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N.Z.L.R. X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 253/80

657

BETWEEN ADAMS MARKETING LIMITED a company duly incorporated in New Zealand and carrying on business at 290 Wakefield Street, Wellington, New Zealand and elsewhere as a merchant

Plaintiff

A N D LYNDSAY G. MULHOLLAND of 39 Marywil Crescent, Auckland, Merchant

First Defendant

A N D KIS (AUSTRALIA) PTY LIMITED a company duly incoporated in the State of New South Wales, Australia and carrying on business at 5 Erith Street, Botany in the said State and elsewhere as merchants

Second Defendant

A N D KIS FRANCE a Society Anonyme organized under the laws of France and carrying on business at 47 Avenue Marie Reynoard, Grenoble, France and elsewhere as manufacturers and merchants

Third Defendant

Hearing: 7, 8, 9, 10 & 11 May 1984

Counsel: A.A.T. Ellis Q.C. & P.T. McCabe for Plaintiff
C.J. Booth for First Defendant
J.C. Corry for Second and Third Defendants

Judgment: 8 June 1984

JUDGMENT OF QUILLIAM J

This is an action for damages consequent upon the termination of an arrangement for the marketing in New Zealand of key cutting machines and accessories.

The action was commenced against three defendants. Some considerable time before the hearing the plaintiff acknowledged that it did not propose to pursue its action against the first defendant and accordingly, at the hearing, counsel for the first defendant was given leave to withdraw and the only question affecting the first defendant is that of costs. The action proceeded against the second defendant (Kis Australia) and the third defendant (Kis France), both of whom had been joined in accordance with R 64 of the Code of Civil Procedure because the plaintiff could not determine which was the proper defendant. In the course of the hearing it was acknowledged on behalf of Kis Australia that if any liability to the plaintiff existed then it was the responsibility of Kis Australia. The action therefore resolved itself into a contest between the plaintiff and Kis Australia.

In April 1978 Mr Adams, the Managing Director and principal shareholder of the plaintiff, saw an advertisement in an Australian trade journal inserted by Kis Australia relating to a key cutting machine and accompanying equipment. There was nothing novel in the idea of a key cutting machine but what Kis Australia had to offer was a single cabinet (which it called a carousel) containing three compartments. The bottom compartment comprised simply storage space, the middle compartment contained the key cutting machine, and the top compartment comprised a series of racks upon which key blanks were displayed. What Kis Australia regarded as novel about this was that it brought together into a single unit a key cutting service attractively and conveniently displayed and so as to be able to be operated in a small space in conjunction with any kind of retail store. The machines and other equipment were manufactured in France by Kis France and supplied under an arrangement between those two companies.

This advertisement was of interest to Mr Adams, whose company had for a lengthy period carried on business as manufacturers' representatives and importers. He saw the chance of selling the Kis machines in New Zealand and accordingly wrote to Kis Australia in response to the advertisement. Kis Australia, which is owned as to 95% by Kis France, is managed by the Australian director Mr Fantl. Mr Fantl had not until then decided to expand his company's operations to New Zealand but the receipt of Mr Adams' letter prompted him to consider the advantages of doing so. He accordingly replied to Mr Adams' letter and enquired "in which way you would consider representing our company in New Zealand". There followed a telephone conversation and further correspondence. The initial negotiations had related to the importing by the plaintiff of key cutting carousels complete with machine and key blanks and also additional key blanks, spare parts and advertising material. This was to enable the plaintiff to distribute the complete units to retailers and to provide the necessary back-up and maintenance services. In the course of the correspondence Mr Fantl referred to the intention of Kis France to set up a plant for the manufacture in either Australia or New Zealand of key blanks rather than sending them from France. The possibility of the plaintiff taking a part in this operation was canvassed although as a matter separate to the supply and distribution of the key cutting units.

By 7 August 1978 negotiations had advanced to the point where Mr Fantl was able to write to Mr Adams setting out the basis of the position which had then been reached between them. This related to an initial supply of machines, the price payable to Kis Australia for them, the requirement as to payment by Letter of Credit, and a number of other matters. There were two points of particular significance in that letter. The first was the observation by Mr Fantl that, "The first six months are a trial period. During this time we will evaluate our future co-operation based on the return figures we both expect." The other was the comment, "Your Kis distributorship for New Zealand will be restricted for the time being to the key cutting division." Mr Fantl followed that letter with a visit to New Zealand when the relationship between the two companies was further discussed.

That relationship was now safely launched and on 25 September 1978 the first order for machines was placed by the plaintiff. It is the precise nature of that relationship which forms the basis of this action, but I will deal with that later. In the meantime I continue the narrative as to the way in which matters developed.

Kis Australia had two types of key cutting machines. The main one was called the Colonmatic and a smaller one was called the Astromatic. On 25 September 1978 the plaintiff ordered 14 Colonmatics, 1 Astromatic, and some ancillary equipment. On 10 November 1978 a further order was placed for a total of 60 Colonmatics for delivery during the months of January to April 1980, and Mr Adams wrote to Mr Fantl saying that he could sell a minimum of 150 units in the coming year provided he could train sufficient personnel to install them and give instructions in their use. It appeared that a firm business relationship had been established but it was soon to be marked by differences and difficulties.

There was produced in evidence a substantial bundle of documents representing the communications which passed between the two companies. It is unnecessary to make any exhaustive analysis of those but some matters emerged with clarity. One was that Mr Adams was constantly complaining that he was not being supplied with all the things Mr Fantl had undertaken to supply. This related, in particular, to key blanks. It should be mentioned that while the key cutting machines were to retail in New Zealand at about $6,300 and the key blanks at about $1.50, nevertheless it was the key blanks which were expected to provide the greatest profit margin in the end. This was likened by Mr Adams to the sale of razors in order to achieve the main object of selling razor blades, and the analogy appears to be an apt one. Accordingly the inability of Kis Australia to supply promptly all the key blanks ordered was a source of irritation to the plaintiff and a matter of discord between the parties.

Another matter which can be seen clearly from the correspondence is that a good deal of trouble was being experienced in the use of the machines in the hands of retailers. The reason for this could not be determined with any confidence. It was the plaintiff's case that the fault lay mainly in the errors of design and, in particular, a lack of protection from the metal filings cut from the key blanks with the result that some of the filings were penetrating into the electric motor and causing it to jam or short-circuit. There was a steady stream of complaints from Mr Adams about this and other defects.

A further matter emerging from the correspondence is the one-sided course which it took. Apparently Mr Fantl's preference was to telephone rather than write a letter. Mr Adams, on the other hand, although willing to discuss matters on the telephone or at meetings, considered it prudent to follow any discussion by a letter confirming what had been discussed. He adopted this course when he found that Mr Fantl was not carrying out his undertakings and was not answering correspondence. There can be little doubt that it was a sensible precaution and has enabled a reasonably clear picture of the relationship to be seen. It is, of course, a matter of constant surprise to the legal profession to observe the way in which commercial firms deal with each other to the extent of substantial sums of money without any formal agreement and often without defining their positions in writing at all. This is what occurred in the present case and it has imposed some obvious difficulties in arriving at a conclusion as to the terms of the arrangement made, but I deal with that more particularly later.

The dealings between the parties continued, even if on an unsatisfactory basis, and in total the plaintiff received from the defendant some 114 Colonmatic machines as well as a few Astromatics and other machines and equipment. The negotiations regarding the manufacture of key blanks in New Zealand continued also, but never achieved any finality. This was a matter which was the concern of Kis France rather than Kis Australia and although Mr Fantl played some part in it he did so only as an intermediary between the plaintiff and Kis France.

The growing list of unresolved complaints by Mr Adams reached a point where he drafted and had typed a letter to send to Mr Fantl in which he proposed to list them all in order to invite a discussion about them in an attempt to achieve some resolution. That letter was not sent because instead a meeting was arranged. This took place at Auckland on 13 and 14 October 1979. It was attended by Mr Adams and two of his staff, Messrs Johnson and Anderson, and by Mr Fantl for Kis Australia and Mr Crasnianski for Kis France. At that meeting a wide range of matters was discussed and it seems that the letter which had not been posted was used as a means of setting the agenda for that meeting. Minutes were kept by Mr Anderson and a few days later copies of the minutes were sent to Mr Fantl and Mr Crasnianski. With minor exceptions each accepted them as correct. Decisions were made at the meeting which were designed to resolve all the matters which had been in dispute, but in the result those decisions seem to have achieved a good deal less than was hoped. Mr Adams resumed his complaints that what had been undertaken by Mr Fantl was not being carried out. At about this stage Mr Adams had to go to hospital for several weeks and the correspondence was carried on by his General Manager, Mr Anderson, but there is no doubt that Mr Anderson's letters expressed Mr Adams' views.

On 24 December 1979 Mr Anderson wrote to Mr Fantl setting out a list of complaints and saying:

> " Consequently, as we discussed on the phone with you recently, we feel we have but one of three options:
>
> 1. To cover these high servicing costs you must entertain a higher profit margin for Adams Marketing without the retail cost of the machine being increased.
>
> 2. That KIS Australia set up their own KIS Marketing organisation in New Zealand with which Adams Marketing will assist in every way possible
>
> or:
>
> 3. That KIS Australia appoint a new Agent in New Zealand. "

Characteristically there was no reply by Mr Fantl to that letter. At about that time he spent some time in France and evidently undertook to ring from France but failed to do so. On 18 January 1980 Mr Adams, now recovered, wrote to Mr Fantl in France and referred again to the three options. On 10 March 1980 he spoke to Mr Fantl on the telephone and in accordance with his practice confirmed in a letter what had been discussed. This related to a number of matters to be attended to by Mr Fantl. One of the main concerns to Mr Adams had been the lack of profitability on the machines he was selling. This he attributed to the high maintenance cost within the period of warranty on the machines. He blamed this on faulty design and workmanship and his method of trying to restore profitability was to try and get the price charged by Kis Australia for the machines reduced. He returned on a number of occasions to this theme but with no success. However, it is apparent that at the time of the conversation on 10 March 1980 there was no indication of the relationship between the companies being terminated and, indeed, the ordering of key blanks, in particular, continued. On 17 April 1980 Mr Adams wrote to Mr Fantl concerning the supply of key blanks and saying that 12 Colonmatics had been sold that month. That letter crossed a letter from Mr Fantl dated 15 April 1980, received by Mr Adams on 22 April, which may be described as the letter of termination, although the question of whether that is what it was is one of the matters to be resolved.

The letter of termination referred to Mr Adams' requests for a lower price for the machines and said, "As we are unable to meet your demands we are forced to find another solution for the New Zealand market." The letter went on:

> " The transition period regarding marketing of Kis products in New Zealand should enable you to be able to dispose of the equipment you still have in stock, especially if you follow the sales concept and system we discussed during my last visit which you should of followed much earlier in time. I wish to bring to your attention that

> all Kis customers in New Zealand will be made aware that you will not be handling Kis products any more and we will therefore send out a circular. "

Early in March 1980 Kis Australia had advertised in New Zealand for another agent, although it happened that Mr Adams was unaware of that. That advertisement was answered by the first defendant, Mr Mulholland, and the result was that a company formed by Mr Mulholland for the purpose was appointed the sole distributor in New Zealand for Kis Australia. Mr Mulholland first went to France and took part in an eight day course at the Kis factory in order to become familiar with the technical aspects of the Kis equipment and also spent a week on a sales course in order to learn what was known as the Kis concept of selling. This was something which had been referred to in discussions between Mr Adams and Mr Fantl and was apparently regarded as a matter of importance in the promotion and sale of Kis equipment. It was a most nebulous concept which I find myself quite unable to distil from the evidence in anything other than a superficial way. As best I could understand it the Kis concept of selling involved the distributor devoting itself solely to Kis products, or at least establishing a separate division of its business for that purpose, and then seeking sales by the personal approach of a salesman rather than by advertising. However that may be, Mr Mulholland undertook a sole distributorship for New Zealand and a standard form of written agreement used by Kis for such a purpose was duly completed. Mr Mulholland started his distributorship on 13 May 1980 and has continued his connection with Kis Australia ever since, although the nature of that relationship has apparently changed in some way during that period.

Further problems arose following the letter of termination because of the plaintiff's inability to dispose of the Kis machines and equipment which it still had in stock. This is the basis of the claim for damages now made. The result was that on 24 July 1980 the plaintiff commenced the present action. That action was originally directed largely to an allegation of infringement of trade mark. Although that allegation has since been abandoned some reference must be made to the basis of it.

At an early stage in the relationship of the parties Mr Adams decided that the way to protect his company in preserving that relationship was to apply for registration in New Zealand of the trade mark "Kis". Accordingly, on 5 October 1978, he caused an application to be made by the plaintiff. When the relationship was terminated Mr Adams claimed that his company had the protection of this registration and that neither Mr Mulholland nor Kis Australia had any right to use the trade mark in New Zealand. The plaintiff accordingly sought against all three defendants an injunction to restrain them from using the mark. An application for an interim injunction was filed and this came before the Chief Justice on 6 August 1980 when it was withdrawn as against Mr Mulholland. There seems to have been little, if any, basis upon which the plaintiff could have claimed any protection by reason of the registration of the trade mark and this is no doubt the reason that no cause of action based on it has been pursued. Eventually, on 18 October 1982, the registration was formally abandoned. In his evidence Mr Adams said that he had applied for registration as a matter of "commercial insurance" in case there should prove to be any difficulty in establishing his right of a sole distributorship. This is a matter requiring consideration later on that topic.

At the commencement of the hearing leave was given, by consent, to the filing of a second amended statement of claim and this is the basis on which the action has proceeded. This alleges that there was a sole distributorship contract between the parties which was wrongfully terminated by the letter of 15 April 1980 and that the selling of Kis products in New Zealand thereafter made it difficult or impossible for the plaintiff to dispose of its existing stock. Whatever the real nature of the contract it was alleged that the plaintiff was entitled at least to reasonable notice of termination and that this was not given. In opening the plaintiff's case, Mr Ellis stressed that the absence of reasonable notice was the real basis of the action.

I have not attempted to set out anything but a summary of the evidence given as further facts will need to be referred to in considering each of the various matters requiring determination. I now turn to those matters which are:

1. Whether there was a sole distributorship contract.

2. If so, whether it was wrongfully terminated.

3. If it was, what would have been a reasonable period of notice of termination.

4. If liability is established, the damages which ought to be awarded.

1. <u>THE CONTRACT</u>

It was the plaintiff's case that, whatever may have been its precise terms, there was a concluded contract between the parties, the principal feature of which was that the plaintiff had the sole rights of distribution in New

Zealand of the Kis key cutting machines and accessories. The defendant's answer was that this had not been established and that the only relationship between the parties was that of seller and buyer.

Before discussing the evidence on this it is necessary to make a general observation. I have already referred to the apparent reluctance of many commercial firms to crystallise their business arrangements in any formal way and sometimes by anything in writing at all. This, of course, does not mean that in such cases no contract has resulted, although it poses obvious difficulties in determining the terms of such a contract. In the present case a new business relationship developed between two astute and experienced businessmen. The venture was in certain respects a new one and there was a constant sparring between the two men in order to try and achieve a commercial advantage. I do not say that in any critical sense. No doubt it was a normal incident of commerce, but it was also a hard-headed series of negotiations and what happened must be considered against such a background.

Certain matters were probably never satisfatorily resolved between the parties. If I were required to set out all the expressly agreed terms of the arrangement I should certainly be hard put to it to do so. Nevertheless, some basic terms were, in my view, clearly agreed upon. For instance, the willingness of the plaintiff to purchase and pay for key cutting machines and equipment and to promote the sales of the Kis products is undoubted. Eventually, if not at the start, the prices to be paid by the plaintiff were fixed as also were a number of the incidental details of supply. For present purposes the important question is whether the plaintiff was to have the sole right of distribution in New Zealand or whether it was to be no more than a customer of Kis Australia leaving the latter free to deal similarly with anyone else it chose in New Zealand. I have no doubt at all that the agreement reached was for the former.

It is true that Mr Adams' attempts to obtain a written agreement for a sole distributorship never met with success. The plaintiff's case, as set out in para 5 of the second amended statement of claim, was:

> " 5. IN November 1978 Kis Australia acting for itself and/or Kis France agreed to give the Plaintiff the sole distribution rights for New Zealand for Kis Key cutting equipment and key blanks, and promotional material for a period of not less than five (5) years. This agreement was made orally between Mr. Adams and Mr. Fantl but the Plaintiff refers to a letter dated 24 November 1978 from the Plaintiff to Kis Australia and the letter in reply dated 29 November 1978. The Plaintiff also relies on the conduct of the parties both before and after November 1978 as evidence of such agreement. The date from which the term of the agency was to run was never finalised by the parties. "

The contract on which the plaintiff sought to rely was accordingly one concluded in November 1978 and was, more particularly, that evidenced in the two letters referred to. The letter of 24 November 1978 from Mr Adams to Mr Fantl dealt with a number of matters, mostly related to the supply of key blanks, advertising material, and other equipment. These are mainly contained in twelve numbered paragraphs. Paragraph 10 states:

> " Please send us a letter giving us a continuing sole distribution situation for at least five years for the reasons we have already discussed. "

The reply to that letter, namely, the letter of 29 November 1978 referred to in para 5 of the second amended statement of claim, deals seriatim with each of the matters raised in Mr Adams' letter. Paragraph 10 reads:

> " I will have an agreement made up. "

This exchange was relied on for the plaintiff as evidence of an oral agreement having been reached for the granting of sole distribution rights.

The defence to this allegation was twofold. First, was Mr Fantl's evidence as to the explanation for the passages cited from those letters. He said that the reference to "a continuing sole distribution situation" related not to the distribution of the key cutting machines but to the proposal to manufacture key blanks in New Zealand. Mr Fantl asserted that what Mr Adams was seeking was an arrangement under which Kis Australia would distribute in Australia key blanks which Mr Adams hoped to manufacture in New Zealand under a contract with Kis France. I have no hesitation in rejecting that evidence. It is inconsistent with the whole tone of the letter of 24 November 1978 and with the fact that at that time the proposal for manufacturing in New Zealand had made virtually no progress at all. Indeed, on 10 November 1978, Mr Adams had written to Mr Fantl saying, "As yet we have not received replies to the queries that were placed with you regarding manufacturing in New Zealand ...." It is inconceivable that a fortnight later when still no reply had been received on this topic, Mr Adams would have intruded a reference to a formal agreement about it into a series of enquiries about something else. Not only do I reject Mr Fantl's evidence on this but it assists me in the general assessment of his credibility.

The other aspect of the defence concerning the existence of a distributorship contract was that Mr Adams had not, in later correspondence and discussions, made a point of pursuing the topic. On 15 May 1979 he had said in a letter to Mr Fantl, "I have not as yet received your letter regarding the agency agreement." The response to that was a telex advising that Mr Fantl would be in New Zealand shortly but Mr Adams' letter following their next meeting contained no mention of a discussion about the agreement. It was then pointed out that while one of the topics set out in the agenda contained in the unposted letter already referred to was "confirmation of Kis distribution in New Zealand", this had plainly not been discussed at the meeting on 13 and 14 October 1979. This seems to be correct and there is no reference to it in the minutes of that meeting. There is, however, an inference to be drawn from the letter of termination that Mr Fantl regarded the plaintiff as having sole distribution rights for New Zealand. What he said was, "As we are unable to meet your demands we are forced to find another solution for the New Zealand market." There seems no reason for Mr Fantl to have expressed himself in that way if he was free already to deal on the New Zealand market. He need have said no more than that he chose not to continue selling to the plaintiff. He was aware, however, that he had an obligation, first, to terminate the arrangement with the plaintiff. Plainly this was also Mr Adams' understanding when he had earlier posed the three options which he said were open to Mr Fantl. They were to meet the demand for a higher profit margin, that Kis Australia should set up its own marketing organisation in New Zealand, and that Kis Australia should appoint a new agent in New Zealand.

It is a proper matter for comment that, following the enquiry in his letter of 15 May 1979 about the agency agreement, Mr Adams did nothing further to follow the matter up. The reason for this must be a matter of speculation. It may well have been the case that he realised he was not going to get from Mr Fantl a written agreement (whether in the form of a letter or other document) and was prepared to rely upon the course of their dealings. Alternatively, he may have thought he could rely upon the application for registration of the trade mark (of which Mr Fantl had no knowledge). Whatever the reason, the most that can be said is that Mr Adams did not pursue the request further. There is no evidence of his having said or done anything to suggest that he had abandoned the claim to a sole right of distribution or that he was acknowledging that there never was such a right. I am accordingly satisfied that the plaintiff has established the creation, in about November 1978, of a contract of sole distributorship arising out of discussions between Mr Adams and Mr Fantl and confirmed by their exchange of letters at that time.

2. WRONGFUL TERMINATION

Accepting that there was a contract between the parties there is nothing to indicate that they had agreed upon how it should be terminated and in those circumstances there was an implied term that it should be upon reasonable notice: (Chitty on Contracts, 25th ed, Vol I, para 861). On the basis of the plaintiff's case the contract was terminated peremptorily by the letter of 15 April 1980 and upon no notice at all. This was the nature of the wrongful termination alleged. The first answer to this was that the contract, if there was one, was terminated by repudiation by the plaintiff. This argument was based upon the general principle as it is set out in Chitty on Contracts, para 1601:

> " A renunciation of a contract occurs when one party, by words or conduct, evinces an intention not to continue to

> perform his part of the contract. But not every refusal to perform some part of a contract will amount to a renunciation. Even a deliberate breach will not necessarily entitle the innocent party to treat himself as discharged, since it may sometimes be that such a breach can appropriately be sanctioned in damages. .... If there is an absolute refusal to perform, the other party may treat himself as discharged. Short of an express refusal, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. Also the party in default 'may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations' or in a way which would deprive the other of substantially the whole benefit of the contract. In such a case, there is little difficulty in holding that the contract has been renounced. "

The argument for the defendant was that Mr Adams had made it clear by his conduct and in his correspondence that he had no real intention of continuing to perform the contract and that this must have been apparent to any reasonable person. The argument was based on the proposition that Mr Adams had made demands as to reduction in price which he knew could not be met, that he had rejected the offer of a visit from a technician from Kis France to resolve the complaints about faulty design and the like, and that he had shown in his letters that he was inviting Kis Australia to choose from his three options one which would terminate the existing arrangement. I do not think any such conclusion should be drawn. As I have already indicated, this was an uneasy relationship by reason of the fact that Mr Adams and Mr Fantl were both hard negotiators manoeuvring for better results. Whether the problems as to repairs and servicing were due to the inadequacies of the plaintiff's employees (as claimed by Kis Australia and Kis France) or for some other reason, there can be little doubt that the cost of making and keeping the machines serviceable must have seriously eroded the plaintiff's profit margin. This was the basis of Mr Adams' complaint and it was one of the matters discussed frequently between the parties. That being so, I can see no reason for saying that Mr Adams was showing a determination not to perform the contract. In the midst of his complaints he was still carrying on correspondence on the basis of a continuing relationship and on 10 March 1980 had extracted Mr Fantl's agreement to consider and give an answer within seven days on matters of supply and cost. It is perhaps little wonder that he received no reply from Mr Fantl on these matters because that was the time when Mr Fantl was advertising for another New Zealand agent.

I am not prepared to uphold that there was repudiation of the contract by Mr Adams. The contract was terminated by Mr Fantl's letter of 15 April 1980 and there is no suggestion that this contained any period of notice, reasonable or otherwise. It appeared to contemplate some kind of "transition period" but there is no indication in the letter as to what that meant. Mr Fantl's explanation was that as the new agent was to be Mr Mulholland, who was based in Auckland, there would be a period during which the plaintiff would be free to dispose of its stocks elsewhere in New Zealand. That may be so, and it could have a bearing on the question of whether loss was suffered by the plaintiff, but it does not, I think, amount to the giving of reasonable notice.

3. REASONABLE NOTICE

The question of what is to be regarded as reasonable notice for the termination of such a contract is not at all easy to decide. On behalf of the defendant it was argued that a period of one month would have been reasonable. For the plaintiff it was said that the period ought to have been however long it may have taken for the plaintiff to dispose of its stock. Neither of these extremes seems to me to be appropriate.

The standard form of agreement which Kis had for sole agencies, and which was completed by Mr Mulholland, provided for termination on 28 days' notice. At first sight this might appear to provide some guide as to what was a reasonable period for the plaintiff. That, however, would be misleading. The actual agreement with Mr Mulholland was not produced in evidence and I am unaware of its other terms. It may well have contained provisions which would not have been appropriate in the plaintiff's case. Having regard to the fact that the plaintiff was required to purchase outright from Kis Australia and then resell, and to the fact that Mr Fantl was plainly expecting Mr Adams to maintain a high turnover of stock, it follows that any termination of the contract was likely to catch the plaintiff with a fairly substantial quantity of unsold stock.

The question of what is reasonable notice will depend upon the circumstances and, in particular, upon the consequences to each party. In the case of the plaintiff this is likely to include the amount of stock held, the extent to which it had incurred expenditure in promoting the defendant's product, and the ability of the market to absorb the remaining stock. From the defendant's point of view regard must be had to the fact that, while the period of notice was running, the contract remained on foot and so the defendant was precluded from appointing another agent. During that period its continuation in the market would, of necessity, be curtailed and that situation could not be expected to continue for any prolonged period.

I was referred to the case of Decro-Wall International SA v Practitioners in Marketing Ltd [1971] 1 WLR 361. That was the case of a sole distributorship contract between a French manufacturing company and an English marketing company. At first instance it was held that reasonable notice of termination was twelve months, and this was upheld by the Court of Appeal. It was on the basis of this decision that it was argued for the plaintiff that notice in the present case should have been of the order of twelve months, or perhaps more. I can, however, see no real parallel between the two cases. In the Decro-Wall case the defendant English marketing company had gone to great lengths to create and develop a market for the plaintiff's goods. They had spent a considerable amount on advertising and had established more than 700 outlets in the United Kingdom for the plaintiff's products. Indeed, they had been so successful that the plaintiff's products accounted for about 83% of the defendant's whole business. This, of course, provides a picture very different from the present one. While the plaintiff had done a good deal to create and develop a market for the Kis products, it had been on a fairly modest scale. No doubt this was due to the fact that there were a number of other key cutting machines on the market employing a similar principle. It had been necessary for the plaintiff to carry a fairly substantial amount of stock and this would suggest that something more than a token period would be required for its disposal. Balancing the various factors as best I can, I think that a reasonable period of notice of termination would have been three months.

I should mention that it was part of the plaintiff's case that the defendant was under an obligation, upon termination of the contract, to take back at the into store cost any stock still held by the plaintiff. This obligation could only have arisen by express agreement between the parties and I am satisfied that no such agreement was ever made. There came a time when Mr Adams was asserting that Kis Australia should take back the remaining stock, but apart from an offer to take key blanks (which was refused by Mr Adams) Mr Fantl made it clear he was not prepared to take back any stock.

4. <u>DAMAGES</u>

The plaintiff has claimed by way of damages $68,020.36, being the amount of a valuation made of the stock remaining unsold at the date of hearing. There are also two claims for interest. The first is for $25,425 being the interest paid to the plaintiff's bank on its overdraft account on the basis of the value of the stock remaining. The second is for $23,231 representing the amount of interest the plaintiff could have earned had it received payment for the stock at the termination of the contract. I deal with these heads of damages separately.

(a) <u>Stock</u>

The measure of the plaintiff's loss as a result of not having received reasonable notice will relate to the loss of opportunity to dispose of stock without competition during the period of notice. I can see no basis upon which the plaintiff may claim that its loss is to be measured simply on the value of the stock remaining in its hands at the date of termination. The purpose of notice must be to allow time to clear stock to the best advantage. It must be a matter of speculation as to how the plaintiff would have fared had it been given a clear field for three months, but some assistance can be derived from a consideration of the sales actually made by the plaintiff and Mr Mulholland respectively.

The duration of the contract between the parties was from November 1978 to 22 April 1980. During that time the plaintiff sold a total of 92 machines which represents an average of just over five a month. In April 1980 there had been 12 sold and this was probably the most successful month during the whole period. Once the contract had been terminated the sales were slow and no doubt difficult to achieve. There was one in May 1980, four in October 1980, and a further nine after 31 March 1981. The period of three months' notice would have expired on 22 July 1980. Mr Mulholland made his first sale on 13 May 1980, and by the end of July had completed a total of 18 sales which represents an average of about seven per month. This was the nature of the competition which he represented to the plaintiff. It cannot be said that the plaintiff would have made the same number of sales in that period without competition. Mr Mulholland was obviously making an energetic start in his agency. He had been to France for both technical and sales training, and he is likely to have applied himself to his sales efforts to a greater extent than would the plaintiff. Faced with the need to quit his stock in a hurry Mr Adams may well have made a greater effort but this is not borne out by what actually occurred.

The plaintiff had branches in Auckland, Wellington and Christchurch and stock was held in each of these places. Mr Mulholland was based only in Auckland. It was not until September 1980 that he first made a sale outside Auckland. The plaintiff was therefore without competition from Mr Mulholland throughout the rest of the country and could have transferred his Auckland stock to Wellington or Christchurch for sale.

A certain amount of confusion arose over the question of whether servicing and maintenance would be avaiable to customers who should make purchases from the plaintiff. Mr Mulholland was not unnaturally anxious to offer his services to any customers of the plaintiff. It is also not unnatural that Mr Adams should have felt suspicious of this and should have resisted what appeared to him to be an attempt by Mr Mulholland to take over his business, particularly as Mr Adams was taking the attitude that he was entitled in any event to continue with his sole distributorship.

It is not possible to arrive, by means of any arithmetical calculation, at an assessment of the number of sales which the plaintiff would have made during the three month period but for the wrongful termination. It is not simply a matter of considering average monthly sales because the monthly sales had been in any event spasmodic, and there were numerous factors which would influence the result. Giving the best consideration I can to all the circumstances, I think it reasonable to say that the absence of competition for three months would have enabled the plaintiff to sell six machines more than it did. The measure of the plaintiff's loss is, in my view, the difference between the amount for which those six machines would have been sold during the period of notice and their value now. The plaintiff still has the machines and is free to sell them. I had at first thought that the proper course was to assess the value of the number of machines which would have been sold and awarded that sum on the basis that the machines would then be transferred to the defendant, but on reflection I do not think that is correct.

At the time of hearing the plaintiff held 11 machines. One of these can be eliminated at once. It was an engraving machine which Mr Adams had bought from Kis in order to see whether there appeared to be a market for such equipment. Plainly it was altogether outside the contract for distribution of key cutting machines. A valuation was made by Mr Smith, an experienced valuer of plant and machinery, and it was on the basis of his valuation that the claim was formulated.

Mr Smith inspected each of the machines, but in arriving at his values he was dependent to a large extent on information supplied to him by Mr Adams and Mr Mulholland. He was obliged to make a number of assumptions. When the machines arrived from Australia each had been packed in a carton. They had all been removed from their cartons and stored wherever a place could be found. The result was that they had suffered somewhat in the process and no longer had the appearance of new machines. Mr Smith was asked to value each machine on the basis, first, that it was new but shop soiled and, alternatively, that it was used. This was because the defendant had alleged that at least some of the machines had been used for retail purposes. The difference between the two methods of valuation was substantial. For instance, the first machine listed by Mr Smith in his valuation was regarded by him as having a value of $7,000 if new but shop soiled, and of only $1,800 if used. Mr Smith had assumed that in the case of used machines they were likely to be sold at auction and had assessed a value accordingly. He acknowledged that it was possible that something better than an auction value may have been obtained for a used machine if there was available to the purchaser a back-up service. Such a service could, of course, have been supplied by Mr Mulholland who was fully prepared to do so, and therefore the values were likely to be rather higher than those assessed by Mr Smith. On the other hand, Mr Smith's valuations on the basis of the machines being new but shop soiled meant that some deduction needed to be made for the cost of putting them in that condition.

A different approach to valuation was made by Mr Mulholland. He had not made the detailed inspection that Mr Smith had, but he was experienced in the trade and accepting the descriptions of each machine recorded by Mr Smith he was prepared to give an estimate of value. I found those estimates more helpful and more realistic and I prefer to adopt them.

I have said that the measure of loss should be related to the loss of six sales and so it is necessary to decide which machines would have been the subject of those sales. There is, I think, little doubt as to how this should be resolved. In mitigation of its loss the plaintiff would have been under an obligation to try and sell, first, its best machines. It is also likely to have proceeded in that way in order to get the most satisfactory result.

Of the ten machines left some have been used by the plaintiff on a retail basis and this is reflected in the number of arm movements recorded on the counters in the machines. I conclude that the plaintiff's loss is to be measured by the value of the six machines with the least use and for this purpose I accept the valuations of each made by Mr Mulholland. I identify the machines by reference to Mr Smith's report (which is part of Exhibit B) as follows:

Wellington	No. 2	Colonmatic Mk III	valued at $ 4,500
Wellington	No. 3	Colonmatic Mk II	valued at $ 1,750
Wellington	No. 4	Colonmatic Mk II	valued at $ 4,750
Wellington	No. 5	Colonmatic Mk III	valued at $ 5,000
Auckland	No. 8	Colonmatic Mk III	valued at $ 5,000
Auckland	No. 9	Colonmatic Mk II	valued at $ 3,000
			$ 24,000

The prices at which each machine would have been sold during the period of the contract were given to Mr Smith by Mr Adams and appear in Mr Smith's valuation. In respect of the six machines which I have just enumerated they were respectively -

	$6,245.44
	6,234.88
	6,227.36
	6,145.28
	6,169.76
	6,169.76
a total of	$ 37,192.48

I therefore assess the plaintiff's loss at $13,192.48.

(b) Interest

Interest is claimed under two heads and I deal with each separately. I should mention that Mr Corry, on behalf of Kis Australia, made no submissions on the question of interest and I therefore assume that he did not wish to dispute that these were proper heads of damages.

(i) Interest on Overdraft

During the period of three months after termination of the contract the plaintiff was in overdraft at the bank to a sum of not less than $107,000 and interest was payable on that overdraft at the rate of 17.5% per annum. The proceeds of any sales which had been made during that period would have gone to reduce that overdraft and so result in a reduction of interest. This is the way in which the claim for interest under this head has been calculated. That calculation, however, is based upon reductions of overdraft for each of the machines actually sold as from the dates of sale and so for those machines not sold there is an interest charge throughout the whole period from 1 March 1980. I am unsure whether the finding I have made as to loss in respect of stock requires an amendment to the calculation of interest. This was not a situation contemplated in the course of the hearing and so no submissions were made upon it. The matter may be one which can readily be resolved by counsel. If it cannot then I will be prepared to hear counsel further on it.

(ii) Interest Loss

This part of the claim represents the amount which it is calculated would have been earned from interest on investment if the plaintiff had been paid for the unsold stock at cost price. Again, notwithstanding the absence of any contrary argument, I confess to considerable uncertainty as to this claim in two respects. The first is as to whether any adjustment is necessary by reason of my earlier finding. More particularly, however, I do not at the moment see how the plaintiff can pursue both these claims for interest together. The basis of the first is the lack of reduction in interest on overdraft. As I have already said, I take this to mean that the proceeds of sale, if sales had been made, would have gone to reduce the overdraft and so save the payment of some interest. This assumes, of course, that the money was applied in that way. It appears that, having notionally reduced its overdraft, the plaintiff also claims that it could have invested the same money and earned interest from it.

It may be I have misunderstood the position. I am not prepared to make a finding on this without hearing further argument from counsel. If counsel are unable to agree upon it the matter should be put down for further argument.

For the reasons I have indicated I defer the entry of judgment and there will be leave reserved to both parties to apply further on the matters I have deferred. The costs will also be reserved, including the question of the liability for the costs of the first defendant.

Solicitors: Jeffries Partners, WELLINGTON, for Plaintiff

Williams, Donald & Co., AUCKLAND, for First Defendant

John G. Swan, WELLINGTON, For Second and Third Defendants

[signature]