

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

**CIV 2011-404-5622**

BETWEEN	OLSEN CONSULTING LIMITED First Plaintiff
AND	JUST OURS ENTERPRISE LIMITED Second Plaintiff
AND	R S & G M FURNISS LIMITED Third Plaintiff
AND	AVINA HOLDINGS LIMITED Fourth Plaintiff
AND	SHREEKRISH HOLDINGS LIMITED Fifth Plaintiff
AND	D J GOODS TRANSPORT LIMITED Sixth Plaintiff
AND	SANVAR HOLDINGS LIMITED Seventh Plaintiff
AND	BACHN LIMITED Eighth Plaintiff
AND	KGC TRADING LIMITED Ninth Plaintiff
AND	GOODMAN FIELDER NEW ZEALAND LIMITED Defendant

Hearing: 25 - 28 October 2011

Appearances: B J Upton & T K Cunningham-Adams for Plaintiffs  
R G Simpson & J Q Wilson for Defendant

Judgment: 23 November 2011

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**JUDGMENT OF KEANE J**

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This judgment was delivered by \_\_\_\_\_ on 23 November at 4.30 pm  
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:

Ben.Upton@simpson grierson.com for Plaintiffs

Ralph.Simpson@bellgully.com for Defendant

[1] In 2008 Goodman Fielder introduced a new uniform agreement to govern its relationship with its delivery contractors, all or most of whom are one man companies, some 130 nationwide. To do this it terminated by notice, as it was entitled to do, the contracts of its then contractors. It resumed its relationship with many, perhaps most, under the terms of the new agreement. It also engaged some new contractors.

[2] Under this new agreement contractors were to be paid a commission fee fixed by Goodman Fielder on the basis of its 'costing model'; a model that was either the same as or closely akin to the model on the basis of which contractors' fees had been calculated under the contracts the 2008 agreement replaced.

[3] When contractors entered the 2008 agreement, Goodman Fielder told each of them what commission fee they could anticipate and showed each a 'cost model', a statement of their assumed efficient delivery costs (their total capital, operating and labour costs with a percentage margin) and their assumed efficient merchandising costs (a labour cost without a margin for shelving the product delivered).

[4] Goodman Fielder did not then disclose to them how it had fixed each of those costs or the hours it had allowed them to complete deliveries and merchandising. Nor did it disclose the formula by which it had translated their assumed annual delivery costs to a cost per unit expressed in the commission fee they were to receive for volumes delivered. The contractors, as the agreement itself says, had to decide for themselves whether that fee, however calculated, would allow them an adequate income, when set against their likely outgoings and hours of work. They must have accepted that it would.

[5] In August 2011, after having made an extensive unilateral review of each contractor's assumed efficient delivery and merchandising costs (a review principally of the distances they travelled set against GPS and public records, and the time they took to travel and to shelve the product, the latter set against time and motion studies), Goodman Fielder notified contractors of the result. It notified a few that their fees were to remain the same, or might even increase. It notified most that their fees were to reduce. The nine, whose proceeding this is, were amongst the most

severely affected. Their fees, they were told, were to reduce between 14 - 42%. (That has since been revised, but their fees are still presently to reduce between 11 - 26%.)

[6] On 29 August 2011 these nine contractors, and 16 others, contested Goodman Fielder's exercise of the right of unilateral review on which it had relied; that given it by clause 9.3 of the agreement to 'review and revise rates ... at any time ... by giving notice in writing to the contractor', subject only to that revision being based on its 'costing model', a copy of which the contractor was entitled to. Their right to an annual review, they contended, had to come first. Goodman Fielder's right was complementary and subordinate. They invoked the disputes process.

[7] Goodman Fielder, for its part, held to its right to make these unilateral revisions on review and to give them immediate effect, subject only to doing so without malice, or caprice, and without being arbitrary. These nine contractors, it contended, and perhaps the 16 others, had since 2008 been receiving unjustifiable windfall returns, not enjoyed by others, or not to the same extent.

[8] On 12 September 2011, therefore, the nine brought this proceeding seeking declaratory and interim and final injunctive relief, contending that Goodman Fielder was in breach of contract and of a fiduciary duty to act in good faith and by a fair process. And on 13 September 2011, at a case conference before Winkelmann J, Goodman Fielder undertook not to reduce their commission fees until after the hearing just recently concluded; and they and Goodman Fielder agreed in the interim to discuss in good faith on what basis, if at all, their commission fees were susceptible of unilateral review.

[9] No agreement as to that issue was reached before the hearing but Goodman Fielder did disclose its 'costing model' and also by degrees, and finally in its affidavit evidence, how it had on the unilateral review calculated each of the nine contractors' assumed efficient delivery and merchandising costs. It disclosed, in particular, the distances it had assessed they travelled, and the hours it had allowed them to make deliveries and to shelve product, and their hourly rate.

[10] At the hearing itself the terms of the 2008 agreement, most especially those requiring or permitting review, inevitably came under closer scrutiny, as did whether Goodman Fielder's review of contractors' costs had been accurate and fair. The nine contractors confirmed, when cross examined, the extent to which they accepted or contested the accuracy of Goodman Fielder's unilateral revisions.

[11] At the end of the hearing, Goodman Fielder gave an undertaking not to reduce the commission fees of the nine contractors until 1 December 2011 at least; and, in the meantime, to undertake with each, so far as it is practicable, an annual review. In a joint memorandum since, counsel have identified what is not in dispute and the three issues still to be resolved.

[12] The first issue is as to the relationship between Goodman Fielder and the contractors. Is it solely in contract or is it also fiduciary? The second is as to the scope of Goodman Fielder's unilateral right of review. Is it subordinate to and does it merely complement the annual shared review that the agreement also requires, or is it free standing? If it is the latter may Goodman Fielder act on the letter of the power or is it constrained by any equitable or implied principle?

[13] The third issue is as to what declaratory and injunctive relief, if any, the contractors entitled to, more especially given Goodman Fielder's undertaking.

### **Nature of relationship**

[14] The nine contractors contend primarily that the 2008 agreement does not permit Goodman Fielder to reduce their commission fees unilaterally without there having first been an annual review, and that Goodman Fielder may only exercise this right between annual reviews to alter their commission fees to reflect unavoidable externally imposed costs.

[15] Goodman Fielder contests that interpretation. It says that its unilateral right of review is not dependent on there having been a prior annual review and that, in contrast to that review, it is entitled not merely to review but to change the contractors' cost inputs and thus their fee rates. Also that it may impose such changes

immediately even where the disputes process is invoked, subject only to notice and the duty not to act maliciously, capriciously or arbitrarily.

[16] The nine contractors say as well that even if Goodman Fielder does have as complete a unilateral right of review as it contends it does, they and Goodman Fielder are in a fiduciary relationship; a relationship that arises precisely because they are rendered vulnerable to Goodman Fielder's serial exercises of will, if only potentially, as a result of Goodman Fielder possessing this contested power to review their commission fees and a number of other unilateral powers.<sup>1</sup>

[17] Goodman Fielder, they contend, may not then exercise any of its unilateral rights solely for its own advantage and at their expense. It is obliged to act in good faith and by a fair process. That at least, they say, requires Goodman Fielder not to reduce their commission fees without first giving them an opportunity to respond and to negotiate and, if need be, to have any dispute resolved by mediation and arbitration under the agreement.

[18] Goodman Fielder, the contractors contend, has acted in breach of that duty by drastically reducing their commission fees on one week's notice, without consulting them first, and without then giving them any reasons, and has compounded that breach since by insisting on its right to impose those reduced rates immediately without engaging first in the disputes process. Goodman Fielder contends in response that it has done no more than to act on its unilateral right and denies that it is under any inhibiting duty to subordinate its interests to theirs.

[19] The relationship between them, Goodman Fielder contends, is not 'inherently fiduciary' like those of 'solicitor and client, trustee and beneficiary, principal and agent, doctor and patient'.<sup>2</sup> Nor is it one, because of any peculiar feature, that entitles them to look to it in trust and confidence or to have any legitimate expectation that it will act 'solely and selflessly' in their interests rather than its own.<sup>3</sup>

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<sup>1</sup> *Frame v Smith* [1987] 2 SCR 99; *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA).

<sup>2</sup> *Chirnside v Fay* [2007] 1 NZLR 433 at [73].

<sup>3</sup> *Ibid* at [80]; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96 - 97; *DHL International (NZ) Ltd v Richmond Ltd* at 23; *Paki v Attorney General* [2009] 1 NZLR 72 (HC) at [133] - [134]; *Paki v Attorney-General* [2009] NZCA 584.

[20] The decisive issue, Goodman Fielder says, is not whether under the agreement 'ascendancy, influence, vulnerability, trust, or dependence' in some sense figure. It is whether any such features so coalesce as to 'so implicate' it in the contractors' 'affairs', or 'so align' it in 'the protection or advancement' of their interests that they enjoy a 'fiduciary expectation'.<sup>4</sup> Goodman Fielder denies that any such features in the relationship coalesce with that effect.

[21] The unilateral powers that Goodman Fielder has reserved to itself under the contract, it says in this context as well, are reserved legitimately and are to be given express effect subject only to this. Where those powers themselves state the purpose they are to serve, or prescribe any standard for their exercise, they must be exercised consistently. That apart, those powers lie within its discretion to exercise as long as it does not act maliciously, capriciously or arbitrarily.<sup>5</sup>

[22] At the level of principle Goodman Fielder's analysis seems to me to be accurate and the contractors have not at that level, it seems to me equally, challenged it in any significant way. Where they differ from Goodman Fielder, and what matters finally, is how those principles apply, to the extent that they do.

[23] As to whether the relationship is fiduciary, what seems to me to be decisive is how Goodman Fielder and the contractors, in reality Goodman Fielder, have chosen to define their relationship; what rights the agreement secures to contractors and on what conditions; what rights Goodman Fielder has reserved to itself; and on what issues each is entitled to have recourse to the disputes process that can culminate in an arbitral award.

[24] Such a survey is also called for in order to set in context Goodman Fielder's unilateral right of review, both to give sensible effect to the words in which it is expressed and to decide whether Goodman Fielder has exercised it consistently with

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<sup>4</sup> Professor Finn "The Fiduciary Principle" in TG Youdan (ed) *Equity, Fiduciaries, and Trusts* (Law Book Company, Sydney 1989).

<sup>5</sup> *Esso Petroleum Ltd v Addison* [2003] EWHC 1730; *Esso Petroleum Ltd v Addison* [2004] [2004] EWCA Civ 1470; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; *Paragon Finance plc v Staunton* [2002] 1 WLR 685 (CA); *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047.

any express or implicit purpose, and any prescribed or implicit standard, and any necessarily consistent process.

[25] There are, I think, four features of the agreement relevant to the first of those questions especially, whether it is also the source of a fiduciary relationship. Those four features are merely illustrative. They are not exhaustive of every term of the agreement and they overlap. They are these.

#### *Features of agreement*

[26] First, Goodman Fielder and the contractors, in reality Goodman Fielder, have defined their relationship as one between fully independent parties. The contractor is not Goodman Fielder's employee, agent or partner. Nor are they in a joint venture relationship. The contractor is an independent contractor;<sup>6</sup> and, as an allied feature of the agreement emphasises, is independent in a further critical sense.

[27] The contractor is obliged to acknowledge, when executing the agreement, that it has done so in the exercise of its own judgment; that it has assessed the contract for itself and as to that taken its own advice; that it has recognised that the contract involves business risks; and that it has relied entirely on its own inquiries and not on anything said by Goodman Fielder.<sup>7</sup>

[28] Second, the agreement does accord to the contractor a 'right' to deliver Goodman Fielder's products within a defined territory, a right that the contractor has requested and Goodman Fielder has granted, but subject to the terms of the agreement.<sup>8</sup> And though the right conferred is exclusive to the contractor, that is not absolute. Goodman Fielder reserves to itself a limited right in that respect; and if it chooses to exercise that right the contractor has no right to compensation.<sup>9</sup>

[29] To obtain this largely but not entirely exclusive delivery right, moreover, the contractor has to satisfy first a series of conditions. It has, for instance, to supply

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<sup>6</sup> Clause 17.

<sup>7</sup> Contractors' signature acknowledgements paras (a) - (e).

<sup>8</sup> Introduction paras (a) - (c).

<sup>9</sup> Clause 5.

Goodman Fielder with a trading bond and a guarantee.<sup>10</sup> It has to indemnify Goodman Fielder against any cost or loss it causes Goodman Fielder.<sup>11</sup> It has to take out adequate public liability and comprehensive all risks insurance cover.<sup>12</sup>

[30] To retain this right and benefit from it, moreover, the contractor assumes the duty to deliver only Goodman Fielder's products within the territory.<sup>13</sup> It undertakes not to make deliveries outside the territory.<sup>14</sup> It agrees to comply with the detailed duties set out in the Third Schedule and Goodman Fielder's operations manual; a manual that Goodman Fielder is free to alter as long as that is consistent with the agreement.<sup>15</sup>

[31] In exchange for discharging these duties and continuing to satisfy those prior conditions the contractor becomes entitled to the commission fee, 'the frequency and method of payment' of which is described in Goodman Fielder's operations manual; a right still contingent on proof of delivery and some related matters. I will return to this aspect of the agreement, when considering the nature and extent of the powers of review.<sup>16</sup>

[32] Against these terms equally, but not exclusively, the contractor is given the right to assign its interest, subject always to Goodman Fielder approving the proposed assignee;<sup>17</sup> and, in any assignment it makes, the contractor has the right to claim goodwill, subject to the assignee first taking advice.<sup>18</sup> As to goodwill, the agreement confirms also, Goodman Fielder assumes no liability.

[33] Third, as will be already evident, the contractor's rights, such as they are, remain subject to any exercise of Goodman Fielder's extensive unilateral powers; and beyond those to which I have referred there are at least three other categories of power that bear on how secure and valuable the contractor's rights actually are.

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<sup>10</sup> Clauses 21, 22.

<sup>11</sup> Clause 32.

<sup>12</sup> Clause 30.

<sup>13</sup> Clause 5.

<sup>14</sup> Clause 3.

<sup>15</sup> Clause 4.

<sup>16</sup> Clause 9.

<sup>17</sup> Clause 18.

<sup>18</sup> Clause 19.

[34] One concerns the contractor's territory and customer base. Goodman Fielder reserves the power to transfer its own interest under the agreement at any time without the contractor's consent.<sup>19</sup> Also, on notice, to change the contractor's territory and reallocate its customers.<sup>20</sup> The next concerns Goodman Fielder's ability to review the contractor's performance. They are to review their relationship quarterly, but Goodman Fielder may also review the contractor 'at any other time if it determines, in its sole discretion'. The last is correlative. While the contractor, as well as Goodman Fielder, has the ability to terminate on 90 days notice, Goodman Fielder may also terminate for cause immediately, and compel the contractor to assign its interest.

[35] The fourth and final feature of the agreement itself is the disputes process. Goodman Fielder and the contractor are each entitled to have resolved as a dispute according to a phased process 'any question, dispute or difference', first informally, and then by formal negotiation and, finally, by mediation and arbitration.<sup>21</sup> This is a very widely expressed right. It is the contractors' only real safeguard.

### *Conclusions*

[36] Under the 2008 agreement, it will be immediately obvious, Goodman Fielder has retained almost complete control. The contractor's 'right' to deliver Goodman Fielder's products largely exclusively within a territory for a prescribed commission fee, a right that may be assigned and may notionally attract goodwill, is more in the nature of a highly contingent privilege.

[37] The contractor's duties are tightly prescribed and Goodman Fielder is able to keep the contractor under close and constant review. It retains the ability to reshape the contractor's territory and customer base and, indeed, to bring the agreement to an end, quite summarily, if in its view the contractor fails to perform. The only safeguard the contractor has, finally, is the ability to invoke the disputes process where it applies.

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<sup>19</sup> Clause 18.

<sup>20</sup> Clause 15.

<sup>21</sup> Clause 25.

[38] This relationship in contract is the antithesis of a fiduciary relationship. In the exercise of its powers Goodman Fielder assumes no duty to act for or on behalf of the contractor. Quite the contrary. Goodman Fielder's only duty is to exercise those powers within their scope and to avoid acting maliciously, capriciously or arbitrarily. Whether in this instance it has done so depends firstly and finally on the express and any implicit scope of its power.

### **Contractual power of review**

[39] In the joint memorandum filed since the hearing Goodman Fielder and the contractors agree, though their reasons are not identical, that Goodman Fielder and the contractor must each year make an annual review of the commission fee and its underlying cost inputs. They differ as to the purpose and features of that review.

[40] The contractors say that this annual review is to enable each party to require inputs to be revised, whether upwards or downwards. Goodman Fielder says that it is to consult as to whether any input ought to be revised because it is or has become inaccurate. The contractors say that a party wanting to vary an input should support that with reasons and data. Goodman Fielder does not disagree but says that no process is prescribed.

[41] As to what costs are reviewable, the contractors say, the 'costing model' is the formula within which the contractor's cost inputs are incorporated and all inputs, including the wage rate and the margin, are reviewable and all except the margin are disputable under the agreement. They also contend that on an annual review a new category of cost input may be introduced; one that is entirely new or until then unidentified or excluded.

[42] Goodman Fielder differs, not as to the nature of the costing model, but as to its extent. It contends that the wage rate and the margin are not cost inputs. They are fixed elements of the model, not open to review or dispute. It also confines what is disputable to the issue of accuracy; as to whether for instance the distances that contractors travel has been correctly calculated. Any new cost category, Goodman Fielder says, as for instance the cost of travel to contractors between their homes and

the depot, lies beyond the scope of the costing model. It would call for a variation to the model and cannot be disputable.

[43] Goodman Fielder and the contractors do agree that on an annual review they can alter a cost input if they agree and that it will remain fixed as agreed, like others that remain undisturbed, until the next annual review subject only to Goodman Fielder's right of unilateral review. It is at this point that they part company almost completely.

[44] They agree that where on an annual review the contractors propose a variation to an input that Goodman Fielder disputes, that input will apply provisionally until the dispute is resolved. Where, however, Goodman Fielder proposes a change that the contractors dispute Goodman Fielder claims to be able to alter the input unilaterally with immediate effect, even though the dispute has still to be resolved. The contractors disagree.

[45] The contractors continue to say that Goodman Fielder may only exercise its unilateral power after there has been an annual review, and between such reviews, or after they have agreed not to make such a review, and may only revise inputs affected by any unanticipated externally imposed changes. Goodman Fielder continues to contend that it may review the commission fee unilaterally at any time, even during an annual review, subject only to the duty not to act maliciously, capriciously or arbitrarily.

[46] A related issue is this. The contractors contend that if Goodman Fielder unilaterally changes the contractor's run or territory, that constitutes a variation to the agreement and requires that the costs involved and the commission fee payable be agreed afresh. Goodman Fielder contends that any such changes involve no variation to the agreement because they expressly lie within its unilateral power. It says also that it is then able to adjust the contractors' cost inputs unilaterally using that power of review.

[47] They continue to differ also as to the extent to which Goodman Fielder's exercise of its unilateral power is disputable. Goodman Fielder continues to contend

that contractors may only dispute miscalculated revisions and that, even then, the variation will still take immediate effect subject only to the contractors' right to seek interim curial relief. The contractors continue to contend that until their dispute is resolved the variation cannot take effect.

[48] Against those opposed stances I turn to clause 9 of the agreement itself, which governs the commission fee to which contractors become entitled and when it must or may be reviewed and with what consequence.

*Commission fee calculation*

[49] The first two paragraphs of clause 9 confer the contractors' right to a commission fee expressed as a liability to Goodman Fielder:

- 9.1 The Company shall pay the Contractor the Commission Fee for the delivery of Products to Centrally Billed Customers made by the Contractor in accordance with this Agreement and which are invoiced by the Company. For the avoidance of doubt, no Commission Fee shall be payable by the Company in respect of Products delivered by the Contractor to Contractor Billed Customers and invoiced by the Company.
- 9.2 The frequency and method of payment of the Commission Fee shall be as described in the Operations Manual.

[50] Neither of these paragraphs defines the commission fee, let alone how it is to be calculated. Nor is it defined anywhere else in the agreement. The commission fee is generally defined but in a circular way. The definition does no more than to refer to clause 9. Nor, I am told, is the fee defined in the operations manual, which was not produced in evidence, to which clause 9.2 refers. And, as clause 9.2 says itself, the manual only prescribes the 'frequency and method of payment'.

[51] To obtain any inkling as to how the commission fee is calculated one must turn, oddly enough, to the final paragraph of the clause, which is in dispute in this case, clause 9.3, which prescribes the two ways in which the fee may be reviewed:

The parties shall review the rates for the Commission Fee annually and, in addition, the Company may review and revise those rates at any time during the term of this Agreement, by giving notice to the Contractor. Any review by the Company under this clause and any change to the rates for the

Commission Fee made by the Company as a result of that review, shall be based on the Company's costing model, a copy of which shall be provided to the Contractor on request.

[52] In the result, clause 9 is notable not so much for what it says as what it does not say. It confers a right to a commission fee without being specific as to what that right is. It imposes a duty to review, and gives a right of review, each of which is equally abstract. To bring content to both one must look beyond the contract to Goodman Fielder's 'costing model' to which clause 9.3 refers, and for two purposes.

[53] The more general of those purposes is to identify the subject matter of the powers of review that clause 9.3 confers. The more particular purpose is to identify the nature of the cost categories incorporated in the model and to distinguish between those susceptible of review and any that form part of the costing model itself and are beyond review.

[54] Then there is the still wider context that the contractors say, and Goodman Fielder disputes, must inform how clause 9.3 is to be interpreted: the way in which the costing model was given effect and reviewed under the contracts the 2008 agreement replaced from which, the contractors say, Goodman Fielder has since departed.

#### *Principles of interpretation*

[55] Where, as is the case as to clause 9.3, the meaning of the words in a contract is in issue the 'ultimate objective' as was recently reaffirmed in the *Vector Gas* case,<sup>22</sup> is to establish objectively the meaning the parties intended their words to bear. And:<sup>23</sup>

To be properly informed the Court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds.

[56] Even where there is no patent ambiguity, the Judge at first instance is always entitled, even obliged, to look to the context. Words that seem plain in isolation may

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<sup>22</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

<sup>23</sup> At [19].

admit of more than one meaning when set against the context.<sup>24</sup> Whether one interpretation, or another, makes commercial sense is also relevant.<sup>25</sup> So too, where the contract is in standard form, as this agreement is, whether:<sup>26</sup>

The terms ... have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'if you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it'.

[57] In this last instance, where there is any ambiguity, that is to be construed against the party whose contract it is, certainly where what is in issue is an exclusion clause or some term of equivalent sensitivity.<sup>27</sup> There must, however, be a genuine ambiguity before this rule comes into play. It is a rule of last resort only to be invoked where 'the meaning of the words are so finely balanced' that no other means of resolving the ambiguity is possible.<sup>28</sup>

[58] Where a unilateral power is clearly conferred, moreover, it 'should not readily be eroded by an expansive approach to judicial recognition of implied terms'. Any terms that are implied, especially any generally expressed to impose a duty of good faith, must be necessary to give the term 'business efficacy' and more generally meet the conditions on which terms may be implied.<sup>29</sup>

### *Costing and cost model*

[59] The subject matter of the two reviews clause 9.3 requires or allows, the costs incorporated in Goodman Fielder's 'costing model', are most completely expressed and applied in the 'cost model' that Goodman Fielder recently completed for each contractor in the exercise of its unilateral power of review.

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<sup>24</sup> At [22] - [23].

<sup>25</sup> At [136].

<sup>26</sup> *Shroeder Music Publishing Co Ltd v Macauley* [1974] 3 All ER 616, 624.

<sup>27</sup> Laws of New Zealand at [133]; Halsbury's Laws of England (4th ed, 1998) vol 9 Contract at [776]; *BP Oil New Zealand Ltd v BA Motors* [1996] 1 NZLR 425 (HC).

<sup>28</sup> *Waterfront Shipping Co Ltd v Trafigura AG (The Sabrewing)* [2007] EWHC 2482 at [15]; see also *McCann v Switzerland Insurance Australia Ltd* (2000) 176 ALR 711 at [74] (HCA).

<sup>29</sup> *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313 (CA) at [90] - [91].

[60] This cost model, like those earlier, begins by identifying the contractor and the delivery run and the contractor's truck. Then it states the kilometres the contractor is assumed to travel each year to complete deliveries. After that it sets out the contractor's delivery costs, expressed finally as a cost per unit against anticipated volumes delivered, using a formula that does not appear on the face of the model, and that has only recently been disclosed, but that is not in issue in this case. Finally, the model sets out the contractor's merchandising costs.

[61] In the delivery cost category the model recognises in the first instance the contractors' capital costs: an annual allowance to replace their truck (an asset they purchase with Goodman Fielder's assistance), and the interest on any related loan. Then their operating expenses: their costs of insurance, communication, registration and certificates of fitness, body maintenance and cleaning, clothing, road user charges, tyres, fuel and repairs and maintenance. Then their costs of administration and finally their labour costs: the wages that they pay themselves and any relief driver, any merchandiser or packer, set against identified hours and hourly rates.

[62] To the sum of these costs the model adds the percentage margin and then translates that increased total from an annual to a weekly amount, and then to a cost per unit for two categories of product, two styles of bread, while for the third category, a variety of products, it allocates a percentage, in each instance set against anticipated volumes delivered.

[63] The merchandising cost allocated to the contractor, the wage the contractor is entitled to for shifting stock into retail outlets, shelving stock and reordering existing stock, once more assumes the number of hours called for and an hourly rate. It discloses neither but both may possibly be calculable from wages allocated for the purpose of delivery.

[64] For the purpose of the reviews that clause 9.3 requires or allows these costs seem to me to lie in three categories. First there are those variable costs that the contractor must incur, like insurance costs or fuel costs. Second, there are those that are imposed by statute or regulation, like registration and certificate of fitness fees and road user charges. Third, there is the 'cost' fixed by Goodman Fielder itself, the

wage rates that dictate the contractor's labour costs, which Goodman Fielder contends, like the percentage margin, are an element of the costing model not susceptible of review. I am unable to agree.

[65] The margin and the wage rates certainly have this in common. Goodman Fielder set them both. But the margin is over costs, is not obviously referable to any market externality and, as the contractors accept, was a margin that Goodman Fielder was entitled to choose. The margin is thus a costing model constant. Whereas the wage rate, though also Goodman Fielder's choice, must have been referable to market rates for equivalent services, the wage rates Goodman Fielder would have had to pay had the contractors been employees. Such rates rise and fall and are generally identifiable. In this they are indistinguishable from the variable cost inputs that are indisputably susceptible of review.

[66] There is also this to consider. In the 'cost models' that Goodman Fielder prepared for each contractor in 2008 and any that have entered contracts since, it only disclosed in the delivery category the contractors' total annual capital, operating and labour costs. It did not identify, as it has now done, the costs making up those totals or the hours it had allowed contractors for deliveries and merchandising or their hourly rates.

[67] Until this recent review, indeed this case I understand, Goodman Fielder has deemed these to be confidential and has always retained the cost models themselves. And those 'cost models' are so abstract, when compared with the most recent model, that there has to be a question whether they could ever have supplied a basis for any proper annual review by Goodman Fielder and the contractor of the contractor's costs. It may be no accident that there has never been one.

[68] Conceivably also there may be a yet further issue and that is whether Goodman Fielder's 'costing model' has remained constant as clause 9.3 assumes it must. The model has certainly become more specific and, because the original was so abstract, the two cannot be compared. The distinction made in submission between presently recognised cost categories and new ones cannot be made on any comparison between the two models.

[69] That is not an issue I have to resolve. It is an issue, however, that goes to what is disputable under the costing model as it has been certainly. It also gives added moment to the disputed evidence that I allowed the contractors to lead as to the review practice under the contracts that the 2008 agreement replaced.

*Disputed contextual evidence*

[70] On 24 October 2011, at the beginning of the hearing, in the ruling that I then gave<sup>30</sup>, I allowed the contractors to put in evidence two affidavits they contended went to the context in which the 2008 agreement was entered into, that Goodman Fielder opposed as both irrelevant and prejudicial. The proposed evidence, I said, went potentially to an objective fact that might have influenced the six of the nine contractors, who were deciding whether to renew their relationship with Goodman Fielder.

[71] The first of those affidavits came from Allan Sims, Goodman Fielder's national distribution manager until 2005 and its national transport manager until 2007. His evidence was that during his tenure as distribution manager he with others standardised Goodman Fielder's contract with distributors nationwide; the contract that introduced, he said, the costing model on which essentially Goodman Fielder evidently still relies.

[72] Mr Sims' evidence was that under that earlier standard contract, although as to this the contract was silent, the contractors met each year with Goodman Fielder's local distribution or bakery manager, or with him, to review their commission fees. This review, he said, enabled Goodman Fielder and the contractor to set their budgets for the year ahead and was open and comprehensive. Each cost input was discussed and agreed, as was the margin.

[73] Some cost inputs were known, Mr Sims said, or could be proved, while others fluctuated or had to be estimated. In those latter instances, his evidence was, the contractor was told how Goodman Fielder had fixed that cost, and if the

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<sup>30</sup> *Olsen Consulting Ltd & Ors v Goodman Fielder New Zealand Ltd* HC Auckland CIV 2011-404-5622, 25 October 2011.

contractors disagreed they had the ability to invoke the disputes process or to terminate the relationship. He could not recall any instance of either ever having happened.

[74] When Mr Sims was cross examined it was put to him that, as a result of the way in which his relationship with Goodman Fielder ended, he had reason to be less than objective and he responded in some detail. As to that I need make no finding. I need only say that on the issues, which concern me, I found Mr Sims both truthful and reliable.

[75] Goodman Fielder's better point, I consider, is that only some of the six contractors, who renewed their contracts, recalled annual reviews and none claimed that this practice influenced them. Mr Sims' evidence, that being so, says nothing about how clause 9.3 is to be interpreted, more especially as the contract with which he was familiar said nothing about the subject. The value of Mr Sims' evidence lies rather in this. It assists to make tangible what any proper review of a contractors' commission fee calculation must necessarily involve.

[76] The second affidavit came from Peter Gallagher, a former Goodman Fielder contractor, who chose not to enter into a 2008 agreement, and who is now chief executive officer of the NZ Professional Drivers Association Incorporated; an organisation that has assisted the contractors in this case that Goodman Fielder does not recognise as having any part to play.

[77] Mr Gallagher's evidence is that, when he was deciding whether to enter into the 2008 agreement, Goodman Fielder's then national contractor manager sent him an email, dated 29 April 2008, in which she described in detail the cost model and said that, once costs had been fixed, 'they remain in place for a year, at which time we meet with the contractors to conduct a commission review'.

[78] The then contractor manager also said this of the way in which Goodman Fielder had assessed the cost inputs for each contractor:

We have spent a significant amount of time determining each of the Contractor Cost Models. We have engaged external sources in the process to

ensure our assumptions of costs are transparent and a fair representation of the business. We do appreciate that you have requested ... a detailed summary of our calculations. However it is our preference not to act in a 'financial adviser' capacity, and therefore encourage all contractors conducting their due diligence to work through their own analysis to intimately understand what costs are likely to be incurred as part of operating their business. If Goodman Fielder provided this financial insight, it may be perceived that we are acting in an 'employee relationship' which is not the objective of our model.

[79] This information, as became clear in evidence, did not feature in the negotiations of any of the nine contractors whose case this is. It cannot then inform how they understood the powers of review the agreement contains. Moreover, it is hearsay (a point that Goodman Fielder took in passing to which I did not refer in my ruling) and I am conscious that, as Goodman Fielder says, it has not been able to test the former manager.

[80] That said, there has been no challenge to the authenticity of the email and its value, like the evidence of Mr Sims, lies in this. It too assists to make tangible what any reliably accurate review of a contractor's delivery costs necessarily calls for. The email also suggests that in 2008, as on this most recent review, Goodman Fielder preferred to establish the accuracy of contractors' costs entirely by itself.

[81] Goodman Fielder contends that in the review that it has just made, a strictly unilateral review, it has done no more than exercise the power given it by clause 9.3; and that is the issue to which I now return on which Goodman Fielder and the contractors so completely divide.

*Contractors' submission as to unilateral power of review*

[82] Clause 9.3, the contractors say, identifies immediately the primary review mechanism agreed, the annual review; a duty to review the commission fee each year that Goodman Fielder and the contractor share that is of value to each of them. The cost inputs then stated in the model may no longer reflect the contractor's actual costs or, conversely, they may have ceased to reflect the contractor's services to Goodman Fielder. The review is, they say, an essential budgetary exercise.

[83] While then, the contractors say, Goodman Fielder's unilateral power is conferred by clause 9.3 'in addition' to the duty to make an annual review and may be exercised at 'any time' these apparently expansive words are not to be taken literally. They cannot mean that Goodman Fielder has reserved to itself a full independent power of review. Its power must be a lesser power merely complementing their agreed primary mechanism, the annual review.

[84] Otherwise, the contractors say, Goodman Fielder would be able to rewrite the bargain struck when the agreement was first entered into, or immediately after an annual review. That has to offend public policy, and ordinary commercial sense. It cannot be that Goodman Fielder is able to retain to itself the ability, if it chooses, to deprive a contractor of an, until then, agreed level of income and consequent goodwill.

[85] As a result, the contractors contend, clause 9.3 must confirm that the commission fee and related rates must remain fixed until there has been an annual review; and that after such a review Goodman Fielder may only review unilaterally to ensure that externally imposed costs, not anticipated at the last review, are taken immediately into account.

[86] Furthermore, the contractors say, Goodman Fielder's unilateral power must be exercised in accord with its 'costing model' and, they say, it is important to note, this constraint does not apply to an annual review; a contrast that confirms the priority and flexibility of that primary review and the subordinate and strictly complementary character of Goodman Fielder's unilateral power.

[87] Finally, the contractors say this. To the extent that there is any ambiguity about the scope of Goodman Fielder's unilateral power the contra proferentum rule applies. The contract is solely of Goodman Fielder's devising. The interpretation that best secures the contractors' right to a proper income from their investment and work, and their consequent right to goodwill, has to be preferred.

## *Conclusions*

[88] I accept that if, as the contractors say, Goodman Fielder has as complete a unilateral power of review of the commission fee as it contends it has, they are rendered as vulnerable as they say they are. Goodman Fielder's recent exercise of that power, the subject of this case, makes that all too plain. I am unable, however, to accept their interpretation of clause 9.3, which is, I consider, unambiguous.

[89] The unilateral right of review that clause 9.3 reserves to Goodman Fielder is a right 'in addition' to the duty that Goodman Fielder shares with the contractors to undertake an annual review. It is not dependent on there having been an annual review. It is a right able to be exercised, 'at any time during the term of this agreement' and may even be exercised at the same time as an annual review. It is a right, moreover, not merely to review but to 'change' the contractors' cost inputs or rates, subject only to any such 'change' being based on Goodman Fielder's 'costing model'. It is a right, furthermore, to impose the 'change' subject only to notice, and despite the contractors' rights both to raise a dispute and to seek interim curial relief.

[90] It follows that I do not accept that the shared annual review is accorded priority over Goodman Fielder's unilateral power simply because it comes first in clause 9.3, or because it confers a collateral right on each to require such a review. I question as well whether any 'difference or dispute' on an annual review is capable of being resolved under the disputes process except by negotiation or mediation; and thus whether an arbitrator could make a binding award where there is no duty to agree and neither has any power of decision. But I say that with this qualification.

[91] The 2008 cost model is, as I have said, so abstract that there may be some issue what costs it included and whether they were all the costs that were worthy of recognition. Also as to how constant the 'costing model' has remained since 2008, an issue of significance under clause 9.3. These are questions that may be susceptible of arbitration.

[92] The issue with which I am concerned finally, however, is whether Goodman Fielder did exercise its power of unilateral review within its scope and not

maliciously, capriciously or arbitrarily. Though the contractors have not succeeded in their contention that Goodman Fielder is in breach of a fiduciary relationship, it is inherent in their complaint that Goodman Fielder has been arbitrary, if not capricious.

### **Exercise of unilateral power**

[93] The revisions that Goodman Fielder gave notice of in October 2011, the nine contractors say, were of a radical order. Goodman Fielder then proposed to reduce their commission fees by between 14 - 42% and has since proposed to do so by between 11 - 26%. In effect, they say, Goodman Fielder has rewritten their bargains, reducing their income and the value of their goodwill.

[94] At the very least, they say, Goodman Fielder must be under a duty, before completing any such review, to tell them what it proposes to do and why and to give them a chance to respond. Also, when imposing any such change in the face of their dispute, at least to give them a chance to adjust to its magnitude.

[95] Clause 9.3 does not expressly state the purpose of the two forms of review it requires or permits, or the standard with which any review must comply, or the process, except insofar as it requires that the review be made within the confines of the 'costing model'. That can only mean, Goodman Fielder says, that it is a unilateral power able to be exercised just as it is expressed. It does not need to be amplified by any implied duty. Nor is it to be reduced in scope. It is fully intelligible and effective just as it is.

[96] That said, Goodman Fielder does accept that it is unable to exercise this power maliciously, capriciously or arbitrarily and the issue whether it has remained within the scope of the power, in this instance certainly, cannot just be inferred from the letter of the power. That letter must be set against the context of the contract as a whole and in this instance certainly the magnitude of the revision Goodman Fielder has made.

[97] Goodman Fielder's power to 'change' the commission fee rates is one, clause 9.3 says, that it may only exercise on a 'review' that is 'based on its costing model'. Clause 9.3 presumes, in other words, that the contractor is entitled to be paid a commission fee paid under the 'costing model' and that is a right incapable of being varied by Goodman Fielder on review. That being so, I consider, Goodman Fielder may only exercise its power to ensure that the calculation is or remains accurate, by correcting any cost input that was once accurate but has ceased to be or by correcting any patent error.

[98] On the evidence I am satisfied that Goodman Fielder did set out to establish accurately what each contractor's actual costs ought to be, not by seeking to establish their actual costs, but by revisiting rather the two assumptions it had made that are so critical to the 'costing model': the distance contractors travel to make deliveries and the time they take to do so and complete merchandising. It concluded, as to these nine contractors, that it had significantly overstated both and therefore reduced their commission fees by the percentages they complain of.

[99] In one sense Goodman Fielder exercised its power of review completely conventionally. The contractors are entitled to be compensated only for their actual costs and entitled only to receive a strictly related margin, and to be paid a wage rate for hours they actually work. But in another sense it was not conventional.

[100] When Goodman Fielder offered these contractors contracts in 2008 or later, it told them what commission fee it was prepared to pay. It disclosed the distance estimate in the 'cost model' it showed them but retained the model. It did not disclose to them the hourly rate. They had to take the offer or leave it. If these nine contractors have since 2008 received any windfall, as Goodman Fielder says they have, that is its sole responsibility. There is some truth to the contractors' point that on this review Goodman Fielder has rewritten their bargain.

[101] Despite that I accept, as I understand the contractors do, that this recent revision was within the scope of Goodman Fielder's power. There can be no question either that Goodman Fielder set out to establish the distances contractors must travel to make deliveries, and the time they must take to complete deliveries and

merchandising, by means that are objective and are able to be replicated and verified. Those means were not capricious.

[102] Goodman Fielder's assumptions, by contrast, were and remain contestable. While some contractors accepted, or did not challenge, Goodman Fielder's distance calculations, all or most contested Goodman Fielder's assumptions about the distances they travel and why and the hours they work and why. Goodman Fielder has accepted that it may need to revisit some of those assumptions with the contractors. That in part is why it has undertaken to make with them a first annual review.

[103] This demonstrates to my mind that, though Goodman Fielder's right of review is unilateral, it cannot be exercised consistently with its purpose, to ensure the costing model calculation is accurate, without engaging the contractor. An entirely unilateral review will always carry the risk of being inaccurate and indeed arbitrary. Goodman Fielder, I conclude, has to be subject to an implied duty to give the contractor notice of the review as it is being made, to explain what is proposed, to enable the contractor to respond and only then, in the light of the contractor's response, to make its decision.

[104] This duty will not be onerous where the adjustment Goodman Fielder proposes is self evident, like an increase in road user charges, or is minor. But where, as is the case here, the revision proposed is radical, the level of consultation would have to be commensurate. And that also applies, I consider, to the issue of notice.

[105] Clause 9.3 calls for no more than simple notice and that may be all that will be called for where the change is self evident or minor. Where, as here, however, it is radical Goodman Fielder, I consider, must be under an implied duty to allow the contractor sufficient time, before the change takes effect, to assess it and to adjust to it or to consider its options. That does not mean to say that the change must await the outcome of the disputes process.

## **Relief**

[106] The contractors are entitled to some but not all the declarations that they seek as to the two forms of review and so, in concluding this decision, I intend to do no more than to summarise, very broadly, the effect of clause 9.3 as I have found it to be.

[107] There must be, as the contractors say, a review of each contractor's commission fee each year unless the contractor and Goodman Fielder agree that none is called for. This review must, as they say also, at a minimum, involve an exchange of proposals as to the rates to apply for the following year accompanied by an exchange of sufficient information.

[108] This review may, as the contractors say, extend to all inputs, including the wage rates. It may only extend to the margin, which is an element of the costing formula, if the parties choose because that is beyond the scope of the review. So too any variation to the cost model categories, assuming they can be established reliably.

[109] Where on an annual review the contractor seeks a variation to an input with which Goodman Fielder disagrees, the input will remain as it is, even where that gives rise to a dispute under the agreement. Whether the input is to vary will depend on the outcome of the disputes process. Where, by contrast, Goodman Fielder seeks a variation the contractors dispute, it may impose the variation in exercise of its unilateral power of review, which it may exercise at any time, and any change it makes will take effect even if disputed, subject to this.

[110] Where Goodman Fielder decides on a unilateral review to vary an input it may not do so until it has given the contractor notice of the proposed change and the reasons why and the contractor has had a reasonable opportunity to respond and Goodman Fielder has considered the response. Where Goodman Fielder does decide to make a change the extent of the notice that it gives the contractor will depend on how significant the change is. Where the change is insignificant the notice may be formal only but where, as is the case here, the change is significant the notice will need to be commensurate.

[111] The injunctive relief that the contractors seek assumes that any change made by Goodman Fielder on a unilateral review cannot take effect until any dispute is resolved under the agreement. As I have just said, that is not so. At the hearing, moreover, Goodman Fielder did undertake not to introduce the changes until 1 December 2011 at the earliest and, in the meantime, to carry out with each of the nine contractors an annual review. Those undertakings, I consider, suffice.

[112] That being so, I decline the contractors any injunctive relief and I invite counsel to settle the declarations to which the contractors are entitled, drawing not just on this section of this decision but on any aspect that is relevant. A joint memorandum is to be filed as to that issue within ten working days of the date of this decision.

[113] There remains the issue of costs, which I invite counsel to resolve by agreement, if at all possible. For the present I need only say this.

[114] The contractors may not have succeeded completely in either of their causes of action. But they have succeeded in obtaining, to a large extent, the declaratory relief they have claimed. Goodman Fielder may equally have succeeded in vindicating by and large its interpretation of its power of review but its exercise of that power resulted inevitably, I consider, in these proceedings and in the outcome, and that too must be weighed in the balance.

[115] If no agreement can be reached as to costs the contractors are to file their memorandum within ten working days of the date of this decision and Goodman Fielder its response within the succeeding ten working days.

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P.J. Keane J