IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2016-470-158
[2017] NZHC 448

UNDER	the Arbitration Act 1996
BETWEEN	FOREST HOLDINGS LTD Appellant
AND	MANGATU BLOCKS INCORPORATION Respondent

Hearing: 13 December 2016

Counsel: M D Branch and K Bond for Appellant
Z G Kennedy and M D Toulmin for Respondent

Judgment: 15 March 2017

JUDGMENT (NO. 2) OF HEATH J

This judgment was delivered by me on 15 March 2017 at 3.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Harkness Henry, Hamilton
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The appeal

[1] Forest Holdings Ltd (Forest Holdings) and Mangatu Blocks Incorporation (Mangatu) were in dispute about Mangatu's alleged wrongful termination of a forestry right (the Forestry Right) which it had granted in favour of Forest Holdings.[1] They submitted their dispute to arbitration. Hon B J Paterson QC was appointed as arbitral tribunal (the arbitrator).

[2] In an award made on 8 June 2016 (the Liability Award), the arbitrator determined that Mangatu's purported termination of the Forestry Right with immediate effect from 10 July 2013, and its subsequent eviction of Forest Holdings from the forest land, constituted a repudiation of the contract.[2] The arbitrator held that Mangatu ought to have served a notice requiring alleged breaches of the forestry right to be remedied within 120 days.

[3] As a result of the Liability Award, it was necessary for the arbitrator to assess damages payable to Forest Holdings. A preliminary question arose about the methodology to be employed in assessing damages. In a second award, made on 29 July 2016 (the Damages Award), the arbitrator found that, having regard to the principles that he considered should be applied, "the prospects of [Forest Holdings] obtaining other than a normal damages award on its capital loss claim appear to be minimal".[3]

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1 See paras [5]–[9] below.
2 See paras 15 and 16 of the termination letter of 10 July 2013, set out at para [14] below.
3 Damages Award, para 41(f), set out at para [23] below.

[4] Forest Holdings sought leave to appeal to this Court against the Damages Award. An appeal may only be brought on a question of law, by leave of the High Court.[4] In a judgment given on 14 November 2016, I granted leave, identifying the point of law as follows:[5]

> (a) …
>
> Having regard to binding findings of fact set out in the [Liability Award] of 8 June 2016, did the arbitral tribunal correctly determine the legal basis on which Forest Holdings Ltd was entitled to seek damages resulting from Mangatu Block[s] [Incorporation's] unlawful termination of the forestry right?

The Forestry Right

[5] Mangatu owns land near Gisborne, on which stands an indigenous forest (the forest land). On 30 June 2003, Mangatu granted the Forestry Right in favour of Forest Holdings. Its terms were recorded in an instrument, called "Memorandum of Transfer and Grant of Forestry Right", which was executed on 30 June 2003, and registered against the forest land.

[6] I summarise the material obligations owed by Mangatu and Forest Holdings to each other under the Forestry Right:

(a) Mangatu granted Forest Holdings the right to "manage, protect, harvest and carry away and otherwise utilise trees, timber and logs growing or to be grown" on the forest land, and to undertake ancillary works to facilitate those activities. The ancillary rights included the ability to "install and use all roadways, tracks and gates on [the forest land] as may be necessary for the purpose of managing, felling, carrying away and selling or utilising" the timber and logs.

(b) The Forestry Right was to enure for a period of 25 years from 1 July 2003. On expiry of that term, Forest Holdings was given a right of first refusal to extend the Forestry Right for a further 25 years, on the same terms. As a result, at the time the Forestry Right was granted, its

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4 Arbitration Act 1996, sch 2, cl 5.

5 *Forest Holdings Ltd v Mangatu Block Incorporation* [2016] NZHC 2720 at para [6](a).

potential maximum duration was fifty years, expiring by effluxion of time on 30 June 2053.

(c) In return for receiving the Forestry Right, Forest Holdings was required to pay royalties to Mangatu. By way of an initial payment of the royalties, Forest Holdings was obliged to pay a "non-refundable" sum of $1,500,000. That sum was paid.

(d) Thereafter, Forest Holdings was required to pay royalties on a monthly basis, in accordance with "a price schedule negotiated annually by the parties". That schedule was to give details of "species and grade prices per cubic metre of Roundwood", for the merchantable timber extracted from the forest land.

(e) Subject to payment of royalties, Forest Holdings was entitled to sell the timber to whomever it chose.

(f) Save for specified exceptions, Forest Holdings was not entitled to transfer the Forestry Right to any other person. One of the exceptions was an ability to assign rights under the Forestry Right, with the prior written consent of Mangatu. If such consent were sought by Forest Holdings, it could not be "unreasonably withheld", if, in the opinion of Mangatu, there were a reputable assignee who "had the financial resources and the land use reputation to meet" Forest Holdings' obligations under the Forestry Right.

(g) Onerous obligations were cast on Forest Holdings to comply with regulatory requirements. In particular, compliance was required with obligations under the Resource Management Act 1991 (the Act). Clause 8 of Schedule B of the Forestry Right required Forest Holdings to "comply in all respects with" the Act. As part of its obligation to comply with the Act, among other things, Forest Holdings was required "to comply with sound sustainable indigenous forest

management principles", and to prepare a "Sustainable Forest Management Plan".

(h) Forest Holdings was obliged to maintain records and provide annual reports to Mangatu; in particular, the receipts it obtained from the sale and utilisation of the timber. Mangatu was given the right to examine such records, at reasonable times, and to take and retain copies of them.

(i) Forest Holdings was obliged to provide a monthly report to Mangatu, to include details of the monthly harvest, inventory movement, and a summary of sales. More detailed information was required to be provided annually to Mangatu, in the form of an annual report.

(j) Forest Holdings was obliged "to the best of its ability" to "preserve, safeguard and respect … and if necessary adequately fence, all graves of the Māori people and monuments, historic places, sacred places and places of archaeological consequences" on the forest land. That obligation was described under the general heading of "Wahi Tapu and Nga Taonga A Nga Tipuna".

[7] Although there was considerable delay in obtaining appropriate resource consents, Forest Holdings was entitled to carry on its forestry business in the interim. Under the relevant District Plan, it had the right to harvest a limited amount of timber, before a consent was granted.

[8] Although the Gisborne District Council (the Council) granted a resource consent on 16 April 2008, its decision was challenged, on appeal, by Royal Forest & Bird Protection Society Inc. Although the Environment Court dismissed the appeal on 7 April 2009, it sought further submissions on the conditions to be imposed. The Court did not give a final decision until 26 April 2010.[6] The Environment Court made some changes to the conditions of consent.

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6 *Royal Forest & Bird Protection Society Inc v Gisborne District Council* [2010] NZEnvC 128.

[9] A Council official who gave evidence before the arbitrator described the conditions as "complex", and accepted that they would "require a significant amount of money and resources from Forest Holdings in order to comply". Over time, it became clear that Forest Holdings was having difficulty in complying with some of the conditions. The "termination" letter sent by Mangatu to Forest Holdings on 10 July 2013[7] relied on a number of such breaches; including an alleged failure to comply with abatement notices issued by the Council on 10 August 2011.[8] Before the arbitrator, Forest Holdings conceded that it had not been able to comply with the abatement notice by 10 July 2013.

[10] Forest Holdings operated under the Forestry Right for just over 10 years. On 10 July 2013, without prior warning, Mangatu's solicitors sent a letter (by email) to Forest Holdings, by which Mangatu purported to cancel the Forestry Right "with immediate effect and without further notice pursuant to clause 3 of Schedule D" of the licence.[9] While Forest Holdings initially disputed the validity of the termination, after some correspondence between the solicitors, it accepted Mangatu's repudiation of, and elected to cancel, the Forestry Right on 29 August 2013. That was the date on which the contract was cancelled.

Repudiation and cancellation of the Forestry Right

[11] Mangatu's solicitors' letter of 10 July 2013 based its notice of termination of the Forestry Right on alleged breaches of:

(a) Forest Holdings' obligation to comply with the Act; and

(b) Forest Holdings' obligation to report to Mangatu under the Forestry Right.

[12] So far as obligations under the Act were concerned, Mangatu relied on the failure of Forest Holdings to comply with the terms of an abatement notice issued by

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7 Se para [10] below.
8 See para [11] below.
9 Clause 3 of Schedule D is set out at para [13] below.

the Council on 10 August 2011.[10] That notice was directed to the failure to submit a "Biodiversity and Pest Management Plan" and a "Baseline Ecological Survey". The abatement notice also required Forest Holdings "to cease indigenous vegetation clearance by 9 September 2011". As to the provision of appropriate reports, Mangatu asserted that the information that Forest Holdings had provided to it pursuant to its contractual obligations was incomplete or inadequate.

[13] Mangatu took the view that it was entitled to cancel the Forestry Right with immediate effect, and without further notice. It took that view notwithstanding the terms of cl 3 of Schedule D of the Forestry Right, which provided:[11]

> **3. Default**
>
> Subject to certain conditions [Mangatu] may terminate the Forestry Right when [Forest Holdings] fails to meet its obligations
>
> (a) *Subject to the terms of 4(c) if either party hereto is in default hereunder the other party may notify such party in writing to remedy such default within one hundred and twenty (120) days of receipt of such notice*;
>
> (b) Notwithstanding the prior provisions of this clause, the party not in default may waive such default but such waiver shall only apply to the particular default waived and shall not be a continuing waiver.
>
> (c) Any money payable hereunder by the Grantee to the Grantor shall be in arrears if unpaid for sixty (60) days after the day appointed for payment and the same shall have been legally demanded in writing (the amount so in arrears and unpaid shall bear interest at the annual rate five percentum (5%) above the Bank of New Zealand indicator lending rate at the time appointed for payment and computed from the day appointed for payment to the intent and effect that the Grantee shall in addition to such amount pay interest thereon to the Grantor. The party not in default may, upon sixty (6) further days notice advising that the consequence of non payment of such outstanding sums due together with interest is cancellation, cancel this agreement without prejudice to any other right or remedy it may have.
>
> (d) If the party in default other than under Clause 4(c) hereof fails to remedy such default within the time set out in paragraph (a) of this clause or the default is not capable of remedy, the party not in default may without prejudice to any other right it may have refer that default issue to arbitration under the Disputes and Arbitration

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[10] See para [9] above.

[11] Clause 4 of the Forestry Right is directed to the topic of "Force Majeure". Clause 4(c), to which clause 3(a) of Schedule D refers, deals with industrial action arising out of strikes and lockouts. It has no relevance in the present case.

provisions of this Forestry Right but not before notice in terms of clause 4(a).

(e) In the event of any possible termination of this Forestry Right under clause 4(c) hereof of the parties hereto shall first confer for the purpose of agreement on what sums if any should be paid the one to the other by way of reimbursement for expenditure incurred or other moneys not paid and on whether any trees growing in the Indigenous Forest should be sold to cover such reimbursement or payment with the balance moneys to be paid out of the Grantee or some other procedure as shall be equitable to the parties at the relevant time. This clause shall have not affect upon the advance payment made in terms of Schedule A paragraph 2.

(Emphasis added)

[14] The solicitors for Mangatu concluded their letter with a summary of what they regarded as the effect of the breaches of the Forestry Right that Forest Holdings had committed. The solicitors said:

Effect of Forest Holdings' Breaches

14. Mangatu considers the above breaches to be material and/or of essential terms of the Forestry Right.

15. Accordingly, Mangatu cancels the Forestry Right with immediate effect and without further notice pursuant to clause 3 of Schedule D of the Forestry Right.

16. Mangatu gives Forest Holdings seven days from the date of this letter to remove all equipment belonging to it and/or its contractors. As Forest Holdings is no longer permitted to enter Mangatu's property, please contact us directly to arrange a suitable date and time to collect any equipment. For the avoidance of doubt, Mangatu does not consent to Forest Holdings entering its property without its prior consent. If necessary, Mangatu will issue a trespass notice.

17. Mangatu continues to reserve all rights and remedies available to it including the issue of proceedings for loss caused by Forest Holdings' breaches of the Forestry Right.

[15] In disputing that Mangatu had validly terminated the Forestry Right, Forest Holdings took the position that, on its true construction, cl 3 of Schedule D[12] of the Forestry Right did not permit termination for breaches of the type on which reliance was placed. It contended that cl 3(a) required a notice to be given so that Forest Holdings had 120 days from the date of its receipt to remedy the alleged defaults.[13]

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12 Set out at para [13] above.

13 See cl 3(a) of Schedule D, set out at para [13] above.

The arbitration

(a) The claims

[16] In its Fourth Amended Points of Claim, dated 7 October 2015, Forest Holdings sought relief on cancellation of the Forest Right, under s 9 of the Contractual Remedies Act 1979.[14] Its claim was based on the market value of the Forestry Right, as at the date of repudiation, 10 July 2013. On that basis, Forest Holdings sought damages in the sum of $10,750,000.

[17] Mangatu denied that its termination of the Forestry Right was unlawful, claiming that it was entitled to terminate without notice. In the alternative, Mangatu contended that, if it had wrongfully repudiated the Forestry Right on 10 July 2013, Forest Holdings was entitled to no more than nominal damages. That contention was premised on the notion that Forest Holdings could not have remedied the defaults alleged within a period of 120 days, had notice been given under cl 3(a) of Schedule D to the Forestry Right.

(b) The Liability Award

[18] In his Liability Award, the arbitrator held that Mangatu had wrongfully terminated the licence. In his view, Mangatu ought to have served a notice on Forest Holdings requiring the alleged breaches of the Forestry Right to be remedied *within 120 days from the date on which Forest Holdings accepted Mangatu's repudiation of the Forestry Right*, 29 August 2013. The arbitrator took the view that if Forest Holdings had not remedied the breaches within that time, Mangatu would have been entitled to terminate the contract.

[19] A number of findings of fact were made by the arbitrator in his Liability Award which are relevant to the question of assessment of damages. Those findings of fact cannot be challenged; the appeal is brought only on a question of law. I summarise relevant factual findings, on the basis of which the arbitrator considered the preliminary question on the assessment of damages:

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[14] As of 1 September 2017, cancellation for repudiation is dealt with by s 36 of the Contract and Commercial Law Act 2017, by virtue of ss 4 and 345(d) of that Act. Until that time, s 9 of the Contractual Remedies Act 1979 remains in force. It continues to govern this dispute.

(a) A breach of a condition of the resource consent operated as a breach of the covenant in the Forestry Right to comply with the Act.

(b) Forest Holdings could not have complied, within 120 days from the date of acceptance of the repudiation, with the provisions of the Baseline Ecological Survey, as required by the consent.

(c) Forest Holdings could not have completed, within 120 days of the date of acceptance of the repudiation, the Biodiversity and Pest Management Plan, as required by the consent.

(d) Forest Holdings could not have completed, within 120 days from the date of acceptance of the repudiation, the Biodiversity Monitoring Plan, as required by the consent.

(c) The Damages Award

[20] In his Damages Award, the arbitrator explained the nature of the preliminary question he was being asked to determine. He said:

> 2. At issue between the parties and unresolved in the liability award is an issue as to whether [Forest Holdings] is entitled to more than nominal damages.
>
> 3. *Mangatu's position is that [Forest Holdings] is not entitled to more than nominal damages because if Mangatu had given the required 120 days' notice to [Forest Holdings] to remedy its breaches, [Forest Holdings] could not have done so within that time. At the end of the 120 days, Mangatu would have terminated the Forestry Right.* Mangatu relies upon authority which provides that in assessing the loss on a repudiation it is necessary for there to be a hypothetical exercise undertaken, namely an assessment of what would have happened had there been no repudiation.
>
> 4. *[Forest Holdings]* disagrees with this approach and *says that the position in this case is analogous to a series of lease/eviction type of cases where damages have been assessed at the value of the business at the date of termination. Therefore, the fact that Mangatu may have been able to terminate the lease in due course is irrelevant.* It does concede that breaches at the time of the repudiation may be relevant to assessing damages but says that the fact that the breaches may have ultimately led to cancellation is not relevant.
>
> (Emphasis added)

[21] In his Damages Award, the arbitrator explained his approach to the assessment of damages. He said:

> 28. … The principles accepted do not automatically reduce the Forestry Right to a nil value as the value is dependent on the factual position. While there was in effect a transfer of the Forestry Right back to Mangatu, it does not necessarily follow that the Forestry Right had a material value in [Forest Holdings] hands. *On the above principles, the acceptance of the repudiation, which is analogous to an unlawful eviction, was the cause of any loss. That loss was the value of the asset at the date of acceptance after taking into account the real possibility of what would have happened if there had not been a repudiation by Mangatu*.
>
> …
>
> 30. I do not see the distinction that [Forest Holdings] submits is there between loss of profit claims and capital loss claims. [Forest Holdings] is entitled to be put in the same situation in respect of damages as if the contract had been performed. *The damages are to compensate for the loss of an asset. In my view, the damages are to be assessed on the basis that there has been an anticipatory breach of the Forestry Right by Mangatu, namely a repudiation which [Forest Holdings] accepted. [Forest Holdings] is entitled to have the Forestry Right valued at that date. Mangatu is entitled to raise possible subsequent events if there was a real possibility they would occur.*
>
> 31. *The damages should be assessed at the date of the acceptance of the repudiation and in accordance with the principles already discussed* the assessment can have regard to future events which make the Forestry Right less valuable or valueless. It is necessary that the future events were a real possibility at the date of acceptance of the repudiation.
>
> ….
>
> (Emphasis added)

[22] In determining the basis on which damages should be assessed, the arbitrator said:

> 33. Mangatu's position is that it must be assumed that it would have given 120 days' notice to [Forest Holdings] to remedy the breaches not later than 10 July 2013 being the date of the repudiation. *A finding to this effect was not made in the liability award*. However, the evidence does establish that Mangatu wished to terminate and would have taken every opportunity to do so. *It is difficult to see how there could be any other finding than that Mangatu would have terminated shortly after 10 July 2013. The assessment of damages will need to take this fact into consideration.*

(Emphasis added)

[23] Finally, the arbitrator summarised his conclusions:

> 41. A summary of my conclusions is:
>
> (a) *Mangatu's repudiation of the Forestry Right gives [Forest Holdings] the right to claim damages for its capital loss*.
>
> (b) *When considering the capital loss, future events can be take into account if there was a real possibility that they would occur at the time the repudiation occurred*.
>
> (c) *Findings have already been made that [Forest Holdings] would not have been able to remedy certain breaches within 120 days*.
>
> (d) While factual findings were not made in the liability award, the evidence suggests that Mangatu wanted to terminate the Forestry Right and would have issued a 120 day notice if that had been necessary.
>
> (e) Although [Forest Holdings] raised other issues which it says would have prevented cancellation, those issues do not assist it.
>
> (f) Consequently, *the prospects of [Forest Holdings] obtaining other than a nominal damages award on its capital loss claim appear to be minimal*.
>
> (g) If [Forest Holdings] amends its points of claim it would be entitled to have a reliance claim considered in respect of the unpaid portion of the royalty and the expenses it incurred and as claimed in its points of claim.
>
> (h) However, a considerable obstacle in pursuing such a claim is the provision of the Forestry Right which allowed Mangatu to retain the unused portion of the royalty payment.
>
> 42. *For [Forest Holdings] to succeed on its damage claim for a capital loss, two issues need to be determined in its favour. The first is that it would be necessary to determine what was a real possibility to happen at the date of the repudiation. If it is determined that the Forestry Right would have been terminated by non-compliance with a notice to remedy, damages can only be nominal.* Some of the relevant matters were not subject to a determinative finding in the liability award and [Forest Holdings] should not be denied the right to have them considered at a hearing. However, on the basis of the above comments it will be obvious that there are serious difficulties confronting [Forest Holdings] on this issue.
>
> 43. *The second issue is quantum.* In view of what is involved and the evidence which will need to be called and considered, it would not be reasonable to proceed with a quantum hearing without having the

> first issue determined. This is particularly so in view of the fact that [Forest Holdings] is not in a position to give security for costs in respect of a quantum hearing.

(Emphasis added)

[24] While the principles to which the arbitrator referred[15] were drawn from a number of authorities, particular reliance was placed on the decision of the House of Lords in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisa (The Golden Victory)*.[16] I discuss that (and other authorities) later, in my analysis of the relevant legal principles to apply.[17]

Analysis

(a) A "first principles" approach

[25] There has been a good deal of academic debate about the correctness of the two most significant decisions on which the arbitrator based his Damages Award; *The Golden Victory*[18] and *Bunge SA v Nidera BV*.[19] They are decisions of the House of Lords and the Supreme Court of the United Kingdom respectively. Given the nature of the debate, I have decided to test the arbitrator's conclusions on the assessment of damages in two stages. Initially, I take a "first principles" approach to the assessment of damages, on the basis of the facts found by the arbitrator in his Liability Award.[20] Having done that, I shall review the relevant authorities to see whether any different approach is demanded.

[26] There are a number of elementary principles that are relevant to the assessment of damages in this case. I start with them. The analysis that follows identifies some of the areas in which a more nuanced approach may be required. Those are the aspects with which I deal in the second part of my analysis.

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15 See paras 28 and 31 of the Damages Award, set out at para [21] above.

16 *Golden Strait Corporation v Nippon Yusen Kubishika Kaisa (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 at paras [9] and [10] per Lord Bingham of Cornhill; para [29] per Lord Scott of Foscote; and para [57] per Lord Carswell.

17 See paras [42]–[51] below.

18 *Golden Strait Corporation v Nippon Yusen Kubishika Kaisa (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 (HL).

19 *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] Bus LR 987, [2015] 3 All ER 1082.

20 That is the basis on which leave to appeal was granted: see para [4] above.

[27] The purpose of an award of damages for breach of contract is (so far as money can do so) to put the injured party in the same position as it would have been if the contract had been performed. That proposition forms the basis of the compensatory principle laid down by the Court of Exchequer in *Robinson v Harman*, as long ago as 1848.[21] In that case, Parke B said:[22]

> … Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

[28] Since that time, the "compensatory principle" has been embedded in the common law. The inherent simplicity of that principle can be seen from an observation made by Woodhouse P, delivering the judgment of the Court of Appeal, in *Māori Trustee v Clark.*[23] That was a case involving a preliminary question of law about how damages were to be assessed under a lease. The lessee was alleged to have breached the lease by failing to make capital improvements. The issue was whether the loss suffered by the lessor should be fixed by reference to the cost of undertaking the work or the diminution in value of the land. The President said:[24]

> In our view the immediate and important test is simply to inquire what has the lessor actually lost by reason of the absent improvements. And the answer to that uncomplicated question appears to us to be plain.

[29] The assessment of damages has never been the subject of inflexible rules. Given the straightforward way in which Woodhouse P felt able to express the compensatory principle some 33 years ago, one might be forgiven for wondering whether the law in this area has become overly complicated. I venture to suggest that the problem lies in the myriad of methods that are used to determine the answer to the simple question: What has the injured party lost? The methods are no more than aids, designed to assist the fact-finder's inquiry. They are not to be regarded as concrete rules to be applied indiscriminately.

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21 *Robinson v Harman* (1848) 1 Exch 850.
22 Ibid, at 855.
23 *Māori Trustee v Clark* [1984] 1 NZLR 578 (HC and CA).
24 Ibid, at 584.

[30] In *Takaro Properties Ltd v Rowling*,[25] Cooke J emphasised the pragmatic nature of the assessment of damages. He said:[26]

> The assessment of damages is a pragmatic subject in tort as in contract. It does not lend itself to hard-and-fast rules, although in some standard situations experience has led the Courts to evolve prima facie rules. An example, I think, is the prima facie rule that when a contract to buy is induced by a tort the damages are the difference between the price paid and the fair value at the time of purchase. See *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553, 585, where the authorities are referred to. The present case, however, does not fall within any prima facie rule. The Court is thrown back on the broad principle of assessing the value of a lost opportunity. That is the asset of which the company has been deprived.

[31] The "*prima facie* rules" to which Cooke J referred were developed in an endeavour to ensure that injured parties did not recover more than their true loss as a result of another party's breach. Three approaches, those based on restitution, reliance and expectation interests, were discussed in some detail by Fisher J in *Newmans Tours Ltd v Ranier Investments Ltd*.[27] Another, "loss of a chance", may be used when it is necessary to assess the likelihood or otherwise of an injured party dealing with the asset after breach. For example, in *Takaro Properties Ltd v Rowling*, Woodhouse P described the assessment of the value of a chance as involving three distinct inquiries:[28]

> … First there is the question as to whether there is affirmative evidence from a plaintiff that in the absence of the negligent conduct complained of he would have had some opportunity of achieving a particular purpose. For reasons already given that evidence is present in this case. Second, there is a need to estimate what would have been the outcome had there been complete success. And finally that outcome reduced to money terms will have to be discounted to accord with what can fairly be regarded as the actual *prospect* of success. ….
>
> (Woodhouse P's emphasis)

[32] Any notion that inflexible rules should be used in assessing different types of contractual damages is dispelled by s 9 of the Contractual Remedies Act 1979. It recognises the need to take a commercially realistic approach to the determination of

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25 *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 (HC and CA).

26 Ibid, at 69.

27 *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 (HC).

28 *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 (HC and CA) at 64. For a more recent exposition of the law in relation to loss of chance claims, see *Benton v Miller & Poulgrain (a Firm)* [2005] 1 NZLR 66 (CA).

an appropriate remedy for breach of contract, once the contract has been cancelled. It recognises that one size does not fit all.

[33] Section 9 applies only if a contract has been cancelled. It does not apply to an anticipatory breach arising out of the wrongful repudiation of a contractual obligation; in that situation its application is postponed until the repudiation is accepted and the agreement cancelled. Section 9 states:

> **9 Power of court to grant relief**
>
> (1) When a contract is cancelled by any party, the court, in any proceedings or on application made for the purpose, may from time to time if it is just and practicable to do so, make an order or orders granting relief under this section.
>
> (2) An order under this section may—
>
> (a) vest in any party to the proceedings, or direct any such party to transfer or assign to any other such party or to deliver to him the possession of, the whole or any part of any real or personal property that was the subject of the contract or was the whole or part of the consideration for it:
>
> (b) subject to section 6, direct any party to the proceedings to pay to any other such party such sum as the court thinks just:
>
> (c) direct any party to the proceedings to do or refrain from doing in relation to any other party any act or thing as the court thinks just.
>
> (3) Any such order, or any provision of it, may be made upon and subject to such terms and conditions as the court thinks fit, not being in any case a term or condition that would have the effect of preventing a claim for damages by any party.
>
> (4) In considering whether to make an order under this section, and in considering the terms of any order it proposes to make, the court shall have regard to—
>
> (a) the terms of the contract; and
>
> (b) the extent to which any party to the contract was or would have been able to perform it in whole or in part; and
>
> (c) any expenditure incurred by a party in or for the purpose of the performance of the contract; and
>
> (d) the value, in its opinion, of any work or services performed by a party in or for the purpose of the performance of the contract; and

(e) any benefit or advantage obtained by a party by reason of anything done by another party in or for the purpose of the performance of the contract; and

(f) such other matters as it thinks proper.

(5) No order shall be made under subsection (2)(a) that would have the effect of depriving a person, not being a party to the contract, of the possession of or any estate or interest in any property acquired by him in good faith and for valuable consideration.

(6) No order shall be made under this section in respect of any property, if any party to the contract has so altered his position in relation to the property, whether before or after the cancellation of the contract, that, having regard to all relevant circumstances, it would in the opinion of the court be inequitable to any party to make such an order.

(7) An application for an order under this section may be made by—

(a) any party to the contract; or

(b) any person claiming through or under any such party; or

(c) any other person if it is material for him to know whether relief under this section will be granted.

[34] In *Cemix Ltd v Flowcrete Asia Sdn Bhd*, Asher J discussed the approaches that could be taken, depending upon whether damages were sought at common law or under the Contractual Remedies Act.[29] Although counsel for neither party relied upon s 9 in that case, Asher J offered some observations on its overall effect:

> [94] … Section 9 gives a Court powers to grant relief in the event of cancellation. The powers expressed are wide-ranging. However, s 10(1) states that s 9 does not prevent a party to a cancelled contract from recovering damages in respect of repudiation or breach of contract by another party. The value of any relief granted under s 9 shall be taken into account in assessing any such damages. I do not consider it necessary to have any recourse to s 9 in this case. While Courts have been ready to make awards in the nature of damages under s 9 (see *Gallagher v Young* [1981] 1 NZLR 734 at 740 and *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68)), as the Court of Appeal indicated in *Coxhead v Newmans Tours Ltd* (1994) 6 TCLR 1 (upholding the approach taken by Fisher J in *Newmans Tours*), the common law approach to the assessment of damages is still an appropriate first port of call for the assessment of loss. I note the view of Professor Coote that s 9 is intended to be a provision enabling the granting of particular relief, rather than creating a new general remedy for breaches of contract: "Remedy and Relief under the Contractual Remedies Act 1979" (1993) 6 JCL 141.

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[29] *Cemix Ltd v Flowcrete Asia Sdn Bhd* HC Auckland CIV 2006-404-1537, 2 April 2008 (Asher J).

[35] At the risk of labouring the point, while some presumptive "rules" exist, there is no inflexible approach to the assessment of damages for any particular type of breach of contract claim. In each case, the damages to be awarded must be tailored to meet the actual loss suffered by the injured party. In a case such as this, this must be done by identifying the nature of the asset in the hands of the injured party at the time at which damages for the breach are to be assessed.

[36] The presumptive starting point is that damages for breach of contract are assessed as at the date of the breach.[30] In *Stirling v Poulgrain*, a case involving a wrongful repudiation of contract, the Court of Appeal confirmed that the contract remained in existence until such time as the repudiation was accepted.[31] That view was confirmed by the Supreme Court in *Paper Reclaim Ltd v Aotearoa International Ltd*.[32] In any given case, it will be necessary to determine whether damages should be assessed at the time of the breach or at some other time, so that the injured party recovers no more than its true loss.

[37] Moving to the facts, what asset did Forest Holdings possess as at 10 July 2013, when Mangatu wrongfully repudiated the Forestry Right? I have already outlined the nature of the mutual obligations of Mangatu and Forest Holdings under the Forestry Right.[33] In broad summary, Forest Holdings had a contract which, at its option, might entitle it (or any assignees) to extract timber from the forest land until 30 June 2053. As at the date on which Mangatu repudiated, there were 40 years to run.

[38] Although the arbitrator has found that Forest Holdings could not have remedied the breach within the period of 120 days for which notice was required,[34] the commercial dynamics between two contracting parties are very different during a period of notice than those that pertain when one party has decided to end the

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30 For example, *Golden Strait Corporation v Nippon Yusen Kubishika Kaisa (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 at para [11] per Lord Bingham. See also the authorities collected by Lord Bingham to support that proposition, and the article to which he refers: S M Waddhams "The Date for the Assessment of Damages" (1981) 97 LQR 445 at 446.

31 *Stirling v Poulgrain* [1980] 2 NZLR 402 (SC and CA).

32 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at para [18].

33 See para [6] above.

34 See para [41](c) of the Damages Award, set out at para [23] above.

contractual relationship and has asserted an immediate termination. Even assuming (which has not yet been the subject of a finding of fact)[35] that Mangatu had issued a notice on 10 July 2013, there was still time for Forest Holdings to negotiate.

[39] By way of example:

(a) If Forest Holdings had begun negotiations with Mangatu immediately after receipt of the notice, it might have been possible for some solution to have been reached which meant that Mangatu agreed to withdraw its notice.

(b) If Mangatu had not withdrawn the notice, Forest Holdings might have gone into the market to find a solvent assignee prepared to acquire the bundle of rights that it held for value. If the proposed assignee fell within the category of person in respect of whom Mangatu could not "unreasonably withhold" consent, Forest Holdings might have realised some benefit.[36]

[40] I am not saying that Forest Holdings could or could not establish the type of factual foundation that I have mentioned. The point is that it must have the right to explore those issues and to adduce evidence to support any options available to it to maximise its recovery.[37] In other words, Forest Holdings is entitled to adduce evidence of the value of the rights of which it was deprived by the repudiation. While the two aspects of the business dynamics to which I have referred[38] are not intended to be exhaustive, they illustrate that Forest Holdings might have been able to extract value from its asset before the contract was cancelled. From a practical point of view, apart from anything else, Mangatu could not have evicted Forest Holdings from the forest land until the notice had expired in circumstances where the defaults had not been remedied.[39]

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35 See para [33] of the Damages Award, set out at para [22] above.
36 See para [6](f) above.
37 See also para [49] below.
38 See para [39] above.
39 In the termination letter of 10 July 2013, Mangatu gave Forest Holdings seven days within which to remove all equipment and to vacate the forest land. See para 16 of the letter set out at para [14] above.

[41] On the face of it, there appears to be room for a respectable argument that Forest Holdings possessed an asset of value to it at the time notice ought to have been given. In those circumstances, I do not think it can be said, on a "first principles" analysis that Forest Holdings was unlikely to obtain more than nominal damages for Mangatu's wrongful repudiation of its contract.

(b) Do the authorities demand a different result?

[42] The arbitrator's approach allows Forest Holdings to claim damages for any capital loss it has suffered, taking into account any future events, where there was a "real possibility" that they would occur at the time of *repudiation*, not cancellation.[40] As a result of those findings, the arbitrator expressed the view that "the prospects of [Forest Holdings] obtaining other than a nominal damages award on its capital loss claim [appeared] to be minimal".[41]

[43] Having regard to the absence of any binding finding of fact in the arbitrator's Liability Award that Mangatu would have issued a remedial notice on 10 July 2013, it is inappropriate for me to venture into a fact-specific analysis of the measure of damages that might be applied. For present purposes, I focus on whether there is any persuasive authority for the view that only nominal damages are likely to be awarded in a case such as this, irrespective of what facts may be found by the arbitrator on that issue. In that regard, the two most important cases are *Golden Victory* and *Bunge SA v Nidera BV*. For reasons that will become apparent, it is unnecessary for me to go beyond those authorities.

[44] Both *Golden Victory* and *Bunge SA* affirm that "subsequent events may be taken into account in assessing damages for the anticipatory breach of a sale of goods contract in respect of which there existed an available market".[42] In a comprehensive article in which the *Golden Victory* decision was examined by reference to authorities involving anticipatory breach (which went back as far as the

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40 See para [41](a) and (b) of the Damages Award, set out at para [23] above.

41 See para [41](f) of the Damages Award, set out at para [23] above. On that issue, see also paras [42] and [43] of the Damages Award, also set out at para [23] above.

42 As explained by Professor Francis Dawson in a Case Note on *Bunge SA v Nidera BV*: Francis Dawson "Damages for Anticipatory Breach" [2016] LMCLQ 6 at 6.

13th Century)[43] Lord Mustill opined that, in a case involving wrongful repudiation of a contract, the valuation of the lost rights should be assessed as at the date of acceptance of the repudiation, and cancellation of the contract.[44] Such an approach is consistent with s 9(1) of the Contractual Remedies Act which gives jurisdiction to the Court to provide a remedy only after the contract has been "cancelled".[45]

[45] In *Bunge SA v Nidera BV*, the Supreme Court of the United Kingdom was concerned with a wrongful repudiation of a contract for the single shipment of Russian wheat on standard terms set out in a document called GAFTA 49.[46] One of the terms of that agreement provided for either party to cancel in the event that there was a Governmental prohibition on export introduced; another provided a mechanism to assess damages. The contemplated type of prohibition did eventuate.

[46] In *Bunge SA*, Lord Sumption discussed the "so-called breach-date rule", in the context of the majority and minority views expressed in the *Golden Victory*. Lord Sumption said:[47]

> …The real difference between the majority and the minority turned on the question what was being valued for the purpose assessing damages. *The majority were valuing the chartered service that would actually have been performed if the charterparty had not been wrongfully brought to a premature end. On that footing, the notional substitute contract, whenever it was made and at whatever market rate, would have made no difference because it would have been subject to the same war clause as the original contract. … The minority on the other hand considered that one should value not the chartered service which would actually have been performed, but the charterparty itself, assessed at the time that it was terminated, by reference to the terms of a notional substitute concluded as soon as possible after the termination of the original. That would vary, not according to the actual outcome, but according to the outcomes which were perceived as possible or probable at the time that the notional substitute contract was made. The possibility or probability of war would then be factored into the price agreed in the substitute contract*. …
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> (Emphasis added)

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43 Michael Mustill "*The Golden Victory* – Some Reflections" (2008) 124 LQR 569.

44 Ibid, at 584.

45 Section 9 of the Contractual Remedies Act 1979 is set out at para [32] above.

46 GAFTA is the Grain and Feed Trade Association. GAFTA 49 refers to a specific standard form FOB (free on board) contract used in the sale of grain and feed in Central and Eastern Europe.

47 *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] Bus LR 987, [2015] 3 All ER 1082 at para [21]. To support his analysis, Lord Sumption referred to *Golden Strait Corporation v Nippon Yusen Kubishika Kaisa (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 at para [37] per Lord Scott, and paras [76]–[78] and [82] per Lord Brown. In respect of the minority view, Lord Sumption referred to para [22] per Lord Bingham and paras [45] and [46] per Lord Walker.

[47] Subsequently, when discussing the effect of the majority views in *Golden Victory*, Lord Sumption said:[48]

> … There is no principled reason why, in order to determine the value of the contractual performance which has been lost by the repudiation, one should not consider what would have happened if the repudiation had not occurred. On the contrary, this seems to be fundamental to any assessment of damages designed to compensate the injured party for the consequences of the breach. [In this case, if] the contract had not been repudiated, it would have been lawfully cancellable. If it was lawfully cancellable, the charterer would have been entitled to avail himself of that right regardless of his motive. The only question is whether he would in fact have done so, a question which in practice would probably have been determined by his financial interest. Commercial certainty is undoubtedly important, although its significance will inevitably vary from one contract to another. But it can rarely be thought to justify an award of substantial damages to someone who has not suffered any. As Lord Mance pointed out in the Court of Appeal in *The Golden Victory* [2006] 1 WLR 533 at [24], the degree of uncertainty involved in that case was no greater than the uncertainty inherent in the contract itself. The parties' obligations were always defeasible in the uncertain event of war, just as their obligations under the contract presently in issue were always defeasible in the uncertain event of an export embargo.

[48] While Lord Toulson wrote separately, the three remaining Judges of the Supreme Court, all of whom had also joined in the judgment given by Lord Sumption,[49] concurred with his reasoning. As a result, the two judgments must be read as complementary in nature. Lord Toulson began his analysis with reference to the compensatory principle. He then moved to consider the impact of *Golden Victory*.[50] Relevantly, his Lordship said:

> [77] Secondary to the fundamental restitutionary principle, in various types of case there is a normal measure of recovery which the courts have developed to give effect to that principle. *The Elena D'Amico*, like *The Golden Victory*, involved the premature wrongful repudiation of a charterparty. The judge held that if there was at the time of termination an available market for chartering in a substitute vessel, damages would normally be assessed on the basis of the difference between the contract rate for the balance of the contract period and the market rate for a substitute charter. He arrived at this result by analogy with cases of sale of goods or shares in which either the seller failed to deliver or the buyer failed to accept delivery: *AKAS Jamal v Moolla Dawood, Sons & Co* [1916] 1 AC 175 and

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48 *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] Bus LR 987, [2015] 3 All ER 1082 at para [23]. Lord Neuberger P, Lord Mance and Lord Clarke each expressed agreement with Lord Sumption's judgment.

49 Lord Neuberger P, Lord Mance and Lord Clarke.

50 *Golden Strait Corporation v Nippon Yusen Kubishika Kaisa (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 at paras [76]–[79]. Lord Toulson also referred to *Koch Marine Inc v D'Amica Societa di Navigazione ARL* (*The Elena d'Amico*) [1980] 1 Lloyd's Rep 75 (Robert Goff J).

Campbell Mostyn (Provisions) Ltd v Barnett Trading Co [1954] 1 Lloyd's Rep 65.

> [78] The broad principle deducible from *The Elena D'Amico* and the cases there considered is that where a contract is discharged by reason of one party's breach, and that party's unperformed obligation is of a kind for which there exists an available market in which the innocent party could obtain a substitute contract, the innocent party's loss will ordinarily be measured by the extent to which his financial position would be worse off under the substitute contract than under the original contract.
>
> [79] The rationale is that in such a situation that measure represents the loss which may fairly and reasonably be considered as arising naturally, ie according to the ordinary course of things, from the breach of contract (*Hadley v Baxendale*). It is fair and reasonable because it reflects the wrong for which the guilty party has been responsible and the resulting financial disadvantage to the innocent party at the date of the breach. The guilty party has been responsible for depriving the innocent party of the benefit of performance under the original contract (and is simultaneously released from his own unperformed obligations). The availability of a substitute market enables a market valuation to be made of what the innocent party has lost, and a line thereby to be drawn under the transaction.

[49] Understandably, Lord Toulson's focus was on the assessment of damages in cases involving an available market in the goods in issue. Lord Mustill developed this point in his Law Quarterly Review article. In explaining the different approaches that might be taken depending upon whether there was an available market, he wrote:[51]

> It remains to consider how this general conclusion should be applied in practice. This must depend on the nature of the contractual rights which the promise has chosen to abandon in exchange for their value. In *The Golden Victory* these were embodied in a time charter, which is a form of financial instrument having a capital value which, if there was an available market (as the arbitrators found there to be), can be ascertained directly through expert evidence. Such evidence will, of course value the contract "warts and all", taking into account any known factors which would tend to depress its value, such as the presence of a termination clause, coupled with a market estimation of the chance that events may bring the clause into play. *It is only if the contract cannot be valued directly as a marketable asset that recourse would be required to an estimate (viewed retrospectively as at the date when the exchange of value for compensation is effected) for the likely future earnings, discounted for the acceleration of cash flow*.
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> (Emphasis added)

[50] The manner in which damages should be assessed in the present case will necessarily turn on the findings of fact that the arbitrator makes, both in relation to

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[51] Michael Mustill "*The Golden Victory* – Some Reflections" (2008) 124 LQR 569.

the time at which Mangatu was likely to have given notice and the likely consequences of its issue. Once the arbitrator has considered the impact of the different commercial dynamics that would result from a termination on notice, he will be better placed to assess the method by which Forest Holdings' loss can be determined. Among other things, the arbitrator may need to consider whether the approach to assessment of damages might be better informed by treating the asset in the hands of Forest Holdings at the relevant time as one for which there was (or was not) an available market of the type to which Lord Mustill referred. The factors to be taken into account in determining the loss suffered cannot be anticipated in advance of the relevant factual findings being made.

[51] My conclusion is that the decisions of the House of Lords and Supreme Court of the United Kingdom in *Golden Victory* and *Bunge SA* respectively do not necessarily operate to give Forest Holdings only a "minimal" chance of recovering more than nominal damages. To adapt the pithy observation of Woodhouse P in *Maori Trustee v Clark*,[52] to fit the circumstances of this case, the immediate and important test is simply to inquire: What did Forest Holdings lose by reason of Mangatu's wrongful repudiation of the Forestry Right on 10 July 2013?

Result

[52] For those reasons, the appeal is allowed. The Damages Award made by the arbitrator is set aside. Questions of damages are remitted to the arbitrator, to be assessed in light of my reasons for judgment.

[53] Costs are reserved. If they cannot be agreed, the following timetable shall apply:

(a) Submissions in support of any claim for costs shall be filed and served on or before 13 April 2017.

(b) Submissions in opposition to any claim for costs shall be filed and served on or before 12 May 2017.

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[52] *Māori Trustee v Clark* [1984] 1 NZLR 578 (HC and CA), set out at para [28] above.

(c) If cross claims are made, each party shall file memoranda in support of and in opposition to their respective claims.

(d) The Registrar shall refer all memoranda to me for determination, on the papers.

[54] I thank counsel for their assistance.

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P R Heath J

Delivered at 3.00pm on 15 March 2017