

FEDERAL MAGISTRATES COURT OF AUSTRALIA

FABSERT PTY LTD v ABB WAREHOUSING (NSW) PTY LTD [2008] FMCA 1198

WORKPLACE RELATIONS – Independent contractors – alleged unfair term of contract.

TRADE PRACTICES – Misleading and deceptive conduct – representation as to payment in addition to contract price.

CONTRACT – Implied term of reasonable notice – what was reasonable notice considered.

Acts Interpretation Act 1901 (Cth), s.18A

Independent Contractors Act 2006 (Cth), ss.11, 12, 15, 16

Trade Practices Act 1974 (Cth), s.52

Adrians Transport Pty Limited & Anor v Pacific Dunlop Limited (trading as Olex Cables) (Federal Court, unreported 8 March, 1996)

Crawford Fitting Co & Ors v Sydney Valve Fittings Pty Ltd (198) 14 NSWLR 438

Husain v O & S Holdings (Vic) Pty Ltd [2005] VSCA 269

Keldote Pty Ltd v Riteway Transport Pty Ltd [2008] FMCA 1167

Kirchner v Mayne Nickless Ltd [2000] VSC 459

Nationwide Produce (Holdings) Pty Ltd (in liq) v Linknarf Ltd (in liq) [2005] FCAFC 129

Pacific Products Pty Ltd v Howard [2005] SASC 290

Applicant:	FABSERT PTY LTD
Respondent:	ABB WAREHOUSING (NSW) PTY LTD
File Number:	SYG808 of 2008
Judgment of:	Driver FM
Hearing date:	25 and 26 August 2008
Delivered at:	Sydney

Delivered on: 30 September 2008

REPRESENTATION

Counsel for the Applicant: Mr D Shoebridge

Solicitors for the Applicant: Levitt Robinson

Counsel for the Respondent: Ms S Mirzabegian

Solicitors for the Respondent: Meehans Solicitors

ORDERS

- (1) The respondent shall pay the applicant damages for breach of contract in the sum of \$36,000.
- (2) The respondent shall pay the applicant interest up to judgment at the rate of 10.5 per cent commencing on 24 August 2007.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG808 of 2008

FABSERT PTY LTD

Applicant

And

ABB WAREHOUSING (NSW) PTY LTD

Respondent

REASONS FOR JUDGMENT

Introduction and background

1. The parties are in dispute over a contract for services entered into on or about 12 September 2005 and terminated on or about 24 August 2007. The respondent (ABB) owns and operates a warehousing business for the purpose of storing customers' goods. Under the contract, the applicant (Fabsert) agreed to provide warehouse management services to ABB and also agreed to provide a container unloading service to ABB. The parties agreed on a contract price of \$3,000 per week for the warehouse management service. In addition, Fabsert was paid a 50 per cent profit share in addition to a fixed price for each container unloaded. Fabsert invoiced ABB weekly. Fabsert makes three claims against ABB:
 - a) that the contract was unfair and harsh pursuant to s.12 of the *Independent Contractors Act 2006* (Cth) ("the Independent Contractors Act"). Fabsert claims the contract was unfair and harsh because it failed to provide for a payment of \$20,000 in

addition to the contract price 12 months after the contract was entered into;

- b) that the contract contained an implied term that ABB was entitled to terminate the contract only upon giving Fabsert reasonable notice or payment in lieu of notice. The period of reasonable notice said to be required is 12 months (modified in oral submissions to six to nine months). Fabsert claims that ABB breached the implied term and seeks damages for the breach; and
- c) that ABB made a representation that it would pay Fabsert \$20,000 per annum in addition to the contract price once its business was “up and running”. This representation is alleged to have been relied upon by Fabsert to enter into the contract. Fabsert claims that the representation was misleading and deceptive and a breach of s.52 of the *Trade Practices Act 1974* (Cth) (“the TPA”) and seeks damages under the TPA.

2. It is common ground that the parties entered into a contract following a conversation between Mr Jeff Sullivan, representing ABB, and Mr Paul Abbott, representing Fabsert, during which they agreed upon the contractual details. There is agreement that during those discussions Fabsert agreed to reduce its contract price. There is disagreement about whether the parties discussed annual or weekly amounts and the initial contract price proposed by Fabsert. There is disagreement about whether the asserted misleading and deceptive representation was made. The parties agree that the terms of the contract were set out in an email from Mr Abbott to Mr Sullivan on 12 September 2005. That email makes no mention of the alleged representation.

3. The contract contained no termination clause. The parties agree that on 24 August 2007 Mr Sullivan advised Mr Ken Foster of Fabsert that ABB had decided to terminate the contract. Mr Sullivan stated that one position would be available working under the new warehouse manager and undertaking whatever duties were specified by him. Mr Foster declined to consider that proposal. However, Fabsert agreed to stay on at the warehouse for one week. The final day on which work was done was 31 August 2007. On that day Fabsert issued its final invoice to ABB. Following the termination, by email, Fabsert raised the issue of a termination payment and also the issue of a claim for the

\$20,000 per annum allegedly promised by Mr Sullivan in addition to the contract price. Neither claim has been met.

Pleadings and evidence

4. Fabsert relies upon an amended statement of claim filed in court on 26 August 2008. Counsel for Fabsert did not press claims in the amended statement of claim for rectification of the contract pursuant to s.16 of the Independent Contractors Act in relation to notice of termination. That claim was pursued as a contract claim under the Court's accrued jurisdiction. Fabsert relies upon the affidavits of Ken Foster filed on 18 July 2008 and 18 August 2008 and the affidavits of Paul Abbott filed on 18 July 2008 and 21 August 2008. Both deponents were cross-examined on their affidavits.

Ken Foster

5. Mr Foster is and was at all material times a director of Fabsert. He deposes as to the establishment of Fabsert and his knowledge or understanding of the conversation between Mr Sullivan and Mr Abbott leading to the parties entering into the contract. He deposes as to his conversation with Mr Sullivan on 24 August 2007 when the contract was terminated. He deposes as to what occurred during the additional week which Fabsert performed services at the warehouse. He deposes to emails he wrote to Mr Dirk Inglis of ABB on 7, 12, 13 and 18 September 2007 concerning Fabsert's claims for the \$20,000 annual payment and a severance package. He deposes as to his efforts to find alternative employment.
6. Under cross-examination Mr Foster maintained his evidence. He conceded that the alleged representation made by Mr Sullivan was that \$20,000 in addition to the contract price would be paid once ABB's business was "up and running". He conceded that he had not asked for payment of that amount prior to the termination of the contract but stated that he had requested several meetings unsuccessfully where the issue would or might have been raised. He conceded that Fabsert subcontracted work to other companies and employed a pool of between 10 and 20 casual employees to assist with unloading (and loading) goods. He stated that he had asked for one month's severance

pay (\$12,000 based on four weeks invoiced amounts of \$3,000 per week). He conceded that he did not at that stage think that severance pay for 12 months work was fair and reasonable. He conceded that he was annoyed by the manner in which the contract was terminated by Mr Sullivan and had approached customers of ABB to see if any of them were interested in entering into an arrangement with Fabsert for warehouse management services.

Paul Abbott

7. Mr Abbott became a director of Fabsert on 26 March 2007. He was at all material times an employee of Fabsert. He deposes as to his conversation with Mr Sullivan on 12 September 2005. He states that Fabsert sought payment of \$176,000 per annum and that Mr Sullivan represented that if Fabsert would reduce its fee to \$156,000 then “once the business is up and running” ABB would pay the shortfall of \$20,000 per year. He states that Fabsert relied upon that representation to enter into the contract. They agreed on other contractual terms during the discussion which were recorded in an email Mr Abbott sent to Mr Sullivan later on 12 September 2005.
8. Mr Abbott deposes as to the duties he and Mr Foster performed pursuant to the contract and the administration of the contract. He deposes as to his knowledge and understanding of the conversation Mr Sullivan had with Mr Foster on 24 August 2007. He deposes as to his efforts to obtain alternative employment.
9. Under cross-examination Mr Abbott conceded that he might have considered entering into the contract for \$156,000 a year whether or not the alleged representation about the additional \$20,000 payment had been made. Mr Abbott was somewhat confused in his evidence under cross-examination as to whether the alleged representation was itself an oral term of the contract. He denied that Mr Sullivan gave one week’s notice of termination of the contract. He stated that the contract was terminated as at 24 August 2007 but Fabsert agreed to stay on for an additional week. He did not regard this as sufficient time for an orderly handover of the business to the new warehouse manager.

10. ABB relies upon its response filed on 17 June 2008. Importantly, counsel for ABB conceded during submissions that the contract between the parties did contain an implied term as to termination on reasonable notice, but ABB asserts that one week's notice was given which was reasonable notice. ABB relies upon the affidavits of Jeffrey Sullivan filed on 11 August 2008 and Dirk Inglis filed on the same day. Only Mr Sullivan was required for cross-examination.

Jeffrey Sullivan

11. Mr Sullivan is a director of ABB. He deposes as to his role in the business of ABB and the purchase of the warehouse business managed by Fabsert in 2005. Mr Foster and Mr Abbott were at the time employed by the former owner of the warehouse (a business known as Aspac) and Mr Abbott approached Mr Sullivan offering to manage the warehouse through a company which he and Mr Foster were then setting up. He states that Mr Abbott suggested a contract price of \$3,500 per week but agreed to reduce it to \$3,000 per week. He denies making the alleged representation of a future payment of \$20,000 per annum. He denies the version of the conversation deposed to by Mr Foster and Mr Abbott. He deposes as to his understanding of the responsibilities of Fabsert and the warehouse business. He deposes as to his conversation with Mr Foster on 24 August 2007 and agrees to the versions of that conversation contained in the affidavits of Mr Foster and Mr Abbott. He denies that any particular figure in relation to a severance package was discussed. He further denies agreeing that Fabsert was entitled to a severance package. Under cross-examination Mr Sullivan maintained his evidence and corrected some errors in his affidavit. He admitted that he could not say definitively that Mr Abbott did not propose a contract price of \$176,000 per annum but he could not remember that asserted discussion. He admitted that the figure of \$156,000 was discussed. He could not remember having any discussion with Mr Inglis about the email claimed by Fabsert for an additional \$20,000 per annum. He agreed he made no response to that claim.

Dirk Inglis

12. Mr Inglis is a director of ABB. He was not present at the pre-contractual discussion between Mr Sullivan and Mr Abbott but deposes as to what Mr Sullivan told him of it. He deposes as to the reason for the termination of the contract and what Mr Sullivan reported to him following the discussion with Mr Foster (at which Mr Abbott was present) on 24 August 2007. He deposes as to a telephone conversation with Mr Foster on 25 August 2007 in which Mr Foster asked for severance pay. He deposes that later that week his accountant advised that no notice of termination was required and no severance pay was payable.

Submissions

13. Counsel for Fabsert submits that the evidence of Messrs Foster and Abbott should be preferred to that of Mr Sullivan. In particular, he submits that the Foster and Abbott version of the conversation leading to the parties entering into the contract should be accepted. On that version, Fabsert was induced to enter into the contract on the promise that it would be reimbursed the difference between the contract price it sought and the contract price it accepted once the ABB business was “up and running”.
14. As to the issue of reasonable notice, counsel for Fabsert submits that in the circumstances of this case at least six months and up to nine months notice was reasonable.
15. The claim under the Independent Contractors Act was narrowed to a claim for \$20,000 in respect of the first year of the contract. Counsel for Fabsert submits that most of the work pursuant to the contract was performed by Messrs Foster and Abbott and that it is sufficient that both of them were directors of Fabsert for at least part of the contract period.
16. Counsel for ABB, while conceding that a term for termination on reasonable notice should be implied into the contract, stressed that this was a contract for services, not an employment contract and the interpretation of what was a reasonable notice period needed to draw on the authorities relating to contracts for services. She submits that

one week's notice was, in effect, given and that was in the circumstances reasonable notice.

17. Counsel for ABB submits that the evidence of Mr Sullivan should be accepted that no representation as to the payment of \$20,000 per annum in addition to the contract price was made. Further, she submits that even if a representation was made, it would not have led a reasonable person into error. She also made submissions as to the assessment of damages if the asserted representation was found to have been made. She submits that, on the terms of the asserted representation, it was just a hoped for advantage.
18. Counsel for ABB submits that the Independent Contractors Act does not apply because the contractual work was not mainly undertaken by directors of Fabsert. Mr Abbott did not become a director until relatively late in the contract period. Substantial work was also undertaken by sub contractors and casual employees. In any event, she submits that the alleged representation was not made and, even if it was, it was not an unfair representation requiring rectification of the contract.
19. Both counsel also made submissions on the adequacy of the efforts made by Messrs Foster and Abbott to mitigate the loss of Fabsert.

Reasoning

The *Trade Practices Act* claim

20. Section 52 of the TPA provides as follows:

- (1) *A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
- (2) *Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).*

Note: For rules relating to representations as to the country of origin of goods, see Division 1AA (sections 65AA to 65AN).

21. Fabsert relevantly asserts:

At the time of entering into the Contract there were negotiations as to the fee to be paid by the Respondent to the Applicant. In return for a reduction in the annual fee by the Applicant under the contract of \$20,000 the Respondent, by its officers, employees or agents, represented to the Applicant that once the business was up and running the Respondent would compensate the applicant for that \$20,000 reduction at the end of that year (“the Representation”).

At the time of making the Representation the Respondent was a corporation within the meaning of the Trade Practices Act and made the Representation in trade or commerce.

Induced by and acting on the Representation the Applicant entered into the Contract with the Respondent at the agreed annual rate. The Representation was not made good and at no time was the further \$20,000 payment referred to in the representation made by the Respondent.

Further or in the alternative by the making of the representation the Respondent was in breach of s.52 of the Trade Practices Act in that the Representation was both false and misleading.

22. The only direct evidence of the making of the alleged misrepresentation is that of Mr Abbott. Mr Sullivan denies making any such representation and Mr Foster has no direct knowledge of it. His knowledge is based on what Mr Abbott told him. I accept from the evidence of Mr Abbott that he and Mr Foster considered that achieving a contract price of \$176,000 per annum was highly desirable following advice from their accountant. I also accept that the figure of \$176,000 was raised by Mr Abbott at the meeting with Mr Sullivan. Mr Abbott was adamant that he raised it and he was unshaken in cross-examination. Mr Sullivan could not say that the figure had not been discussed. He just could not remember discussing it. I find that the figure was discussed. I further find that Mr Foster and Mr Sullivan discussed annual and weekly amounts. Fabsert wanted to be paid on a weekly basis and it was inevitable that whatever annual sums were discussed needed to be converted into weekly amounts. \$176,000 does not convert into a convenient weekly figure and the figure would have been needed to have been rounded up or down in order to be sensibly discussed on a weekly basis. Mr Sullivan’s recollection is that Mr

Abbott proposed a weekly figure of \$3,500 (which would equate to an annual sum of \$182,000). It is possible that for convenience Mr Abbott rounded up the approximate weekly sum for the annual figure of \$176,000 to \$3,500. In any event, the parties agree that Mr Sullivan did not want to pay more than \$3,000 per week or \$156,000 per annum. The question then is whether, as alleged by Fabsert, Mr Sullivan represented that ABB would pay in the future the difference between the annual amount sought and agreed. Mr Sullivan was adamant that he made no such representation. He was unshaken on that in cross-examination. Mr Abbott was equally adamant that a representation was made and Mr Foster gave evidence that Mr Abbott told him of it. On the other hand, Mr Inglis deposed that Mr Sullivan did not tell him of it.

23. Both Mr Foster and Mr Abbott presented as reliable witnesses. So did Mr Sullivan, although his memory was not as good as Messrs Foster and Abbott. I find, on the balance of probabilities, that Mr Sullivan did make a representation that ABB might make good the difference between the contract price of \$176,000 sought by Fabsert and the contract price of \$156,000 agreed between the parties at some stage in the future when ABB determined that its business was sufficiently viable to do so. That is what Mr Sullivan meant by the phrase “when the business is up and running”. It was not a representation that the sum of \$20,000 per annum would necessarily be paid, or that it would be payable at a particular future point in time. It was no more than a representation that ABB was willing to consider the payment of the additional \$20,000 per annum in the future if it was satisfied that business circumstances supported such an additional payment.
24. I reject the assertion that Fabsert was induced by the representation to enter into the contract. First, in the terms that I have found the representation was made, it was too vague to be reliable. Secondly, as Mr Abbott admitted under cross-examination, he would have considered entering into the contract even if the representation had not been made. The contract represented an attractive position for Fabsert as a start up company with no business other than the warehouse at which Messrs Foster and Abbott had been working formerly as employees. There was no immediate alternative to the contract that was on offer. Thirdly, it is inconceivable that, if Messrs Foster and

Abbott were induced by the representation to enter into the contract at a price of \$156,000 per annum, no mention of the representation would have been made in the detailed email Mr Abbott sent to Mr Sullivan on the same day as the discussion occurred. The fact that Mr Abbott made no mention of the representation in that email in my view strongly supports the conclusion that he and Mr Foster were not induced by it to enter into the contract.

25. Further, neither Mr Abbott nor Mr Foster actively pursued the representation during the life of the contract. I accept that they had sought meetings with representatives of ABB, presumably to discuss matters relating to the contract, but they acquiesced when no meetings were arranged. They were willing to let things ride. They were, in my view, satisfied with the terms of the contract as agreed. The issue of the representation was only raised by Mr Foster with Mr Inglis after the contract was terminated. The terms in which the representation was raised in Mr Foster's email to Mr Inglis on 7 September 2007 strongly suggests that it was raised as a bargaining chip in order to secure a severance package. That email was directed to the issue of a severance package and the issue of the representation was raised in the context of the disappointment felt by Mr Foster and the proposition that Fabsert had foregone something it might properly have asked for. Mr Foster incorrectly asserts in the email that the representation was referred to in the email Mr Abbott sent to Mr Sullivan setting out the contractual details.
26. I also reject the contention that the representation made by Mr Sullivan was misleading or deceptive. It was not a promise to pay \$20,000 at any particular time. It was not a promise to pay \$20,000 at all. It was simply a representation that ABB would be willing to consider the issue of the additional \$20,000 at some unspecified time in the future by reference to the capacity of its business to support the additional payment at that future time. A reasonable person would not be led into error by such a vague and general statement. A reasonable person would not expect that a payment of \$20,000 would be made at any particular time or at all. The behaviour of Mr Sullivan and Mr Abbott during the life of the contract supports the conclusion that they did not have an expectation that they would be paid the additional \$20,000 at any particular time or necessarily at all. I so find.

27. I reject the claim based upon s.52 of the TPA.

The *Independent Contractors Act* claim

28. There is a question whether the Independent Contractors Act has any application in this case. Section 11 of the Act provides as follows:

(1) *This Part applies to a services contract, other than:*

(a) *a services contract to the extent that the contract relates to the performance of work by the independent contractor for the private and domestic purposes of another party to the contract; or*

(b) *without limiting paragraph (a), a services contract to which an independent contractor that is a body corporate is a party, unless the work to which the contract relates is wholly or mainly performed by:*

(i) *a director of the body corporate; or*

(ii) *a member of the family of a director of the body corporate.*

(2) *In this section:*

"director" has the same meaning as in the Corporations Act 2001.

29. The Court has no power to review a contract for the provision of services on the grounds that it is unfair and/or harsh if the services contract is a contract to which a body corporate is a party, unless the work to which the contract relates is wholly or mainly performed by a director of the body corporate or a member of his or her family. In the present case, services were provided during the course of the contract by Mr Foster and his wife and by Mr Abbott, as well as others. Casual and other labour was employed for the purpose of the loading and unloading of goods. That was a necessary part of the performance of the contract but Fabsert was engaged as a warehouse manager, not as a labour hire company. The services which Fabsert provided under the contract were warehouse management services. The contract specifically permitted Fabsert to engage sub contractors to unpack containers for which it was separately paid. In my view, the engagement and use of casual and other labour for the packing and

unpacking of goods does not dilute the provision of warehouse management services pursuant to the contract by Mr Foster and Mr Abbott. It was their skill, experience and judgement that was brought to bear in the provision of warehouse management services which were the services to be provided pursuant to the contract. On the evidence, the paperwork performed by Mr Foster's wife was incidental.

30. Difficulty arises because, while Mr Foster was a director of Fabsert for the whole period of the contract, Mr Abbott was only a director for five months of it. That is little more than 20 per cent of the contract period.
31. The words "wholly" or "mainly" are not defined in the Act. Neither have those words in s.11(1)(b) been the subject of any judicial consideration. "Wholly" is defined in the Macquarie Dictionary (third edition) as "entirely; totally". "Mainly" is defined in the Macquarie Dictionary as meaning "chiefly, principally, for the most part". That means, in my view, that significantly more than half of the work under the contract must have been performed by Mr Foster and Mr Abbott as directors if the Court is to deal with the contract under the Independent Contractors Act.
32. Fabsert asserts that it is sufficient for the purposes of the section if a person is a director for any part of the term of a contract. On the other hand, ABB asserts that the section requires that a person be a director from the start of the contract period. Neither interpretation may be correct. The section is expressed in the present tense which might suggest that the work to which the contract relates must be wholly or mainly performed by a director of the body corporate at the time at which the Court is considering the issue. That interpretation is of no assistance, however, where the Court is dealing with a contract which has been terminated. In *Keldote Pty Ltd v Riteway Transport Pty Ltd* [2008] FMCA 1167 at [3]-[4] Cameron FM held that the Independent Contractors Act covers contracts that are no longer on foot. I agree with his Honour's conclusion on that point. I do not think anything in particular turns on the use of the present tense in the Act¹.
33. In relation to this case, I find that the effect of s.11(1)(b) is that the Court cannot review the contract unless the services were provided

¹ cf s.18A *Acts Interpretation Act 1901* (Cth)

during the relevant period (that is, the period between the commencement of the contract and its termination) mainly by the directors. The evidence of Mr Foster and Mr Abbott was that they shared their duties equally, notwithstanding that Mr Foster was paid about ten times as much by Fabsert as Mr Abbott. It follows, and I find, that no more than half of the services could have been provided by Mr Foster as a director. The services were provided by Mr Abbott as a director for about 20 per cent of the contract period. In my view, in assessing how the services were performed for this purpose, the Court cannot take into account services performed by Mr Abbott before he became a director. Nevertheless, substantially more than half the services of warehouse management were provided by Mr Foster and Mr Abbott as directors. I find that the services under the contract were mainly provided by a director of Fabsert (or a member of his family) on the basis that:

- a) the services were management services and the provision of manual labour, while necessary for the performance of the contract, was not a management service;
- b) the management services were provided equally by Mr Foster and Mr Abbott; and
- c) Mr Foster was a director of Fabsert for the whole of the period of the contract and Mr Abbott was a director for a reasonable period of it.

34. While this Court has jurisdiction to deal with the contract, I do not accept the contention that the contract was unfair or harsh. Relevant guidance on that issue has recently been provided by this Court in *Keldote*. I prefer the submissions of ABB on this issue to those of Fabsert.

35. Pursuant to s.12(3) of the Independent Contractors Act, when assessing whether or not a contract is unfair or harsh, the Court:

must only have regard to:

- (a) *the terms of the contract when it was made; and*

(b) *to the extent that this Part allows the Court to consider other matters – other matters existing at the time when the contract was made.*

36. Section 15 identifies the other matters which may be considered by the Court when reviewing a contract under s.12(1) of the Independent Contractors Act. Those matters include:
- a) the relative strengths of the bargaining positions of the parties to the contract;
 - b) whether any undue influence or pressure was exerted on, or unfair tactics were used against, a party to the contract;
 - c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
 - d) any other matter that the Court thinks is relevant.
37. I accept from the words of s.12(3) of the Independent Contractors Act that in assessing the question of unfairness and/or harshness, the Court is limited to considering the terms of the contract and the circumstances in which the contract was made, at the time the contract was made. That is the correct approach which has recently been confirmed by Cameron FM in *Keldote* at [66].
38. Fabsert claims that the contract was unfair and/or harsh because it did not include a term to the effect that ABB would pay Fabsert \$20,000 once the business was up and running.
39. It is alleged by Fabsert that the contract was unfair having regard to the following matters:
- a) Fabsert and its principals had a significantly weaker bargaining position than ABB;
 - b) unfair tactics were used against Fabsert;
 - c) the contract provided for total remuneration that was less than that of an employee performing similar work.

40. As to the third of these matters, Fabsert did not lead any evidence as to the remuneration paid to an employee performing similar work as Fabsert. Accordingly, unfairness on that ground is not made out.
41. As to the matter concerning the bargaining positions of the parties, on one view Mr Foster and Mr Abbott had a weaker bargaining position than ABB at the time the contract was made. Fabsert was a start up company and the only contract on offer was that offered by ABB. In order to secure the contract, they had to reduce the contract price. However, on another view Fabsert was in a stronger bargaining position than ABB because both Mr Foster and Mr Abbott were employed by the previous owner of the warehousing business and had pre-existing relationships with customers who became customers of ABB at the time the contract was made. Further, Fabsert was able to negotiate a 50 per cent profit share on container charges when the contract was made. On balance, I find that the bargaining positions of the parties were equal.
42. Fabsert claimed that ABB used unfair tactics against it in that ABB allegedly made the representation which, it was said, gave Fabsert a false sense of security. The unfairness was highlighted, so it was said, by the fact that Fabsert would not have entered into the contract but for the representation. Unfairness on this ground depends on whether or not the representation was made and if it was made, whether or not the representation was false. Further, Fabsert's reliance on the representation is also relevant to determining whether ABB used unfair tactics against it. For the reasons expressed in paragraphs 23 to 26 above, in relation to the TPA claim, Fabsert has failed to prove that ABB used unfair tactics against it.

The contract claim

43. The parties agree that a term of termination on reasonable notice should be implied into the contract. Both parties relied upon the decision of the New South Wales Court of Appeal in *Crawford Fitting Co & Ors v Sydney Valve Fittings Pty Ltd* (1998) 14 NSWLR 438. That case, like the present, involved a contract for provision of services. At page 444 about D McHugh JA said:

When a contract is terminable on reasonable notice, the period of notice must be sufficiently long to enable the recipient to deploy his labour and equipment in alternative employment, to carry out his commitments, to bring current negotiations to fruition and to wind up the association in a businesslike manner: Winter Garden Theatre (London) Ltd v Millenium Productions Ltd (at 200-201); Australian Blue Metal Ltd v Hughes (at 99) and W K Witt (WA) Pty Ltd v Metters Ltd (at 24-25). But in the latter case Hale J denied (at 23) that it is relevant to the reasonableness of the period of notice that the recipient needs time to recoup any expenditure incurred.

44. His Honour continued at page 448:

The chief purpose of a notice for a reasonable period, therefore, is to enable the parties to bring to an end in an orderly way a relationship which, ex hypothesi, has existed for a reasonable period so that they will have a reasonable opportunity to enter into alternative arrangements and to wind up matters which arise out of their relationship. Matters to be wound up will include carrying out existing commitments, bringing current negotiations to fruition, and, where appropriate, obtaining the fruits of any extraordinary expenditure or effort carried out within the scope of the agreement. The line between ordinary recurrent expenditure and effort and extraordinary expenditure and effort will not always be easy to draw. But in general it will be determined by what the parties would reasonably have contemplated was extraordinary effort or expenditure.

45. The Court found that a notice period of six months was reasonable taking into account that the contract had been on foot for 15 years and was a distributorship agreement which, on termination, required that the distributor recoup any extraordinary expenditure or effort, particularly where that expenditure or effort was incurred with the actual or tacit authority of the principal in an agency agreement.
46. The decision in *Crawford Fitting* has been applied on a number of occasions since in relation to reasonable notice in contracts for the provision of services. In *Adrians Transport Pty Limited & Anor v Pacific Dunlop Limited (trading as Olex Cables)* (Federal Court, unreported, 8 March 1996) the Court found that three months' notice was required in order to wind down business relationships arising out of the contract. In *Husain v O & S Holdings (Vic) Pty Ltd* [2005] VSCA 269 six months was found to be reasonable notice to enable a

manufacturer and distributor to clear stock held pursuant to the contract. Longer periods of notice were found necessary in *Kirchner v Mayne Nickless Ltd* [2000] VSC 459 and *Pacific Products Pty Ltd v Howard* [2005] SASC 290, having regard to the special circumstances of those cases. In a particular case, what is reasonable notice requires consideration of what reasonably minded businessmen carrying on business in the location in which the parties operated would consider as reasonable. The subject matter of the agreement is a factor to be taken into account in determining the reasonableness of the notice. This is because the implication of reasonable notice is intended to serve the common purpose of the parties: *Nationwide Produce (Holdings) Pty Ltd (in liq) v Linknarf Ltd (in liq)* [2005] FCAFC 129.

47. In the present case it does not appear that Mr Sullivan considered that any notice period at all was required. He intended to terminate the contract on the day he spoke to Mr Foster (and Mr Abbott) on 24 August 2007 and he did terminate the contract on that day. Fabsert agreed to stay on at the warehouse for one week but not pursuant to a period of notice. That was, on the evidence, a separate informal agreement between the parties entered into in consequence of the termination.
48. I accept the evidence of Mr Foster and Mr Abbott that the period of one week was manifestly inadequate in order to hand over the warehouse management business to the new warehouse manager. The person (Pablo) identified to be the new warehouse manager did not even appear during that week. I infer that he would have appeared if he had been able to do so in order to develop an understanding of his duties. It was necessary that the new warehouse manager understand what goods were to be delivered and despatched, where they were coming from and going to, and what the system was for the receiving, management, storage and dispatch of goods. Further, relations with the customers of ABB needed to be preserved. Those relations would be damaged if there was no reliable system in place for the receiving, unloading, storage, repacking and despatch of goods as required. At the relevant time (following the termination) Fabsert considered that a period of one month was reasonably required for the orderly handover of the business. I agree.

49. Further, Fabsert needed to redeploy its labour. While the authorities in relation to reasonable notice in employment contracts are not directly relevant, it is relevant to take into account the circumstances in which Mr Foster and Mr Abbott provided their labour through Fabsert. Fabsert had effectively no business other than that which it had with ABB. It was almost entirely dependent upon its contract with ABB. Mr Foster and Mr Abbott had no other business to fall back on. Upon the termination of the contract they either had to find alternative business agreements for Fabsert or alternative employment for themselves. If they were to continue to pursue the business of warehouse management, in which they had developed experience, they would either have to find a warehouse without a manager or displace an existing manager. That would take time. They could have sought alternative employment, either through Fabsert or as individuals (which is ultimately what they did) but the options for them were limited given their age (at the time 55 in the case of Mr Foster and 48 in the case of Mr Abbott) and experience.
50. In all the circumstances, I find that a period of 12 weeks' notice was reasonably required under the contract in order for Fabsert to wind down its operations, to hand over responsibility effectively to the new warehouse manager and to redeploy its labour. Fabsert should have been paid \$36,000 in lieu of that notice. No notice was given. They were not paid any amount in lieu of notice. That is the measure of the damages Fabsert should receive for breach of the implied term of reasonable notice.
51. I am satisfied, on the evidence, that there should be no reduction in damages because of any failure by Messrs Foster and Abbott to take reasonable steps to mitigate their loss. Initially, they made efforts to continue the warehouse management business of Fabsert by pursuing the only avenue which appeared open to them, which was to attempt to lure customers of ABB to Fabsert. That was unsuccessful. They then sought individual employment in other fields and I am satisfied that the steps they took to obtain alternative employment were reasonable. Mr Abbott was more successful than Mr Foster.
52. Fabsert is entitled to damages for the breach of the implied term of reasonable notice but not otherwise.

53. Fabsert also claims interest. Fabsert should receive interest up to judgment from the date of termination of the contract at the rate of 10.5 per cent (the same rate of interest that is applicable to post judgment interest under rule 26.01 of the *Federal Magistrates Court Rules 2001* (Cth)).
54. I will hear the parties as to costs.

I certify that the preceding fifty-four (54) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 30 September 2008