ENDING A BUSINESS RELATIONSHIP THAT HAS RUN ITS COURSE

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A. INTRODUCTION

The topic has given me carte blanche to consider many doctrines of interesting and developing law that apply when (business) things fall apart, and the centre cannot hold. [1] The ending of business relationships can be put into two main categories: consensual (including mediated), or litigated/ arbitrated. The perspective as to the ending of relationships can also fall into two main categories: ending via a process such as a termination clause, that is in the contractual 'mix' from the beginning of the relationship; or ending in some other way (eg repudiating, and letting the cards fall they may as regards damages).
As an overlay to the above, are requirements for ending relationships imposed by law, eg the Franchising Code, or Real Property Act, which contain requirements that notices be given before relationships can be terminated.

B. CONSENSUAL ENDING --VIA A PROVISION THAT IS IN THE RELATIONSHIP FROM THE OUTSET

Important matters to think about when drafting commercial contracts are not only when they are to incept, but precisely how long they are intended to run, and how they might be brought to an end, and by whom.

Standard forms of retail and commercial leases and franchise agreements

[1] WB Yeats, The Second Coming

made provision for this type of clarity. But a surprising amount of commercial agreements do not.

C. *EXPERT DETERMINATION CLAUSES*

Sometimes the right to serve a notice of termination will depend on the expert determiner deciding that an event has occurred under the contract, that gives the right to terminate eg whether goods have been sold that are not fit for purpose; or whether services have bene provided that are not to a certain standard; or whether profit over a given time has or has not reached the level of X.

This is a topic on its own, and occupies its own chapter in the loose-leaf service of Jacobs QC, published via Thomson Reuters. Issues can arise as to whether the clause as binding, or not binding because insufficiently certain eg as to the rules which apply, or otherwise as to the procedure to be adopted.

All I do at this time is to flag the topic, and refer to a recent case summarising many of the salient principles: *WTE Co Generation v RCR Energy Pty Ltd* [2013] VSC 314, where Vickery J analysed the cases and concluded as regards the legal principles at para [39]:

Pulling the threads together, the following principles may be stated as to a stay should be granted where a contractual dispute resolution process is expressed to be a pre-condition to litigation, and where the enforceability of such provision is put in issue:

1. The general rule is that equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary for the court to determine that the clause is enforceable. This is because supervision of performance pursuant to the clause would be untenable.[29]
2. The Court may, however, effectively achieve enforcement of a dispute resolution clause by default, by ordering that a proceeding commenced in respect of a dispute subject to the clause, be stayed or adjourned until such time as the process referred to in the clause, is completed.[30] What is enforced by this means is not

co-operation and consent of the parties but participation in a process from which consent might come.[31]

3. A circumstance which will operate to preclude the ordering of a stay on this ground arises where the particular dispute resolution clause is determined to be unenforceable, as where for example, the clause is found to be uncertain.[32]
4. Dispute resolution clauses in contracts should be construed robustly to give them commercial effect.[33] The modern approach to the construction of commercial agreements is generally to endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement.[34]
5. Honest business people who approach a dispute about an existing contract will often be able to settle it.[35] If business people are prepared in the exercise of their commercial judgment to constrain themselves by reference to express words that are broad and general, but which nevertheless have sensible and ascribable meaning, the task of the court is to give effect to and not to impede such solemn express contractual provisions.[36] Uncertainty of proof does not detract from there being a real obligation with real content.[37]
6. A dispute resolution clause in a contract, consistently with public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, enforceable content be given to contractual dispute resolution clauses.[38]
7. The trend of recent authority is in favour of construing dispute resolution clauses where possible, in a way that will enable those clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court.[39]
8. The court does not need to see a set of rules set out in advance by which the agreement, if any, between the parties may in fact be achieved.[40] The process need not be overly structured. However, the process from which consent might come must be sufficiently certain to be enforceable.[41] A contract which leaves the process or model to be utilized for the dispute resolution ill defined, or the

subject of further negotiation and agreement, will be uncertain and unenforceable.[42]

9. An agreement to agree to another agreement may be incomplete if it lacks the essential terms of the future bargain.[43]
10. An agreement to negotiate, if viewed as an agreement to behave in a particular way, may be uncertain, but is not incomplete. The relevant question is whether the clause has certain content.[44]
11. An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete.[45]

HH concluded as follows:

> [41] To my mind, sub-clause 42.2 of the relevant Contract, which provided that "In the event the parties have not resolved the dispute then [within a further 7 days] a senior executive representing each of the parties must meet to attempt to resolve the dispute or to agree on methods of doing so, is unenforceable". [Emphasis added]
>
> [42] The process established by the clause is uncertain. Once the operation of sub-clause 42.2 is triggered, the parties are required to do one of two things, either to meet together to resolve the dispute, or to agree on methods of doing so. No process is prescribed to determine which option is to be pursued.

D. SERVICE OF NOTICES: A COLD, HARD WORLD

Notice provisions are potentially critical when considering bringing a business relationship to an end. Contracts often make provision for the mechanics of serving notices: to whom (eg will agents suffice?); by whom (ditto), in what mode (will email do? If so, does receipt need to be confirmed?); if personal, then what exactly does that mean: does it have to be on a specified person or will an employee or officer suffice? To what address? Does any particular form of words need to be used?

All these matters reoccur like clock work in the decided cases, showing that the business world and those who advise them, are getting no better at drafting notice provisions.

One relevant provision is Sec 170 of the *Conveyancing Act* (NSW), which provides:

"**170** (1) Any notice required or authorised by this Act to be served shall be in writing, and shall be sufficiently served

(a) if delivered personally;

(b) If left at or sent by post to the last known residential or business address in or out of New South Wales of the person to be served;

(b1) in the case of a mortgagor in possession or a lessee, if left at or sent by post to any occupied house or building comprised in the mortgage or lease;

(b2) in the case of a mining lease, if left at or sent by post to the office of the mine;

(c) if delivered to the facilities of a document exchange of which the person on whom it is to be served is a member; or

(d) in such manner as the Court may direct.

(1A) In the case of service by delivery to the facilities of a document exchange, the notice is, unless the contrary is proved, to be taken to have been served on the second business day following the day of delivery of the notice to those facilities.

(2) Any notice required or authorised by this Act to be served on a lessee or mortgagor shall, if served otherwise than by post, be sufficient although addressed to the lessee or mortgagor by that designation only, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(2A) The provisions of this section extend to notices required to be served by any instrument affecting property (including any dealing under the *Real Property Act 1900*) executed, made or coming into operation after the commencement of the Conveyancing (Amendment) Act 1930, unless a contrary intention appears in the instrument or dealing or in the

Real Property Act 1900.

(3) This section does not apply to notices served in proceedings in any court.

(4) This section applies only if and so far as a contrary intention is not expressed in any instrument, and shall have effect subject to the provisions of such instrument.

(5) In this section, "business day" means any day except Saturday or Sunday or a day that is a public or bank holiday throughout the State."

Moreover s76(1) of the *Interpretation Act* (NSW) 1987 provides that "if an act or instrument authorises or requires any document to be served by post (whether the word "serve", "give" or "send" or any other word is used), service of the document:

(a) may be effected by properly addressing, prepaying and posting a letter containing the document; and

(b) in Australia or in an external territory is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected on the fourth working day after the letter was posted ...
"Working day" defined in subsection 2 of s76 as meaning "a day that is not: (a) a Saturday or Sunday, or (b) a public holiday or a bank holiday in the place to which the letter was addressed."

An important case regarding service of notices is *Lolly Pops (Harbourside) Pty Ltd v Werncog Pty Ltd* [1998] NSWSC 3014, when Young J (As HH then was) held as follows:

"Clause 16.6 of the lease, provides that "All demands, requisitions, consents, elections or notices shall be in writing and may be given to or served upon a party hereto by being left at that address specified as that party's address in the relevant Item of the Reference Schedule (which address may be amended from time to time by prior written notice to the other party). Any such demand, requisition, consent, election or notice if posted shall be deemed duly served at the expiration of three (3) business days after the time of posting. ..."

Several things could be said about clause 16.6. The first is that this sort of clause is usually read as being facultative only. That is, it does not prescribe an exclusive method for the service of notices but only one which may be availed of by a party wishing to give a notice if he, she or it so wishes; see *Wilson's Laundry Pty Ltd v Patmoy* (1961) 78 WN (NSW) 636 and *Tsaoucis v Gallipoli Memorial Club Ltd* - Young J, 27 May 1998, ………….

It has been observed that at least in the context of exercising options, notice provisions are a "cold hard world": *Burrell v Cameron* (SCNSW, Windeyer J, 4 April 1997, unreported, cited with approval in para [2] of *Parras & Ors v FAI General Insurance Company Ltd (Prov Liq apptd*) [2001] NSWSC 1077 revised - 30/11/2001.

As Goulding J said in *Carradine Properties Ltd v Aslam* [1976] 1 WLR 442 at 446:

"In an option clause the requirement is that a party must strictly comply with the condition for its exercise. If the condition includes the giving of a particular notice, it seems to me that the logical first approach is to interpret the notice, looking at the words and applying legal principles to their construction, and then ask whether it complies with the **strict requirements** as to the exercise of the option."

(emphasis added)

"[4] More recently, however, there has been some signs of relaxation of this strict approach, though by reference primarily to ordinary principles of construction. This has been allowed incipiently and tentatively for minor time infractions (for example, *Hillier v Goodfellow* [1988] VicConvR 54-310), and the trend still remains the other way (see for example, *Bressan v Squires* [1974] 2 NSWLR 460; *Diakogiannis v Johnson* (1989) NSWConR 55-472). But significantly, in construing notices with some inaccuracy, obvious error or looseness of formal expression, the House of Lords recently simply asked, how would the recipient, as a reasonable commercial person, be taken to have understood the intent of the notice: *Mannai Limited v Eagle Star Association Company Ltd* [1997] UKHL 19; *[1997] 2 WLR 945.* *That this "commercial" approach has manifested itself so far in cases dealing with a notice to terminate a lease* — so called "*break clauses*" — does not preclude the future

application of that approach to option cases. This is demonstrated by the juxtaposition, without discrimination, of those two categories in *Carradine Properties Ltd* (supra) at 446, though in the context of the more stringent approach. Thus I would, consistent with authority, tend to such a commercial construction of the notice and indeed of the clause providing for such mandatory notice. That said, proper compliance with the notice clause, so construed remains a condition precedent to valid exercise of the option in cases such as the present.

In the context of notices required for the exercise of an option to renew a lease, Nestle JA for the plurality held as follows in *APN Funds v Australia Property* [2013] VSCA 239:

“[29] Quaere, for example, what would be the situation if an Exercise Notice were delivered by post but, before it reached a responsible officer of the recipient, it was lost or destroyed? Should it be concluded in those circumstances that the effect of the Deed was that, because the notice was not in fact received, the time for exercise of the option expired and the recipient of the notice was under no obligation to complete? Equally, what if an Exercise Notice were in fact received but the sender of the Notice was not sure of its receipt and the recipient refused to confirm receipt until after 10 Business Days after receipt. Should it be concluded in those circumstances that the effect of the Deed was that the recipient would be entitled to claim that it was then too late for the sender to insist on completion? Alternatively, what if an Exercise Notice were sent on Day 1 but did not come to the attention of the recipient until Day 11. In those circumstances, should it really be concluded that the effect of the Deed was to allow a sender keen to get out of the contract to claim that, because the recipient was not ready and willing to complete on Day 10, the contract was at an end? Or, in each of those cases, is the posited outcome so unreasonable that clause 16 should be taken to apply? As Lord Morris of Both-y-Gest said in *L Schuler AG v Wickman Machine Tool Sales Ltd*:[15]

The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.”

E. WINDING UP – JUST AND EQUITABLE – APPOINTING A LIQUIDATOR

Where substratum of trust has disappeared.

a. **OPPRESSION**
b. **APPOINTING A RECEIVER OR ADMINISTRATOR**

F.1. MEMORANDA OF UNDERSTANDINGS: THE ROAD TO HELL IS LITTERED WITH GOOD INTENTIONS

It may be tempting to bring difficult "exit'' negotiations to a head by entering into MOU's, in circumstances where there are still details to be agreed. This temptation ought be avoided, because the case law is littered with controversies as to what category of *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353, MOU's fall into. i.e. whether they are currently binding and valid, or merely agreements to agree and hence void for vagueness.

See eg *Lampropoulos v Lynne Kolnik As Executor of the Will of Gerald Thomas Foley* [2010] WASC 193

F.2. HEADS OF AGREEMENTS

Similar considerations to those above, apply.

G. ACCORD AND SATISFACTION – *Beware symbolic hand shakes*

In *El-mir v Risk* [2005] NSWCA 215; the court cited the Federal Commissioner of *Taxation v Orica Ltd* [1998] HCA 33; (1998) 194 CLR 500, in which it was said that the 'essence of accord and satisfaction "is the acceptance by the plaintiff of something in place of his cause of action", ... the accord is the agreement of consent to accept the satisfaction ... upon provision of the satisfaction, there is a discharge which extinguishes the cause of action' (Gummow J at [116], citing Dixon J in *McDermott v Black*). The court again cited Gummow J in *Thompson v Australian Capital Television Pty Ltd* (1996) CLR 574 at 610, wherein his Honour was said to have emphasised that accord and satisfaction 'requires acceptance of something in place of *<u>the full remedy</u>* to which the recipient is entitled' (at

[48] emphasis original).

The court in *El-mir v Risk* cited the following extract from the judgment of Lord Esher MR in *Day v Mclea* (1889) 22 QBD 610 at 613: 'The question whether there has been an accord and satisfaction is one of fact'

Where there is an agreement to accept a promise in satisfaction of the cause of action, "the original cause of action is discharged from the date when the promise is made": *McDermott v Black* per Starke J (at176); Dixon J (at 183 - 185); see also *British Russian Gazette & Trade Outlook Ltd v Associated Newspapers Ltd* (at 644) per Scrutton LJ.

The consequences of the discharge of the original cause of action by accord and satisfaction were explained by Phillips JA (with whom Winneke P and Charles JA agreed) in *Osborn & Bernotti t/as G04 Productions v McDermott t/as RA McDermott & Co Karmine Pty Ltd* [1998] 3 VR 1 at 8, in a passage referred to with apparent approval by Gummow and Hayne JJ in *Baxter v Obacelo Pty Ltd* [2001] HCA 66; (2001) 205 CLR 635 at [56]. Phillips JA said:

> **"**Where there is an accord and satisfaction, the agreement for compromise may be enforced, and indeed only that agreement may be enforced, because *ex hypothesi* the previous cause of action has gone; it has been 'satisfied' by the making of the new agreement constituted by abandonment of the earlier cause of action in return for the promise of other benefit." (emphasis added)

See *Well Garnished Pty Ltd v Chaos Investments Pty Ltd* [2103] NSWADT 246, where I successfully argued that an agreement including the withdrawal of proceedings, constituted accord and satisfaction.

Case law establishes that symbolic acts, signifying consensus, eg hand shaking, may evidence accord has been reached.

H. CONTRACTUAL RIGHTS OF TERMINATION:

As to express powers of termination in commercial cases, see *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Limited* [2000] WASCA 102, *Central Exchange Ltd v Anaconda Nickel Ltd* [2002] WASCA 94 and *Apple*

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Communications Ltd v Optus Mobile Pty Ltd [2001] NSWSC 635.

In *Thiess Contractors Pty Limited v Placer (Granny Smith) Pty Limited* [2000] WASCA 102 the Supreme Court of Western Australia (Full Court) (*Ipp, Steytler* and *Wheeler* JJ) examined rights under a termination clause. The contract was a schedule-of-rates mining contract under which Thiess undertook to carry out open-cut mining at Placer's Granny Smith gold mine at Laverton, Western Australia. The contract was entered into in 1989 and the rights and obligations of the parties subsequently re-negotiated and incorporated into a new contract effective from 1 August 1992. Placer terminated the contract in March 1995 in reliance on the termination clause which entitled it, at its option and at any time and for any reason that it might deem advisable, to cancel and terminate the contract. Thiess commenced proceedings against Placer alleging, amongst other things, that Placer's termination of the contract was unlawful.

Thiess contended that, prior to entering into the new contract, Placer represented that it would only rely on the termination clause to terminate the contract if the mine were closed or if the mine were uneconomic to work. It was submitted that the exercise of the rights under the termination clause was inconsistent with the alleged representation that the contract was to be for the life of the mine. Thiess also relied upon fair dealing principles against the exercise of those rights.

The Full Court held that there was no such inconsistency and that the intention of the parties in entering into the contract was always subject to the termination clause as evidenced by the terms of the contract itself. At the time the contract was entered into, Placer had stressed the importance of the termination clause to it and the Court found, as a matter of inference, that it would not have entered into the contract without it. [2]

In relation to an argument that the parties had an "understanding" that the termination clause would only be used in very limited circumstances, the Court stated at [19]:

> "Mr Morris' statement that he could not see any situation in which Placer would need to invoke the termination clause falls into the same category. The mere fact that at the time in question Mr Morris could not conceive of a situation in which Placer would exercise its rights under

[2] Case summary extracted verbatim from Gough& Gilmour Holdings Pty Limited v Caterpillar of Australia Limited (No. 11) [2002] NSWIRComm 354

> the termination clause does not mean that he represented that such a situation would never arise. After all, Placer insisted on the termination clause being inserted in the contract, even though Thiess wished it to be removed. Thiess was well aware of the risks of agreeing to the contract with the termination clause in it and accepted those risks."

The case went to the High Court.

H.1. COMMERCIAL CONTRACTS FOR INDEFINITE PERIODS: TERMINABLE UPON REASONABLE NOTICE? OR IS THERE A CONCEPT OF CORPORATE IMMORTALITY?

This much is clear: what is "reasonable notice'' is a matter of fact and degree, on which reasonable minds may differ: *Alivar v Calandra & Co Pty Ltd* (Unreported, 29 February 1988 at 19; *Alivar v Calandra & Co Pty Ltd* Unreported, 16 May 1996, p 13; para [77] of *IOOF Building Society Pty Ltd v Foxeden Pty Ltd* [2009] VSCA 138.

In other words, saying that reasonable notice must be give is an invitation to future disputation.

The authorities relevant to whether and in what circumstances commercial contracts for an indefinite period may be terminated were authoritatively reviewed by McHugh JA in *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd*, (1988) 14 NSWLR 438 where His Honour observed at 443-444, 445:

When the question arises whether a commercial agreement for an indefinite period may be terminated, the answer depends upon whether the agreement contains an implied term to that effect: *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1948] AC 173 at 205; *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556 at 581; *Australian Blue Metal Ltd v Hughes* [1963] AC 74 at 97; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 at 371, 376; [1971] 2 All ER 216 at 224, 229 and *Barro Group Pty Ltd v Fraser* [1985] VicRp 59; [1985] VR 577 at 583-584, 585. The existence of the term is a matter of construction. But the question of construction does not depend only upon a textual examination of the words or writings of the parties. It also involves consideration of the subject matter of

the agreement, the circumstances in which it was made, and the provisions to which the parties have or have not agreed: *Re Spenborough Urban District Council's Agreement* [1968] Ch 139 at 147.

In *Llanelly Railway and Dock Co v London and North Western Railway Co* (1875) LR 7 HL 550, Lord Selborne declared (at 567) that:

> "... an agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon anyone alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto."

In *Llanelly* the House of Lords held that an agreement by which a railway company was given running powers over another company's lines was a permanent and not a terminable agreement. However, with the exception of Lord Selborne, the judgments of the other members of the House were based on the terms of the agreement and not upon any general principle of construction: see Lord Cairns (at 560), Lord Chelmsford (at 561), and Lord Hatherley (at 565).

Although even in the second half of this century the law has been stated to be in accordance with the speech of Lord Selborne in *Llanelly* (see *Halsbury*, 3rd ed, Vol 8, par 267 at 156), the weight of twentieth century authority makes it difficult to hold that there is any presumption of perpetuity in the case of commercial agreements: *Crediton Gas Co v Crediton Urban Council* [1928] Ch 447; *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd*; *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd*; *Re Spenborough Urban District Council's Agreement*; *Australian Blue Metal Ltd v Hughes* and *Decro-Wall International SA v Practitioners in Marketing Ltd*.

In *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd*, McNair J said (at 577) that there is no presumption of permanency in the case of an indefinite commercial agreement but that if there is it is in favour of termination and not perpetuity. Buckley J has also expressed the view that there is no presumption either way: *Re Spenborough Urban District Council's Agreement* (at 150). To the same effect is the judgment of Lockhart J in *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1985) 6 FCR 524 at 554; 60 ALR 73 at 101. However, it is not easy to reconcile these statements with the principle that there is a general presumption against

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adding to a contract a term which the parties have not expressed: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 137 per Lord Wright. In principle, the better view would seem to be that, although there is presumption against implying a term that an agreement is terminable, ordinarily the nature of a commercial agreement will lead to the conclusion that the parties must have intended it to be terminable on notice. This was the effect of the approach of the courts in *Winter Garden*; *Martin-Baker*; *Spenborough* and *Decro-Wall*.

Whether a contract is terminable on reasonable notice instead of at will also depends upon the existence of an implied term: *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* (at 206); *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* (at 581); *Australian Blue Metal Ltd v Hughes* (at 99). That question is determined by the circumstances existing at the date of the contract: *Australian Blue Metal Ltd v Hughes* (at 99). However, the reasonableness of the period of notice depends upon the circumstances existing when the notice is given: *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* (at 199-200); *Australian Blue Metal Ltd v Hughes* (at 99); *W K Witt (WA) Pty Ltd v Metters Ltd and General Industries Ltd* [1967] WAR 15 at 23-24; *Decro-Wall International SA v Practitioners in Marketing Ltd* (at 370; 224; 376-377; 229; 381; 234).

When a contract is terminable on reasonable notice, the period of notice must be sufficiently long to enable the recipient to deploy his labour and equipment in alternative employment, to carry out his commitments, to bring current negotiations to fruition and to wind up the association in a businesslike manner: *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* (at 200-201); *Australian Blue Metal Ltd v Hughes* (at 99) and *W K Witt (W A) Pty Ltd v Metters Ltd* (at 24-25). But in the latter case Hale J denied (at 23) that it is relevant to the reasonableness of the period of notice that the recipient needs time to recoup any expenditure incurred.

...

In *Australian Blue Metal Ltd v Hughes*, the parties entered into a written agreement which gave the "right to mine for magnesite" in return for a royalty. The Judicial Committee held that the agreement was terminable at will with a period of grace to remove any mineral already mined. However, Lord Devlin, in tendering the advice of the Judicial Committee, said that it would not have

made any difference to the result of the appeal if the agreement was terminable only on reasonable notice. He said (at 99):

> "... The implication of reasonable notice is intended to serve only the common purpose of the parties. Whether there need be any notice at all, and, if so, the common purpose for which it is required, are matters to be determined as at the date of the contract; the reasonable time for the fulfilment of the purpose is a matter to be determined as at the date of the notice. The common purpose is frequently derived from the desire that both parties may be expected to have to cushion themselves against sudden change, giving themselves time to make alternative arrangements of a sort similar to those which are being terminated."

For a recent application of these principles, see *Woolworths (SA) Pty Ltd v Basetone Pty Ltd; Woolworths (SA) Pty Ltd v Montebello and Montebello* [2006] SASC 225. That case concerned drivers of trucks for Woolworths, and the terms on which their contracts could be terminated. One of the matters was what the ambit was of evidence as to “surrounding circumstances” and the case involves a practical discussion of the point, as it identifies at para [93] the categories of evidence that Woolworths sought (and was granted leave) to adduce, namely

- the size and nature of Woolworths during the relevant period;
- the distribution practices of Woolworths Australia-wide;
- the organisational structure of Woolworths at the time;
- the business in which the owner-drivers were to be engaged upon entering into the contract;
- how Woolworths ran its business prior to engaging the owner-drivers on the terms of the contract;
- what involvement the owner-drivers had in the business of Woolworths prior to their engagement on the terms of the contract;
- why Woolworths changed its cartage operations to use of owner-drivers on the terms of the contract;
- the known capacity and potential of Woolworths’ business to fluctuate;
- the known susceptibility of Woolworths Limited’s share price to fluctuations as a result of downturns in the business; and
- the known items of costs in Woolworths’ business available for reduction.

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The New Zealand Court of Appeal had occasion to canvass this line of authority in *Bobux Marketing Ltd v Raynor Marketing* Ltd [2001] NZCA 348; 1 NZLR 506. In Bobux, [3] the parties set out to establish a business relationship. Bobux, as manufacturer, designed and supplied an "original" product (leather booties for children) and Raynor, as sole and exclusive UK distributor, obtained a customer base for the booties in the United Kingdom.

Raynor says that the clauses exclusively govern the right to terminate and that Bobux, could not bring the agreement to an end by giving a reasonable period of notice in circumstances where Raynor was not in breach of any of its obligations and had ordered the minimum quantities specified in the agreement.

In 1993, a Mr Bennett had set up a distribution arrangement with a company in the United States called Almega Marketing Inc.

He sent the company a short agreement which he had drafted himself and which he had previously used with a distributor in Australia. Clause 11 of this agreement provided for an initial trial period of six months followed by a further period of six months during which a minimum total order of 3,000 pairs of shoes was expected. It was then provided:

> "After the first year this agreement shall continue until the expiration of a 4 month prior written notice given by one party to the other."

Clause 12 set a sales target of 1,000 pairs per month.

Before the agreement was signed, Almega expressed concern as to what would happen if this sales target was not met. The company was fearful that the agreement might be terminated for that reason. Mr Bennett indicated that it was not his intention to cancel the agreement if Almega did not meet the sales target. In order to reflect this intention, Almega's attorneys drafted a clause as an additional cl 13. It provided:

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[3] Case summary extracted primarily from various parts of the minority judgment of Thomas J .

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> "This agreement shall not be terminated by "Bobux Marketing LTD" as long as "Almega Marketing" continues to meet the minimum purchase requirements as well as all other stipulations stated in this agreement."

The key clauses of the contract are extracted as follows:

"18. The initial period of this Agreement shall be a trial period of six months during which no minimum monthly orders shall be required. On expiry of such period, the Distributor or the Supplier may give written notice to the other of them to terminate this Agreement, which notice must be given so as to be received by the other of them within fourteen days from the end of the six month period, failing which there will be no right to terminate this agreement on this ground thereafter.

19. If this Agreement is not terminated as provided in paragraph 18 above, it will continue for an indefinite period from the date hereof and may only be terminated:

(a) on four calendar months written notice by either party to the other, provided that such notice may only be given after the first year of operation of this Agreement and such notice may only be given by the Supplier if the Distributor will have failed to order at least the Minimum Quantity (as defined below); or

(b) with immediate effect by written notice given by either party if the other party will have committed a material breach of the provisions of this Agreement and will not have remedied the breach within 14 days of written notice requiring it to be remedied. For the avoidance of doubt, any failure to order the Minimum Quantity shall not be regarded as a breach of this Agreement.

20. For the purposes of this Agreement, the "Minimum Quantity" means:

(a) for the first year of operation of this Agreement – nil; and

(b) thereafter, the equivalent of 1,500 pairs of the Products in each successive period of three months, provided that any excess over and above 6000 pairs of the Products ordered by the Distributor in the first year of operation of this Agreement shall count towards and be treated as Products ordered in the three month period following that year, and any excess over and above 1500 pairs of the Products ordered or treated

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as being ordered in any three month period shall count towards and be treated as having been ordered in the next three month period.

21. On termination of this agreement for any reason (unless this agreement is terminated by the Supplier under paragraph 19(b) above) the Supplier will, if required to do so by the Distributor, be obliged to supply to the Distributor on the terms set out in this Agreement a quantity of the Products up to the quantity ordered by the Distributor in the twelve months prior to the date of termination (or if less, the period from commencement of this Agreement to the date of termination) and the Distributor shall be entitled to sell those Products as it sees fit. On any such termination the Distributor shall provide the Supplier with a list of its customers and the Supplier shall not itself and shall procure that any Distributor appointed by it (and it shall be entitled to appoint any other Distributor after termination but subject to this provision) shall not directly or indirectly sell any of the Products to any of the customers mentioned on that list for a period of 12 months following such termination. It is recorded that the basis of this provision is to enable the Distributor to enjoy the fair benefit of any market which it will have been able to build up for the Products.

For the avoidance of doubt, on termination by the Supplier, the Supplier shall fulfil all orders placed by the Distributor before the date of termination unless the Distributor cancels such orders (which it shall be entitled to do without having any liability to the Supplier) and the Distributor shall be entitled to sell its stock of Products after such termination.

This Clause shall survive any termination of this Agreement."

Thomas J, in the minority, found a right of Bobux to terminate based on implied notions of good faith. HH considered the concept of corporate immortality to be commercially absurd, and would have been prepared to import a term giving Bobux the 'right to terminate the contract on reasonable notice simply to avoid giving effect to a contract which is otherwise commercially unrealistic.

The majority judgment was delivered by Blanchard J for himself and Keith J. Their Honours stated the general principle as follows:

"[65] In *Crawford Fitting Co v City Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438, 443, McHugh JA said that the question of construction in a case of this kind did not depend only upon a textual examination. It involves consideration also of the subject matter of the agreement, the circumstances in which it was made and the provisions which the parties have or have not agreed.

[66] We feel the force of the observation in one Canadian case, to which Mr Brown referred us, that "the concept of a perpetual distribution agreement is difficult to entertain" (*Treen Gloves & Safety Products Ltd v Degil Safety Products (1989) Inc.* (1990) 33 CPR (3d) 74, 81). This Court has, however, itself commented in *Minister of Education v De Luxe Motor Services (1972) Ltd* [1990] 1 NZLR 27, 31 that it is doubtful that there is any general presumption in favour of determinability of continuing contracts of no specified duration, but that "most Judges and practitioners...would expect to find cogent reasons in the nature or terms of the particular contract before placing on it the interpretation that there is no right to determine on reasonable notice." We respectfully agree and have approached the interpretation of the contract now before the Court on that basis.

[67] We accept that the mere statement that a contract is to continue " for an indefinite period " or the fact that a contract may contain certain express provisions enabling termination in defined circumstances, such as material breach by the other party, does not preclude the finding of an implicit right also to bring the relationship to an end by a period of notice which is reasonable in the circumstances which exist at the time the notice is given (see, for example, *Re Spenborough Urban District Council's Agreement* [1968] 1 Ch 139, 153). Nor is it fatal to the possible existence of such a right of termination in one party that the other party is alone expressly given that right (*Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173).

[68] *In the end, although in a mercantile or commercial contract the Court will favour an interpretation which enables the relationship to be terminated on reasonable notice , the question remains whether the language actually used by the parties admits of an implication or interpretation to that effect.*''

The majority concluded as follows at [73] ff:

"[73] In the face of these provisions, can it be said that where Raynor is not in breach and has duly ordered the minimum quantity (either in the year in question or by application of the provision for carrying forward the benefit of previous orders), there is room for the implication of a right to terminate without cause on reasonable notice? We think not, for it would contradict the express agreement not to give a termination notice if Raynor is maintaining minimum orders…………….

[78] We also do not place much weight on the appellant's suggestion that an inability to bring the relationship to an end may work a hardship on a husband and wife owned company whose proprietors may at some stage wish to give up the manufacture of children's booties. We think it more likely that, if the business is still profitable when they wish to retire, they will prefer to sell their shareholding rather than close down the business. If, because of changes of circumstance, they conclude that the manufacturing business is no longer viable, it seems most improbable that the distributor will take a different view of the position at that time. In other words, we think that the problems envisaged for the supplier because of the absence of a reasonable notice " exit provision are not likely to arise in practice."

The New South Wales Court of Appeal in *Crawford made the point that* generally speaking, for representational arrangements of this type, the shorter the notice the better. Their honours pointed out that there are practical problems of conflict of interest if the distributor trades within the notice period and at the same time tries to establish new relationships.

Also, as is also pointed out in *Crawford*, a long period is not really in the interests of a distributor who, if the break must come, must deal with it sooner rather than later.

See further the discussion of Crawford in *Cabvan Pty Ltd v Arturo S..P.A.* [1998] FCA 553.

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H.2. IMPLICATION OF TERMS OF GOOD FAITH AND FAIR DEALING AS A RESTRAINT UPON EXERCISING RIGHTS TO TERMINATE

A term of good faith and fair dealing has been implied into certain commercial contracts eg *Burger King*, *Overlook, Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* and *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635.

A contracting party must not exercise its powers in reliance on inaccurate information or wrong facts *Renard Constructions (ME) Pty Limited v Minister for Public Works* (1992*)* 26 NSWLR 234.

A case where there was a two-step show-cause mechanism. Step 1. Issue a show-cause notice. Step 2. Consider response and possibly terminate.

This judgment has been applied by *Finn* J of the Federal Court in *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; (1997) 146 ALR 1 and referred to by the High Court in *Royal Botanic Gardens and Domain Trust v South Sydney City Council.*

However, to *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 76 ALJR 436, 445, 463 the High Court indicated that it remained to be determined whether or not the concept was part of the general law.

I. WHAT IF ONE PERSON DOES NOT WANT TO SAY GOODBYE ?

MANDATORY INJUNCTIONS TO COMPEL ONGOING RELATIONSHIPS: AN OVERVIEW OF THE PRINCIPLES

[This section is a partial and limited extract of a new chapter, to be published September 2015, of my loose-leaf service, *Injunctions: Law and Practice* (Thomson Reuters)]

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[I.1.] Introduction

It once was the position that injunctions would not be granted to restrain the breach of negative covenants, if they amounted to the specific enforcement of an agreement for personal services: *Hawthorn Football Club v Harding* [1998] VR 49 at 58 per Tadgell J.

So too *Atlas Steels Australia Pty Ltd v Atlas Steels Ltd* (1948) 49 SR (NSW) 157, which involved a sole distribution agreement. Sugerman J said, at pp. 160-1:

"I think that I may here take as a starting point that this is a contract to employ the plaintiff as an agent - that it is for present purposes a contract for personal service, not merely in that it is a contract of agency but also in that it involves specific services to be rendered, and personal relationship, between the parties, of a close and continuing kind, and such as not only to be incapable of specific enforcement but also to render difficult of application any principle of dissolving the injunction in the event of the plaintiff's own breach of condition."

Later, at the same page, his Honour said:

"But the matter of high principle involved seems to me to be the strong policy of our law against holding contracting parties to a continuance of personal relations under their contracts against the will of either ... …………''

A case which encapsulated this proposition well, was *J C Williamson Limited v Lukey & Mulholland* [1931] HCA 15; (1931) 45 CLR 282, where Dixon J said at 297-8:

"Specific performance is inapplicable when the continued supervision of the Court is necessary in order to ensure the fulfilment of the contract. It is not a form of relief which can be granted if the contract involves the performance by one party of services to the other or requires their continual co-operation."

The principle in *Williamson v Lukey* has been taken up in many other cases eg *Curro v Beyond Productions Pty Limited* (1993) 30 NSWLR 337. The court, comprising Meagher JA, Handley JA and Cripps JA, referred to the well-known observations of Lord Cairns LC in *Doherty v Allman* (1878) 3 App Cas 709 at 720

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and observed that:

"*Under the doctrine enunciated by Lord Cairns LC in Doherty v Allman (1878) 3 App Cas 709 at 720, a Court of Equity would always grant an injunction to enforce a negative contractual promise made for consideration; Secondly that, by way of exception a negative promise would not be enforced by injunction if that would have the practical effect of compelling specific performance of a contract of personal service or if it would force the defendant either to perform that contract or remain idle (with overtones of destitution); and thirdly, by way of exception to the exceptions, in the case of special services a promise not to take employment with a competitor, would, under the doctrine of Lumley v Wagner, be restrained.*"

The restraint and caution exercised by courts when making mandatory orders , associated with *Redland Bricks Ltd v Morris* [1970] AC 652, is dealt with more fully in my loose leaf service, *Injunctions: Law and Practice.*

However, in more recent times, the courts in various jurisdictions have taken a more flexible approach, where there is no hard and fast rule in these circumstances, and where the fact that personal services are involved is but one factor weighing (as a restraint) against the order; but is not a bar *per se.* A line of Victorian establish the proposition that courts look to the overall prevailing justice of the circumstances : *State Transport Authority v Apex Quarries Ltd* (1988) VR 187 , citing *Thomas Borthwick & Son (Australasia) Ltd v South Otago Freezing Co Ltd* (1978) 1 NZLR 538; *Axxess Australia Pty Ltd v Primus Telecommunications (Aust) Pty Ltd* [2000] VSC 64; *Imac Security Services Pty Ltd v Tyco Australia Pty Ltd* [2002] VSC 592, esp. at paras [36] to [37].

Consistent with this line is *Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd* (1983) 1 NSWLR 513 (considered more fully below).

Nevertheless, there is an ongoing judicial reluctance to make orders which involve ongoing supervision: *Bircan v Portakaldali* [2008] NSWSC 791, para [13].

The question in the types of cases is whether it is just in all the circumstances the plaintiff be confined to its remedy in damages: *Evans Marshall & Co Ltd v*

Bertola SA (1973) 1 WLR 349 at 379 and *Sandersons Motor (Sales) Pty Ltd v Yorkstar Motors Pty Ltd* [1983] 1 NSWLR 513 at 516.

[…] *Reason why courts reluctant to specifically enforce contracts for service* : *courts distinguish between orders requiring a defendant to carry on an activity over an extended period, and achieving a result.*

Beech J summarised the reasons why courts are reluctant to make orders in the nature of injunctions, the effect of which is to specifically enforce contracts for personal services, in *Netline Pty Ltd v QAV Pty Ltd [No.2]* [2015] WASC 113, as follows:

“68. Various reasons have been stated for this general approach. A contract for personal services,[36] or one requiring continual cooperation between the parties, will not generally be specifically enforced.[37] Nor, generally, will one involving the maintenance of personal relationships, including relationships of trust and confidence.[38]

69. Another consideration militating against the grant of specific performance used to be expressed as the undesirability of the need for constant supervision by the court. That is no longer seen as a useful criterion in determining whether specific performance should be granted.[39] Rather, two other considerations are relevant. First, a person who is subject to a mandatory order attended by criminal sanction must realistically be in a position to know with precision what is required of them. Secondly, the possibility of repeated applications for rulings on compliance with orders requiring a party to carry on an activity over a more or less extended period of time should be discouraged.[40] These considerations give rise to questions of degree; they do not create an absolute bar to an order for specific performance.[41]

70. In ***Argyll Stores***, Lord Hoffmann drew a distinction between orders requiring a defendant to carry on an activity, such as running a business over an extended period of time, and orders which require the defendant to achieve a result. The prospect of repeated applications for rulings on compliance arise to a much greater extent in the context of orders of the first kind.[42]

71. The distinction made by Lord Hoffmann has been applied in cases in Australia, including cases in this court.[43]"

[I.2.] Lumley v Wagner

Miss Johanna Lumley was singer. She had contractually committed herself to perform twice a week, for three months, at the ………..theatre. The owner of a rival theatre sought to poach her away with more money. Lord St Leonards held:

"It is true that I have not the means of compelling her to sing. But she has not cause for complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfill her engagement ": at [1852] Eng R 602; 619 to 620.

Later cases extended this principle to circumstances not involving purely personal services eg *De Mattos v Gibson* 4 De G & J 276 and *The Lord Strathcona* [1926] AC 108; see also the analysis in para [28] of *LauritzenCool AB v Lady Navigation Inc* [2004] EWHC 2607; [2005] 1 WLR 3686; [2005] EWCA 579.

[I.3.] What is an implied negative stipulation?

In *Thomas Borthwick and Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538 , the defendant contracted to supply freezing facilities to the plaintiff, an exporter. Contractual arrangements commenced in 1946. In 1968 the parties entered into a further contract for 20 years. After a further eight years, that is, in 1976, one party purported to determine the contract.

Part of the head note reads:

"The equitable remedy of injunction may, at the discretion of the court, be granted to restrain breaches of negative covenants in contracts that are in part contracts for the sale of goods even though this may amount to ordering specific performance in a roundabout way and for a long period."

At p. 550 the Court of Appeal quoted Sachs LJ in *Evans Marshall and Co Ltd v Bertola SA* [1973] 1 WLR 349, at p. 379 (with whom the other members of the Court of Appeal agreed):

"Next I turn to the weight to be given to the nature of the relations between the parties which the judge likened to that of a joint venture where confidence and co-operation between the parties is required. I am not at all sure that the analogy is quite correct. This is a commercial agreement between trading companies that can be implemented to the profit of both parties, if each conforms with its express and implied terms. As in a great many commercial contracts consultation between the parties as to implementation is desirable: but that does not necessarily turn them into joint ventures. "But in any event, the fact that some degree of mutual co-operation or confidence is needed does not preclude the court from granting negative injunctions designed to encourage the party in breach to perform his part."

At p. 551 the court said:

"At first sight the contract is quite complicated and no doubt sensible co-operation and mutual confidence are needed if it is to operate with maximum efficiency. But that is not unusual in trading contracts."

And at p. 551:

"It is significant that there is no evidence of practical difficulties in the working of the contract in the past."

In *Dataforce Pty Ltd v Brambles Holdings Ltd* [1988] VicRp 73; [1988] VR 771 , Southwell J commented that "The Thomas Borthwick Case might fairly be described as the high-water mark of cases where a court would force contracting parties to continue their contract for a long period of time……..''

[I.4.] Courts reluctant to interfere in commercial relationships.

The above proposition is associated with *J.C. Williamson v Luckey and Mulholland* [1931] HCA 15; (1931) 45 CLR 282, per Dixon J at 299-300.

[I.5.] Specific performance of commercial agreements against companies.

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This sub section is intended to be the subject of future updates to my *Injunctions: Law and Practice,* loose-leaf service. Cases such as *Schering Pty Ltd v Forrest Pharmaceuticals Co Pty Ltd* [1982] 1 NSWLR 286 and *LauritzenCool AB v Lady Navigation Inc* [2004] EWHC 2607; [2005] 1 WLR 3686; [2005] EWCA 579 will be considered (a charterparty case).

[I.6.] Car Dealerships

Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd [1983] 1 NSWLR 513 involved a distributorship agreement. The relevant clause provided that the distributor could terminate the agreement "with cause, by giving the Dealer written notice thereof, stating the Distributor's grounds for such termination. The grounds for such termination shall include but not be limited to ...".

In the proceedings the dealer sought to restrain the distributor from acting on a notice given pursuant to that provision. At 515 Yeldham J said:

"What is sought by the plaintiff in the present case is an injunction to restrain the defendant from terminating the dealer agreement in breach of the contract between the parties in purported reliance upon a notice which I have held it could not validly give. The injunction is to restrain what is in substance the breach of a negative stipulation, namely that the defendant would not terminate the contract without cause except in the circumstances provided for in cl 10 of the main dealer agreement."

Yeldham J concluded as follows:

"……..The present case involves far more than the mere sale of goods. The plaintiff has spent considerable sums of money in order to establish and maintain its position as a Mercedes-Benz dealer in the eastern suburbs of Sydney. Plainly it was entitled to expect that the agreement would be "a self renewing agreement" and would not in normal circumstances be terminated. The future rights and obligations of the parties are controlled and determined by the dealership agreement and do not require the supervision of the court.

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Hence I see no reason why an injunction should not be granted and every reason why it should be. Damages in my view would not be adequate compensation. The true principle is: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?" (per Sachs LJ in Evans Marshall & Co Ltd v Bertola SA *[19731 1 WLR 349, at 379; [1973] 1 All ER 992, at 1005)……..”*

25 August 2015

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