

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2011-404-0123

Between **WIDGETS RETAILER LIMITED**
 Plaintiff

And **WIDGETS SUPPLIER LIMITED**
 Defendant

**JOINT MEMORANDUM OF COUNSEL FOR FIRST CASE MANAGEMENT
CONFERENCE**

Judicial Officer: Associate Judge Doogue

Next Event Date: 20 May 2011 at 3.10pm

Dated 11 May 2011

BLOGGS & DOE
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JOINT MEMORANDUM OF COUNSEL FOR FIRST CASE MANAGEMENT CONFERENCE

MAY IT PLEASE THE COURT:

Introduction

1. The plaintiff filed this proceeding on 28 January 2011. The defendant filed and served a statement of defence dated 8 March 2011. The plaintiff filed and served its reply on 22 March 2011.
2. The dispute concerns the termination of distribution arrangements between the plaintiff Widgets Retailer Limited (WRL) and the defendant Widgets Supplier Limited (WSL).
 - (a) On 30 June 2010 the defendant informed the plaintiff that it had appointed a new distributor in New Zealand from 1 January 2011.
 - (a) The plaintiff alleges that this was a repudiation of a fixed term contract and therefore seeks damages in the sum of \$1 million, along with interest and costs.
 - (b) The defendant's position is that there was no fixed term contract and the defendant was entitled to terminate the arrangements at any time. Furthermore, six months constituted reasonable notice of termination even if reasonable notice was required (which is denied).
 - (c) In the alternative, the defendant alleges that the plaintiff breached its obligations to promote the defendant's products in New Zealand, and the plaintiff failed to meet the required sales targets, providing valid grounds to terminate the distribution arrangements.

Track Assignment

3. Counsel agree that the standard track is appropriate.

Essential issues of fact and law

4. The following matters are the key issues that are in dispute in this litigation:
 - (a) **Were the parties committed to a fixed term contract or were the arrangements terminable?:** What were the relevant terms of the arrangements between WSL and WRL in 2010?

- (i) Can the plaintiff establish that the parties objectively intended to enter into, and did actually become bound to, a sufficiently certain contract for a fixed term?
 - (ii) Alternatively, were the arrangements terminable and/or in the nature of a standing offer?
- (b) **If the arrangements were terminable, what termination notice period was required (if any)?:**
- (i) Were the arrangements terminable at will or on reasonable notice?
 - (ii) If reasonable notice was required, what period of notice would have been reasonable in the circumstances (was six months reasonable)?
- (c) **Alleged failure to promote the products and meet sales targets:**
- (i) What were the promotional obligations and sales targets, and what was the nature of any such contractual obligations?
 - (ii) Did the plaintiff breach any such obligations?
 - (iii) If so, were they essential terms or was the breach substantial enough to justify cancellation?
- (d) **Alleged loss:** If the defendant was not entitled to terminate the distribution arrangements from 1 January 2010, what was the amount of loss allegedly suffered by the plaintiff, including issues of mitigation?

Categorisation

5. The parties consider that this is a category 2 proceeding.

Pleadings and further parties

6. The parties do not anticipate any further amendments to the pleadings, nor do they seek further particulars.

Discovery

7. The parties agree that non-standard discovery orders should be made under rule 8.22. The parties have agreed:
- (a) to discover documents falling with the categories set out Part A of the Appendix; and
 - (b) to make changes to the default Listing and Exchange protocol as set out in Part B of the Appendix.

Timetable

8. The parties respectfully request the following timetable:
- (a) Verified lists of documents to be filed and served by 10 June 2011;
 - (b) Exchange to be completed by the dates set out in Appendix A (i.e. 17 June 2011 for all categories except category 5 which is to be exchanged by 1 July 2011);
 - (c) A further case management conference to be scheduled for the first available date after 1 July 2011.

DATED this day of October 2010

J B Bloggs
Counsel for the plaintiff

M J White
Counsel for the defendant

APPENDIX

Part A: Categories of documents for discovery

Agreed General principles

- The parties agree that they are not required to retrieve deleted electronic data or to restore data from backup tapes (unless reasonably requested by the opposing party).
- The parties agree that they will seek to identify emails and electronic documents falling within the categories in the table below by using key word searches, with the search terms to be agreed in advance with each other by 27 May 2011.

Item	Category description	Date range	Date for exchange
1.	Correspondence between WRL and WSL (or their agents) about the nature and terms of the distribution arrangements between them, to the extent that the documents are relevant to the duration of the arrangements, rights of termination, and the contractual nature and effect of promotional obligations and sales targets.	After 1 January 2008	17 June 2010
2.	Summary data about the goods ordered and supplied between the parties: <ul style="list-style-type: none">- monthly volumes ordered and supplied- amounts paid by WRL to WSL for the products supplied- gross sales prices received by WRL from sales of those products to customers (including refunds for returns).	After 1 January 2008	17 June 2010
3.	Documents showing projected sales or budgets relating to the purchase and resale by WRL of WSL's products	Documents created or amended between 1 January 2008 and 30	17 June 2010

		June 2010	
4.	Summary data about the amount spent monthly by WRL on promoting WSL's product in New Zealand.	Between 1 January 2006 to 1 January 2011	17 June 2010
5.	Example documents of each final version of any material published by WRL to third parties promoting WSL's product in New Zealand (e.g. promotional flyers, magazine advertisements)	After 1 January 2009	1 July 2010
6.	Any board minutes or board papers about or referring to the distribution arrangements between WRL and WSL, to the extent that they are relevant to the duration of the arrangements, rights of termination, and the contractual nature and effect of promotional obligations and sales targets.	After 1 January 2008	17 June 2010
7.	All documents not falling within the above categories that the parties intend to rely upon at trial (and any known documents qualifying or contradicting them).		17 June 2010
8.	Leave reserved to make further requests for specific documents or categories of documents arising out of discovery.		

Part B: Changes to the default Listing and Exchange protocol

The parties agree that the Listing and exchange protocol in Part B of Schedule 9 of the High Court Rules shall apply, subject to the following:

1. The following acronyms will be used for the parties:

WRL Widgets Retailer Limited

WSL Widgets Supplier Limited

2. The parties agree to use the following document types:

Board papers	Papers prepared for Board meetings
Email	For any emails
Fax	For any fax or fax cover sheet sent by facsimile
Financial Report	For any documents solely containing financial/accounting information such as budgets, forecasts, sales reports, financial statements etc
Letter	For any correspondence between the parties other than emails or faxes
Minutes	Minutes of Board meetings
Memo	Any internal correspondence apart from emails
Spreadsheet	For any spreadsheets
Summary data	Any data summaries prepared for the purpose of this proceeding in accordance with the categories identified in Part A above

3. For chains of emails, the parties will ensure that at least one copy of each relevant email is discovered and listed as a separate document, but agree that it is not necessary to ensure that each such email is at the top level (i.e. it is sufficient if it is listed and appears somewhere in a chain).
4. All spreadsheets will be provided to the other party in excel format (.xls) (subject to confidentiality undertakings where appropriate).
5. The documents in category 5 will be globally listed as one entry, but each document will have a unique document ID.