IN THE COURT OF APPEAL OF NEW ZEALAND

CA164/03

	BETWEEN	NORMAN WILLIAM JACK AND JUDITH ANN JACK Appellant
	AND	MURRAY CLIVE GUY Respondent

Hearing: 5 August 2004

Court: Hammond, William Young, and Chambers JJ

Counsel: B P Henry and D A Watson for Appellants
P J Reardon for Respondent

Judgment: 1 December 2004 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay costs to the respondent in the sum of $6,000 together with reasonable disbursements, including counsel's reasonable travelling and accommodation costs. If counsel cannot agree disbursements, they are to be fixed by the registrar. The appellants' liability for costs is joint and several.

REASONS

HAMMOND AND CHAMBERS JJ

(Given by Chambers J)

Harvesting pine trees

[1] In 1973 Bill and Judith Jack bought a hill country farm just north of Feilding. Some time after purchase they planted pine trees on parts of the farm.

[2] In 1993, Mr Jack decided it was time for at least some of the trees to be harvested and sold. He had discussions with Murray Guy, a farm consultant. There is no dispute that in August 1993, as a result of those discussions, Mr Jack and Mr Guy entered into a contract. The nature of that contract, however, was seriously in dispute in the High Court and remained in dispute before us. Mr Jack contended that he agreed to sell some of the pine trees to Mr Guy. It was Mr Guy's responsibility to harvest the trees and to pay for them. In fact, the harvesting never took place. Indeed, even today, 11 years later, the trees have still not been harvested. Mr Jack claims that this is because Mr Guy breached their contract and failed to harvest the trees and to pay for them. Mr Jack seeks damages for the loss he says he suffered as a result of Mr Guy's breach.

[3] Mr Guy asserts that he never agreed to buy the trees. Rather, he says he agreed to act as Mr Jack's agent and to find a buyer for the trees. He says he did just that. He says he carried out all his obligations to Mr Jack insofar as that was possible. The reason why the trees were not harvested is that Mr Jack had not performed certain tasks he had agreed to do by the time the purchaser of the logs, ITT Rayonier Limited, wanted them harvested.

[4] It was not until 2003 that the dispute between the Jacks and Mr Guy was finally heard. Durie J heard the case and delivered a reserved judgment on 1 August last year. He found in favour of Mr Guy. He held that the contract between the Jacks and Mr Guy was an agency and that Mr Guy had not breached any obligations he had undertaken.

[5] From this judgment Mr and Mrs Jack have appealed.

Issues on the appeal

[6] Mr Henry and Ms Watson appeared for Mr and Mrs Jack on the appeal. Neither was counsel in the High Court. They took only two points on the Jacks' behalf.

[7] The first issue, Mr Henry submitted, was the nature of the agreement. Mr Henry submitted that the agreement was one of sale and purchase: Mr and Mrs Jack agreed to sell certain of their trees to Mr Guy, who was responsible for harvesting them and paying for them. Durie J had found that the agreement was "an agency": *Jack v Guy* HC PMN CIV-2003-454-202 1 August 2003 at [56]. Mr Reardon, for Mr Guy, supported the judge's finding. Mr Henry accepted that, if he failed to persuade us on this ground, the appeal must fail.

[8] If the agreement was one of sale and purchase, then the second issue was whether Mr Guy had breached the contract. Mr Henry contended that he had, because he had refused to harvest or pay for the trees. Mr Henry submitted that in late September 1993 Mr Guy had advised that he would not be continuing with the contract, purportedly on the basis that Mr Jack had not arranged the required resource consent and had not put in the necessary roading to enable harvesting to take place. Mr Henry accepted that Mr Jack had not by that time done those things, but said Mr Guy still did not have the right to cancel. This was because Mr Guy failed to make time of the essence. Further, the time for performance of Mr Jack's obligations had not yet arisen and it was not inevitable that he would not be able to perform.

[9] Mr Guy disputed all this. He contended, as a fallback argument, that, if the agreement was one of sale and purchase, then a term of that agreement was that Mr Jack should obtain a resource consent to permit the tree felling and put in necessary roading before harvesting was due to take place. Mr Guy contended that Mr Jack had failed to do that and that there was no likelihood of his doing that before harvesting was due to take place. As a consequence, Mr Guy contended he was entitled to cancel the contract and did so.

[10] So the second issue becomes: did Mr Guy repudiate the contract or was Mr Jack in breach, the breach being one entitling Mr Guy to cancel?

[11] We shall consider the issues in turn.

Nature of the contract

[12] Mr Jack and Mr Guy met at the Jacks' farm on 2 August 1993. The following day Mr Guy sent a letter to Mr Jack. Because that letter is of fundamental importance in this case, we set it out in full. For the sake of the analysis that follows, we have numbered the paragraphs:

GUY & ASSOCIATES
FARM MANAGEMENT & FINANCE CONSULTANTS
FARM FORESTRY CONSULTANTS

59 MANCHESTER STREET
P.O. BOX 22
FEILDING
TELEPHONE: (06) 323-9918
FAX: (06) 323-9918

3 August 1993

Mr N.W. Jack
"Ngapuhi"
R.D.
REWA

Dear Bill,

RADIATA PINE WOODLOT PRODUCE – REWA

1. Further to our inspection and discussions with you on site yesterday, we are now in a position to confirm nett stumpage prices to you for your logs on a graded basis. We anticipate logging your trees sometime during the summer period, but

as you will appreciate we will be scheduling your harvesting with other woodlots in the general area and will keep you informed on the likely timing of this. We are aware that your preferred harvest time is February/March 1994 and will, if practicable, comply with this however contractors schedules and an early onset of winter have to be considered.

2. The logs will be sold on a maximised graded basis for which you will receive the following nett stumpage prices, exclusive of GST: -

Export pruned peeler 4.1 & 6.1m.	$252 per tonne
Japan C. & I. Sawlog	$146 per tonne
Hyundai peeler sawlog	$73 per M^3
Domestic pulp (Karioi)	$18 per tonne

3. We will be endeavouring to maximise the cutting of the high valued logs. The log specifications for these grades are enclosed. If practicable, depending on volumes yielded, short pruned logs (i.e. less than 4.1m) and post logs will be further graded and sold to best advantage on the domestic market.

4. A logging cost of $22 has been built into our calculations of net stumpage. This may be on the high side and if so then the difference will be credited to your net proceeds. The provision of internal roading and tracking and its cost will be your responsibility.

5. The logs are marked by ITT Rayonier with proceeds paid fortnightly to us and net stumpages forwarded to you within 7 days of our receiving and paying contractors.

6. Should there be any significant price increases between now and harvest, these will be added to our quoted net prices.

7. As discussed Resource Consents, further investigation of logging technique and road siting, are necessary. Therefore confirmation of our harvesting contract is vital to ensure adequate time for planning and preparation. Confirmation within 7 days would be appreciated. Costs associated with Resource Management application, consent and requirements are to be met by you.

8. If acceptable, please sign one copy of this letter as acceptance of our terms and your authority to us to proceed with harvesting. As we will be creating invoices could you please supply your GST number.

9. Should you have any queries do not hesitate to contact us.

Yours sincerely,
GUY & ASSOCIATES
Farm Management & Finance Consultants
Farm Forestry Consultants

Murray C. Guy, M.Agr.Sc.(Hons), M.N.Z.S.F.M.
PRINCIPAL

Accepted by……..

GST Number……. Date…….……

[13] Attached to the letter were separate sheets containing the log specifications for each grade of log mentioned.

[14] Mr Jack did sign the letter and send it back to Mr Guy. He did not do it within the seven days stipulated: Mr Guy in fact contended he did not receive the acceptance until 16 August. But nothing turns on that. Durie J accepted that the letter of 3 August was a crucial part of the parties' contractual relationship. There was no dispute about that before us. Although the agreement was not made on 3 August, we shall refer to it as "the 3 August agreement" as that was the date of Mr Guy's letter which is at the heart of it.

[15] Durie J held that this letter (once accepted) did not constitute an agreement for sale and purchase of the trees. Rather, he said that it created an agency. His Honour did not attempt to elucidate what the terms of the agency were. Nor are Mr Reardon's submissions any more helpful in terms of identifying precisely what, on the agency argument, Mr Guy was undertaking to do.

[16] With respect to Durie J, we consider that the contract between Mr Jack and Mr Guy was a contract of sale and purchase. Mr Guy's promises are inconsistent with a mere agency arrangement. In paragraph 1, he promises to log the trees. In paragraph 2, he promises Mr Jack what he will receive for the logs. In paragraph 3, he promises to maximise the cutting of the high valued logs. In paragraph 4, he promises an increased price if his logging cost of $22 turns out to be lower. In paragraph 5, he promises when he will be paying Mr Jack. In paragraph 8, he refers to this letter, once accepted, as being his authority to proceed with harvesting. Certainly in its own terms none of that is consistent with this letter creating an agency.

[17] We turn to consider the judge's reasons for finding that the 3 August letter constituted merely the creation of an agency relationship. First, at [37], the judge referred to the letterhead, in which Mr Guy was referred to as "neither a lumberer nor a wood buyer but a farm and forestry consultant". With respect, we see nothing in that point. The heading to the letter did not constitute part of the contract. In any event, Mr Guy's normal occupation could not override the clear terms of the parties' promises to each other. Further, as we shall show later, Mr Guy, as a result of a contract he had earlier entered into with ITT Rayonier Limited ("Rayonier"), was obliged to source 4000 m^3 of logs. Since he was bound to sell those logs to Rayonier and since he did not own a timber plantation himself, it followed he was bound to buy logs if he was not to breach his Rayonier contract. He was therefore a "wood buyer", whatever his letterhead might proclaim.

[18] The judge accepted that paragraph 1 did indicate "that what was involved was indeed a sale": at [38]. But the judge went on to say that, notwithstanding that, the paragraph "is not inconsistent with an agency in which [Mr Guy's] firm is acting in no larger role than that of an advisor". That proposition requires closer analysis. What is the judge saying Mr Guy's promise is? It is important to recognise that Mr Guy has never contended that he was acting as agent for Rayonier when entering into the contract with Mr Jack. What, then, is he promising? The judgment under appeal does not make this clear. Is it a promise that he will find a buyer who will log the trees? Or is it merely a promise to use reasonable endeavours to find such a buyer? Neither is consistent with the clear words of the first paragraph. There is nothing tentative about the promise to log the trees (provided, of course, Mr Jack met his obligations, as set out later in the letter). Nor is there any suggestion that anyone other than Mr Guy (or his contractor) will be doing the logging. With respect to the judge, we are simply unable to accept that this paragraph is consistent with Mr Guy's role being that merely of an advisor to Mr Jack.

[19] Durie J did not refer to paragraph 2 of the letter. But he thought that "the third to sixth paragraphs [were] indicative of an agency arrangement": at [39]. He referred in particular to the third paragraph commencing "We will be endeavouring…". That is certainly not inconsistent with a sale: it amounts to a promise by the logger (buyer) that he will use reasonable endeavours to maximise the

cutting of the high valued logs, obviously intending thereby to reassure Mr Jack that the cutting would be done in such a way as to maximise his returns. Durie J considered that, were this a sale of a forest, "an explanation of [Mr Guy's] on-sale proposals for post logs, the marketing of logs by Rayonier, and the reference to net stumpage (for the return after logging and other expenses) would all be inexplicable": at [39]. With respect, they would not be. It was relevant to tell Mr Jack who would ultimately be marketing the logs, because Mr Jack's payments, as to timing, were contingent on when Rayonier paid Mr Guy. The reference to net stumpage is quite consistent with a sale. Mr Guy was informing Mr Jack that he had calculated a logging cost of $22 in his calculation of net stumpage. If his logging cost was lower than that, then he promised that the difference would be added to the price to be paid to Mr Jack. There is nothing inexplicable about such a pricing arrangement on a sale.

[20] The judge discussed paragraph 7 of the letter in which Mr Guy had referred to "our harvesting contract". Durie J accepted that that reference was "more suggestive of an outright sale of the cut trees than it is of an agency". He gave no explanation as to why Mr Guy would have referred to the agreement as being "our harvesting contract" if Mr Guy was not in fact undertaking to harvest.

[21] The judge then referred to paragraph 8 where Mr Guy had asked Mr Jack to sign and return a copy of the letter, signifying his acceptance of "our terms and [his] authority to [Mr Guy] to proceed with harvesting". The judge thought that wording consistent with either a sale and purchase or an agency arrangement. With respect, we disagree. If this were merely an agency arrangement, then its signing could not possibly give Mr Guy authority to harvest, because Mr Guy would not be the harvester. Presumably his obligation was to find one, who would then enter into a contract with Mr Jack, if Mr Jack was satisfied with the proposed harvester and the terms the harvester was offering. But that is not what the 3 August letter provides. Nor did Mr Guy's proposed harvester ever make or attempt to make a contract with Mr Jack.

[22] The judge considered that his interpretation of the 3 August letter was reinforced by other "contextual evidence": at [43]. In particular, His Honour referred

to an agreement entered into between Mr Guy and Rayonier earlier in 1993 ("the Rayonier agreement"). That agreement, which is dated 14 April 1993, was in written form. Under it, Rayonier agreed to purchase and Mr Guy agreed to sell logs specified in the schedule to the agreement upon the terms contained in it. We shall set out these terms in some detail because we consider that they, far from reinforcing an agency relationship between Mr Jack and Mr Guy, in fact reinforce the conclusion that the 3 August agreement was one of sale and purchase. Under clause 2 of the Rayonier agreement, Mr Guy agreed to deliver to Rayonier between 14 April 1993 and 14 October 1993 approximately 4,000 m^3 of logs. The logs were to be sourced from "various blocks in the Manawatu, Horowhenua and Rangitikei area". The purchase price for the logs was specified and was exclusive of GST, which was payable by Rayonier: see clause 3. (GST was, of course, payable because Mr Guy as seller was making a supply of goods to Rayonier.) It was Mr Guy's responsibility to transport the logs to the Port of Wellington: see clause 5. Title and risk in the logs passed from Mr Guy to Rayonier upon Mr Guy delivering the logs at Wellington: see clause 6. Mr Guy warranted that, upon the passing of title, no other person would have any title or other interest in the logs delivered: see clause 6.1(a). It was Mr Guy's obligation to insure the logs, at his cost, until title to the logs passed to Rayonier: see clause 7. Mr Guy had the responsibility to employ and pay contractors for work he had to do under the contract (eg harvesting and delivering the logs): see clause 11. Importantly, clause 15 provided that the written agreement constituted the entire agreement between the parties "and there is no other agreement written or oral". The parties further agreed that "no amendment to this Agreement shall be effective unless made in writing and signed by both parties".

[23] Nothing could be clearer than that, by that agreement, Mr Guy was undertaking to source logs meeting Rayonier's specifications which he would then sell and deliver to Rayonier. It could not possibly be the case that Mr Guy was entering into that contract as agent. For a start, he had not at that stage sorted out exactly where he was going to source the logs. But further, it is completely inconsistent with the written terms of the Rayonier agreement that Rayonier was agreeing to contract with a number of individual woodlot owners. The judge appears to have considered that Mr Guy entered into that agreement as an agent, and that this then in some way confirmed that his relationship with Mr Jack was also that of an

agent. We cannot agree. It was essential under the Rayonier agreement that Mr Guy acquire title in the logs which he was bound to supply and deliver to Rayonier. His subsequent agreement with Mr Jack was a step taken to acquire title to Mr Jack's logs, obviously at the time logs he intended to sell on to Rayonier pursuant to his obligations to that company.

[24] The confusion in Mr Guy's stance is reflected in Mr Reardon's submission before us. He appears to consider that the High Court found that a contract was formed between Mr Jack and Rayonier, pursuant to which Mr "Jack was selling the trees directly to Rayonier". In fact, Durie J made no such finding. And indeed, Mr Reardon does not explain how and when this alleged agreement came into existence. There is no evidence that anyone from Rayonier ever saw the 3 August letter and agreed to its terms. Nor is there any evidence that Mr Jack ever saw the Rayonier agreement and agreed to be substituted for Mr Guy, or indeed that Rayonier ever agreed to such a substitution. Further, there are clear inconsistencies between the two agreements, not least on price. Mr Jack and Rayonier were never in a contractual relationship, and, contrary to Mr Reardon's submission, Durie J never found that they were.

[25] We have not overlooked that the 3 August agreement appears to have been subject to an oral condition that Rayonier would have to approve the suitability of the trees, something which happened later in August. That was no doubt a sensible precaution on Mr Guy's part, as he clearly would not want to buy trees which were not going to be suitable for supply by him under the Rayonier agreement. We do not see this as assisting the agency argument. It was always clear in the 3 August agreement that the trees would eventually be finding their way to Rayonier.

[26] On the first issue, we find in favour of Mr Jack. The agreement between him and Mr Guy was one of sale and purchase.

[27] We therefore proceed to consider the second issue.

Who breached the agreement?

[28] Each party to the contract alleges the other breached it. To work out who is right requires a close analysis of the parties' agreement.

[29] For the reasons already given, we have found that Mr Guy undertook the obligation of buying and harvesting the trees. As to when that harvesting would take place, we refer to paragraph 1 of the 3 August letter:

> We anticipate logging your trees sometime during the summer period, but as you will appreciate we will be scheduling your harvesting with other woodlots in the general area and will keep you informed on the likely timing of this. We are aware that your preferred harvest time is February/March 1994 and will, if practicable, comply with this however contractors schedules and an early onset of winter have to be considered.

[30] Effectively the parties' arrangement on timing of harvesting was this:

1. Mr Guy will harvest the logs at some time before the winter of 1994, in the same general period as he is harvesting other woodlots in the general area.

2. Mr Guy's present intention is that harvesting will take place in the summer period.

3. Mr Guy will keep Mr Jack informed of the likely time of harvesting.

4. Subject to clause 1, the trees will be harvested at Mr Jack's preferred time, namely February/March 1994.

[31] Mr Guy was taking something of a risk when setting out such timing, as under his contract with Rayonier, he was bound to deliver the logs by no later than 14 October 1993. Perhaps he thought that there would be a degree of flexibility on Rayonier's part.

[32] In any event, an important event occurred on 3 September 1993. Mr Guy received a fax from Mark Allardice, at that time Rayonier's Southern North Island Log Procurement Supervisor. Apparently the fax was to the effect that the market had steadied and that Rayonier "were not interested in any new contracts at the old prices and no longer wanted certain grades". Later that month, Mr Allardice rang Mr Guy again. He said that the market was falling "and that Rayonier needed to market the logs it was committed to as soon as possible". Mr Guy in his evidence thought "that it had to be done by the end of October". That was in fact in accordance with Rayonier's contract with Mr Guy. If Mr Guy thought that he was going to have much leeway under it, Mr Allardice's telephone call would have disabused him. (As a matter of interest, it does appear that subsequently the contract period under the Rayonier agreement was extended to 8 November 1993.)

[33] The second call from Mr Allardice caused Mr Guy to act. According to his evidence, he then approached the various woodlot owners whose forests were yet to be harvested. He told them about Mr Allardice's advice. He said in evidence, "I believe I told each of them I was worried that Rayonier might try to pull out of the contract unless the forest was harvested promptly." It is unclear as to the basis for the advice Mr Guy gave to the woodlot owners. Mr Allardice had not said anything contrary to Rayonier's contract with Mr Guy. Mr Guy said that he spoke to Mr Jack at that time. According to Mr Guy, he told Mr Jack that Rayonier had been in contact with him, that the market was falling, and that they [Rayonier] wanted all woodlots harvested that they had a commitment to. He asked Mr Jack whether he had obtained his resource consent and had done the necessary roading to facilitate the harvesting process. Mr Jack said that he had not. According to Mr Guy, he then told Mr Jack that his lot needed to be harvested in conjunction with the others. He said that, as a result of Mr Jack not being ready, Rayonier were saying to him that they would have to bypass his woodlot. Mr Jack said, according to Mr Guy, that he still wanted his woodlot harvested. Mr Guy replied that that would be something that Rayonier would have to decide in that they were telling him [Mr Guy] that they wanted his [Mr Jack's] woodlot now, in conjunction with the other woodlots that they were committed to. Later in evidence, Mr Guy said that he had told Mr Jack in the course of this conversation that, in view of the fact he was not ready, "he would have to take pot luck with the market".

[34] There are some difficulties with Mr Guy's account of that conversation. This was the first time Mr Guy knew that Mr Jack was not ready. In light of that, it is somewhat difficult to see how Mr Guy was able to say that "as a result of him not being ready Rayonier were saying to me [i.e. Mr Guy] that they would have to bypass his woodlot". Perhaps the explanation is that Mr Guy has by error kaleidoscoped two conversations with Mr Jack, in between which Mr Guy had been back to Rayonier.

[35] There is no rival account of this conversation (or these conversations) as Mr Jack denied that he had had any telephone conversation with Mr Guy at that time. Durie J did not believe him. He appears to have accepted Mr Guy's account: at [17]. Mr Henry acknowledged that on appeal he had to accept that factual finding. He was prepared to argue this matter on the basis that there was a conversation between Mr Guy and Mr Jack in late September 1993 and that the gist of it was as relayed by Mr Guy. The enquiry therefore becomes: what are the legal consequences of that conversation?

[36] The first question which must be answered is whether Mr Guy was within his rights in stipulating to Mr Jack towards the end of September 1993 that the trees would have to be harvested by the end of October. In our view, Mr Guy was within his rights. He had always stipulated that the harvesting was to be "in the same general period as he [was] harvesting other woodlots in the general area". It is true that harvesting was now to take place before the summer, but, in the 3 August agreement, he had never given more than a "present intention" that harvesting would take place in the summer. There is no evidence that, as at the date of the 3 August agreement, that was not Mr Guy's intention. We appreciate that under the Rayonier agreement he was obliged to deliver the logs by 14 October, but he appears to have had an expectation that later delivery would be satisfactory for Rayonier. Indeed, it appears that his expectation in that regard was reasonable; it was only the fall in wood prices which became evident in September 1993 that caused panic within Rayonier. Rayonier clearly decided that harvesting should take place urgently so that they could offload the logs they had bought as quickly as possible, before prices perhaps deteriorated further. Although, in terms of clause 4 of our reformulation of the timing obligation, the trees were to be harvested, if practicable, at Mr Jack's

preferred time, namely February/March 1994, that promise was always subject to the overriding requirement that harvesting of Mr Jack's lot was to take place in the same general period as the harvesting of other woodlots in the general area. There is no suggestion in the evidence that the hauling forward of harvesting was done in bad faith or for an improper purpose.

[37] It is common ground that, as at the date of this telephone call in late September 1993, Mr Jack was not in a position to allow harvesting on his farm to take place. That was because he had not by that time obtained the necessary resource consent. Nor had he put in the roading required before harvesting was to take place. He had to provide and pay for internal roading and tracking: see paragraph 4 of the letter of 3 August 1993. He was to obtain and pay for the necessary resource consent: see paragraph 9 of the same letter. By the end of September, Mr Jack had done nothing on either matter.

[38] Mr Jack blamed his lack of action in applying for the resource consent on Mr Guy. He said that Mr Guy had promised to send a harvesting plan and that the Manawatu Wanganui Regional Council required such a plan to support the application for consent to cut the trees. There was no reference to Mr Guy having any such obligation in the 3 August letter. Mr Guy disputed that he had ever agreed to provide the harvesting plan and Durie J believed him: at [12].

[39] Mr Jack explained his inactivity on the roading front on the basis that he was waiting for Mr Guy to send his roading expert before taking any steps himself. Once again, Durie J did not believe Mr Jack's explanation: at [14] and [16]. There is nothing in the 3 August agreement to support the view that Mr Guy had any obligations with respect to roading. Insofar as Mr Jack alleged that the obligation had arisen from an oral amendment of the agreement on or about 27 August, Durie J found such alleged variation unproved: at [13]. Mr Henry accepted that he could not challenge that finding, which was essentially a credibility finding.

[40] So we reach the position that, at the time of the telephone conversation between Mr Guy and Mr Jack in late September 1993, Mr Jack had taken no steps on either matter. When Mr Guy learned this, he concluded that it was not going to be

possible for Mr Jack to be ready so that his trees could be harvested in the same general period as he was harvesting other woodlots in the general area. There is no doubt, on Durie J's findings, that Mr Guy then indicated to Mr Jack (whether in that conversation or another shortly after) that the deal was off. Was that intimation a wrongful repudiation of the 3 August agreement or was it a valid cancellation?

[41] There was some discussion in counsel's submissions as to the time within which Mr Jack had to obtain the resource consent. (We note at this point that Mr Henry in his submissions appeared to overlook completely Mr Jack's obligation to put in roading. We shall return to that matter shortly.) Mr Henry submitted that there was no stipulated time for the performance of the obligation to obtain resource consent, with the consequence that by implication Mr Jack had a reasonable period of time in which to obtain it. If Mr Guy was concerned about timeliness in this regard, he had to give notice making time of the essence. Only if the resource consent was not obtained within a reasonable period of such notice being given could Mr Guy cancel the contract.

[42] We do not agree with that submission. We consider the time for performance of Mr Jack's obligations to obtain the resource consent and to put in the necessary roading was fixed under the contract. Those obligations clearly had to be fulfilled before the nominated time for harvesting. If those obligations were not fulfilled by the time of harvesting, then clearly Mr Guy would have been entitled to cancel the 3 August agreement. The performance of those obligations was essential to Mr Guy, as he would not be permitted by law to harvest the trees without the requisite resource consent having been obtained. But that was not the position as at the end of September. Mr Guy was not ready immediately to harvest the trees, although he wished to do so by the end of the following month. Mr Jack was not then in breach of the 3 August agreement, as the time by which his obligations had to be fulfilled had not yet arrived. Mr Guy was not at that time entitled to cancel the contract on the basis that Mr Jack had repudiated the agreement or on the basis that Mr Jack had broken a stipulation in the contract: see Contractual Remedies Act 1979, s 7(2) and (3)(b). In the circumstances, the law did not require Mr Guy to make time of the essence. He had no need to do so.

[43] The real question in this case was whether it was clear that Mr Jack was going to default on his obligations. Under s 7(3)(c) of the Contractual Remedies Act, a party to a contract may cancel it if it is clear that the stipulation in the contract will be broken by another party to that contract. It is Mr Jack's contention that it was still possible for him to comply with his obligations in time. Mr Henry submitted that the evidence demonstrated that a resource consent could normally be obtained in 20 working days or, if urgent, within "a couple of days". He submitted that Mr Guy had not established on the balance of probabilities that Mr Jack's failure was clear. The legal consequence therefore was that Mr Guy's information was a repudiation of the contract, not a cancellation.

[44] The test under s 7(3)(c) was comprehensively discussed by Blanchard J in *Brooklands Motor Company Limited (in rec) v Bridge Wholesale Acceptance Corporation (Australia) Limited* (1993) 7 NZCLC 260,449. In that case, His Honour concluded that the test to be applied is "whether a reasonable bystander, aware of all relevant existing and future facts, would have believed that by the time of the purported cancellation it was clear that there would be a breach of the requisite essentiality or seriousness": at 260,461. That test appears to meet with the approval of the editors of the leading New Zealand contract text: see Burrows, Finn & Todd *Law of Contract in New Zealand* (2ed 2002) at 632-3. We apply Blanchard J's test.

[45] The first comment we make is as to onus of proof. Mr Henry submitted, without citing authority, that the onus was on Mr Guy to establish that Mr Jack's anticipated breach was inevitable. We do not accept that. It is Mr Jack who has brought a claim for damages. An essential part of that claim, which Mr Jack must prove, is that Mr Guy breached the contract – in this case, by repudiating it. It is for Mr Jack to establish that Mr Guy's acts amounted to a repudiation rather than a cancellation (as he claims). It is accordingly for Mr Jack to establish, on the balance of probabilities, that the reasonable bystander would not have believed it was clear that Mr Jack would not fulfil his obligations in time.

[46] Secondly, there is no evidence as to how quickly Mr Jack could have obtained a resource consent in 1993. The only evidence to which Mr Henry referred us came from Aaron Madden, a Land Management Officer (Soils) for the Manawatu

Wanganui Regional Council. He gave evidence that he was satisfied that the application could have been dealt with on a non-notified basis "provided it was supported by the necessary documentation". He also noted that councils had a legal obligation to process non-notified consents within 20 working days – and indeed, in certain circumstances of urgency, consents had been made available in an even shorter time.

[47] But that 20 working day period (approximately a month) starts running from the date on which a council receives a proper application, with all supporting documentation. At the time of Mr Guy's conversation with Mr Jack in late September, Mr Jack had done nothing to get this application under way. There is no evidence as to how quickly he could have got the necessary information. Clearly it would have required roading information, but at that stage Mr Jack had made no effort to obtain a roading expert for advice.

[48] There may be some doubt as to the extent to which, when applying the "reasonable bystander" test, the court may look at subsequent events. In so far as that is permissible, we would observe that Mr Jack's optimism now that he could have got the resource consent in double-quick time is not supported by the evidence of what later happened when he did try to get a resource consent. Mr Jack in subsequent years made three different applications for a resource consent to log and extract his trees.

[49] The first was made on 15 April 1996. An officer at the regional council made the following annotation on the application on 17 April: "trees are being removed from difficult area (erosion). Aaron [Madden] will need to do inspection – arrange with him to visit site, I'll come as well as this will not be an easy consent to write conditions for." Mr Madden did in fact make "an initial site inspection" on 24 April. He noted that Mr Jack had not finalised "the extraction route for the logs". The location of the proposed new tracking was "dependent on further recommendations from roading consultants/contractors". Mr Madden noted that "a critical section of the proposed extraction route is far too steep for conventional logging trucks". Mr Madden recommended that the application be put on hold until the council received the additional information on track siting from Mr Jack. It would appear

that nothing further was heard from Mr Jack. On 1 May the following year, the council wrote to Mr Jack withdrawing [sic] his application "due to the time lapse since [the] request" for a resource consent.

[50] The next application was made two years later, on 27 March 1999. The council responded on 31 March 1999 requesting a harvesting plan, a tracking plan, and written approval of neighbours. The council also noted that "a preliminary assessment of [the] application" by Mr Madden had raised concerns. Mr Madden said that he was concerned with the potential impacts of intended tracking across a stream "to the extent that at this stage he does not support tracking through the streambed". By 21 October 1999, the additional information requested had still not been provided.

[51] That appears to have led Mr Jack to make a fresh application (his third) on 27 October 1999. On this occasion a resource consent was granted – on 24 November. The consent was subject to 16 conditions. A harvesting plan was still required: condition 15 did not permit any harvesting or tracking until the harvesting plan had been approved in writing. That harvesting plan was not approved until 9 May the following year.

[52] While that subsequent history is not definitive, it is scarcely supportive of Mr Jack's optimism that he could have got the resource consent in time for harvesting by the end of October or early November.

[53] The third point we would make is that we have to date been concentrating solely on the likelihood of Mr Jack's getting the resource consent in time. But that was not all that he had to do: he also had to put in place the necessary roading. Mr Henry made no reference to that in his submissions. He concentrated purely on the resource consent. The roading could not be done until the resource consent was granted. There is no expert evidence as to what the council's roading requirements would have been in 1993. We do know, however, what their requirements were in 1999, as they are detailed as conditions to the resource consent. We do not set out the details of the tracks, culverts, and drains required. Suffice it to say that it is

obvious that putting in the tracks to the requisite council standards would have required some considerable time.

[54] We also attach some significance to Mr Jack's reaction (or perhaps lack of reaction) to Mr Guy's advice that the sale would not be going ahead. If Mr Jack had truly believed that he could get the resource consent and put in the roading in time, one would have expected some protest from him. So far as the evidence discloses, there was none. He appears to have accepted that Mr Guy was acting within his rights. The lack of adverse reaction provides support for the view we have reached on the other evidence.

[55] Based on the evidence we have – somewhat sparse though it is – we are quite satisfied that a reasonable bystander would have believed in late September 1993 that it was clear that Mr Jack would not be able to fulfil his obligations with respect to a resource consent and roading by the time of harvesting. There can be no doubt that the parties had impliedly agreed that the performance of those obligations falling on Mr Jack was essential to Mr Guy: indeed, he could not fulfil his obligations unless Mr Jack first fulfilled his. And Mr Guy had always made it clear that his undertaking to harvest and buy Mr Jack's trees was contingent on the work being done at the same time as other woodlots in the area were harvested.

[56] It follows, therefore, that we are satisfied that Mr Guy was entitled to cancel the 3 August agreement pursuant to s 7(3)(c) of the Contractual Remedies Act and that he did so. It follows therefore that Mr Jack's claim for breach of the 3 August agreement must fail.

Result

[57] For different reasons from those articulated by Durie J, we have found that Mr Guy was not in breach of the 3 August agreement and was entitled to cancel and did cancel that agreement in late September 1993.

[58] Accordingly, we dismiss the appeal.

WILLIAM YOUNG J

[59] I agree that the appeal should be dismissed but my reasons differ from those which appear in the judgment prepared by Chambers J.

[60] Given that the outcome of the case is the same on my approach as it is on that preferred by Hammond and Chambers JJ, and that the issue is simply one of fact, I see no point in giving elaborate reasons.

[61] I see four possible ways of analysing Mr Guy's role:

(a) He could have been acting independently as an entrepreneur, buying and selling timber on his own account. This is what Mr and Mrs Jack allege and is how Hammond and Chambers JJ view the situation.

(b) He could have been acting as agent for Mr and Mrs Jack. This is what he alleges and Durie J found to be the case.

(c) He could have been acting as agent for Rayonier.

(d) He could have been acting as agent for both Mr and Mrs Jack and Rayonier.

[62] I doubt if Mr Guy analysed his role with precision. He probably just saw himself as an intermediary, bringing buyers and sellers together and making a profit. I think that this may explain the not entirely consistent trail of documents which he created.

[63] I agree that the 3 August 1993 letter which Mr Guy sent to Mr Jack and the 14 April 1993 agreement between Mr Guy and Rayonier, particularly if viewed together but in isolation from the facts as a whole, strongly indicate that Mr Guy was acting as an entrepreneur, obtaining a commitment from Rayonier to acquire logs (and thus committing himself to their supply) and then buying logs to meet his obligations. It is, however, not entirely uncommon for a person who is ostensibly (ie on the face of the relevant contractual documentation) a party to a contract to be held

to have been only an agent. On this basis, the status of Mr Guy in his dealings with Mr Jack involves an issue of fact and not just construction.

[64] On the findings of fact made by Durie J, the letter of 3 August 1993 was preceded by discussions on 2 August between Mr Guy and Mr Jack in the course of which Mr Guy made it clear that the prices which were to be agreed would be subject to Rayonier's approval and that Rayonier would also be required to inspect the trees and confirm that it was willing to take them. The first of these two points was picked up in the letter of 3 August as, on the findings made by Durie J, Mr Guy spoke by telephone to Rayonier before sending the letter of 3 August. The second of these points (inspection of the trees by Rayonier and confirmation of its willingness to take them) was not.

[65] Durie J also found that a Rayonier representative, Mr Mark Allardice inspected the trees in 25 August 1993 and duly confirmed that Rayonier was prepared to take them and that Mr Jack was told of this the next day.

[66] I think it possible to treat the 14 April 1993 "agreement" from Rayonier as an ill-expressed commitment by Rayonier to take approximately 4,000 m^3 of logs which Mr Guy was to procure and thus to see his later agreement with Mr and Mrs Jack as part of that procurement. On this basis, the dealings direct between Mr Jack and Mr Guy in August 1993 brought about a contract between Mr and Mrs Jack as vendors and Rayonier as purchaser which was eventually finalised on 26 August 1993 when Mr Jack was told that Rayonier would take the trees.

[67] Viewed in this light, I think that the approach taken by Durie J was open to him and indeed I think preferable to the view that Mr Guy was a principal. There are indeed, as Durie J pointed out, aspects of the 3 August 1993 letter which are suggestive of agency. As well, and importantly, the externalities of Mr Guy's role are indicative of him acting as an agent rather than as an entrepreneur. Further, I think it of at least some significance that when problems arose, Mr Jack himself seems to have acted on the basis that he had been in contract with Rayonier.

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