SUPREME COURT OF QUEENSLAND

CITATION:	*Hydrofibre Pty Ltd v Australian Prime Fibre Pty Ltd and Anor* [2013] QSC 163
PARTIES:	**HYDROFIBRE PTY LTD ACN 120 252 628** (Plaintiff) v **AUSTRALIAN PRIME FIBRE PTY LTD ACN 092 742 991** (First Defendant) and **PAUL DOUGLAS WOOSLEY** (Second Defendant)
FILE NO/S:	BS 5498 of 2009
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	21 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	11, 12, 13, 14, 15, 20 February 2013
JUDGE:	Philip McMurdo J
ORDER:	**The plaintiff's claim against each defendant is dismissed.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACT AND OTHER MATTERS – where contract for first defendant to produce hydromulch to be purchased by plaintiff – where contract for one year duration with option of two year extension – where contract did not expressly stipulate commencement date – where plaintiff argues contract commenced upon first defendant obtaining the capacity to produce hydromulch– where plaintiff relied upon surrounding circumstances to support its argument – whether contract commenced on date of execution or upon first defendant obtaining capacity to produce hydromulch – whether surrounding circumstances relied upon by plaintiff admissible to interpret contract

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACT AND OTHER MATTERS – where contract for first defendant to produce hydromulch which contained a base ingredient – where plaintiff argues that contract was only for production of base ingredient for use in hyrdomulch – where defendants argue that hydromulch should be given its ordinary meaning – where both parties rely upon surrounding circumstances to support their interpretations – whether the term hydromulch in the contract refers to its ordinary meaning or the base ingredient only – whether any surrounding circumstances relied upon by parties are admissible

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – GENERAL – where plaintiff claimed damages for loss of profits – where plaintiff based its claim on the profits it would have made from re-selling the product it would have purchased from the first defendant under the contract – where the plaintiff alternatively argued for an account of profits – whether the plaintiff established the evidentiary basis to entitle it to loss of profits – whether an account of profits is available as a remedy for breach of contract – whether the plaintiff is entitled to an account of profits

Agricultural & Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570, applied
Attorney-General v Blake [2001] 1 AC 268, cited
BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 52 ALJR 20, applied
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, applied
Hospitality Group Pty Ltd v Australian Rugby Union Ltd (2001) 110 FCR 157; [2001] FCA 1040, considered
Mermaids Café & Car Pty Ltd v Elsafty Enterprises Pty Ltd [2010] QCA 271, applied
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537, cited
Thorby v Goldberg (1964) 112 CLR 597, applied
Western Export Services Inc v Jireh International Pty Ltd [2011] HCA 45; (2012) 86 ALJR 1, cited

COUNSEL: G J Handran for the plaintiff

J W Lee for the defendants

SOLICITORS: Dowdt Company Lawyers for the plaintiff

Griffiths Parry Lawyers for the defendants

[1] The plaintiff and the first defendant made a written contract in September 2006, pursuant to which the first defendant was to manufacture and sell to the plaintiff

various types of "hydromulch". It was agreed that the contract would have a duration of one year, with the plaintiff having an option to extend the term by two further years. But nothing was ever supplied under that agreement and ultimately the parties fell out in about April 2009.

[2] The plaintiff's primary claim is for damages for breaches of that contract. In essence, the alleged breaches are a failure by the first defendant to supply the plaintiff and the first defendant's supply of relevant products to others, contrary to an express restraint provision of the contract. There is an alternative contractual claim for an account of the profits derived by the first defendant from those breaches, more particularly from its supplies to other buyers.

[3] The plaintiff had also claimed damages pursuant to s 82 of the *Trade Practices Act 1974* (Cth) (the Act), for what was said to have been the misleading and deceptive conduct of the first defendant in misrepresenting its intention to perform this contract. One of the types of hydromulch which the first defendant contracted to manufacture and supply consisted of, or was at least based upon, shredded paper. As both parties well understood at the date of the contract, the first defendant did not then have the machinery capable of shredding paper to the extent required for the plaintiff's required use. In essence, the plaintiff had claimed that the first defendant falsely represented that it would acquire the capacity to make this product, when it did not intend to do so. And it also alleged that the first defendant did not intend to supply to the plaintiff that product if and when it acquired the capacity to do so.

[4] The second defendant, Mr Woosley, effectively owned and controlled the first defendant. The plaintiff also sought damages against him pursuant to s 82, as a party allegedly involved in his company's contravention of s 52 of the Act.

[5] In the plaintiff's final submissions, these claims under the Act were abandoned. Therefore, the plaintiff's claim against the second defendant fails. Its claim against the first defendant (which I will now call the defendant) is limited to its contractual case.

The contract

[6] It is common ground that the parties did sign the document entitled "Manufacturing Agreement" on or about the date which it bears, which is 2 September 2006. The plaintiff says that the contract was constituted by the express terms of this document as well as several implied terms. It does not suggest that there were any oral terms or that the contract was subsequently varied.

[7] In many respects the defendant disputes that upon its proper interpretation, this document had the effect for which the plaintiff contends. The defendant also says that the contract document was incomplete, in that some essential terms were not agreed, or that it lacks sufficient certainty.

[8] One of the issues involves the duration of this contract (if it was otherwise enforceable). The question here is the date from which the initial term of one year, and in turn the two further years, would be calculated. The plaintiff argues that the initial term of one year did not commence until May 2009, when (it is common ground) the defendant became capable of producing shredded paper as the plaintiff required. The plaintiff's case is that it was from that point in time that the defendant

was to supply any of the products under this contract. None of the alleged breaches of contract appears to pre-date May 2009. Therefore, if in truth the period of one year had expired by then, there having been no purported extension of the duration of the contract, the plaintiff's case would fail. At least when this dispute arose, the defendant claimed that the term of the contract had indeed expired. Alternatively, the defendant says that the parties agreed to abandon the contract at a meeting between their respective representatives in January 2009.

[9] The contract recited that:

> "The Buyer [the plaintiff] has developed products known as 'Hydrofibre' products ('the Product') and owns certain intellectual property in the Product and processes of manufacture."

[10] Clause 2.1 provided:

> "2.1 The Buyer hereby agrees to purchase from the Seller and the Seller hereby agrees to manufacture and supply to the Buyer, the Products."

The term "Products" was defined to mean:

> "… the products specified in schedule 3 and as agreed from time to time between the Buyer and the Seller."

[11] In schedule 3, the following appeared under the heading "Products":

> "Product A) 100% Cellulose Hydromulch
> Product B) Cellulose and Cane Mix Hydromulch
> Product C) 100% Cane Fibre Hydromulch
> Product D) Cane Fibre and Cellulose Mix Hydromulch
> Product E) Wood Fibre Hydromulch"

[12] Therefore each of the products was a variety of Hydromulch. The parties agree that this word had a certain recognised meaning in the landscaping and associated industries. The plaintiff pleads that Hydromulch is regarded as being:

> "… a mix of base ingredient, composed of shredded paper (or cellulose), plant fibre (such as cane fibre), or wood fibre, or a combination of them (Base Ingredient), held together by a binder or tackifier, which is mixed with water, and on occasions grass seed and fertilizer, and sprayed onto exposed soil to prevent erosion and to control dust."[1]

The defendant pleads in response as follows:

> "(a) … "Base Ingredient" for the purposes of this proceeding is described as composed of shredded paper (or cellulose), plant fibre (such as cane fibre), or wood fibre, or a combination of them;
>
> (b) … Hydromulch is a mix of Base Ingredient, held together by a binder or tackifier;
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> (c) … Hydromulch is mixed with water, and on occasions one or more of grass seed, fertilizer and dye;

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1 Second Further Amended Statement of Claim, paragraph 5.

(d) … after being mixed with water, Hydromulch is used to spray onto exposed soil to prevent erosion and control dust;

(e) … Hydromulch can be described as a mix of a water retaining mulch, which can be laced with grass seed and fertilizer, and which is held together with a binder or tackifier, and which when mixed with water will act as an erosion inhibitor."

[13] Thus the parties agree Hydromulch consists at least of a base ingredient, such as shredded paper, as well as a binder or tackifier and may also include other components such as grass seed and fertilizer. But there is an issue as to whether the term Hydromulch was used precisely in this sense within the contract. The plaintiff's case is that in the contract, it was a reference only to the base ingredient, such as shredded paper. The defendant says that it was a reference to a mix of the base ingredient and one or more other components, such that only water had to be added for its application to the ground. This question received much attention in the arguments but, as I will discuss, the outcome of the case does not depend upon it.

[14] That which was to be supplied was required to meet the "Specifications", a term defined to mean:

> "… the specification for the Product as agreed between the parties from time to time or as specified in the Buyer's purchase orders."

The defendant says that the agreement was incomplete, because it required the further agreement of the parties as to these specifications. The plaintiff points to the alternative limb of that definition saying that, absent some further agreement of that kind, the specification was to be that contained within its purchase orders. It is unnecessary to refer to the balance of the contract to resolve this issue. In my view, the plaintiff's submission should be accepted. The agreement was not incomplete for the fact that one party was allowed to provide the particular specification.[2]

[15] Clause 2.3 made, to some extent, provision for the price or prices of the Products as follows:

> "2.3 The price of the Products shall be as set out in Schedule 5 or as agreed between the parties from time to time."

In Schedule 5, were these terms:

"Product Pricing

> $6.50 (plus GST) per Bale produced (based on a cost of $150 per tonne for paper to process) produced in either coloured or clear plastic wrapping. FOB Tanawah.
>
> Price will be reconfirmed and up dated (sic) with a scale of price decreasing as ordering quantities increases. This will happen within 3 months of the production of the first order."

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[2] *Thorby v Goldberg* (1964) 112 CLR 597 at 604-605 (Kitto J), 613 (Menzies J); *Mermaids Café & Car Pty Ltd v Elsafty Enterprises Pty Ltd* [2010] QCA 271 at [38] (Chesterman JA, with whom Holmes and Fraser JJA agreed).

There are two matters which may be noted about that provision. The first is that the quantified price is said to be based on a cost of *paper*, although some of the Products would not contain any paper. This raises a question as to whether the price of $6.50 (plus GST) per bale applied only to products A, B and D, leaving the price for the other products unstated and the agreement uncertain or incomplete. Secondly, the price of $6.50 was to be varied within three months of the production of the first order, but the means by which that price was to be "up dated (sic)", other than by a further agreement between the parties, was not specified. This raises a question as to whether the contract was uncertain or incomplete as to the price for any of the Products. I return to these questions below.

Duration of the contract

[16] The duration of the contract was the subject of cl 5.1, which was as follows:

> "5.1 The term of this Agreement is for a one (1) year period with a two (2) year option at the conclusion of the one (1) year period, the Buyer may add (sic) its discretion and enter into the two (2) year option by sending a written notice to the Seller at least two months prior to the completion of the initial one (1) year term;"

Also relevant to that question was cl 4.1 and Schedule 4 which were as follows:

> "4.1 The Buyer agrees to purchase the minimum quantities set out in schedule 4.
>
> …
>
> Minimum Quantities:
>
> 1 July 2006 - 30 June 2007 - 15,000 Bales
> 1 July 2007 - 30 June 2008 - 25,000 Bales
> 1 July 2008 - 30 June 2009 - 50,000 Bales."

Neither cl 4 nor Schedule 4 specified any particular minimum quantity for a particular product within the five categories in Schedule 3.

[17] The minimum purchase quantities were relevant also to the defendant's right to supply any of the Products to another buyer. This was set out in cl 11 as follows:

> "11.1 The Seller shall manufacture the Products exclusively for the Buyer.
>
> 11.2 So long as the Buyer continues to meet the minimum purchase quantities set out in schedule 4 the Seller shall not manufacture or sell the Products to any party other than the Buyer.
>
> 11.3 The Buyer agrees that the Seller may manufacture and sell the Products to third parties should the Buyer not meet the minimum quantities set out in schedule 4 in that period.
>
> 11.4 With the prior written consent of the Buyer, the Seller may manufacture and sell the Products under its own (or a third party's) name.

> 11.5 If the Seller manufactures the Products for its self (sic) or third parties pursuant to clauses 11.3 or 11.4, the Seller must pay a royalty to the Buyer. Such royalty shall be negotiated between the Buyer and Seller in good faith."

[18] The plaintiff argues that the duration of the agreement was qualified by cl 13.1, which was in these terms:

> "13.1 The Seller shall manufacture and deliver the Product as ordered within a reasonable time frame after the manufacturing commencement date. Unless otherwise stated delivery times, for valid orders will normally be two (2) to three (3) business days after the order has been placed. Orders are considered valid upon receiving either by phone or fax. Special requests and new products will be delivered based on availability and specific agreement between the Buyer and the Seller."

[19] The plaintiff's pleaded case is that upon the proper construction of cl 5.1 and in the premises of certain facts which I will discuss, the agreement was:

> "… for a term of one year commencing on the date on which the First Defendant supplied to the Plaintiff Products A to D, extended for a further term of two years upon the Plaintiff giving the First Defendant written notice of that extension at least two months prior to the completion of the initial one year term."[3]

[20] However, the plaintiff's ultimate argument in this respect was different from its pleaded case. In the written submissions of the plaintiff, it is said that the initial one year period of the contract commenced at the point in time which is described in cl 13.1 as "the manufacturing commencement date." It is perhaps necessary to set out in full the relevant part of the plaintiff's written submissions:

> "59. The 3 year period specified in clause 5.1 aligns with the 3 year period specified in Schedule 4 for the minimum quantities. The first annual period of minimum quantities starts on 1 July 2006. Whilst the agreement was proposed in or about June 2006, it was not entered into until September 2006. The date on which the minimum quantities commence are therefore of no assistance.
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> 60. Clause 13.1 however is. That clause provides, upon its proper construction, that the first defendant's performance starts at 'manufacturing commencement time'. For reasons submitted earlier, that time must be when the first defendant develops the ability to manufacture paper.
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> 61. It is therefore only at 'manufacturing commencement time' or within a reasonable period of that time, that the first defendant's obligations to manufacture and supply commence. Until supply commences, the plaintiff is unable to procure (or attempt to procure) the minimum quantities

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[3] Second Further Amended Statement of Claim, paragraph 25(d).

> of product and therefore obtain the commercial benefit of the agreement.
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> 62. Read as a whole, it is submitted that the one year period of the agreement in clause 5.1 commenced on the manufacturing commencement date (ie 5 May 2009).
>
> 63. It would be, it is submitted, unworkable if the 'period' of the agreement operated discordantly with the express suspension of the first defendant's obligations to manufacture and deliver product."

[21] As is common ground, the defendant first produced a paper based product suitable for hydromulch on 5 May 2009. According to these submissions, the plaintiff's case is that the period of one year specified in cl 5.1 commenced upon the first occasion of the manufacture of Product A, or perhaps any of the types of Product which contained paper.

[22] The product which was produced on 5 May 2009 was not supplied to the plaintiff. Rather it was the outcome of a successful trial production of this particular product, and the culmination of the defendant's testing and trial process in developing its manufacturing capacity. Therefore, upon the plaintiff's *pleaded* case, this could not have been the date of commencement of the first year of the contract.

[23] It may be noted that in a letter from the plaintiff's then solicitors to the defendant of 14 April 2009,[4] yet another interpretation of cl 5 was advanced in these terms:

> "It is our client's position that the one year term of the contract provided for in Clause 5 of the document runs from the date upon which the minimum quantities of Hydromulch specified in Clause 4.1 and Schedule 4 of the contract are first manufactured by Australian Prime Fibre Pty Ltd.
>
> It is our client's position that in circumstances where Australian Prime Fibre has yet to manufacture such minimum quantities of Hydromulch the term of the contract cannot be said to have expired rather the term of the contract has not yet commenced to run."

[24] Remarkably, the written submissions for the defendant seem to suggest that the contract did not commence to operate until "production of the first order", although the construction of cl 5.1 which had been alleged in the statement of claim was disputed in the defence.[5] And the defendant, according to its own record of the meeting between representatives of the parties on 15 January 2009, had then maintained that the contract had "expired". In the course of the oral submissions by counsel for the defendant, it appeared that his written submissions resulted from a mistaken belief that there was an express term to that effect. Ultimately, there is no concession of the correctness of the plaintiff's argument.[6]

[25] Before going beyond the words of this contract document, it is necessary to determine whether there is any relevant ambiguity in the language of the contract in

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4 Exhibit 88.

5 Fourth amended defence of the first and second defendants, paragraph 23.

6 T 6-15, ll 25-35; T 6-17, ll 7-15; T 6-18, ll 40-45; T 6-19, ll 40-45.

this respect.[7] In my view, the contract, in its stipulation of its duration, was ambiguous or susceptible of more than one meaning,[8] but none of these meanings is that for which the plaintiff contends.

[26] The two year option period was to commence upon the expiry of the initial one year period, so that the question is when that one year was to commence. If read alone, cl 5.1, in my view, could mean only that the one year period commenced immediately, that is to say upon the making of the contract. It contains no indication of any intention to in some way suspend the operation of the contract and, more specifically, the commencement of that one year period.

[27] However. cl 5.1 must be read with the whole of the contract, and another meaning might be indicated by the provisions of cl 4.1, Schedule 4 and cl 11. Upon one view, they indicate an intention that the respective periods of one year and two years, as referred to in cl 5.1, should coincide with the years set out in Schedule 4. The practical consequence of that interpretation would be that the (initial) duration of the contract would not be a period of one year, but instead would be the period from the date of the contract until 30 June 2007. Upon another interpretation, the initial term would be for a period of one year from the date of the contract, but the specification of minimum quantities in Schedule 4, although expressed by reference to years commencing on 1 July, should be read as if they referred to years commencing on 2 September. Each of those interpretations requires some words to be effectively disregarded, namely either the reference to a "one (1) year period" in cl 5.1 or references to specific financial years in Schedule 4. There is a third interpretation, however, which does not require either of those terms to be disregarded. It is that the contract would initially have an effect over one year from 2 September 2006, but that the required minimum quantity to be purchased would still be 15,000 bales by 30 June 2007. Similarly, if the duration was extended, the two year period would commence on 2 September 2007 and the plaintiff would be required to purchase by 30 June 2008 and 30 June 2009 respectively 25,000 and 50,000 bales.

[28] Under that third interpretation, there is some discord between the years of operation of the contract and the years which define the minimum quantities to be purchased. But that would not appear to make the contract unworkable or so offensive to the apparent purpose of this contract as to require its rejection.

[29] Under each of these three interpretations which I have suggested, the contract would have an immediate effect from 2 September 2006. In no respect would its operation be suspended. The expiry date of the contract would be known from the outset. But under the interpretation for which the plaintiff contends, the operation of the contract was, at the least, complicated in that there was no immediate obligation upon either party in respect of any of the Products until the defendant produced at least one of the Products as contained paper. The plaintiff's argument focuses upon cl 13.1. But in my view, the terms of that clause, and of the contract as a whole, are not capable of being interpreted in this very particular way for which the plaintiff contends.

[30] The plaintiff submits that upon its proper interpretation, cl 13.1 provides for the commencement of "the first defendant's performance" at "manufacturing

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7 *Western Export Services Inc v Jireh International Pty Ltd* (2012) 86 ALJR 1; [2011] HCA 45.

8 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352.

commencement time" or "within a reasonable period of that time." It submits that "until supply commences, the plaintiff is unable to procure (or attempt to procure) the minimum quantities of product and therefore obtain the commercial benefit of the agreement."[9] Those submissions do not distinguish between such of the Products as contained paper and the other types of products which were the subject of the contract. But a further submission for the plaintiff was that the "performance of the manufacturing agreement" was conditional upon the "first defendant's ability to manufacture and supply the 'products' with paper in whole or in part …", with the consequence that the defendant was obliged "to make reasonable efforts to bring about its ability to manufacture and supply the paper-based products."[10] This distinction between paper-based products and other products is said to come from the "surrounding circumstances", which (it is said) "all point to the fact that the agreement contemplated, and was principally directed to … paper-based 'products' for use in hydromulch."[11]

[31] If, for the moment, it could be said that the facts and circumstances of potential relevance to the proper interpretation of the contract indicated that the parties intended that most of the supply would be of paper-based products, the fundamental difficulty of this argument is that it must be able to be reconciled with the words which appear in the contract. There is no indication of any such distinction between the paper-based products and other products. The reference to the cost of paper in the pricing provision of Schedule 5 provides no such indication.

[32] The term "manufacturing commencement date", which appears in cl 13.1, is not a defined term. It does seem to refer to a date upon which some manufacturing actually commences. It indicates the existence of some interval of time between the date of the contract and the commencement of manufacturing. It does not distinguish between the different categories of Products which were the subject of the contract. And it does not indicate that the manufacture and delivery of products which did not contain paper was to be suspended pending the first manufacture of a paper-based product. I am unable to accept the plaintiff's submission that within cl 13.1 there is, according to one possible interpretation, an "express suspension of the first defendant's obligations to manufacture and deliver product."[12]

[33] If the words of the contract do not have a possible meaning which accords with the plaintiff's argument, they cannot be given such a meaning by reference to what are said to be relevant surrounding facts and circumstances. At least for that reason, the plaintiff's argument cannot be accepted. But in case it is thought that the contract has a possible meaning as the plaintiff argues, I will go to the factual matters upon which it relies.

[34] The plaintiff identifies a very large number of factual matters which are said to be relevant to this question of interpretation. Its argument appears to include effectively the whole of the course of dealings between the parties which preceded this contract, as well as dealings between the defendant and another company under the same control as the plaintiff, prior to the incorporation of the plaintiff on 19 June 2006. Indeed, the fact of the incorporation of the plaintiff is one of the facts which

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9 Plaintiff's written submissions, paragraphs 60-62.

10 Plaintiff's written submissions, paragraph 50, citing *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537.

11 Plaintiff's written submissions, paragraph 53.

12 Plaintiff's written submissions, paragraph 63.

is said to be relevant in this context, although just how that fact and many of the other matters which were relied upon could bear upon the interpretation of the contract was not developed.

[35] The plaintiff's case here appears to be inconsistent with the established bounds of what is admissible by way of evidence of surrounding circumstances and, in particular, this part of the judgment of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*:

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. … Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, … if the facts are notorious knowledge of them will be presumed.
>
> It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. …
>
> Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract."[13]

The written submissions for the plaintiff seek findings of fact in terms of paragraph 35 of that outline. Some of paragraph 35 contains argument rather than statements of fact. Many of the facts there set out are largely uncontroversial, regardless of their relevance.

[36] Within the very many matters asserted in paragraph 35, in my view there are some facts and circumstances which would be admissible in this context (if the words of the contract were capable of being interpreted as the plaintiff argues). Most importantly, as at the date of the contract, it was understood by both sides that the defendant had no immediate capability to produce shredded paper to meet the

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13 (1982) 149 CLR 337 at 352.

plaintiff's purposes. To be able to do so, the defendant had to acquire further machinery and to develop, by some experimentation, a process of reliable manufacture of that material. It was for that reason that some weeks prior to the contract, the plaintiff had paid to the defendant $22,000 for the purpose of funding the defendant's acquisition of further machinery. This payment was made upon the agreed basis that it would be credited towards the future supply of shredded paper. Consistently with that agreement, the defendant addressed an invoice to the plaintiff dated 26 June 2006, in the sum of $20,000 plus GST, for "sales (pre-payment) for bags of 100% Cellulose."

[37] As for a cane-based product, the defendant then had the means of cutting or shredding cane through a 25 millimetre screen, which it had demonstrated in a test conducted at its Tanawah premises in cooperation with Nathan and Joshua Magnus from the plaintiff. The second defendant gave evidence that this cane was cut through a 16 millimetre screen, but I do not accept that evidence. It was not foreshadowed by his summary of evidence and it was not put to Nathan or Joshua Magnus during their testimony. Therefore, I accept that the parties knew or understood that the defendant had a present capability of producing cane shredded to that specification of 25 millimetres but not more finely.

[38] I accept, as the plaintiff contends in paragraph 36 of its written submissions, that at the time of the contract, both parties anticipated that the defendant would "soon be able to grind paper."

[39] These are the only matters from the plaintiff's extensive list of facts and circumstances which could properly affect the interpretation of the contract in respect of its duration. Many of the matters within paragraph 35 would appear to be directed to a different question of interpretation, which is whether the Product was hydromulch according to its trade meaning, or instead only its base ingredient. Many other matters within paragraph 35 seem to have no bearing upon the present question or that question. Although it may be difficult for some litigants to accept the objective theory of contract, believing that their contract ought to mean what they thought it meant, there can be no question that in this case, where there is no alternative claim for rectification or plea of any estoppel, evidence of facts outside the contract itself is relevant only upon the established basis as appears from that passage in *Codelfa*.

[40] Those facts and circumstances which could have some bearing upon this question of interpretation do not provide sufficient support for the plaintiff's argument. In particular, they do not support what is said to have been the (objectively) intended distinction between paper-based products and other products. Nor do they support any interpretation by which the duration of the contract would be according to the date of some manufacture of a product.

[41] In hindsight, it can be seen that the task of developing the necessary capability to produce shredded paper as the plaintiff required was seriously underestimated, both in time and in cost. Instead when this contract was made, it was anticipated that although the production would not commence immediately, there would be no substantial delay. That circumstance tends strongly against the plaintiff's interpretation, because it indicates that there was no need to suspend the operation of the contract, in whole or in part, pending the development of that capability.

[42] That circumstance also provides a factual context which assists in the interpretation of cl 13.1, by explaining the evident anticipation of the parties, expressed within cl 13.1, that manufacturing would not commence immediately. But rather than providing for the suspension of the operation of the contract, cl 13.1 simply made it clear that the defendant was not obliged to manufacture and deliver the product immediately. By necessary implication, it was obliged to take steps to become capable of producing each of these products as quickly as was practicable. But cl 13 was concerned to require the expeditious employment of that manufacturing capability. I am unable to accept that by cl 13 (or otherwise) the parties there agreed to suspend performance of any or all of the contract or that they agreed that the period of one year specified within cl 5.1 would be defined by reference to the date of employment of that capability.

[43] I return then to the question of what was the agreed duration of the contract. I have identified three possible interpretations above at [27]. In my conclusion, it is the third of those which should be accepted. This is because it involves no departure from the prescription of the period of one year and of the definition of the relevant time periods for the minimum quantities within Schedule 4. Of course, the parties may not have actually adverted to this question when they signed the contract. But it is the intention which objectively appears from the contract document which must be found.

[44] Some events which occurred after making the contract are said to be relevant to this question of the duration of the contract and should be discussed. The first is that on 18 October 2006, Ms Stanley[14] of the defendant wrote to Nathan and Josh Magnus in response to their apparent impatience with the lack of progress on the defendant's side. In the course of explaining the reasons for the delay to that point, Ms Stanley wrote:

> "I felt very sad to hear that you have been relying so much on this project getting off the ground in the shortest possible time frames, and Paula and I are truely (sic) sorry that these time frame have not been able to be met by us, and this is something that was not expected, but we have to do everything we can to meet our customers (sic) orders. We are still working towards fitting the new installation, but at this point in time it is impossible for me to give you a date as I am affraid (sic) of dissapointing (sic) you again. I will just have to ring you when it is all done as we are working all hours of the day and night. It could be done in 1-2 weeks, or it could be 1-2 months?
>
> Both Hydro mulch and Australian Prime Fibre have signed the manufacturing agreement and in that there are minimum order requirements by certain dates, we do understand that now with the set back in time frames those dates and minimum order requirements will need to be adjusted, which we can do once production has started."[15]

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14 Now Mrs Wood as she gave evidence.

15 Exhibit 32.

That was a suggestion for some further agreement, which would vary the provisions for minimum orders by certain dates. But the suggestion went no further. Of course this correspondence cannot be used to interpret the contract.[16]

[45] The subject of the duration of the contract was discussed in late 2008 and early 2009. In an email from Nathan Magnus to the second defendant of 29 December 2008, Mr Magnus asserted that the second defendant had recently said to him that the contract period commenced from when "the product (hydromulch paper) was finally being produced."[17] His email sought confirmation "that the 3 year time period of the contract starts with the completion of our first order."[18] The second defendant responded to the email but did not offer any such confirmation. Rather, he said that having reviewed the contract, he felt that there were "a few points that need to be looked at" and which should be discussed.[19] He asserted that the defendant had entered into the contract believing there was only a minimal amount which he had to invest [to become capable of manufacturing the required products] but that the defendant had spent over $2 million in doing so.

[46] In response to that email, Nathan Magnus emailed Ms Stanley on 12 January 2009 and asked that he be told "what areas of the contract that you would like to have a look at" and saying that "it was all OK with me except for the vagueness on the actual start date of the contract, which was understood to be when production had stated (sic)."[20]

[47] On 15 January 2009, there was a meeting between on the plaintiff's side, Nathan Magnus and his wife Rebecca Magnus, and on the defendant's side, Ms Stanley and the second defendant. Each side prepared notes which purported to record the substance of the discussion. Each of those persons gave evidence as to his or her recollection of the meeting. The defendant relies upon this meeting for its alternative case that any contract then existing was abandoned by an agreement made at the meeting. I have concluded that the contract had already then expired. I do not understand the plaintiff to argue that in that event, the parties must be taken to have made a fresh contract in this meeting of 15 January 2009. Such a case would have to explain what the parties had agreed by way of such a new contract about the relevant amounts and dates for minimum orders.

[48] Undoubtedly the evidence of these witnesses was substantially affected by the content of the document prepared by his or her side as a record of the meeting. To the extent that the evidence of one of these witnesses is supported by one or perhaps both of these notes of the meeting, it has particular weight. It is unlikely that any of the witnesses would have a precise and independent recollection of what was said at this meeting, which was more than four years ago. However, there are two things about this meeting on which it is appropriate that I record my findings.

[49] The first is that I find, as Ms Stanley recorded, that the second defendant then said that the contract was "out of date" and had "expired."[21] There is a specific note by Ms Stanley to that effect and she vouched for the accuracy of her notes. In cross-

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16 *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 582 [35].
17 Exhibit 77.
18 Exhibit 77.
19 Exhibit 78.
20 Exhibit 79.
21 Exhibit 102.

examination, she was not challenged about the note of the second defendant's statement that the contract was out of date and had expired. Yet in his written submissions, counsel for the plaintiff did challenge the accuracy of her note in that respect. That argument referred to the absence of a reference to the contract being expired in another document, which was a one page series of "dot points" prepared by the second defendant after the same meeting. I do not see that the absence of such a reference in his short document is significant.

[50] The second question is whether there was an agreed abandonment of the contract at this meeting. I find that there was no discussion about, let alone an agreement that the contract of 2006 would then be abandoned. Rather, as I have found, the second defendant stated that the 2006 contract had already expired.

[51] For the plaintiff it is argued that the parties then agreed that the contract did have and would continue to have some ongoing operation. Reliance is placed upon the note prepared by Nathan Magnus that although there was then some inadequacies in the contract, due to the change in the cost of production machinery and "a need to put a new figure on minimum purchases per annum", it was then agreed "that a new contract was in everyone's best interest but that a new contract could not be written until the production line was completed and testing had finished."[22] He further noted that "it was then decided that the current contract would remain the working agreement until a new one replaced it."[23] In Ms Stanley's note of the meeting, she recorded the outcome of the meeting as including an agreement by the parties "that the contract needs to be re-done and is outdated" and a mutual understanding that "many changes have taken place over the past three years so what information [there] is in the old contract is irrelevant to both [the defendant] and [the plaintiff]."[24]

[52] Finding as I do that the second defendant maintained that the contract had expired, I would not accept that at the same time, he said words to the effect that if it had not expired, the contract should be there and then abandoned. Nor am I persuaded that by some means, the plaintiff's representatives accepted that the contract was no longer on foot. Therefore, if I am incorrect in holding that there was no existing contract as at 15 January 2009, I would not be persuaded to find in favour of the defendant's argument that any such contract was abandoned.

[53] On 4 March 2009, there was a further meeting, this time attended by Nathan Magnus, the second defendant and, for some of the time, Ms Stanley. At this meeting, there was a discussion about the possible use of a certain cane product for hydromulch. But in the course of the meeting, Mr Magnus noticed that there was a truck in the defendant's yard which advertised that the defendant was producing hydromulch. This prompted him to ask the second defendant whether any inquiries of the defendant about hydromulch were referred to the plaintiff. The second defendant responded that he was proposing to sell hydromulch to other buyers and in particular, to a company which was then its biggest customer for other mulch products. Mr Magnus responded to the effect that this would be a breach of the agreement and that the defendant would have to pay to the plaintiff a royalty upon such sales. Mr Magnus recorded that the second defendant's response was to say that "this contract was out of date" and that he had spent $2 million on the

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22 Exhibit 80.
23 Exhibit 80.
24 Exhibit 102.

machinery in order to be able to produce the product, which he needed to recover by doing business with others.[25] There was then a debate between them as to whether the second defendant had disclosed an intention to sell hydromulch products to third parties during the meeting of 15 January 2009. This debate was resolved by Ms Stanley referring to her notes of the meeting which made no reference to that disclosure.

[54] There are notes of the meeting of 4 March which were prepared by the second defendant and Ms Stanley. They record some discussion, or at least statements by the second defendant, to the effect that the (2006) contract was now "out of date and no longer valid" and a preparedness to renegotiate a different contract.[26] It is inherently probable and I find that he made such statements.

[55] The statements for the defendant in these meetings that the contract had expired are, of course, irrelevant to the question of the proper interpretation of the contract. But as there was a factual contest as to whether they were made, and in case they are thought to be of some relevance to this or some other issue, I find that they were made.

[56] To return to the principal question, the contract had an agreed duration of one year from 2 September 2006. The plaintiff was able to extend it for two years beyond that period. But to do so the plaintiff had to give a written notice of extension, at least two months prior to the completion of that one year term. The plaintiff makes no claim to have given such a notice. Consequently, the contract expired on 2 September 2007. Possibly one or both of the parties believed at some point after then that there was a contract still existing between them. But there is no argument that they acted towards each other in a way which created the new contract, or by which the defendant became precluded from contending, as it did in early 2009, that the contract period had expired.

[57] It is no part of the plaintiff's case that the defendant breached the contract within that one year period. It does not claim, for example, that the defendant wrongfully failed to supply it with any products during that period. Nor is it alleged that the defendant supplied any other buyer with any relevant product within that period. And the plaintiff does not allege that the defendant breached the contract by failing to develop its manufacturing capability with proper expedition.

[58] Therefore, at the time when the defendant is said to have breached the contract, it was no longer bound to perform it, and at least for this reason, the plaintiff's case fails.

Price

[59] I return to the questions about the terms of cl 2.3 and Schedule 5 referred to above at [15]. In the course of his oral argument, and I must concede prompted by a question from me, counsel for the defendant said that he would "persist with the argument that pricing is relevantly uncertain."[27] But that case was not raised by his clients' pleading and nor was it within his written submissions. At the commencement of the trial I was provided by the plaintiff's counsel with a

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25 Exhibit 81.

26 Exhibit 103.

27 T 6-13, ll 28-29.

statement of issues for determination, which did not identify this issue. All of that might explain why the question of certainty or incompleteness, in respect of price, was not addressed in the very extensive written submissions for the plaintiff. However, the plaintiff's counsel addressed this question in his oral submissions without any claim of surprise.

[60] In the plaintiff's submission, the price of $6.50 (plus GST) per bale applied to each of the products and not only to those which had a paper content. Then he appeared to submit that the stated basis for that price, which was a cost of $150 per tonne for paper to process, affected all kinds of products and in this way, if the cost rose above that price there would be a different price which would be reached by negotiations. That would appear to be simply an agreement to agree. An alternative view which might be open is that a rise in the cost of paper above $150 per tonne would not of itself displace the price of $6.50, but instead was a record of the basis of the price for the purposes of further negotiations of a revised price. That view would have had the advantage of not invalidating the contract.

[61] Then there was the provision in Schedule 5 about reconfirmation and updating of the price. As I read this provision, it calls for some revision of the price as "ordering quantities increase," and in any case within three months of the production of the first order. There is no expressed process or formula by which this revision of price was to be effected. Counsel for the plaintiff conceded that the revision would have to be by a further agreement. In my view, there are two possible interpretations of this provision for reconfirmation and updating of the price. One is that, at least at the point of three months from the production of the first order, the original price of $6.50 would become irrelevant and that from then, the price would be that which resulted from some further agreement. The other is that the parties contracted to endeavour to agree upon revised prices, but that absent such an agreement, the price would remain $6.50. Upon the first interpretation, the provision for price, and in turn the contract (because of the essentiality of price), would be uncertain. Upon the latter interpretation, the contract would be sufficiently certain. The second interpretation seems preferable, again because it would not invalidate the contract.

[62] Because of my conclusion about the duration of the contract and its consequence for this case, it is unnecessary (and perhaps inappropriate given the lack of any proper argument) to reach a concluded view on this legal question of the price provisions.

What was to be supplied – the base ingredient or something further?

[63] As I have already noted, the term hydromulch has a recognised trade meaning and the pleadings demonstrate that that meaning is not controversial. It involves more than the base ingredient and includes at least a binding agent or tackifier. That is supported by the evidence of several independent witnesses.[28]

[64] The defendant says that each of the products was described as a hydromulch and that the term should be given its recognised meaning within this contract. The plaintiff submits that, upon its proper interpretation, it must be taken to refer only to the base ingredient. Now that ingredient in the form of, for example, sugar cane, has a common use in what is called garden mulch. But hydromulch is applied as a

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[28] Mr Darryl Wittleton at T 2-32, Mr Tom Tarrent at T 2-44, Mr Iain White at T 2-47-48 and Mr Gregory Nicols at T 2-54.

liquid mix. The application is usually made by pumping the mix from a tank at the site, where water has been added to the other materials, which are themselves mixed at the site. The evidence well demonstrates that the plaintiff intended to on-sell bales to contractors who apply hydromulch in this way. The size of the packaging was considered to be conducive to the economical transport of the material and the waterproof material of the packaging was also considered to be an advance upon what was being used to supply a base ingredient to these contractors. There is further evidence that in discussions between the parties which preceded the contract, reference was made to the possibility of producing bales of material which would include essentially all of the ingredients of hydromulch to which only the water would have to be added. But it was discussed also that the proposal for that complete mix was not the only purpose of the intended contract.

[65] I have mentioned these pre-contractual dealings because of the emphasis upon them in the argument for the plaintiff. But in my view, none of them can be properly considered in interpreting the contract.

[66] In a draft of the contract there was a different description of the varieties of product within Schedule 3. It differed in that the word "Hydromulch" did not appear at the end of each of the descriptions in Schedule 3. This word was added at the insistence of the defendant. Usually a draft contract is irrelevant for the purposes of interpreting the contract which the parties did make. But in this instance, there may be an example of the type of case described by Mason J in *Codelfa*,[29] namely where evidence can be led of the actual intention of the parties, being evidence about what they have refused to include in their contract. Without appearing to decide the question, Mason J queried whether it was right to place on the words of a contract a meaning which the parties have united in rejecting.

[67] If this change from the draft is admissible, it would show that the parties intended that the products should be within a narrower category than simply any cellulose, cane or cane fibre, or wood fibre, and that they intended the categories of products to be limited in some way for use within hydromulch. The contract itself reveals a good reason for that limitation, because of the restraint upon the defendant in supplying such products to any other person. In that respect, it is proper to have regard to the nature of the defendant's business, as well understood by the plaintiff, which included the extensive supply of garden mulch including a cane fibre material.

[68] This distinction between, for example, cane fibre garden mulch and cane fibre hydromulch was not completely clear. The plaintiff was interested in cane fibre which was more finely cut than that ordinarily used in garden mulch. That is because some contractors had equipment which would not accommodate the use of the larger cane pieces within a hydromulch mix. But there were other contractors, with different equipment which could accommodate the larger material. So what was an appropriate base ingredient for one contractor's hydromulch was not necessarily so for another contractor's product.

[69] The question is further complicated by the reference to "the Product" in the recitals to the contract. They refer to a product known as "hydrospray grass" as having been developed by the plaintiff. They recite that it is that product which was to be

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29 (1982) 149 CLR 337 at 352-353.

manufactured and sold to the plaintiff. Undoubtedly, as the parties knew, there was such a product although it appears to have been developed prior to the incorporation of the plaintiff but at least in respect of a particular mix, by Nathan Magnus. The contract recited that the plaintiff owned certain intellectual property in this hydrospray grass and the processes of its manufacture. There is no evidence to substantiate that claim. It may be that there was some intellectual property owned by Mr Magnus, the plaintiff or some other related entity, but this is not established by the evidence. The reference to this hydrospray grass could suggest a limitation upon the descriptions of the products specified in Schedule 3. But the plaintiff made it clear to the defendant prior to this contract that it was interested in obtaining material for other uses of hydromulch.

[70] Other clauses of the contract referred to this so-called intellectual property of the plaintiff. Clause 7.1 provided that the defendant was to disclose to the plaintiff full details of any improvements made to the products, which should then become part of the plaintiff's intellectual property. Clause 8 contained an acknowledgment by the defendant of that intellectual property and a promise by each party to advise the other of any suspected or actual infringements of it. These several references to intellectual property would suggest that the products within Schedule 3 should be understood as something more complex than merely the base ingredients.

[71] The plaintiff argues that the provisions as to price are relevant to this question. It is said that they indicate that only a base ingredient was to be supplied, because it is to be expected that the defendant would have required more detailed terms as to price had the contract been limited to a mix of base ingredient and other materials. However, that matter has relatively little weight, because the parties clearly anticipated that they would make some further agreement as to price as things developed.

[72] Of course on one view, hydromulch is a reference not to a mix of dry materials but to the slurry which is ultimately applied to the ground. Clearly, this was not a contract to supply hydromulch in that sense. But effect must be given to the deliberate choice of the word hydromulch in the description of each of the categories of product. The defendant agreed to a very substantial limitation upon its dealings with other customers, according to the scope of what it agreed to sell to the plaintiff. Its apparent intention was not to have this contract affect its existing business of the manufacture and supply of mulch. The plaintiff's interpretation of the contract could well have affected that business, because of the imperfect distinction between garden mulch and material to be used in hydromulch. But further, there are the extensive references to the so-called intellectual property enjoyed by the plaintiff in the product, which would appear to lack any foundation if the product was limited to simply shredded paper or another of the base ingredients. In my conclusion, the defendant's argument on this question is the better one.

[73] The defendant argued that this was the critical question in the case, such that if it was resolved in the defendant's favour, that put paid to the entirety of the plaintiff's claim. I should record that this was not a submission which necessarily I would have accepted. Assuming for the moment that the duration of the contract was as the plaintiff argues, so that the parties were bound at all by it in the first half of 2009, the defendant's stance that it was not contractually bound might have been considered to be a repudiation of the contract. On the other hand, it was not so clear

that the plaintiff was then offering to perform the contract only upon the basis that it was for the supply of base ingredient material. In that event, the result could have been that the plaintiff was entitled to determine the contract for the defendant's repudiation and in turn be entitled to damages for a loss of its bargain. This issue of the type of product to be supplied under the contract in principle, was relevant to the assessment of those damages, although as I discuss below, I am unable to conclude that this issue would have required the dismissal of the plaintiff's claim.

Defendant's other issues

[74] Although it is unnecessary to determine other questions raised by the defendant in its pleading, it is perhaps necessary to say something about two matters, each pleaded within paragraph 25 of the Defence. They concern the intellectual property (or otherwise) of the plaintiff.

[75] The defendant pleaded that it signed the contract in reliance upon a representation by the plaintiff that the plaintiff "had intellectual property rights and exclusivity in relation to the products it had developed."[30] It was pleaded that this was false and consequently "no enforceable agreement was reached."[31]

[76] The second matter is an alleged implied term of the contract that the plaintiff had such intellectual property and exclusive rights,[32] with the consequence that if that was untrue, again there was no enforceable agreement reached.

[77] These matters were not ultimately argued but it was not clear that they were abandoned.

[78] The alleged implied term does not appear to satisfy the requirements for the implication of a term as set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*.[33] Such a term was not necessary to give this contract business efficacy. It was not so obvious that it went without saying and the term is far from clearly expressed.

[79] As to the misrepresentation case, there was no relief sought under the Act. Indeed, there was no relief at all sought in consequence of this alleged misrepresentation. Instead, it was simply asserted that it had the consequence of putting paid to the enforceability of the contract from the outset. Perhaps that was intended to mean that the contract was able to be rescinded by the defendant as the innocent party. But the defendant did not plead that it had elected to rescind. Further, the misrepresentation case appeared to have no evidentiary foundation. In the course of his final submissions, counsel for the defendant was unable to refer me to any reference in the evidence, particularly that of the second defendant, to support a finding that defendant had signed the contract in reliance upon such a representation.

[80] Further, it was incumbent upon the defendant to prove the falsity of this alleged representation. This is another allegation which received scant attention in the evidence and none in the submissions. The evidence does not indicate any

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30 Fourth amended defence of the first and second defendants, paragraph 25(a).

31 Fourth amended defence of the first and second defendants, paragraph 25(d).

32 Fourth amended defence of the first and second defendants, paragraph 25(b).

33 (1977) 180 CLR 266 at 283; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 347.

particular intellectual property enjoyed by the plaintiff or anyone associated with it. As I have said, that was unlikely to have been the case in relation to simply the base ingredients. But it was for the defendant to prove the absence of such intellectual property, which it failed to do.

The payment of $22,000

[81] I have referred to the plaintiff's payment of $22,000 to the defendant in June 2006. That was for the purpose of funding the development of the defendant's capability to produce shredded paper as required by the plaintiff. It was also to be a prepayment for the supply of product. Over the years there were some supplies of cane to the plaintiff. But these were not supplies under the contract, as appears from the fact that they were prices other than the contract price. No credit was given in those transactions for this payment.

[82] The plaintiff claimed no relief in relation to this payment. For example, there is no claim for it to return on the basis of a failure of consideration.

Damages

[83] The plaintiff claimed damages upon the basis of a loss of the profits which it would have enjoyed from reselling products purchased under the contract over three years from April 2009. It complained also that the defendant sold products to third parties in breach of the contract. But ultimately the plaintiff's case which was argued was one which required an assessment of the loss from not having products supplied to it under the contract, of course with the benefit of re-selling those products in a market in which the defendant would have been prevented from competing.

[84] This required the plaintiff to prove the likely sales which it would have made and the likely profits from such sales. As to the sales, the plaintiff called evidence from several buyers or potential buyers. One of those witnesses was Mr Wimble of the business Enviro Sales. The plaintiff made a written agreement with this entity shortly after entering into the contract with the defendant. Its agreement with Enviro Sales provided for its appointment by the plaintiff as a distributor of paper mulch, cane fibre mulch and a mix of the two over a three year period, with certain minimum quantities to be purchased by Enviro Sales. The paper mulch product was to be sold at a price of "$13.00 less 10% discount + GST." Over the three year period, the minimum purchases by Enviro Sales totalled 49,000 bags. But Mr Wimble gave evidence that his company's demand would have been at least 1,000 tonnes per annum and possibly as much as 3,000 tonnes per annum of sugar cane and/or paper mix. In 20 kilogram bales, that equates to a range of 50,000 to 150,000 bales per year or 150,000 to 450,000 bales over the three year period for which the loss is claimed.

[85] It is unnecessary to discuss the evidence of each of these witnesses except to say that each of them gave credible evidence which tended to prove that his entity was likely to have been a buyer from the plaintiff to a certain extent or at least within a certain range. The defendant's counsel offered no criticism of the evidence of these witnesses except by the bald submission that there was "no satisfactory evidence led as to the market which the plaintiff might have exploited …".[34] That assertion

[34] First and second defendants' written submissions, paragraph 30.

cannot be accepted. The evidence of these witnesses, taken together, provides ample proof of a substantial demand.

[86] Now the products the subject of that evidence were of the "base ingredient kind." But it does not appear that their demand would have been any less had the product also included at least a tackifier or binding agent. The overall effect of this evidence is that there were potential sales for the plaintiff in the range of 560,000 to 827,800 bales over the three years from 2009. That equates to a range of about 186,000 to 275,000 bales per annum.

[87] The defendant called evidence from other suppliers of similar material. The plaintiff argued that their evidence was of little relevance because the products sold by their companies would not have been effective substitutes for those which the plaintiff would have re-sold. I would not readily reject their evidence as having no relevance or weight. It is probative of the fact that there were other suppliers of similar products and it could not be assumed that the plaintiff would have been without competition. And once the plaintiff achieved anything like the sales upon which its claim is based, the prospect of further competition emerging would have increased.

[88] The plaintiff called evidence from an accountant, Mr Charlton, who made a number of calculations of lost profits upon various scenarios. The second of those was that the plaintiff would have acquired from the defendant no more than the minimum quantities which it was required to purchase under the contract. I accept that had this contract been performed over the three years from April 2009, more probably than not the quantities purchased would have been considerably more than those minimum quantities and I accept that this scenario is unrealistic. The third of them assumed certain re-sales but, in the case of Mr Wimble's company, only the minimum quantities under the plaintiff's contract with it. Again, on the basis of Mr Wimble's evidence that scenario was unrealistic. The more relevant calculations were those under Mr Charlton's first scenario. In that respect, Mr Charlton (and before him, in an earlier report, his colleague Mr Knight) assumed, as he had been instructed, that the lost sales would have been of the order of 107,000 bales per annum. Mr Charlton then assumed or adopted certain costs and expenses from which he derived an overall loss of profits of $1,511,510. He saw fit to do an alternative calculation, upon the same scenario but increasing the quantities of sales by 30 per cent. On that basis, he reached an overall loss of profits of $2,125,839. Mr Charlton felt that he was able to make a professional judgment as to the reasonableness of that 30 per cent increase. But he has no experience in this type of business and it seemed that this particular opinion was outside his professional expertise. The likely amount of sales is to be estimated from the evidence of the potential buyers to which I have referred. But of course that evidence must be assessed with an understanding of the uncertainties and contingencies, most particularly the effect of competition, at least in the absence of any demonstrated intellectual property enjoyed by the plaintiff.

[89] I have the impression that Mr Charlton's calculations had not followed a particularly thorough examination by him of the likely costs and expenses. But there was no particular challenge to that part of his report in that respect when he was cross-examined, and ultimately it was submitted that simply his evidence had no value because of the plaintiff's failure "to provide him with proper data" and Mr Charlton being "asked to assume everything in the plaintiff's favour" and doing

"little more than a mechanical calculation of totting up the figures."[35] In my view, the calculations had more weight than that submission recognises.

[90] The plaintiff's submission was that making a proper discount for contingencies, the damages should be assessed in a range of $1.5 million to $1.75 million. An assessment of this kind is necessarily somewhat arbitrary. But ultimately the plaintiff's submission is realistic. It does not seem at all far fetched but the plaintiff would have made profits of the order at least $500,000 per annum. I would have been prepared to assess damages for breach of contract at $1.5 million.

[91] The plaintiff argued that there was an alternative remedy available to it for the same breach of contract, which was an account of the profits which were derived by the defendant in consequence of its own breach. This argument relied upon *Attorney-General v Blake*[36] and the subsequent English decisions.[37] But *Blake* has little support thus far in Australia and a majority of the Full Court of the Federal Court (although perhaps in obiter dicta) has said that the availability of this remedy for a breach of contract does not accord with the law in this country.[38]

[92] Because the plaintiff's case for breach of contract fails, it is unnecessary to explore the availability of this remedy as a matter of law. But it is appropriate that some things be said about the remedy (if any) in the context of this case. In *Blake*, Lord Nicholls of Birkenhead said that an account of profits would be available only in exceptional cases and where the usual remedies of damages, specific performance and injunction were inadequate. He added that a "useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of the profit, a description which was clearly more relevant to the extraordinary facts of that case than to the present one."[39]

[93] If I am wrong in my conclusions as to the interpretation of the contract, and the defendant did breach the contract by, in particular, selling any of the "products" to other buyers, there is no circumstance in this case by which it could be fairly described as exceptional. It could hardly be said that the contract is a model of legal drafting and that the interpretation of the contract advanced by the plaintiff was plainly the only possibility. In turn, it cannot be concluded that the defendant must have acted upon the understanding that its contract was indeed on foot and enforceable but that it chose to breach it for its own purposes.

[94] Moreover, it is far from demonstrated that the remedy of damages for breach of contract would not be adequate in this case. The plaintiff made some attempt, through another part of Mr Charlton's report, to prove the profits which have been derived by the defendant from selling what were said to be relevant products. But it soon emerged that this analysis was of no probative value, because Mr Charlton had been asked to assume that certain products were relevant which, on neither side's case as to the scope of the contract, could have been within it.

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35 First and second defendants' written submissions, paragraph 31.

36 [2001] 1 AC 268.

37 *Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830; *Esso Petroleum Co Ltd v Niad Ltd* [2001] All ER (D) 324.

38 *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at 196; [2001] FCA 1040 at [157]-[159] (Hill and Finkelstein JJ).

39 *Attorney-General v Blake* [2001] 1 AC 268 at 285.

Conclusion

[95] The plaintiff's claim against each defendant will be dismissed.