties' contract between February 2001 and May 2002. As at 2 February 2001, the parties' agreement was on foot. In the High Court, Paper Reclaim had tried to argue that Aotearoa was in breach of its contractual obligations to Paper Reclaim and that Paper Reclaim's letter of 2 February 2001 was a notice of cancellation under s 8 of the Contractual Remedies Act 1979. Nicholson J rejected that submission. He found that Aotearoa had not breached the contract. He also found that Paper Reclaim's 2 February letter was not a notice of cancellation but rather was an act of repudiation: the liability judgment at [143].

[62] In its amended points on appeal, Paper Reclaim argued that Nicholson J was "wrong to find that the letter of 2 February 2001 did not amount to notice of

cancellation”: point 7. Mr Judd, however, in his written submissions dropped that argument. He accepted that, if Nicholson J’s conclusion as to the terms of the agreement were upheld, then the 2 February letter would constitute, not a notice of cancellation, but rather a repudiation.

[63] When one party repudiates a contract, the other normally has an election: the innocent party may either affirm the contract or cancel it. In this case, there can be no doubt that initially Aotearoa elected to affirm. Indeed, it even applied for interlocutory relief, seeking to compel Paper Reclaim to fulfil its obligations under the contract. Eventually, however, it changed its mind and, in the face of a continuing refusal on Paper Reclaim’s part to fulfil its obligations, elected to cancel. Mr Grant submitted to us that Aotearoa’s cancellation occurred on 3 May 2002. It was the giving of that notice which brought the agreement to an end.

[64] Nicholson J, apart from finding that Paper Reclaim had repudiated the contract on 2 February 2001, did not make findings as to when the contract did come to an end. Neither counsel before us made submissions on this topic. In light of that, we think it unwise to make any findings ourselves. All we can say is that the contract came to an end no later than 3 May 2002. It is possible that, if the evidence relating to the period between 2 February 2001 and 3 May 2002 were closely analysed, an earlier act on Aotearoa’s part may have constituted cancellation of the contract. That is a matter which can be explored, if necessary, at the quantum hearing.

[65] What is important to note is that the contract did not terminate on the effluxion of some reasonable notice period. It terminated because, at some point, Aotearoa elected to cancel following a repudiation of the agreement. This is an important point to make, as it seems to have been assumed by counsel on both sides that Paper Reclaim’s liability to Aotearoa would be for lost commissions etc between 2 February 2001 and the end of whatever was held to be the reasonable period of notice. That is not the case. Paper Reclaim’s 2 February letter was not a giving of notice under term 8: *Decro-Wall International SA v Practitioners in Marketing Limited* [1971] 1 WLR 361 (CA). It did not in any way “start time running”. The only reason for working out what the reasonable notice period would have been is

that it may have significance in the calculation of damages. We use the tentative “may”, because we have not had submissions from counsel on this point. But it may be helpful to the parties if we express preliminary views as to the significance of what a reasonable notice period at the relevant time would have been.

[66] Let us assume for the sake of argument that the contract was cancelled on 3 May 2002 and let us further assume that a reasonable notice period at that time would have been one year. Up to 3 May 2002, Aotearoa would be entitled to its commissions under term 3 as if Paper Reclaim had continued to use it as agent, as it was bound to do. From 3 May 2002, the position would change, however. With Aotearoa’s election to cancel, both parties were freed from their primary obligations under the contract. Aotearoa would still 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. Aotearoa, in claiming damages for the post-cancellation period, would, of course, have to give credit for the money it saved through not having to carry out its obligations under the contract. It was, after all, free after cancellation to pursue any business opportunities it chose: it had no continuing obligation to Paper Reclaim.

[67] In the calculation of these post-cancellation damages, regard would have to be had to the fact that, but for the cancellation, each party would have been able to exercise the power conferred by term 8 and would thereby have been able to bring the contract lawfully to an end. 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 i.e. 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.

[68] In light of the above discussion, we would raise two quibbles about Nicholson J’s finding, as reproduced at [60] above. First, the crucial date is not necessarily February 2001. The crucial date for determining what would have been a reasonable notice period is the date of cancellation, whenever that was. So far as we

can see, however, nothing really of significance changed between February 2001 and May 2002 (the latter being the last possible date of cancellation). For this reason, in our discussion below as to what would have been a reasonable period, we draw no distinction between 2001 and 2002.

[69] Secondly, the judge said that “the period of reasonable notice...*was* eight years”. Perhaps more correctly that should have been expressed as “*would have been* eight years”. No notice was ever given. The fixing of what would have been a reasonable notice period is necessary solely because of its possible relevance in the calculation of damages.

[70] With that background, we now turn to determine what would have been reasonable notice as at 2001 or 2002. It is common ground between the parties and well supported by authority that the length of notice is not determined in light of circumstances at the date on which the contract was made but rather is determined, normally, at the time and “in the light of the circumstances in which the notice is given”: *Australian Blue Metal* at 99. Normally, of course, a notice has been given. The usual inquiry, in the event of dispute, is whether the period of notice was long enough. That is to be determined in the light of the circumstances in which the notice was given. Here, no notice was given. For that reason, one makes the assessment at the date of cancellation.

[71] Neither counsel in his written submissions referred us to any case authority when determining the length of the notice period. Nor did the trial judge in his reasons for judgment. That was somewhat surprising because one would have thought this was an area where past judicial decisions would give considerable guidance. After all, what better than past judicial decisions to guide a party when trying to determine what period of notice he or she should give?

[72] A period of eight years’ notice seemed to us, at first blush, to be a very lengthy period. We asked Mr Grant what authority he could point to in support of such a long notice period. He conceded that he had not been able to find any case in which a court had been prepared to impose a notice period as long as eight years; the longest period he had been able to find was five years. That was the period imposed

in *Paperlight Limited v Swinton Group Limited* [1998] CLC 1667. We have looked at that case carefully. It contains a number of very special circumstances, which Clarke J referred to at 1687-1689. His Lordship accepted that the period fixed in most cases was no more than a year: see, for instance, *Winter Garden Theatre (London) Limited v Millennium Productions Limited* [1948] AC 173 (HL) (one month), *Martin-Aker Aircraft Co Limited v Canadian Flight Equipment Limited* [1955] 2 QB 556 (one year), and *Decro-Wall* (one year).

[73] In *Australian Blue Metal*, to which we have already referred, the Privy Council held that the agreement was terminable at will (at 98). But Their Lordships continued that, even if the agreement had been terminable only on reasonable notice, it would not have made any difference because, “any time which Their Lordships would have fixed, had there been a requirement for reasonable notice, would have expired before [the] proceedings commenced”: at 100. It is clear from that that any notice period would not have exceeded eight months as *Australian Blue Metal* had been asked to cease mining and to leave the land on 19 August 1957, but were still there when proceedings commenced on 13 May 1958: at 77.

[74] A New Zealand case not dissimilar to the present is *J W Paterson & Sons Limited v Fletcher Concrete and Infrastructure Limited* HC ROT M89/00 13 February 2001. Paterson applied for an interim injunction to prevent Fletcher from changing the source of its supply of sand from Paterson to another of Fletcher’s divisions. Fletcher had given four weeks’ notice. Morris J granted the injunction. He held that four weeks’ notice was inadequate, given that Paterson had been supplying sand to Fletcher for 35 years and in light of the overall circumstances of the case. Morris J held that what would be a reasonable notice period would have to be determined at the substantive hearing; he expressed the view, however, that the reasonable notice period would be between six months and 12 months.

[75] Since the termination in the present case, and indeed since Nicholson J’s judgment, Miller J has held in *Hirequip Holdings Limited v City Hire Centre (1973) Limited* HC NAP CIV2004-441-362 3 October 2005 that a reasonable notice period in the circumstances of that case was six months.

[76] We have concluded that Nicholson J was in error in fixing an eight year notice period. The notice period should have been one year. Our reasons for concluding that His Honour erred and our reasons for concluding that one year would have been the appropriate period are these.

[77] First, the bulk of judicial authority would suggest that in comparable circumstances the courts have fixed notice periods of about one year. Those authorities are important because we have little doubt that had a reasonable business person in the position of either party consulted a lawyer before deciding what notice period to give, that lawyer would have suggested about a year based on authorities readily accessible in the law reports and texts. It would never have occurred to any lawyer to suggest eight years. The judge, we respectfully consider, fell into error because of his apparent setting aside of precedents establishing notice periods in comparable circumstances.

[78] Secondly, we agree with Penlington J in *Anchor Butter Co Ltd v Tui Foods Limited* [1997] 3 NZLR 107 at 124 that relevant matters in determining the period 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 carried out within the scope of the agreement”. The first three of those matters would point to the need for a short notice period in this case. It is difficult to see the last factor mentioned as being relevant in this case. Aotearoa’s expenditure and effort could scarcely be described as “extraordinary”; in any event, Aotearoa had been reaping the fruits of its expenditure and effort for many years. This was by no means a situation where a party had expended much effort prior to termination but had yet to reap the rewards of it.

[79] Thirdly, Nicholson J appeared to think that Aotearoa must be given sufficient time to become a major player in the waste paper business. His Honour referred to the fact that it would be very expensive for Aotearoa to be able to compete with Carter Holt and Paper Reclaim, who between them purchased about 80% of New Zealand’s waste paper. His Honour considered that Aotearoa in 2001 found itself “in a position of considerable difficulty” in obtaining alternative sources of

waste paper: at [121]. This focus was, with respect, wrong. The notice period is not to be determined by how long it would take for Aotearoa to become a significant competitor of Paper Reclaim. The reference in *Australian Blue Metal* to “alternative arrangements of a sort similar to those which are being terminated” is not to be construed narrowly. After all, the likelihood is that Aotearoa will never be able to replicate what had been its role in its venture with Paper Reclaim. Obviously, Paper Reclaim no longer wishes to use it as its agent. Carter Holt, as the biggest player, probably has its own export arrangements and would have no use for Aotearoa’s services. Between them they currently control 80% of the market. Aotearoa in these circumstances has to face the fact that it will have to move into a different business activity. The fact that a “similar arrangement” would probably not be available does not lead to a conclusion that a very long notice period would have been required. On the contrary, what it means is that Aotearoa was bound to consider alternatives.

[80] Reasonable business people looking at the situation in 2001 or 2002 and contemplating what would be a reasonable notice period in the circumstances would have considered one possibility to be that Aotearoa would try to expand the business it had already developed as a dealer in scrap metal, plastics and glass: the liability judgment at [116]. Mr Cash did not think that those dealings would enable him to “replicate” the revenue he had been earning “for the rest of [his] working life”. That may be so, but, of course, Paper Reclaim would have been under no obligation to provide Mr Cash with the same level of business he had been enjoying through his association with it. In this regard, we agree with McHugh JA’s observation in *Crawford Fitting Co v Sydney Valve and Fittings Pty Limited* (1988) 14 NSWLR 438 at 453 (CA):

It is, of course, unnecessary that the recipient of a notice should do as well in his first years of new business as he did in his old business. The termination of his business, whenever it occurs, is very likely to have adverse trading consequences for a substantial period. *However, that is the risk which a distributor, who enters into an agreement terminable at any time, inevitably runs.* [Emphasis added.]

[81] The second possibility was that Aotearoa might elect to compete with Paper Reclaim in the waste paper market. Nicholson J seemed to consider that that was unrealistic because Mr Cash’s evidence was that in order to be competitive with Paper Reclaim, Aotearoa would have to spend about \$3 million, which it did not

have. Mr Cash gave evidence that a baler like Paper Reclaim's, which can process 20 tonnes an hour, costs about \$750,000. Nicholson J seems to have placed much weight on this evidence and to have concluded that it was unreasonable to expect Paper Reclaim to follow this course. We disagree. What Mr Cash's evidence shows is that Paper Reclaim must have invested many millions of dollars to achieve its present market position, dollars which Aotearoa has not had to spend in order to secure the financial rewards it enjoyed up to 2001. Aotearoa could not have demanded a longer notice period because it was not prepared to match the sort of financial outlay Paper Reclaim had had to fund.

[82] Nicholson J referred to the fact that Aotearoa, by entering into the agreement, had given up the ability to bale itself and had sold its baler. But that needs to be put into perspective. The baler showing in Aotearoa's financial statements for the year ending 31 March 1985 appears to have been sold for \$15,000. That baler was clearly completely different from and inferior to the sort of baler Paper Reclaim now has. Had Paper Reclaim and Aotearoa not entered into this venture, Aotearoa would have had at some point to make the kind of investment Paper Reclaim made. It has been spared that. Aotearoa cannot now argue that the notional reasonable notice period should be a long one on the basis that it would have needed many more years' agency commissions before having sufficient capital to compete with Paper Reclaim.

[83] In so far as it may be relevant, we find that, but for Aotearoa's cancellation of the agreement, Paper Reclaim would have been able to give notice under term 8. That notice would have had to be at least a year. If the parties cannot agree on damages and proceed to a quantum hearing in the High Court, the judge should proceed on that basis, but should not feel bound by the preliminary views we have expressed as to the legal significance of this finding.

Sales to Carter Holt

[84] Aotearoa complains that Paper Reclaim has been selling waste paper to Carter Holt with the knowledge since 1996 that some of that paper has then been exported by Carter Holt. Aotearoa, in its third amended statement of claim (the statement of claim on which the liability trial proceeded), accepted that Paper

Reclaim's sales to Carter Holt did not breach any express terms of the agreement. That is significant: Aotearoa did not allege, for instance, that the sales were in breach of term 4, under which Paper Reclaim had promised to focus its activities on the sourcing and baling of wastepaper to the mutual financial benefit of both companies. Aotearoa did claim, however, that such sales did breach an implied term, namely term 9. Aotearoa also claimed that the sales breached a fiduciary obligation Paper Reclaim owed Aotearoa, that obligation being to the same effect as term 9.

[85] Nicholson J accepted this argument. He found that Paper Reclaim had "provided waste paper to Carter Holt in knowledge that the paper was to be used for export by Carter Holt and was thereby in breach of its contractual and fiduciary obligations to Aotearoa, thereby causing Aotearoa loss": the liability judgment at [211]. He therefore found that Aotearoa succeeded on its seventh cause of action. The quantum of loss was to be addressed at the later quantum hearing.

[86] Paper Reclaim denied that there was an implied term that each party would act with reasonableness and good faith to the other in the implementation and continuing operation of the joint undertaking. The reason for disputing such a term is obvious if, as Messrs O'Rourke and Taylor asserted in evidence, there was no underlying relationship between the two companies. Mr Judd acknowledged, however, that if, contrary to his submissions, we found that the agreement contained terms 1 to 7, then it would be reasonable to imply a term to the effect pleaded by Aotearoa and accepted by the judge. Since we have found that the judge correctly identified the express terms of the agreement, it follows, in light of Paper Reclaim's concession, that term 9 is to be implied into the parties' agreement. Mr Judd's submission was, however, that Paper Reclaim's sales to Carter Holt did not breach term 9.

[87] The factual background to this dispute is as follows. Paper Reclaim had been selling to NZ Forest Products from the 1970s. This was well known to Mr Cash at the time at which he entered into the joint venture agreement. There was no suggestion at that time that Paper Reclaim would have to discontinue those sales. Nor was there any suggestion that the profit on those sales would have to be shared. Nor did Mr Cash ask for those sales to be subject to a condition that the paper not be

exported. For years after the joint venture agreement was entered into, Mr Cash knew that sales to Forest Products/Carter Holt were continuing; he never suggested that that was in any way in breach of Paper Reclaim's obligations to Aotearoa.

[88] Carter Holt started exporting waste paper in mid 1996. At that time the relevant supply agreement between Paper Reclaim and Carter Holt was a written agreement which had been entered into in April that year. That agreement, like the agreements before it, imposed no restrictions on what Carter Holt could do with the paper. The fact that it did not was not a breach of any obligation Paper Reclaim had to Aotearoa. And indeed, Aotearoa did not claim that the entry into that agreement was wrongful or in breach of its joint venture agreement with Paper Reclaim. It is obvious why Aotearoa did not claim that Paper Reclaim's entry into the April 1996 contract was not wrongful; if that was wrongful, then so too would Paper Reclaim have acted wrongly in all the other domestic sale agreements it had made, none of which contained restrictions on what the purchaser could do with the waste paper purchased.

[89] Aotearoa's argument, as pleaded, was that Paper Reclaim breached term 9 of the joint venture agreement by providing "waste paper to Carter Holt Harvey Limited in the knowledge that the paper was to be used for export by Carter Holt Harvey". Paper Reclaim acquired that knowledge in the latter half of 1996. Accordingly, that was when the alleged breach began. At that point, so the argument went, Paper Reclaim should have ceased supplying paper to Carter Holt. But how could it?

[90] Paper Reclaim was bound to supply Carter Holt under the April 1996 agreement. It had not imposed any restriction on what Carter Holt could do with the paper: Carter Holt was committing no wrong. Paper Reclaim may not have liked Carter Holt exporting waste paper Paper Reclaim had supplied to it, but it was too late for tears on that score. The acquisition of knowledge that Carter Holt was exporting cannot turn Paper Reclaim's continued supply of paper to Carter Holt into a wrongful act when clearly Carter Holt was not in breach of its contract with Paper Reclaim in later exporting and Paper Reclaim was bound to continue supplying Carter Holt.

[91] The implied term as to reasonable conduct cannot be construed so as to widen the parties' primary obligations to each other. The implied term cannot be used to restrict a party's business activities domestically in circumstances where the parties never expressly gave any undertakings to each other with respect to that market.

[92] Aotearoa's argument was clearly hopeless. Nicholson J appears to have recognised this, as he did not decide this cause of action in Aotearoa's favour on the basis on which the case had been pleaded. This was one of Mr Judd's complaints. He submitted that the judge's reasoning was in conflict with Aotearoa's pleading and its counsel's argument. The judge said at [200]:

By not contractually prohibiting Carter Holt from exporting the waste paper which it supplied to it, Paper Reclaim permitted Carter Holt to export that paper and thereby subverted Paper Reclaim's contractual obligation to export all its paper through Aotearoa. It is significant that on the third renewal of the contract to supply waste paper to Carter Holt made on 1 August 2000, Paper Reclaim included a term that Carter Holt would not "...export any waste paper supplied by (Paper Reclaim), without the consent in writing of Paper Reclaim..."

[93] Mr Judd complained that it had never been Aotearoa's case that Paper Reclaim's wrongful act was its failure contractually to prohibit Carter Holt from exporting the waste paper. Nor, he said, had it ever been alleged by Aotearoa that the sales to Carter Holt were in breach of what we have called term 3. We agree with those criticisms. It was not open to the judge effectively to find a breach of term 3 in this regard, when such had not been pleaded. Nor was it appropriate for the judge to change the focus of the alleged wrong from Paper Reclaim's continued supply faced with knowledge that paper was being exported to Paper Reclaim's failure to impose a restriction on the purchaser's rights of resale. No amendment of the pleadings to this effect was ever sought, either before the High Court or before us. Had an amendment to the pleadings been sought, it is by no means certain that it would have been granted, as this twist on the argument has significant repercussions. It would mean, for instance, that Paper Reclaim had breached its agreement with Aotearoa every time it negotiated a domestic sale without imposing a restriction on the purchaser's ability to export the paper supplied. That would have led to a further

chain of inquiry as to Mr Cash's knowledge of Paper Reclaim's domestic sales and indeed of his own domestic sales.

[94] In any event, we wish to make clear that we do not consider that Paper Reclaim's sales to Carter Holt were in breach of term 3.

[95] We also wish to comment on the second sentence of Nicholson J's [200]. We do not see any significance for current purposes in the fact that in 2000 Paper Reclaim did negotiate a term prohibiting Carter Holt exporting waste paper supplied by Paper Reclaim without Paper Reclaim's consent. There may have been a number of reasons why such a term was negotiated; that change does not assist at all in determining whether Paper Reclaim was previously acting wrongfully vis-a-vis Aotearoa.

[96] Mr Grant in his submissions before us attempted to argue the matter on both bases. First, he relied on Nicholson J's revised basis as set out in the liability judgment at [200]. For the reasons given above, we hold that it is too late for Aotearoa now to change course as to the nature of its complaint. Aotearoa is stuck with its pleading and with the way the matter was approached in the evidence at trial. Alternatively, Mr Grant put forward Aotearoa's original argument, namely that breach occurred when Paper Reclaim continued to supply paper to Carter Holt "in the knowledge that the paper would be exported by Carter Holt". This argument fails for the reasons given above: by the time Paper Reclaim knew that Carter Holt was exporting, it was already committed to continuing supply to Carter Holt.

[97] The judge was, with respect, wrong in his conclusion that the sales to Carter Holt were in breach of term 9 of the agreement.

Fiduciary duty

[98] As well as its claim for breach of contract, Aotearoa advanced a claim in equity. It claimed that it and Paper Reclaim were in a fiduciary relationship, one of the obligations of which was that Paper Reclaim would "act reasonably and in good faith in the implementation of the joint undertaking": third amended statement of

claim, para 17. It will be immediately apparent that the tenor of this obligation is identical to the implied term, term 9. Indeed, the seventh cause of action, which is concerned with the sales to Carter Holt, runs together the claim in contract for breach of term 9 and the claim in equity for breach of a fiduciary obligation: see para 33.

[99] We have already found that Paper Reclaim's sales to Carter Holt were not in breach of the parties' agreement. Mr Grant accepted that, if we reached that finding, then equity could not save that claim.

[100] Breach of fiduciary duty was also advanced in the third cause of action. The breach was pleaded in the following way (para 18):

The defendant [Paper Reclaim] was in breach of the fiduciary duties in that it has sold paper for export other than via the plaintiff [Aotearoa] and at its request, the defendant has received information from the plaintiff concerning markets, customers, transportation costs, transportation routes, and other information relating to the plaintiff's role and activities, which the defendant has used and is continuing to use to its commercial benefit and to the detriment of the plaintiff.

Particulars

The defendant has made discovery of consignments of waste paper which it has sold since 2 February 2001 which reveal that the defendant has sold waste paper to customers introduced to it by the plaintiff; used the same shipping arrangements (with two exceptions) negotiated by the plaintiff and revealed to the defendant; and shipped at the same freight rates as were negotiated by the plaintiff and revealed to the defendant.

[101] Under this cause of action, Aotearoa sought "damages for breach of fiduciary duty" and costs. Aotearoa did not seek any injunctive relief. Presumably that was because there was no evidence that the threat of misuse of information still existed.

[102] Nicholson J's findings of fact with respect to this cause of action were limited to the following three paragraphs of his reasons for judgment:

[170] In his first brief of evidence given in November 2001, Mr Cash stated:

Because I was so confident in the certainty of the contractual agreement with Paper Reclaim, I disclosed everything to the Company about Aotearoa's freights 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 without Aotearoa's assistance. I believe that since February 2001 Paper Reclaim has continued to sell product to the customers which were introduced to the Company by Aotearoa in Australia namely Cosco (now Snowtex), all the Amcor Mills, Visy Industries, and Paper Converters. In addition, I believe that Paper Reclaim could not have done this without taking advantage of all the information which Aotearoa provided it about freight rates, shipping arrangements, shipping contracts and so on. This 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.

[171] Mr Cash gave a second brief of evidence in January 2002, replying to statements made in briefs of evidence of Mr O'Rourke, Mr Taylor and Mr Bland. In that reply, Mr Cash referred to the evidence of Mr Bland about export sales by Paper Reclaim after 2 February 2001 and documents discovered by Paper Reclaim relating to such export sales. Mr Cash said:

It is also clear to me from seeing the documents, that Paper Reclaim has used information about the freight rates which I had negotiated and of which I had informed Paper Reclaim. I refer, for example, to a collection of documents which show all of the people to whom Paper Reclaim has shipped product as part of the consignments. I am aware that Paper Reclaim has subsequently been selling large volumes of waste paper and I believe that it will also have been using information from Aotearoa about freight rates etc for those sales. There has been no discovery of documents relating to these sales.

[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 or sources other than Aotearoa. His evidence was also to the effect that prices and freight rates were negotiated by Paper Reclaim without use of the information which it had earlier received from Aotearoa on these aspects. Mr Cash responded in evidence to these assertions comprehensively and compellingly. 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 paragraphs 10c and 18 of the third amended statement of claim.

[103] The significance of the pleadings, these findings and the evidence is that there is no claim or evidence that Paper Reclaim used the alleged confidential information before 2 February 2001 or after January 2002. In light of that, this cause of action adds nothing. Up until at least February 2002, Paper Reclaim should have been continuing to use Aotearoa as its export agent. It will have to pay Aotearoa commission on exports it made during that period. Aotearoa cannot expect more than that. So no separate loss accrued from this alleged breach of fiduciary duty.

[104] Indeed, this argument is to some extent at odds with Aotearoa's contract cause of action, on which it has succeeded. Aotearoa's argument on that cause of action is that Paper Reclaim repudiated the agreement on 2 February 2001, which repudiation Aotearoa refused to accept. It elected to keep the agreement on foot until, it says, 3 May 2002, at which point it threw in the towel and elected to cancel. If that argument is right, then both sides were under a continuing obligation to pursue exports. In those circumstances, there would seem to be nothing wrong with Paper Reclaim utilising Aotearoa's contacts, even though technically Aotearoa should have been doing the work. Paper Reclaim's primary fault was in not paying the commissions that were due.

[105] In these circumstances, we are satisfied that Aotearoa should not have succeeded under the third cause of action.

[106] In any event, while we agree with Nicholson J that the joint venture agreement did create a joint venture relationship, we do not see that relationship as imposing a fiduciary duty on Paper Reclaim. The parties in this case, as in *Hospital Products Limited v US Surgical Corp* (1984) 156 CLR 41, entered into their arrangement at arm's length and on an equal footing. It was open to them to include in their contract whatever terms they thought necessary to protect their respective positions. Mr Cash was under no pressure to make any agreement or to accept any particular terms. There is no need for equitable invention in this standard commercial contract: see Butler (ed) *Equity and Trusts in New Zealand* (2003) at [36.4.1].

[107] In particular, there is no need for equitable intervention where the parties are agreed (albeit as a fallback position on Mr Judd's part) that the contract itself contains an implied term to act reasonably and in good faith: see *Kiwi Gold NL v Prophecy Mining NL* CA30/91 18 July 1991 at 12.

[108] With respect to the judge, therefore, we hold he was wrong in his finding that Paper Reclaim owed obligations as a fiduciary. Even if Paper Reclaim's acts between February 2001 and January 2002 were wrongful, any loss will be scooped up by Aotearoa's damages claim for breach of term 3.

[109] Finally, we record that we find it unnecessary to consider Mr Judd's complaint that Nicholson J interpreted this cause of action as if it were breach of a duty not to make use of confidential information, a breach which Mr Judd asserted had never been pleaded.

The sale to AMCOR

[110] We turn now to consider the fifth cause of action. The essence of this claim can be simply stated. Aotearoa alleged that an Australian company, AMCOR, had placed an order with it for 525 tonnes of a waste paper called Shoalhaven Whites. The paper was to be shipped from New Zealand to Australia in four consignments, the first in January 2001 and the last in April 2001. In the end, Paper Reclaim supplied only 260.82 tonnes. Paper Reclaim paid Aotearoa its commission on the tonnage supplied, but did not pay commission on the balance never supplied. Aotearoa claimed that commission was nonetheless payable on the balance.

[111] Nicholson J agreed. He held that Aotearoa was liable in contract to supply the paper to AMCOR and could have been successfully sued by it if it failed to perform the contract. In turn, he found, Paper Reclaim contracted with Aotearoa to supply the paper to AMCOR and thus enable Aotearoa to fulfil its contract with AMCOR: the liability judgment at [189]. For this reason, His Honour found that Paper Reclaim was bound to pay commission on all 525 tonnes. The agreed amount of unpaid commission was \$16,590.50 plus GST. Nicholson J entered judgment in Aotearoa's favour in that amount.

[112] Aotearoa has claimed the commission on the whole order pursuant to term 7. The problem is, however, that term 7, as pleaded and found by the judge, does not answer the question of what triggers liability to pay the commission. There are various possibilities:

- (a) The commission may become payable only when the purchaser pays. This is Paper Reclaim's argument.

- (b) The commission may become payable when the paper is shipped. It is at that point that Aotearoa as agent has done everything required of it.
- (c) The commission may become payable as soon as an unconditional contract is entered into or a conditional contract becomes unconditional. This is effectively Aotearoa's argument.

[113] Unfortunately, Nicholson J did not determine what triggered Paper Reclaim's liability to pay commission. Unfortunately too, Mr Cash's evidence on this topic is very sparse. In his evidence as to what was said at the agreement meeting, all he could recall on this topic was this:

We discussed the remuneration structure. 10% was agreed upon. It was the amount which I had been getting up to that time and the discussion on this was not long.

[114] Mr Cash, in an affidavit which appears to have become part of the evidence at trial, said that, with respect to Australian customers, the practice was for Paper Reclaim to pay Aotearoa its commission "within one day of the receipt of the sale funds". Mr O'Rourke, in his affidavit in reply, said in response to this point:

There is no dispute that [Paper Reclaim] is obligated to pay [Aotearoa] its 10% commission within 1 day of [Paper Reclaim] receiving the proceeds of sale when payment is made to [Paper Reclaim]...

[115] That evidence supports possibility (a). It is not conclusive, however, as it would still be possible for the obligation to pay commission to arise earlier, even though payment would not be required until receipt of the purchase money or until the date at which such purchase money should have been paid. No one gave evidence to that effect, however. Almost certainly, in a relationship lasting almost two decades, there must have been occasions when purchasers failed to pay. It would have been interesting to know what happened to Aotearoa's commission in those circumstances.

[116] In the end, however, we do not need to resolve which of the three possibilities listed at [112] represented the parties' contractual position (whether express or implied). This is because Aotearoa failed to prove that any of the

triggering events occurred. Obviously, if either (a) or (b) was the triggering event, then commission was not payable with respect to the balance of 264.18 tonnes, which was neither shipped nor paid for. If (c) was the trigger, then Aotearoa's problem is that it failed to prove the terms of the agreement with AMCOR. No evidence was called from AMCOR. AMCOR's order was not in evidence. The only documentary material concerning this order was an email from "Mike" of Aotearoa to Steven Barns at AMCOR, dated 11 January 2001. That email read in part:

Thanks your email over night and phone call earlier today.

We acknowledge your orders for White but are a little confused re orders/numbers.

Our original understanding is orders should be: -

NRS000501 for 75 MTS for January shipment

NRS000502 for 150 MTS for February shipment

NRS000503 for 150 MTS for March shipment

NRS000504 for 150 MTS for April shipment

Total 525 MTS all at A\$550/MT CNF.

Please confirm a/m is correct – thanks.

[117] No reply to that email is in evidence.

[118] What is known is that Paper Reclaim supplied 70.74 tonnes on 26 January 2001, 102.52 tonnes on 8 March 2001 and 87.56 tonnes on 9 April 2001, making a total amount supplied of 260.82 tonnes. Commission has been paid on that amount. What is also known is that AMCOR has never sued either Paper Reclaim or Aotearoa with respect to the balance. There is no evidence of AMCOR complaining about a breach of contract. Nicholson J accepted Mr O'Rourke's evidence that the reason Paper Reclaim did not supply the balance "was that it did not have the Shoalhaven White paper to supply": the liability judgment at [188].

[119] All this evidence, coupled with the absence of any evidence of complaint on AMCOR's part, leads us to the conclusion that probably there was no breach of the AMCOR contract. There was probably a provision in it which qualified the obligation to supply in the event that Paper Reclaim could not source the particular

paper. If that is right, then even if the trigger for the payment of commission was an unconditional contract, Aotearoa did not prove that there ever was an unconditional contract of sale with respect to the balance tonnage.

[120] It is possible that this conclusion is unfair to Aotearoa, but it bore the onus of proof, with respect to both what the trigger was for the payment of commission under the joint venture agreement and the terms of the AMCOR agreement. Aotearoa's case was evidentially deficient on both counts.

[121] Nicholson J's finding on this topic was as follows:

[189] Mr Judd submitted that the statement in Paper Reclaim's letter of 23 February 2001 that "...we are to pay Aotearoa 10% commission on the FOB value of these orders on receipt of the funds from the buyer ..." was a condition of the contract which never eventuated and therefore Paper Reclaim was under no liability to pay. However, in my view that statement did no more than specify the stage at which the commission would be paid and did not negate liability to pay commission. Aotearoa was liable in contract to supply the paper to AMCOR and could have been successfully sued by it if it failed to perform that contract. In turn, Paper Reclaim contracted with Aotearoa to supply that paper to AMCOR and thus enable Aotearoa to fulfil its contract with AMCOR. The quoted statement was clearly not intended to absolve Paper Reclaim from the contractual liability to supply the paper but merely defined the stage at which Paper Reclaim would pay the commission to Aotearoa. Had this not been stipulated, Aotearoa could have claimed payment of commission as soon as Paper Reclaim contracted to supply the paper.

[122] With respect, this misses the point, as did Mr Judd's submission, at least as quoted by the judge. Paper Reclaim's letter of 23 February 2001 was irrelevant. Aotearoa was not suing on that letter; it was suing under the export agency agreement. By 23 February 2001 Paper Reclaim no longer considered itself bound by its past relationship with Aotearoa. Its stance in that regard was wrongful. Its wrongful stance has no bearing on the correct construction of the joint venture agreement.

[123] Further, counsel did not refer us to any evidence to support Nicholson J's finding that Aotearoa was liable in contract to supply the paper to AMCOR and could have been successfully sued by it if it failed to perform that contract. We do not know the terms of the AMCOR contract. There is no basis for asserting that AMCOR could have successfully sued Aotearoa. Further, we do not even know

whether AMCOR's contract was with Aotearoa or Paper Reclaim. The judge seems to have assumed that there were two contracts, one between Aotearoa and AMCOR, and the other between Paper Reclaim and Aotearoa. So far as we can see, there is no evidence to support that conclusion. Although we do not know, we think it unlikely that a "two contract" analysis is accurate. Given the way Aotearoa and Paper Reclaim generally interacted with third parties, we think a more likely analysis is that Paper Reclaim, through its agent, Aotearoa, contracted with AMCOR. But, as we say, we cannot be certain of that because of the absence of evidence.

[124] With respect, we consider that the judge's analysis is unsupported by the evidence. In addition to that, however, we consider that he failed to focus on the correct legal and factual issues which this cause of action threw up.

[125] On this cause of action, we reverse the judge's finding that Paper Reclaim was liable to Aotearoa. The judgment in Aotearoa's favour is set aside.

Conclusion on the liability appeal

[126] For the reasons we have given, Aotearoa holds on to the findings in its favour as to the terms of the joint venture agreement it alleged and to the finding that it was entitled to reasonable notice before the agreement could be terminated. Paper Reclaim did not give a notice. Rather, it repudiated the agreement. In time – at the latest 3 May 2002 – Aotearoa elected to cancel the agreement. We have held that a reasonable notice period would have been a year.

[127] Aotearoa's loss should not be difficult to calculate. If, however, the parties are unable to agree quantum, then a further hearing in the High Court may be required.

Application for further evidence

[128] Shortly before the hearing of this appeal, Paper Reclaim applied to this court for leave to adduce further evidence from no fewer than 16 witnesses. Fourteen of them had sworn affidavits. The essential point of the new evidence was to demonstrate that Mr Cash had given false evidence as to when he had given up baling and as to the fate of the baler. This in turn cast doubt, Mr Judd submitted, on Mr Cash's evidence relating to the alleged meeting at which the export agency agreement was allegedly made. Mr Judd submitted that the new evidence would show conclusively that the meeting could not have taken place when Mr Cash said it had. Further, some of what Mr Cash said had been discussed at that meeting simply could not have been discussed. The new evidence, Mr Judd submitted, was of fundamental importance, as it went to an issue which was right at the heart of the case, namely the meeting at which the alleged agreement was made.

[129] The first two days of the appeal hearing were spent hearing counsel on this application. In fact, much of what we heard in those two days related to the substantive appeal, as it was important to put the application into context. For that reason, we needed to understand what Paper Reclaim's complaints were with respect to the judgment as a whole. On the afternoon of the second day (19 July 2005), we advised that the application for leave to admit further evidence was granted only to the extent that the affidavit of John Mark Trevelyan Wells dated 14 July 2005 was admitted for the purposes of the appeal. We advised that we would give our reasons for that decision when determining the substantive appeal. These now are those reasons. We record that the hearing of the substantive appeal, which took place on 20 and 21 July last year, reinforced the reasons we had formulated as to why the additional evidence (save in one respect) should not be admitted.

The additional evidence we are not admitting

[130] Mr Judd appreciated that there are established guidelines for the admission of further evidence in this court. They are conveniently set out in *Rae v International Insurance Brokers (Nelson Marlborough) Limited* [1998] 3 NZLR 190 at 192-193 and *Airwork (NZ) Limited v Vertical Flight Management Limited* [1999] 1 NZLR

641 at 649-650. The first requirement is that the new evidence is fresh, in the sense that it could not have been obtained for use in the court below. Mr Judd submitted that that criterion was met. He said that the evidence now sought to be adduced could not with reasonable diligence have been obtained for use in the High Court because of Aotearoa's failure to discover three relevant documents:

- (a) the case on appeal in *Aotearoa International Limited v Scancarriers A/S*, this court's decision being later reported in [1985] 1 NZLR 513;
- (b) a brief of Mr Cash's evidence prepared for that litigation;
- (c) an instrument by way of security dated 19 August 1981 given by Aotearoa in favour of the Development Finance Corporation.

[131] We are quite satisfied that there was no failure on Aotearoa's part with respect to discovery of these three documents. The first two can be considered together. Paper Reclaim was well aware of Aotearoa's claim against Scancarriers as its progress through the courts (1983-1985) coincided with the start of the relationship between Messrs O'Rourke, Taylor and Cash. Indeed, Mr Taylor gave evidence for Aotearoa in the litigation. Mr Cash has said on oath that he did not consider it likely that the file had any relevance to the Paper Reclaim litigation, an opinion apparently shared by Messrs O'Rourke and Taylor. In any event, the file from the Scancarriers' litigation was always available for inspection at the High Court in Auckland. Paper Reclaim had ample opportunity to request discovery of any document relating to the Scancarriers' litigation had it considered that litigation relevant; it did not do so.

[132] As for the instrument by way of security, it is clear from evidence given by Mark Wells, Paper Reclaim's solicitor, that he received instructions from Messrs Taylor and O'Rourke on 27 November 2001 to make enquiries about the baler, the sale of which was recorded in Aotearoa's financial statements for the year ended 31 March 1985. It is obvious what must have prompted those instructions. Messrs Taylor and O'Rourke would have recently read Mr Cash's first brief of evidence, dated 2 November 2001. They would have read in paragraphs 6.1, 6.19,

and 7.1 that Mr Cash was able to put a rough date on the agreement meeting by reference to the fact that Aotearoa's baler was recorded as having been sold in the year ended 31 March 1985. Messrs Taylor and O'Rourke were sceptical about that.

[133] Mr Wells caused a search to be made of the Companies Office file. A copy of the very security which Paper Reclaim now says Aotearoa failed to discover was obtained. But none of Mr Wells's legal team saw it as being of significance, in part because the baler was described in the instrument as a "fully automatic 30 ton Davis hydraulic press with feed elevator attached". No one apparently realised that "hydraulic press" is another name for a baler, even though Aotearoa's financial statements for the year ended 31 March 1985 showed only one item – a "press" – as having been sold that year. Clearly it must have been that item to which Mr Cash was referring when he said that the accounts helped him pinpoint when the baler had been sold and hence when the joint venture agreement had been made. The only available deduction is that "press" and "baler" must be synonymous.

[134] We do not see the fact of that instrument's non-discovery as an error on Aotearoa's part. In any event, Paper Reclaim had the relevant instrument: the fact that its legal team did not recognise its significance is beside the point. Further, at no time did Paper Reclaim seek information about the baler by correspondence, request for further discovery, interrogatories, or any other procedure.

[135] All the new evidence (except that contained in Mr Wells's affidavit of 14 July 2005, to which we shall return) was available at the time of trial, had Paper Reclaim sought to adduce it. Paper Reclaim was well aware, at the latest in November 2001, that Aotearoa was claiming that a term of the joint venture agreement was that Aotearoa would cease to bale waste paper (term 1) and that Mr Cash said that, as a consequence, he had sold the baler. The trial did not begin until 7 May 2002 and did not conclude until 10 June 2003. Paper Reclaim had ample opportunity to explore the fate of the baler, if it saw that as of relevance.

[136] The second requirement is that the new evidence be cogent and likely to have an important influence on the result of the case, although it need not be decisive. We are clear that Paper Reclaim has not established this criterion either. For the reasons

we have already given, we do not see it as decisive whether the agreement was made at the agreement meeting. Nor do we see term 1 as being of any particular significance. The meeting may well have taken place as Mr Cash asserted and as found by Nicholson J. But, even if Mr Cash is muddled about the timing or has run together two or more meetings, we are satisfied that a clear understanding developed that Aotearoa was the exclusive export agent of Paper Reclaim's. The alternative propounded in the witness box by Messrs O'Rourke and Taylor just cannot stand with the evidence viewed as a whole, for the reasons we have given. Therefore, even if Mr Cash's evidence as to the fate of the baler is wrong, that is not decisive.

[137] There is a third criterion: the proposed evidence must be credible, although it need not be incontrovertible. We do not need to consider that criterion.

[138] For these reasons, we considered that the bulk of the proposed new evidence should not be adduced.

Mr Wells's 14 July 2005 affidavit

[139] On 14 July last year, just prior to the hearing before us, Morrison Kent, Aotearoa's solicitors, discovered certain documents dating from 1984, relating to a proposed agreement between Paper Reclaim and Aotearoa. We should explain that during 1984 Paper Reclaim and Aotearoa had both instructed lawyers in an attempt to draft a new written agreement to replace a 1982 agreement between Paper Reclaim and Mr Cash personally. Various drafts had passed between the respective solicitors, but no written agreement was ever entered into. Nicholson J refers to this at [23]-[28] of the liability judgment.

[140] The significance of the new material was explained by Mr Wells, who was Paper Reclaim's lawyer in 1984, in his affidavit of 14 July 2005:

The evidence I gave at the trial of CP117/01 was based on documents that were obtained from Paper Reclaim. The first document was a letter dated 20 March 1984 and which is included in the Case on Appeal at page 969. Because of that letter and the absence in discovery of any document indicating otherwise, I had assumed it was Paper Reclaim who had initiated the preparation of a detailed formal agreement between Paper Reclaim and

Mr Cash in 1984 and that I had initiated the sequence of correspondences regarding such proposed agreement.

From the documents received from Morrison Kent this morning it now appears that the drafting of a detailed agreement between Paper Reclaim and Mr Cash was initiated by Mr Cash and his solicitors Earl, Kent & Co and that I did not initiate the exchange of communications about such an agreement because my letter of 27 January 1984 to Earl, Kent & Co (which is exhibited as “C” hereto) refers to Messrs O’Rourke and Taylor having handed me an agreement prepared by Earl, Kent & Co.

[141] This clearly is new evidence. Mr Wells explained why he did not have copies of these late discovered documents (even though he was party to them). There had been a discovery failure on Aotearoa’s part with respect to the documents eventually supplied on 14 July. Their relevance was immediately recognised by Morrison Kent when their client stumbled across them. The exchange of correspondence and draft agreements during 1984 was of some relevance when evaluating the likelihood of the alleged oral agreement. There can be no doubt about the cogency of this new evidence: it is entirely documentary, consisting of correspondence or draft agreements prepared by reputable solicitors.

[142] We have taken into account this new material when evaluating the first issue on this appeal. (That is the only issue to which this new material could pertain.) The new material did not, however, cause us to consider that Nicholson J’s findings as to the joint venture agreement were wrong.

Costs in the High Court

[143] Following its success in the liability judgment, Aotearoa sought indemnity costs. Paper Reclaim opposed that application.

[144] On 30 August 2004, Nicholson J delivered the costs judgment. He found that Aotearoa’s actual legal costs relating to the proceeding were \$515,114.50 (excluding GST and disbursements) and that those costs were reasonable: the costs judgment at [4] and [70]. He determined that this was an appropriate case for indemnity costs, but he considered that they should be reduced by 20% to reflect the fact that Paper Reclaim had not been completely successful. That reduced the costs award to

\$412,091.60. To that His Honour added disbursements of \$117,023.55 and costs on the disputed costs application of \$3,000. The total was \$532,115.15.

[145] Nicholson J awarded what were essentially indemnity costs pursuant to r 48C(4)(a) of the High Court Rules. That provision permits indemnity costs against a party where “the party has acted...improperly...in defending a proceeding or a step in a proceeding”: the costs judgment at [59].

[146] Nicholson J considered that this provision was triggered in the present case because Messrs O’Rourke and Taylor had “made false affidavits and [given] false evidence in denying the existence of the exclusive export contract”: the costs judgment at [63]. His Honour said at [61]:

In his affidavit in support of Aotearoa’s interim injunction application and his oral evidence at the trial, Mr Cash swore that there was a meeting and agreement. In affidavits opposing the interim injunction application and oral evidence at the trial, Mr O’Rourke & Mr Taylor each swore that there was no such meeting and agreement. As I said in my judgment:

The disputed issue of whether an exclusive export contract was made comes down bluntly to an issue of who told the truth. There is no room for mistake or failure of memory. If such an important oral contract was made and was thereafter the basis on which the parties did million dollar business for 16 years, short of abnormal mental deterioration, the people who made it are very likely to still remember it and its main terms.

[147] In addition, Nicholson J took a dim view of Paper Reclaim’s conduct generally from 1999 through to 2001. At [63] of the costs judgment, His Honour said that he thought this conduct to be relevant to a decision whether indemnity costs should be awarded. He quoted in this respect from [133] of his liability judgment:

It should not be overlooked that for some 14 years after the exclusive export contract was made, the parties performed that contract in harmony and to their considerable mutual financial advantage. The inference which I draw from facts proved by the evidence is that about 1999 Mr O’Rourke and Mr Taylor considered that Paper Reclaim’s business was in a position of power, prosperity and information which would enable it to conduct export business without Aotearoa and thus make more export profit for itself. They put pressure upon Mr Cash, by unilaterally changing the mode and time of payment to Aotearoa and by trying to reduce the rate of Aotearoa’s remuneration. They increased the pressure by becoming more demanding in the administration of the export arrangements and goaded Mr Cash to take steps which they then used [in February 2001] as purported justification for

casting Aotearoa and Mr Cash adrift, while denying that Paper Reclaim and Aotearoa were tied together by a contract.

[148] Mr Judd attacked the costs judgment. His first submission, of course, assuming Paper Reclaim were completely successful on the appeal, was that Paper Reclaim should have had costs awarded in its favour. Mr Judd's hope in that regard has not come to pass, so this possibility needs no further discussion.

[149] Mr Judd's fallback argument was that this was not an appropriate case for indemnity costs. He submitted that there had been no misconduct on Paper Reclaim's part in defending the proceeding. He further submitted that there was no warrant for the judge's finding that Messrs Taylor and O'Rourke had given perjured evidence.

[150] Mr Grant sought to uphold the judge's reasoning.

[151] With great respect to the judge, we have no hesitation in holding that his costs judgment was wrong and that the reasoning that led to it was wrong. It must be set aside. These are the reasons.

[152] First, it could not possibly be said that Paper Reclaim acted "improperly" in defending the proceeding. Aotearoa's claim has failed in numerous respects:

- (a) Aotearoa argued that the joint venture agreement was of indefinite duration and could not be terminated save for cause. This was the first cause of action. Nicholson J rejected that proposition, as have we.
- (b) Aotearoa's fallback position (the second cause of action) was that, even if the contract could be terminated by the giving of reasonable notice, the length of reasonable notice would have been 13 years 10 months. (That was calculated to carry the agreement through to 3 December 2014 when Mr Cash would turn 65 and be able to retire.) That was, with respect, an extremely ambitious argument, given that no court, so far as counsel's research has showed, has ever found a reasonable notice period of longer than five years.

- (c) The third cause of action – breach of fiduciary duty – was in the circumstances misconceived and has not succeeded.
- (d) The fourth cause of action failed before Nicholson J. Aotearoa has not cross-appealed with respect to that finding. For that reason it has not been discussed in this judgment.
- (e) The fifth cause of action (relating to the claim for commission on the sale to AMCOR) was upheld in the High Court but has failed in this court.
- (f) As already indicated, the sixth cause of action has yet to be heard.
- (g) Aotearoa failed on the seventh cause of action (sales to Carter Holt) in this court, after having succeeded in the High Court.
- (h) Paper Reclaim succeeded before Nicholson J on its counterclaim. Aotearoa did not appeal against that decision.

[153] Although it is true, therefore, that Aotearoa succeeded on the major issue in the case – the existence of the joint venture agreement – it failed (or should have failed) on numerous other causes of action it advanced and failed in its defence to Paper Reclaim’s counterclaim.

[154] Secondly, we do not accept the judge’s conclusion that the evidence of Messrs O’Rourke and Taylor was deliberately false in so far as they denied that there was an agreement meeting and in so far as they denied that an oral agreement was reached at it. While we are satisfied that, looking at the evidence overall, the parties must have reached an understanding at some point in the 1980s that Aotearoa would be Paper Reclaim’s exclusive export agent, we go no further than saying it is *probable* that there was a meeting as alleged by Mr Cash. If there was such a meeting, we think it entirely possible that Messrs O’Rourke and Taylor may simply have forgotten it. These three men were meeting all the time – almost on a daily

basis. It seems clear that the relationship evolved over time. And of course, the crucial term – term 8 – was, even on Mr Cash’s case, an implied term.

[155] We fail to see how the judge could be so sure that Messrs O’Rourke and Taylor were lying when Mr Cash himself was so uncertain about various aspects of the oral agreement. Without being exhaustive, we mention the following matters.

[156] First, when Aotearoa commenced this proceeding, Mr Cash put the meeting as having occurred in 1982: first statement of claim, para 3. This is significant because an agreement definitely was reached that year (the written one between Paper Reclaim and Mr Cash personally), *but it was not the one he was claiming on*. This suggests that Mr Cash’s memory of the circumstances surrounding the making of the joint venture agreement was hazy, to say the least.

[157] Secondly, Mr Cash originally asserted that immediately after the meeting, “Paper Reclaim typed up the agreed terms and supplied [him] with a copy of them”: Mr Cash’s affidavit dated 28 March 2001, para 4.2. Mr Cash identified that copy and attached it as exhibit B. Exhibit B was referred to at trial as document B. It was later established that document B was not typed up until December 1992 and faxed to Mr Cash on 16 December 1992. So Mr Cash’s recollection in that regard was faulty too.

[158] Thirdly, Mr Cash found it difficult to recollect exactly what had been said at the agreement meeting. That is not surprising given that not a shred of contemporaneous documentary material relating to this meeting or the oral agreement allegedly made at it has been located. Nor is there any reference to the agreement meeting in any documentation before these proceedings were commenced in 2001. Despite all the difficulties between Paper Reclaim and Aotearoa from 1999 on, Mr Cash at no stage in that period (prior to the commencement of these proceedings) referred explicitly, in correspondence or conversations with Paper Reclaim and its directors, to the agreement meeting and the oral agreement allegedly made at it. Certainly Mr Cash asserted that Aotearoa was Paper Reclaim’s exclusive export agent – and we uphold the finding that it was. But he did not at that stage tie his company’s status back to a specific meeting or to a specific oral agreement.

[159] Fourthly, Mr Cash accepts that the agreement evolved over time. For instance, an agreement that Aotearoa would receive compensation of \$5 a tonne on 50/50 deals was discussed, Mr Cash said, “at a later meeting”. He was not able to define when that meeting was or where it was held. If he had forgotten the details of that meeting, why is it not equally possible that Messrs O’Rourke and Taylor might have forgotten the agreement meeting?

[160] Our third reason for setting aside the costs judgment is that the judge was wrong to take into account Paper Reclaim’s conduct generally from 1999 through to February 2001. If that conduct was wrongful, then the remedy is damages. Aotearoa did not plead any breach of contract relating to that period, save for sales to Carter Holt, which we have found not to have been in breach of the joint venture agreement. So the reasoning of the judge on this topic was doubly unfair to Paper Reclaim: His Honour not only took into account conduct which had never been pleaded as wrongful but also took it into account with respect to costs, to which it could never have been relevant.

[161] Counsel agreed that, if the appeal against the costs judgment succeeded, this court should fix an appropriate costs award with respect to the High Court proceeding. That seems a sensible course, particularly since Nicholson J is shortly to retire. We shall give the parties an opportunity to try to agree what costs in the High Court should have been. If they cannot agree, then memorandums can be filed in this court.

Exemplary damages for breach of contract

[162] After Nicholson J delivered his liability judgment on 19 March 2004, Aotearoa applied for leave to file and serve an amended statement of claim, including a claim for the first time for exemplary damages. Nicholson J heard that application on 30 June 2004. His Honour delivered his decision on that application on 3 September 2004. His Honour granted leave. Subsequently Aotearoa filed its fourth amended statement of claim.

[163] Paper Reclaim has appealed against the pleadings judgment. So far as the cause of action for breach of contract is concerned, Paper Reclaim's objection is to the judge's permitting exemplary damages to be claimed for the first time.

[164] So far as the cause of action for breach of fiduciary duty is concerned, the objection is two-fold. First, the judge permitted exemplary damages to be claimed for the first time. Secondly, Aotearoa also sought for the first time an account of profits. We have ruled out that cause of action entirely. For that reason, we do not need to discuss whether or not these amendments should have been allowed.

[165] That leaves for discussion the question of exemplary damages as a remedy in breach of contract cases. There are really two issues that arise in this context:

- (a) are exemplary damages claimable at all for breach of contract?
- (b) if they are, should Aotearoa have been permitted to amend its pleading to include a claim for exemplary damages after the liability trial had concluded?

[166] We turn to the first issue. Because of the difficulty of this issue, after the hearing we sought further submissions on the question whether exemplary damages can be claimed at all for breach of contract or breach of fiduciary duty. Counsel responded with very helpful submissions, for which we are grateful.

[167] So far as we are aware, this court has never granted or approved a grant of exemplary damages for breach of contract. Nor has it ever definitively pronounced on whether exemplary damages could be awarded for breach of contract, although, in fairness, it should be noted that in *Telecom Corporation New Zealand Limited v Business Assocs Limited* CA7/93 23 June 1993, *State Insurance Limited v Cedenco Foods Limited* CA216/97 6 August 1998, and *Attorney-General v Gilbert* [2002] 2 NZLR 342 there are indications that in principle exemplary damages might be available. In none of those cases, however, did any party mount a full-on attack on the availability in principle of exemplary damages as a remedy for breach of

contract. Mr Judd has advanced such an attack in this case. We are bound to deal with it.

[168] Because there is no binding appellate authority in this country, it is useful to review what the position is in other comparable jurisdictions.

[169] Exemplary damages are not available for breach of contract in Australia. That position has been clear since *Butler v Fairclough* (1917) 23 CLR 78 and has recently been reaffirmed in *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 6-7 and *Hospitality Group Pty Limited v Australian Rugby Union Limited* (2001) 110 FCR 157 at [142]-[143]. See further Seddon and Ellinghaus *Cheshire and Fifoot's Law of Contract* (8 Aust ed 2002) at [23.2].

[170] The position is the same in the United Kingdom. The current position is summarised in Treitel *The Law of Contract* (11ed 2003) at 935 as follows:

As a general rule punitive damages cannot be awarded in a purely contractual action, since the object of such an action is not to punish the defendant but to compensate the claimant. Punitive damages are not available even though the breach was committed deliberately and with a view to profit. If the court is particularly outraged by the defendant's conduct, it can sometimes achieve much the same result by awarding damages for injury to the claimant's feelings. In theory such damages are meant to compensate the claimant for mental suffering, rather than to punish the defendant. But in practice the distinction is often hard to draw and – from the defendant's point of view – to perceive. However, where the claimant has a cause of action both in tort and for breach of contract, he may be able to recover punitive damages by framing the claim in tort. For example, a landlord who lawfully evicts his tenant is guilty both of a breach of contract and of a trespass; and punitive damages have been awarded in such a case.

[171] To similar effect, see Beale (ed) *Chitty on Contracts* (29ed 2004) at [26-019]. We should note in passing that we agree that in appropriate circumstances (and subject to the accident compensation legislation) compensatory damages may be awarded for mental distress. No such damages have, however, been claimed in this case. We also accept that in circumstances where a defendant may be liable both in tort and for breach of contract, exemplary damages may be recoverable in the tort claim. But again there is no suggestion in the present case that Paper Reclaim

committed any sort of tort against Aotearoa and we have found that it did not owe any fiduciary obligations.

[172] The question has also been examined in detail by the England and Wales Law Commission. In its 1997 report, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247 1997), it recommended that exemplary damages should not be available for breach of contract: at 105 and 118-119. Its reasons for this recommendation were succinctly set out at 118:

A range of reasons cumulatively lead to that recommendation. First, exemplary damages have never been awarded for breach of contract. Second, contract primarily involves pecuniary, rather than non-pecuniary, losses; in contrast, the torts for which exemplary damages are most commonly awarded, and are likely to continue to be most commonly awarded, usually give rise to claims for non-pecuniary losses. Thirdly, the need for certainty is perceived to be greater in relation to contract than tort and, arguably, there is therefore less scope for the sort of discretion which the courts must have in determining the availability and quantum of exemplary damages. Fourthly, a contract is a private arrangement in which parties negotiate rights and duties, whereas the duties which obtain under the law of tort are imposed by law; it can accordingly be argued that the notion of state punishment is more readily applicable to the latter than to the former. Fifthly, the doctrine of efficient breach dictates that contracting parties should have available the option of breaking the contract and paying compensatory damages, if they are able to find a more remunerative use for the subject matter of the promise. To award exemplary damages would tend to discourage efficient breach.

[173] In Ireland the common law position is that exemplary damages are not available for breach of contract. The Irish Law Reform Commission has investigated and consulted on the topic of exemplary damages. Its final report, issued in 2000, *Report on Aggravated, Exemplary and Restitutionary Damages* (LRC 60-2000), recommended that the availability of exemplary damages should not be extended to cases of breach of contract: at [1.66]. The commission considered that “an extension of exemplary damages to contract cases would be at odds with the traditional concept of contract law as having an exclusively private law character”: at [1.54].

[174] The United States presents a confused picture. The *Restatement (Second) of Contracts* (1981) says at [355]:

Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

[175] Notwithstanding that general rule, different state jurisdictions have recognised other circumstances in which exemplary damages may be awarded for a breach of contract. See generally Sassaman “Punitive Damages in Contract Actions – Are the Exceptions Swallowing the Rule?” (1980-81) 20 Washburn LJ 86 at 92-96 and Sullivan “Punitive Damages and the Law of Contract: The Reality and the Illusion of Legal Change” (1976-77) 61 Minn L Rev 208 at 220-251.

[176] The Supreme Court of Canada has recently considered whether exemplary damages should be available for breach of contract. In *Whiten v Pilot Insurance Co* (2002) 209 DLR (4th) 257, the court held that exemplary damages could be awarded in a breach of contract claim provided that the defendant’s conduct was such as to give rise to an “independent actionable wrong” (drawing on *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085). That independent wrong need not be a claim in tort. In that regard, the court’s conclusion deviated from the position in the American *Restatement*.

[177] The Supreme Court’s position has been subject to some fairly trenchant criticism. For instance, Professor McCamus, in an article “Prometheus Bound or Loose Cannon? Punitive Damages for Pure Breach of Contract in Canada” (2004) 41 San Diego L Rev 1491 at 1504, said that the court had given “no explanation... for the proposition that although one single breach of duty suffices for punitive damages in the tort context, punitive damages in contract require two breaches of duty”. Indeed, he went on, “it appears that no coherent justification can be offered for the latter requirement.” Professor McCamus said that the decision failed to supply a convincing reason for making an extension of the scope of punitive damages in the contract context beyond cases of breach of contract that also constitute tortious wrongdoing: at 1519.

[178] An even more damning review of the decision is Adjunct Professor Swan’s article “Punitive Damages for Breach of Contract: A Remedy in Search of a

Justification” (2003-04) 29 Queen’s LJ 596. He concludes that the Supreme Court’s judgment is “deeply disappointing”: at 644. He went on:

The failures of the Court occur at many levels: the cause of action is misstated and misunderstood, and the full range of compensable heads of loss or damage, including costs, is completely ignored so that the jury verdict is justified on a basis – the “if and only if” argument – that is flatly wrong. The analysis of punitive damages, while in many respects careful and properly cautious, fails to consider what is necessarily entailed by the whole enterprise of bringing considerations of punishment or deterrence into the civil law and, in particular, ignores the regulatory background to the insurance business. To an extraordinary extent, the Court seems oblivious to its own previous decisions.

[179] He concludes at 646:

The casual assumption by the Court that punitive damages can be awarded for breach of contract is not only unnecessary to achieve the goals of the law, but deeply inconsistent with the purpose and role of contracts.

[180] The clear trend of overseas authority is against the possibility that exemplary damages should be available in breach of contract cases. We are of the view that the position in New Zealand should conform with that trend. We are particularly influenced by the detailed reports undertaken by the law commissions in the United Kingdom and Ireland. Those reports were formulated following extensive consultation. We find their reasoning compelling and adopt it.

[181] It is easy for a court to hedge and say that exemplary damages should not be possible save “in very rare cases” or “in exceptional circumstances”. But the downside of “leaving an out” is that any plaintiff can blithely plead a claim for exemplary damages, asserting that his or her case is in the “exceptional” category. The defendant will never be successful in having the claim struck out, as the court will not be able to assess at a strike-out stage whether the case factually comes within the exceptional category where exemplary damages might lie. A claim may go to trial unnecessarily, the plaintiff hoping that he or she may win the \$1 million jackpot Mrs Whiten won. (In the present case, Aotearoa has not stipulated how much it hopes for – incidentally, a breach of rr 109 and 115 of the High Court Rules.) The fact that the odds may be slim may not deter a plaintiff with stars in his eyes. Alternatively, defendants may feel compelled to offer something in order to get rid of the possibility that this case is found to be within the exceptional category. It is quite

wrong to give plaintiffs a powerful weapon with which they can harass defendants and, perhaps, extract large settlements because the costs of defending even an unmeritorious claim may be huge: Swan at 645. Mr Beck is right that the time has come for this “bull...to be grasped by the horns and slaughtered” and that exemplary damages have “no place in a principled system of contractual damages”: “Contract” [2005] NZ Law Review 53 at 64.

[182] There is certainly no need for exemplary damages to fill any hole in the range of compensatory damages in the contract field. Contractual remedies now available in appropriate cases include expectation damages, reliance damages, and damages for non-pecuniary loss, mental distress, disappointment and loss of amenity. It has even been suggested that a court could order an account of profits as a contractual remedy: *Attorney-General v Blake* [2001] 1 AC 268 (HL). In addition, in appropriate cases, indemnity costs may be available for improper conduct in the course of litigation. And, of course, also within the court’s armoury are the non-monetary remedies of injunction and specific performance. There is no reason in principle to add yet another remedy to the above list that would give a contracting party a windfall profit over and above that which it had bargained for.

[183] In our view, therefore, it is not open to Aotearoa to seek exemplary damages for Paper Reclaim’s breach of contract. We leave open the possibility that exemplary damages may be available in circumstances where the breach of contract also constitutes a tort for which exemplary damages are recoverable. There is no suggestion in the present case that Paper Reclaim’s conduct does constitute a tort.

[184] We also leave for another day whether exemplary damages can be claimed for breach of fiduciary duty. We have found that Paper Reclaim did not owe fiduciary obligations to Aotearoa.

[185] In view of our finding on the first issue (at [165]), we do not need to go on to consider the second issue, namely the lateness of the application to amend.

[186] Before we leave this topic, we make a further observation. We do not criticise Nicholson J at all for concluding that a claim for exemplary damages might

be available in breach of contract cases. The law on this topic in New Zealand was not clear and there was at least a possibility that exemplary damages could be claimed when one considered the authorities cited above at [167].

[187] It follows from this finding that Aotearoa will now have to file a further amended statement of claim omitting any claim for exemplary damages. That amended pleading should also omit causes of action which have failed or been finally disposed of. This means that only the second and sixth causes of action will remain.

[188] The second cause of action will also need amendment. At present, Aotearoa has pleaded that Paper Reclaim “summarily terminated the arrangements with [Aotearoa] in or about February 2001”: fourth amended statement of claim, para 14. Aotearoa then goes on to claim damages for loss of revenue for Nicholson J’s “8 year period of notice running from February 2001 to February 2009”: fourth amended statement of claim, para 15(a). That is inconsistent with the argument Mr Grant presented to us, which we have accepted. The contract did not “summarily terminate” as a consequence of Paper Reclaim’s action on 2 February 2001. That was a repudiation of the joint venture agreement, a repudiation which, Mr Grant told us in his submissions, Aotearoa did not accept. The contract did not come to an end until Aotearoa elected to accept the repudiation and cancel the agreement. That will need tidying up in the amended claim. Aotearoa will need to specify when it was that it gave notice of cancellation, thereby bringing the contract finally to an end.

Costs in this court

[189] We have concluded that there should be no order for costs in this court, as the honours are equally shared.

[190] Paper Reclaim failed in its essential challenge to the judge’s finding of a joint venture agreement on the terms as found by the judge. We have also confirmed that Paper Reclaim breached the joint venture agreement by its repudiation on 2 February 2001. Paper Reclaim also in effect failed on its application to adduce further evidence.

[191] At the same time, Paper Reclaim has succeeded in having the reasonable notice period reduced from eight years to one year. It has also succeeded on all the subsidiary causes of action. It has also succeeded in having the claim for exemplary damages struck out.

Solicitors:
Wells & Co, Auckland, for Appellant
Morrison Kent, Auckland, for Respondent