IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2014-419-000234
[2014] NZHC 2911

UNDER	Part 20 of the High Court Rules
IN THE MATTER	of an appeal from the District Court
BETWEEN	SPOONER COMMERCIAL LIMITED First Appellant
	KAREN LINDA SPOONER Second Appellant
AND	A1 COMMERCIAL SERVICES LIMITED (now known as Cambridge Carpet Cleaning Limited) Respondent

Hearing: 21 October 2014

Appearances: M Branch and K Lomas for Appellant
E J Hudson for Respondent

Judgment: 21 November 2014

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Friday, 21 November 2014 at 2.00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors: Harkness Henry, Lawyers, Hamilton

Counsel: Elliot Hudson, Barrister, Hamilton

Introduction

[1] This is an appeal from a District Court decision of Judge Spiller granting $50,114.00 in damages to the respondent, A1 Commercial Services Limited.[1]

[2] The first appellants, Spooner Commercial Limited (Spooner), entered into an agreement to sell a cleaning business, then known as A1 Cleaning Services (A1), to Mr and Mrs Holden, who acquired A1 via the respondent company. The monthly income generated by the business was 23% less than expected by the purchasers under the contract and as represented by the second appellant, Karen Spooner. The appellants do not dispute their liability to compensate the respondent for its loss for breach of warranty or breach of s 9 of the Fair Trading Act 1986. The only issue on appeal is the quantum of damages required to compensate the respondent for the diminution in the value of A1's goodwill.

[3] The appellants argue the correct assessment of loss is $16,770.53, and seek orders accordingly. It relies on the evidence of its expert witness, Mr Robert Braithwaite, who takes a probability-based methodology in quantifying the loss. That approach contrasts with the revenue-based methodology adopted by the respondent's expert witness, Mr John Dobson. Judge Spiller preferred Mr Dobson's approach and applied it in fixing damages at $50,114.00.

[4] The appellants advance their appeal on three grounds:

(a) The District Court Judge failed to give reasons for his decision.

(b) The correct methodology to be applied was that of Mr Braithwaite.

(c) Even if Mr Dobson's methodology was preferred, his actual calculation, and therefore the result, was flawed.

---

1 *A1 Commercial Services Limited v Spooner Commercial Limited* DC Hamilton CIV-2011-019-001039, 12 May 2014.

[5] I do not propose to deal with the first ground in any depth. Although there have been calls to the contrary,[2] it remains the position in New Zealand that there is no general duty on Courts or other public decision-makers to provide reasons for their decisions.[3] Here Judge Spiller did in fact give reasons. Since the appellants merely question their adequacy, I prefer to deal with this appeal on its merits.

Background

[6] A1 was a Hamilton-based commercial cleaning business owned and operated by Mr & Mrs Spooner. The appellants and respondent entered into an agreement for the sale and purchase of A1 on 4 March 2010. The sale price of $282,500 comprised of $20,000 in tangible assets, $1,200 in stock in trade and $261,300 in intangible assets. The turnover warranted by the agreement for the period 1 September 2009 to 31 December 2009 was $135,205.

[7] Clause 6.5 of the agreement stated the vendor warranted that amount to be correct, and no client had advised the vendor that they proposed to cease or reduce their existing business. Under cl 27.1 the vendor undertook inter alia that, to the best of the vendor's knowledge, all information relevant to the profitability of the business had been disclosed, all information provided was true and correct, and it would disclose any new information inconsistent with the warranties and undertakings in the agreement. The agreement contained a due diligence provision.

[8] The relevant events are summarised by Wylie J in his judgment dated 18 April 2013:[4]

> [17] Prior to confirmation, Mr Holden asked for details of the business' contracts with its various clients. The Spooners declined to provide details, but did supply a spreadsheet setting out the amount charged out to each client on a monthly basis. The spreadsheet did not disclose the names of clients. Mrs Spooner also sent copies of the business' invoices sent to clients to Mr Holden, but again, the names of clients had been blanked out. Ultimately, copies of the client contracts were provided, but again, the names were deleted.

---

2 Tim Cochrane "A General Public Law Duty to Provide Reasons: Why New Zealand Should Follow the Irish Supreme Court" (2013) 11 NZJPIL 517.

3 *R v Awatere* [1982] 1 NZLR 644 (CA), *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) at [79]-[85].

4 *A1 Commercial Services Limited v Spooner Commercial Limited* [2013] NZHC 796.

> [18] The contracts were in the names of the previous owner of the business. Mrs Spooner told Mr Holden that she had sent out new contracts, but had not received all of them back.
>
> [19] The Holdens were primarily concerned with the value of the contracts. Although they did not know the names of individual clients, they thought that all contracts were in place and that no clients had advised that they intended to cease or reduce their existing business with Spooner Commercial.
>
> [20] The agreement became unconditional, and it was settled on 15 March 2010. Following settlement, the Holdens were given access to the business. They then obtained the signed client agreements, and they became aware of the identity of the business' clients.
>
> [21] On 18 March 2010, Mr and Mrs Holden received an email advice from one client, Bettle Advertising, advising that it was terminating its contract. In that email, it was noted that Bettle Advertising had had numerous issues with the company's services that they had brought to the attention of Spooner Commercial and the Spooners. Mr Holden followed up, and Bettle Advertising replied, attaching copies of emails which it had sent to Mr and Mrs Spooner on 15/16 December 2009.
>
> [22] Mr Holden visited various clients of the business. He met with a representative of a business known as WEL Networks Limited, based in Hamilton. It had two contracts with the business. The representative told Mr Holden that WEL's contracts with the business were up for renegotiation. The WEL representative sent to Mr Holden copies of earlier correspondence dated 23 November 2009 which had been sent to Spooner Commercial, attention Mrs Spooner. The letter advised that WEL Networks considered that it was not obliged to honour its existing contracts, but had done so out of good faith. It recorded that the contracts expired in May 2010, and that a full review of WEL's cleaning requirements and the market would be undertaken at that time.
>
> [23] In the event, A1 tendered for the WEL cleaning contracts when they came up for review, but it was not successful.
>
> [24] As a result, A1 found that it had lost the two contracts with WEL Networks Limited, and the contract with Bettle Advertising. The total value of these contracts was $7,267.75 per month. This was 23 percent of the represented monthly turnover of $31,008.
>
> [25] The loss of the contracts was brought to the attention of Mrs Spooner, first by telephone calls and then through correspondence sent by Mr and Mrs Holden's solicitor. The parties were unable to settle the matter, and proceedings were issued in the District Court.

[9] On 10 August 2012 Judge Spiller found that the appellants had breached cl 27.1 of the agreement.[5] The notice of termination and the concerns raised by

---

5 *A1 Commercial Services Limited v Spooner Commercial Limited* DC Hamilton CIV-2011-019-001039, 10 August 2012.

Bettle Advertising were not disclosed to the purchasers. The same conclusion was reached in respect to the WEL Networks contracts. Having found the first appellants liable for breach of contract Judge Spiller preferred the evidence of the appellants, put forward by Mr Braithwaite, and set the damages at $8880. The second appellant was found not to have made the alleged representations as to the intention of the business' clients to maintain their existing business, and therefore had not engaged in misleading or deceptive conduct.

[10] The respondent appealed that decision to this Court. In his reserved judgment Wylie J found that Mrs Spooner was in fact liable under the Fair Trading Act 1986 because her overall conduct, examined objectively, was misleading and deceptive. More importantly for the present appeal the award of damages was found to be patently inadequate. Wylie J noted deficiencies in the evidence of Mr Braithwaite and Mr Fieldes, A1's accountant. There was no satisfactory evidence on which the diminution of goodwill could be assessed. Accordingly, the matter was remitted to the District Court for reconsideration of the appropriate quantum of damages to apply.

District Court decision

[11] The matter was reheard by Judge Spiller on 9 May 2014. Judge Spiller heard evidence from Mr Braithwaite, for the appellants, and Mr Dobson for the respondent. Both experts are appropriately qualified. The experts presented two different methodologies with strikingly different results.

Two competing methodologies

[12] Mr Dobson adopts Mr Fieldes' revenue-based approach. It is simple and straightforward. The value ascribed to the goodwill under the agreement was $261,300.00. The annual turnover for the business was $400,164.00. Hence every dollar of annual turnover is driven by 0.65 cents of goodwill (the goodwill/revenue multiple). The lost annual turnover from the loss of the Bettle and WEL Networks contracts was $87,213.00. Sixty five per cent of that loss is attributable to the loss in A1's goodwill. The loss in goodwill is therefore $56,688. In other words, if properly informed of the significant and imminent risk to the Bettle and WEL

Networks contracts that represented 23% of A1's revenue, the respondent would have paid $204,611 for A1's goodwill, and $225,811 for A1 in total. The figure of $56,688 is then discounted by $6,574, being the gross profit gained by the respondent from the WEL Networks contracts in the period after the settlement date but before the contracts were terminated. The assessed loss by Mr Dobson is therefore $50,114.00.

[13] Mr Braithwaite's probability-based approach is fairly described as more complex. First, Mr Braithwaite values A1's presently-held contracts (approximately 40 fixed and open term service contracts) to be 80% of A1's goodwill (the allocated goodwill); the rest being the value of A1's ability to gain new contracts (the inherent goodwill). Accordingly the value of A1's presently-held contracts paid for by the respondent was $209,040.00.

[14] Next, according to Mr Braithwaite, when analysed closely the Bettle and WEL Networks contracts had a 50 per cent chance each of continuing, compared to the 90 per cent chance for the fixed term contracts and 92% chance for the open term contracts held by A1 at the settlement date. The chance of each contract continuing is said to be a function of the chance of the contracts coming up for review and the chance that, on review, A1 would lose the contract to a competitor.

[15] From there Mr Braithwaite calculates A1's probability adjusted monthly revenue for two scenarios: first, the hypothetical scenario in which the WEL Networks (fixed-term) and Bettle (open-term) contracts had the same probability of continuing as any other fixed or open contracts, and second, the actual scenario in which the contracts are accorded a lower value because of the diminished likelihood they would continue compared to the other contracts held by A1. Finally, the value of A1's goodwill at the date of contract is calculated by deducting the monthly revenue to take into account these probabilities. Applying the assumptions proposed, Mr Braithwaite values the worth of A1's presently-held contracts (the allocated goodwill) at $192,269. The difference in value between what was paid ($209,040) and what was received ($192,269) is the respondent's loss. That loss is $16,771.

[16] Mr Braithwaite's approach is summarised in the following spreadsheets. First, the following assumptions are made as to the probabilities of retaining revenue in each scenario:

Scenario 1 - without knowledge of intention to review				
	Probability of review	**Probability of losing review**	**Overall probability of losing revenue**	**Overall chance of retaining revenue**
Contracts subject to dispute:				
WEL Contracts (fixed term)	20%	50%	10%	90%
Bettle Contract (open term)	10%	80%	8%	92%
Other contracts:				
Fixed term contracts	20%	50%	10%	90%
Open contracts	10%	80%	8%	92%
Scenario 2 - with knowledge of intention to review				
Assumptions	**Probability of review**	**Probability of losing review**	**Overall probability of losing revenue**	**Overall chance of retaining revenue**
Contracts subject to dispute:				
WEL Contracts (fixed term)	100%	50%	50%	50%
Bettle Contract (open term)	50%	100%	50%	50%
Other contracts:				
Fixed term contracts	20%	50%	10%	90%
Open contracts	10%	80%	8%	92%

[17] Second, the calculations that follow from those probabilities are determined:

Scenario 1 - without knowledge of intention to review				
	Monthly revenue	**Probability of revenue continuing**	**Probability adjusted monthly revenue**	**Allocated goodwill**
Contracts subject to dispute:				
WEL Contracts (fixed term)	4,361	90%	3,924	28,846
Bettle Contract (open term)	1,280	92%	1,177	8,653
Other contracts:				
Fixed term contracts	3,109	90%	2,798	20,567
Open contracts	22,326	92%	20,540	150,975
Total	31,075		28,440	209,040

Scenario 2 – with knowledge of intention to review				
	Monthly revenue	**Probability of revenue continuing**	**Probability adjusted monthly revenue**	**Allocated goodwill**
Contracts subject to dispute:				
WEL Contracts (fixed term)	4,361	50%	2,180	16,025
Bettle Contract (open term)	1,280	50%	640	4,703
Other contracts:				
Fixed term contracts	3,109	90%	2,798	20,567
Open contracts	22,326	92%	20,540	150,975
Total	31,075		26,158	192,269

[18] Third, by comparing scenario 1 and 2, the loss in value of A1's allocated goodwill is quantified:

	Scenario 1 - allocated goodwill	**Scenario 2 - allocated goodwill**	**Difference**
WEL Contracts	28,846	16,025	12,820
Bettle Contract	8,653	4,703	3,950
Other contracts:			
Fixed term contracts	20,567	20,567	0
Open contracts	150,975	150,975	0
Total	209,040	192,269	**16,771**

[19] At the District Court hearing it was accepted by Mr Braithwaite that the assumed probabilities that the contracts would continue were arguable. In particular, it was accepted that the probability of losing the WEL Networks contracts on review could be 75%, meaning the overall chance of retaining revenue would be 25%. The effect of that is that the probability adjusted monthly revenue calculated in scenario 2 for the WEL Networks contracts would be half ($1,090), and the allocated value/goodwill of those contracts would also be half ($8,013). The total goodwill in scenario 2 would therefore be $184,257, and so the loss in the value of A1 would be $24,783 (being $209,040, the contract price paid for the allocated goodwill, minus $184,257, the actual value of the allocated goodwill).

[20] Judge Spiller issued his judgment on 12 May 2014. He preferred the revenue-based approach of Mr Dobson, and gave the following reasons for his preference:[6]

(a) It better accorded with the comment of Wylie J that an award of $8,800 was patently inadequate to compensate for loss in monthly revenue.

(b) He had satisfactorily addressed the concerns raised by Wylie J in respect to Mr Fieldes' assessment of loss.

(c) His proposal of damages better reflected the fact that Mrs Spooner's overall conduct was misleading and deceptive, conduct that was deemed to have been engaged in by Spooner through its director, Mrs Spooner.

(d) His methodology and calculations were more realistic assessments of what normally happens in the market place and what probably would have prevailed in the circumstances of this case.

The Judge accordingly ordered damages amounting to $50,114.00 to the respondent, plus interest at the prescribed rate from 15 March 2010 (the date of the breach of contract) to 10 August 2012 (the date of Judge Spiller's original judgment). At a subsequent cost hearing $20,171.00 in costs was granted to the respondent. The awarded costs included the expert witness fee of Mr Dobson of $15,678.80, which was considered unreasonable by the Judge and reduced in half. Those sums compare with the respondent's original award of $8,800, and the grant to the appellants of $10,288.11 in costs made to reflect two Calderbank offers made by the appellants prior to the District Court hearing of $6500 on 17 April 2012 and $20,000 on 19 June 2012. Combined with the substantial costs incurred at the first District Court hearing and the first appeal to this Court, it is clear the parties' litigation costs have equalled or outrun the value of this claim.

---

[6] *A1 Commercial Services Limited v Spooner Commercial Limited*, above n 1, at [9]–[12].

Submissions

[21] The appellant's primary submission is that Mr Braithwaite's methodology is to be preferred, and if Mr Dobson's methodology is adopted, it should be adjusted downward to account for the errors in his calculations.

[22] The appellants submit that in assessing damages care must be taken to apply the established principles so as to arrive at the most accurate quantification of the loss caused. Mr Braithwaite's methodology more accurately quantifies the loss. Just because the claim is small does not mean this Court should come to a rough solution and not rely on the best evidence provided to it.

[23] Mr Braithwaite's methodology is said to be preferable for a number of reasons, the first of which is that is properly distinguishes between goodwill inherent to the business (its ability to gain new contracts) and the goodwill value of the contracts presently held. From there it accounts for the probability of the continuance of the all presently held contracts and takes the probability-adjusted value of those contracts and deducts the value of the Bettle and WEL contracts once their value is also adjusted to take into account the likelihood of their cancellation. Mr Dobson's approach does not account for these probabilities.

[24] As well as the evidence and submissions filed in support of Mr Braithwaite's approach, the appellants also critique the approach taken by Mr Dobson. The primary critique is that Mr Dobson's approach is not objective and does not seek to determine the market value of A1; it is subjective in that his approach is to decide what he would have advised A1 had he had all the relevant information and then he assumes the appellants would have accepted that figure. Further it is said that Mr Dobson's approach ascribes no value to the Bettle and WEL Networks contracts, when in fact they should be given some value to account for the possibility at the time of the contract that they would continue. On that basis it is said that Mr Dobson's approach assesses damages retrospectively and fixes them at the time of trial, rather than at the time of contract. This approach crystallises the loss and does not appropriately account for the fact that the loss of the Bettle and WEL Networks contracts was not a foregone conclusion but was rather an unknown

quantity at the time agreement was reached. There are further arguments as to why the date of assessment of damages should be at the time of contract, not the time of trial, which I will elaborate on in due course.

[25] Finally, if Mr Dobson's methodology is preferred, it is argued that it overestimates the respondent's loss. First, it does not take into account that the loss in goodwill related only to the presently-held contracts, and did not affect A1's inherent goodwill. Second, it takes a pro-rata approach in that it does not distinguish between fixed and open-term contracts, nor does it factor either into the equation by assuming that there is a 100% chance that the presently-held contracts would continue into the future. Third, the damages granted must be reduced to take into account the income received by the respondent from the WEL Networks contracts that continued to run for a period of time after the date of contract.

[26] Applying the proposed modifications to Mr Dobson's approach the appellants submits the correct assessment of damages if Mr Dobson's approach was preferred to be $38,776:

A1's turnover per annum	$400,164
A1's goodwill under the contract	$261,300
Goodwill reduced by 20% to account for inherent goodwill	$209,040
Goodwill over turnover	$209,040 / $400,164 = $0.52 per $1 of turnover
Lost revenue	$87,213
Lost goodwill	$87,213 x .52 = $45,350.76
Income received from WEL contracts after date of agreement	$6,574.76
Lost goodwill less income received	$45,350.76 - $6,574.76 = $38776.00
Loss of goodwill	**$38,776**

[27] In response the respondent correctly notes that the method for determining damages should not be elevated to become the test for damages. Determining quantum in these circumstances is a practical question, and the methodologies employed should only be seen as an aid.

[28] Despite that it is suggested by the respondent that Mr Dobson's approach is preferable, primarily because it is the method persons in the market place would have applied. Mr Braithwaite's approach might be sound in theory, but as he conceded in cross-examination he could not recall a single case where he had employed a similar probability-based methodology. Similarly, Mr Dobson testified that he had not seen it employed in his 25 years experience.

[29] Mr Braithwaite's approach is also attacked for being highly subjective. The inputs applied, such as the probability of the WEL contracts continuing in contrast to the other open and fixed term contracts held by A1, are at best estimates. Given the unknowns about the correct inputs to apply, it is submitted that the Court should focus on what loss actually did occur, and thereby shift the date of assessment of loss from the date of breach to the date of trial.

[30] As to the criticisms of Mr Dobson's approach, the respondent notes that the proposition that a reduction was required to take into account A1's inherent goodwill was put to Mr Dobson in cross examination. Mr Dobson declined to reduce his figure, stating that the multiple employed already reflected the reduction for inherent goodwill. It is also submitted that it was justified for Mr Dobson not to distinguish between the pre-existent open and fixed term contracts, because the difference in the likelihood of them continuing into the future, assessed by Mr Braithwaite as 92 and 90% respectively, was in his view negligible.

Discussion

[31] The principles to apply in assessing loss in these circumstances are well settled. The Court must determine the actual market value of A1's goodwill, and then compare that figure with the price paid for it by the respondent. The difference, where caused by the appellants' breach, is the respondent's loss.[7] In determining the market value of A1's goodwill the comments of Tipping J in *Clark v Clark* are relevant:[8]

---

7 *Robinson v Harman* (1848) 1 Ex 850 at 855.

8 *Clark v Clark* (1988) 4 FRNZ 567 at 574.

> It is as well to re-emphasise that the essential question is not what is the right method but what is the right result. The tribunal which is charged with the task of fixing the value should consider all methods suggested on either side as having validity and their weight must be evaluated against all the circumstances of the case. In the end the question is what figure would the hypothetical willing but not anxious vender and his purchaser counterpart be likely to arrive in a reasonably conducted negotiation for the sale and purchase of the shares. It is of the essence of such an exercise as the present that the Court should assess carefully the factors likely to weigh on either side in such a negotiation and must fix what is likely in its view to be the result of genuine and responsibly conducted negotiations conducted by the hypothetical parties.

[32] The starting point, therefore, is to consider methods employed by the parties, and evaluate their weight in the context of this case. Mr Dobson's approach, subject to some form of deduction given the chance the imputed contracts would continue, may seem intuitively attractive, as it is the methodology that would most likely have been applied had the parties engaged in genuine and responsibly conducted negotiations. However, the weight to be applied to that approach must be determined in the immediate context of Wylie J's judgment, in which Mr Fieldes' approach (the approach adopted by Mr Dobson) was considered deficient in a number of respects. It must also be seen in the context of the overriding requirement in the assessment of damages to establish the market value of A1. For the reasons that follow, in my view Mr Dobson's approach fails to address the issues identified by Wylie J and does not accurately assess the diminution in value of A1's goodwill.

[33] In his judgment Wylie J noted deficiencies in both Mr Braithwaite's and Mr Fieldes' evidence. He noted both of the parties' evidence did not distinguish between A1's inherent goodwill and that which represented A1's presently held contracts (the allocated goodwill). Further, Mr Braithwaite's original assessment:

(a) assumed that the open contracts would continue for 30 months, while the fixed-term contracts would not continue or be renewed, and no justification was provided for this assumption;

(b) calculated the loss on what appeared to be the basis that A1 would progressively shut down, and would cease to have any goodwill as and when the contracts came to an end; and

(c) did not provide any reason why the losses suffered as a result of non-disclosure of the Bettle Advertising emails reduced the loss by 50 per cent, nor any reason as to how non-disclosure of the WEL Networks correspondence affected his loss calculation.

[34] As to Mr Fieldes' calculation, Wylie J agreed with Mr Braithwaite's critique that it valued the goodwill attributable to each of the business clients on a pro rata basis, and it was inappropriate to do so. Further, Mr Fieldes' calculations assumed that the Bettle and WEL Networks contracts had no value as at the date of settlement. The calculations also failed to take into account that the respondent had received some value from the WEL Networks contracts as it ran to mid May 2010.

[35] At the second District Court hearing, Judge Spiller stated he was satisfied that Mr Dobson had addressed the concerns expressed by Wylie J. He did not explain why he was satisfied. The respondent submits that it is apparent from the transcript of the evidence, but as the appellants correctly point out, there is a danger in constructing reasoning from notes of evidence, and in fact it is not clear on the face of the transcript why the Judge came to that conclusion.

[36] The first issue is that Mr Dobson, like Mr Fieldes, chose not to distinguish between A1's inherent and allocated goodwill. Although Mr Dobson agreed that a deduction for the inherent goodwill would be appropriate if Mr Braithwaite's approach was accepted, he suggested that the valuation of A1 should derive solely from the revenue it was to receive, because that sum reflects the value of A1's inherent goodwill, and accordingly there is no need to separately account for it. This approach directly contradicts the criticisms made by Wylie J. Although in the context of small business the revenue of a company is the most important (and often determinative) factor in valuation, Wylie J specifically critiqued the parties for failing to account for the inherent goodwill, and he is correct that in this particular case there is value in A1's brand and the new business that brand attracts, independent from the value in the contracts held by A1.

[37] The second issue is that Mr Dobson chose not to distinguish between the fixed and open term contracts, and determined the chance of the Bettle (open term)

contract and the WEL Networks (fixed term) contracts of continuing without regard to the different chance of each being renewed, and in fact set the chance of them continuing at 0%. The effect of this choice was to give no value to the Bettle and WEL Networks contracts. Mr Dobson's response was that, first, the difference between the fixed and open term contracts calculated by Mr Braithwaite was minimal (90% and 92% respectively), and second, it was appropriate to value the Bettle and WEL Networks contracts at zero because that is the value a reasonably informed purchaser would have ascribed to them.

[38] With respect, that argument is only compelling if the damages to the respondent are assessed at the time of trial, and not at the date of contract when the breach occurred. Although the probabilities are reasonably in dispute, I agree with the appellants that the loss of the Bettle and WEL Networks contracts was not a foregone conclusion at the time of contract, and in fact the respondent enjoyed the benefit of the WEL Networks contracts for some months after the date of contract and was also afforded the opportunity to rebid for those contracts after they expired in May 2010.

[39] For these reasons it is not possible to see how Judge Spiller could have been satisfied that Mr Dobson had addressed Wylie J's concerns unless Judge Spiller chose to assess damages at the time of trial and not the date of breach. Judge Spiller did not specifically state that he would assess damages at the date of trial, but at the hearing in front of him it was argued by counsel for the respondent that the Court, in its discretion, could assess damages at the later date if that resulted in a fairer solution. Counsel relied on a number of English and New Zealand cases.[9] Although not substantively argued in front of me, this appears to be the crux of the issue in this case: should damages be assessed after the Bettle and WEL Networks contracts were terminated, in which case Mr Dobson's simple, backwards-looking approach appears preferable, or should they be assessed at the date of contract, in which case Mr Braithwaite's more complicated probability-based assessment appears to more accurately approximate the respondent's loss?

---

[9] *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA); *Golden Strait Corporation v Nipon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353.

Date for assessing loss

[40] In *Law of Contract in New Zealand* the learned authors state:[10]

> The amount of money adjudged to be due to the plaintiff has usually been assessed as at the time when the contract was broken. In *Stirling v Poulgrain* it was recognised by the Court of Appeal that, although this is the general rule, it is not a universal rule and yields to the Court's power in the interests of justice to fix such other date as may be appropriate in all the circumstances.
>
> One purpose of the breach-date rule is that of achieving certainty in commercial contracts. But in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* the House of Lords held that this was subject to the overriding compensatory principle that the damages awarded should represent no more than the value of the contractual benefits of which the plaintiff had been deprived. So if at the date of breach there had been a real possibility that an event would happen terminating the contract or reducing the contractual benefits, the quantum of damages might need to be reduced proportionately to reflect the estimated likelihood of the possibility materialising. But where such an event had already happened by the time damages were assessed, the court should have regard to what had actually occurred. …

[41] My view is that the reasoning in *Stirling v Poulgrain* and *The Golden Victory* does not aid the respondent in this case. In *Stirling v Poulgrain* the rule is framed as an exception to apply in the interest of fairness and justice.[11] In *The Golden Victory* the exception exists when the overriding compensatory principle of contractual damages demands its application.[12] Even if there is a discernible difference between the two approaches, neither applies in the present case. In my view Mr Dobson's methodology overstates the respondent's loss by failing to take into account the probabilities that the Bettle and WEL Networks contracts would not be terminated and by assuming that their termination was a foregone conclusion.[13] The error was specifically pointed out to the respondent by Wylie J, and by failing to correct it Mr Dobson's analysis does not accord with the fundamental compensatory principle that the damages awarded should represent no more than the value of the contractual benefits of which the respondent had been deprived. It would therefore not be fair or just to the appellants to assess damages at the date of trial and not the date of breach, because to do so would be to overstate the respondent's loss. The only discernible

---

10 Burrows, Finn & Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [21.2.2(c)].

11 *Stirling v Poulgrain*, above n 9, at 420 (per Cooke J) and 424 (per Richardson J).

12 *The Golden Victory*, above n 9, at [33].

13 At [38].

justification is that it would be convenient to apply Mr Dobson's simple and straightforward analysis in the context of a small business, but where the Court has been provided with affidavit evidence, that evidence is not to be ignored in the name of convenience or simplicity. As always the function of the Court in this context is to assess the appropriate quantum of damages with the information available to it.

[42] For those reasons I will assess damages as at the date of breach (15 March 2010), and not at the date of trial. It follows that Mr Braithwaite's approach is at least preferable in principle, although I question some of the assumptions made by him in his assessment.

The other reasons of Judge Spiller

[43] It is necessary at this stage to consider the other reasons provided by Judge Spiller for preferring Mr Dobson's analysis. The first, that Mr Dobson's approach better accorded with Wylie J's comment that an award of $8,800 was patently inadequate, does not provide sound reason to distinguish between Mr Dobson's and Mr Braithwaite's respective end results. The award suggested by Mr Braithwaite ($16,771) is nearly double what Wylie J considered to be patently inadequate. It cannot be reasonably inferred from Wylie J's comment what he would have considered adequate, and whether he would have thought Mr Dobson's assessment to be more or less adequate than Mr Braithwaite's. In any event Wylie J concluded that he did not have enough information to fix damages, and his comment as to adequacy has to be assessed in light of that limitation. It was for Judge Spiller to make his own assessment of what was adequate, having regard to the additional information filed.

[44] The third reason, that Mr Dobson's proposal of damages better reflected the fact that the appellants' conduct had been misleading and deceptive, also does not provide good reason for preferring Mr Dobson's methodology. The role of damages, at least in this context, both in contract or under the Fair Trading Act, is not to punish the appellants for their conduct, but to compensate the respondent for its loss. Accordingly, the immorality of Mrs Spooner's conduct is irrelevant to the assessment of the diminution of A1's goodwill caused by the breaches of warranty

and misrepresentation, and does not provide good reason to distinguish between the experts.

[45] The fourth reason, that Mr Dobson's assessment was a more realistic assessment of what normally happens in the market place, has already been considered. Wylie J specifically pointed out that Mr Fieldes' calculations assumed that the Bettle and WEL Networks contracts had no value as at the date of settlement. Although there are difficulties in assessing the value of contracts that may or may not be renewed, the market-value test for assessment of damages must have due regard to those probabilities. That requirement follows from the need to assess damages at the date of breach. Realistically in a market place those factors would receive some consideration, and Mr Dobson's approach is deficient in both of these respects.

[46] For those reasons I am not satisfied by the reasons put forward by Judge Spiller that Mr Dobson's approach should in all the circumstances be preferred.

Quantifying the loss

[47] Finally, I turn to an assessment of Mr Braithwaite's approach, which I consider appropriate in principle. As a preliminary matter, I am satisfied that Mr Braithwaite has answered the concerns of Wylie J. His methodology distinguishes between the inherent and allocated goodwill; it does not adopt an arbitrary distinction between the value of A1's open and fixed-term contracts; it does not presuppose that A1 would progressively shut down; and the affidavit evidence provides reasons for the various assumptions made as to the overall probability of losing the Bettle and WEL Networks contracts in comparison to A1's other open and fixed-term contracts.

[48] I turn now to consider the various assumptions as to probability and value adopted by Mr Braithwaite. These assumptions are contestable and are addressed in turn.

The value of the inherent goodwill

[49] Mr Braithwaite valued A1's inherent goodwill, as opposed the value of A1's presently held contracts, to be 20% of the goodwill value. He came to that conclusion by reviewing the ability of A1 to gain new contracts in the 2007 to 2009 period. This analysis suggested, on average, that new contracts to the value of 10% of existing contracts could be gained each year. That analysis was based on the assumption that new clients' contracts would be for a period of two years. At the hearing Mr Dobson accepted that this figure was acceptable if Mr Braithwaite's approach was adopted.[14] Having reviewed the evidence I am satisfied that the 20% allocation is a reasonable estimate of A1's inherent goodwill.

Probability of retaining revenue from open and fixed-term contracts

[50] Mr Braithwaite considered the open and fixed-term contracts other than the Bettle and WEL Networks contracts had a 92% and 90% chance of retention respectively. He calculated those numbers as follows:

	Probability of review	**Probability of losing review**	**Overall probability of losing revenue**	**Overall chance of retaining revenue**
Other contracts:				
Fixed term contracts	20%	50%	10%	90%
Open term contracts	10%	80%	8%	92%

[51] Although both fixed and open term contracts were able to be terminated at one months' notice, Mr Braithwaite gave the fixed-term contracts a greater probability of review, primarily because the fixed-term nature provides a trigger point for the customer to reconsider whether to renew the contract or not. However, the probability of losing review was considered lower for A1's fixed-term contracts because A1 would be the incumbent provider of the service, and would have the opportunity to bid for the new work and win the work assuming pricing and quality remained competitive.

14 Notes of evidence, p 11, 21.

[52] Mr Dobson did not express a specific opinion on those assumptions except to say that there is very little difference between the two sums reached (90% and 92%) and so it is not a major point. Having regard to Mr Braithwaite's affidavit evidence and method of calculation I consider it reasonable to proceed on the assumptions put forward by him, even if the difference in result reached between the two sums is minor.

Probability of retaining the Bettle contract

[53] The contract with Bettle Advertising was terminated on 18 March 2010, 3 days after the agreement to purchase A1 settled on 15 March 2010. The probability of its retention by A1 was in some doubt before the settlement date. There had been issues with the quality of the cleaning services provided by A1. On 15 December 2009, Ms Simone Baird, the account director of Bettle, emailed Mrs Spooner and stated that Bettle was not happy with the cleaning service provided, and as a result Bettle had decided to terminate the agreement and change suppliers in the new year. After a meeting between Ms Baird and Mrs Spooner, Ms Baird sent another email on 16 December 2009, stating:

> [W]e would like to offer you the opportunity to address the issues raised today and the chance to rectify them. As a result, I would like to catch up again at the end of January to ensure that our expectations have been met.

[54] According to an email sent by Ms Baird to Mr Holden on 16 April 2010, she never heard again from Mrs Spooner until she received a letter in March 2010 informing Bettle that A1 had been sold.

[55] In his affidavit evidence Mr Braithwaite considers there was a 50% probability of review of the Bettle contract, and 100% probability of losing that review if it occurred. He says that a 50% probability of review is justified because the correspondence indicates that the issues between A1 and Bettle appear to have been rectified and the contract continued beyond the date that Bettle had advised they wished to terminate.

[56] I am not satisfied that a reasonable purchaser and vendor with full information would consider the chance of A1 retaining the Bettle contract to be 50%.

Although it had not been cancelled, Ms Baird had made clear in her email on 15 December 2009 that the cleaning contract was up for review. The service provided by A1 may have improved in January and February, but Mrs Spooner failed to get back in touch with Ms Baird to fully resolve the issues and ensure that Bettle's expectations were being met. It is fair to say A1 remained on notice during this period and termination remained a very real possibility. Against that, however, I am satisfied that the Bettle contract should be afforded some value, even if its continuance was unlikely. Overall I consider that there was a 25% chance of A1 retaining the Bettle contract, and a reasonable purchaser and vendor would have valued it accordingly.

Probability of retaining WEL Networks contracts

[57] The viability of A1's contracts with WEL Networks was also marginal. On 23 November 2009, the procurement manager at WEL Networks emailed Mrs Spooner:

> Thank you for your letters requesting we sign a 2 year contract. Enclosed are copies of the current contracts that were signed with the previous owners. We were not obliged to honour these contracts when the A1 Cleaning business was sold, but did so out of good faith. This was despite not having had any advice or correspondence from the previous owners regarding the sale of the business.
>
> The cleaning contracts for 110 & 114 Maui Street expire in May 2010, at which time we will conduct a full review of our cleaning requirements and with the market.

[58] On 1 April 2010 the respondent was informed of the review and was given the opportunity to tender for the contract at its expiry in May. In his written affidavit Mr Braithwaite suggests that although there was a 100% chance of review, A1 was in a strong position of being able to win the tender and retain the work because they were the incumbent, and there was overall a 50/50 chance of A1 retaining the contracts. At the hearing Mr Braithwaite recreated his analysis assuming that the chance of losing the contracts could be as high as 75%. In cross-examination counsel for the respondent noted that the contract was coming to an end in May 2010, and in this sense was more than a review. Also in cross-examination it was conceded by Mr Braithwaite that the competitors to A1 would have the same information as A1, and that the only reason why WEL Networks would go to market

would be if it was dissatisfied with either the service of A1 or the price of its services. The point was then made that A1 would have had to tender at a lower price to retain the contracts, meaning the value would be less than before.[15] Meanwhile Mr Dobson in his evidence stated that he would probably accept that there was a 75% chance A1 would lose the WEL Networks contracts.

[59] I agree with that figure. Although it was not a foregone conclusion that A1 would lose the WEL Networks contracts, their continuance on the same footing beyond May 2010 was in serious doubt. Accordingly, I consider there was an overall chance of 25% of retaining the revenue from the WEL Networks contracts, and a reasonable purchaser and vendor with full information would have valued them accordingly.

Conclusions

[60] Applying those conclusions to the spreadsheet set out in [17] above, the following modifications (set out in bold) are necessary:

Scenario 1 - without knowledge of intention to review				
	Monthly revenue	**Probability of revenue continuing**	**Probability adjusted monthly revenue**	**Allocated goodwill**
Contracts subject to dispute:				
WEL Contracts (fixed term)	4,361	90%	3,924	28,846
Bettle Contract (open term)	1,280	92%	1,177	8,653
Other contracts:				
Fixed term contracts	3,109	90%	2,798	20,567
Open contracts	22,326	92%	20,540	150,975
Total	31,075		28,440	209,040

[15] Notes of evidence, pp 42-43.

Scenario 2 - with knowledge of intention to review				
	Monthly revenue	**Probability of revenue continuing**	**Probability adjusted monthly revenue**	**Allocated goodwill**
Contracts subject to dispute:				
WEL Contracts (fixed term)	4,361	**25%**	**1,090**	**8,013**
Bettle Contract (open term)	1,280	**25%**	**320**	**2,353**
Other contracts:				
Fixed term contracts	3,109	90%	2,798	20,567
Open contracts	22,326	92%	20,540	150,975
Total	31,075		26,158	**181,908**

[61] The following loss of $27,133 is thereby calculated:

	Scenario 1 - allocated goodwill	**Scenario 2 - allocated goodwill**	**Difference**
WEL Contracts	28,846	**8,013**	**20,833**
Bettle Contract	8,653	**2,353**	**6300**
Other contracts:			
Fixed term contracts	20,567	20,567	0
Open contracts	150,975	150,975	0
Total	209,040	**181,908**	**27,133**

[62] Standing back, given the size of the business involved I am satisfied that a reasonable purchaser and vendor would have uplifted the discount derived from the above calculation ($27,133) to account for the risk taken by the respondent. Counsel for the respondent makes the observation that the appellants' methodology implies that the purchaser would be happy to take a gamble in respect to 23% of A1's revenue. I am also cognisant to the comments of Tipping J in *Clark v Clark*, cited above, that emphasise what matters is not the right method, but what is the right result. Overall I consider that a purchaser of a business the size of A1 would be risk adverse and the seller, in concluding an agreement, would be sensitive to that.

[63] Further, without placing too much weight on the fact, I accept that in the normal course Mrs Spooner would have clarified with Ms Baird whether Bettle intended to continue its contract with A1, and the parties may have agreed to place funds in escrow to account for the risk that the WEL Networks contracts would not be renewed. These options were denied to the respondent, and have directly resulted in an overly drawn out and extremely costly period of litigation for both parties.

[64] Accordingly, having primary regard to need to account for what would occur in the circumstances, being the purchase of a small, apparently low risk cleaning business in Hamilton, I am satisfied that an uplift of just under 20% in the deduction calculated above is necessary to account for the identified risk factor, which suggests the market value of the business was no more than $250,000 at the time of contract. That calculation puts the diminution in the value of the allocated goodwill to be $32,500.

Result

[65] The appeal is allowed in part. Judge Spiller's award of $50,114.00 is substituted with an award of $32,500, plus interest at the prescribed rate from 15 March 2010 to 10 August 2012.

[66] The appellants have asked that the issue of costs should be reserved and considered by this Court at a later date. In the interests of the timely resolution of this matter I will not send the issue of costs back to the District Court. Any memorandum from the appellants is to be filed and served at this Court by 5 pm Friday, 28 November 2014, and any memorandum in reply is to be filed and served by 5 pm Friday, 5 December 2014.

………………………………

Woolford J