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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 22 of 2020

BETWEEN:

ROYCO SHIPPING SERVICES LIMITED Plaintiff

-and-

MATSON SOUTH PACIFIC LIMITED Defendant

SEPARATE TRIAL

Whether the parties' agreement contains an implied term of exclusivity

JUDGMENT

BEFORE:	LORD CHIEF JUSTICE WHITTEN QC
Counsel:	Mr William Edwards for the Plaintiff
	Mr R. Stephenson for the Defendant
Date of submissions:	13 & 30 November 2020,13 & 14 January 2021
Date of hearings:	11 December 2020 and 22 January 2021
Date of judgment:	10 February 2021

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Introduction

1. The plaintiff ("***Royco***") provides stevedoring services in the Kingdom of Tonga for the loading and unloading of cargo on and from vessels berthed at the Port of Nuku'alofa. The defendant ("***Matson***") operates seafaring vessels for cargo transportation throughout the Pacific.

2. On 28 April 2017, the parties entered into an agreement by which Royco agreed to provide Matson with stevedoring services for its vessels at the Port of Nuku'alofa ("***the agreement***").

3. On 5 March 2020, Matson terminated the agreement by giving Royco three months' notice pursuant to the agreement. During the said termination period, Matson engaged another stevedore to service for its vessels.

4. In these proceedings, Royco seeks a declaration that the agreement is to be construed as inferring; alternatively, that it contains an implied term of, exclusivity by which Royco was entitled to service all of Matson's vessels at the Port of Nuku'alofa ("***the exclusivity term***"). Further, by reason of Matson engaging another stevedore during the termination notice period, Royco alleges that Matson breached the exclusivity term for which it claims damages in the sum of $26,616.47 ("subject to adjustment").

5. Matson denies Royco's claim.

6. Further Matson filed a counterclaim seeking NZD$4,331.23 for the costs of repairing a container and restoring it to serviceability allegedly damaged by Royco during its stevedoring of a ship on 30 December 2019. In its defence to counterclaim, Royco stated that it had paid the sum claimed and that Matson had accepted the payment.

Question for separate trial

7. Being the pivotal issue in respect of Royco's claim, the question of whether the agreement contained an exclusivity term could appropriately be determined by way of a separate trial pursuant to Order 25 rule 4 of the Supreme Court Rules was raised with the parties.

8. Order 25 rule 4 provides:

> **Separate trials**
>
> (1) The Court may order the separate trial of any question or issue arising in an action, whether of fact or law or mixed fact and law, and whether or not it was raised on the pleadings.
>
> (2) On making a decision on any question or issue tried separately the Court may give final judgment in the action if that decision substantially disposes of the action or renders further trial unnecessary.

9. Separate trials are appropriate only where the determination of the issue does not require consideration of disputed facts or issues of credit and where it will either dispose of the proceedings in their entirety or at least reduce the issues left to be determined. It is a power that has traditionally been exercised with 'great caution'. That is because the 'attractions of trials of *issues* rather than of cases in their totality' are 'often more chimerical than real' and that 'common experience demonstrates that savings in time and expense are often illusory. Separate trials 'should only be embarked upon when the utility, economy and fairness to the parties are beyond question.'[1]

10. On 10 September 2020, after hearing from the parties and considering the above principles, I ordered that a separate trial be conducted of the following question:

> "Whether, on its proper construction, the agreement between the parties dated 28 April 2017, including any implied term as alleged in paragraph 11 of the Amended Statement of Claim, conferring on the plaintiff an exclusive right to provide stevedoring services for all of the defendant's vessels at the Port of Nuku'alofa during the term of the agreement including the three-month termination period ending on 8 June 2020?"[2]

Issues for determination

11. Royco's case on this issue was encapsulated in paragraph 11 of its First Amended Statement of Claim as follows:

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[1] *Yang v Manoa* [2016] TOCA 3 at [25] referring to *Bass v Perpetual Trustees Co Ltd* (1999) 198 CLR 334 at 357. See also *Evans Deakin Industries Ltd v Commonwealth* [1983] Qd R 40 at 45; *Tepco Pty Ltd v Water Board* [2001] HCA 19 at [168]–[170] and *Birti v SPI Electricity Pty Ltd* [2011] VSC 566 at [23].

[2] Corrected from '5 March' as per the pleadings.

"In respect of the Stevedoring Agreement, where provisions of the said agreement are referred to in paragraphs 5 to 10 inclusive,[3] the plaintiff's right and obligation to provide the stevedoring services for all of the defendant's vessels in Tonga is an exclusive right, where exclusivity is not expressly provided for in the Stevedoring Agreement. It is implicit that exclusivity applied even though it is not expressly stated in the Stevedoring Agreement, for the following reasons:

Particulars

(a) exclusivity is required as a matter of construing the actual words used in the agreement when viewed as a whole;

(b) upon true [sic] construction of the contract, many of the salient features of the agreement would be unnecessary if Matson was entitled to utilise stevedoring services from elsewhere;

(c) in order to give effect to all the words in the agreement, it is implicit that exclusivity applies even though it is not expressly stated;

(d) the exclusivity term is implied otherwise without it the agreement would for all purposes be ineffective as the services agreement would impose no obligation on the defendant;

(e) the implied term of exclusivity is necessary for business efficacy;

(f) the implied term of exclusivity is so obvious that it goes without saying;

(g) the implied term is reasonable and equitable;

(h) the implied term is capable of clear expression; and

(i) the implied term does not contradict any express terms of the contract."

12. There are therefore three parts to Royco's pleaded case to be considered and determined:

(a) particulars (a) and (c) of paragraph 11 amount to a plea that exclusivity is to be inferred from, or is implicit upon, the proper construction of the express terms of the agreement;

(b) the allegation in particular (b) reflects the approach adopted by the New South Wales Court of Appeal in the decision in *Rehau Pte Ltd v AAP Industries Pty Ltd* [2018] NSWCA 96 ("***Rehau***"); and

[3] Referred to further below.

(c) particulars (d) to (i) express the common law conventional test for implication of terms in contracts.

13. By its defence, Matson denied that exclusivity is to be inferred from the express terms, or implied as a separate term, of the agreement. Further, Matson raised two additional issues in support of its denial of an 'exclusivity term', namely, the effect of:

(a) clause 22 of the agreement (an entire agreement clause); and

(b) section 24 of the *Consumer Protection Act*.

14. During oral submissions, Mr Edwards sought to draw attention to paragraph 10(b) of Royco's Reply in which it was asserted that exclusivity was "a practice adopted by the (stevedoring) industry". However, that plea was deployed in opposition to, and in the context of, Matson's defence based on the *Consumer Protection Act*. As discussed below, terms may be implied on the basis of industry custom or usage. However, as paragraph 11 of its pleading made plain, Royco did not seek to rely upon custom or usage as a basis for implication of the exclusivity term. When, during exchanges with Mr Edwards, the ambit of Royco's pleaded case was so confirmed, he declined to apply to further amend the claim.

15. As the parties' submissions did not include reference to any Tongan decisions, a survey of English[4] and other Commonwealth[5] jurisprudence on these issues is both necessary and instructive.

Is exclusivity implicit or to be inferred?

16. Royco's case calls for recognition of the distinction between inference and interpretation of the express terms of an agreement compared with implication of additional terms.[6] Although implied terms are, by hypothesis, terms which were not actually agreed by the parties, the border between actual and implied terms cannot be precise. This is so in part because the actual terms of a contract comprise not only the terms expressed by the parties, but also unexpressed terms to which the assent can be inferred. Moreover, it is inherently difficult to

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[4] *Civil Law Act*, ss 3 and 4.
[5] *Evidence Act*, s.166.
[6] Cheshire & Fifoot's Law of Contract, 8th Australian edition, [10.40].

draw a line between interpreting express terms and implying unexpressed terms: e.g. *Butt v Long* (1953) 88 CLR 476. In many cases, the court, in interpreting the meaning of the words of the parties, in effect adds to them, although its conclusion is expressed in the language of exegesis rather than of implication: *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland* (1976) 50 ALJR 769.

17. The first limb of Royco's case – that exclusivity was implicit or to be inferred from the express terms of the agreement - elicited submissions on the correct approach to construction of the agreement, the nature of the agreement and consideration of specific express terms.

Approach to construction of the agreement

18. Mr Edwards submitted that the guiding principles for construction of the agreement are as discussed by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society & Ors* [1998] 1 WLR 896 at 912 and 913, namely:

    (a) interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract;

    (b) subject to the next requirement, the background, or "matrix of fact", includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man;

    (c) save for actions for rectification, for reasons of practical policy, the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent;

    (d) the meaning which a document would convey to a reasonable man is not the same thing as the meaning of its words but what the parties using those words against the relevant background would reasonably have been understood to mean;

(e) the background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax;[7]

(f) the "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents;

(g) on the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."[8]

19. Further, as the High Court of Australia stated in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 ("***Woodside***"):

(a) an objective approach is to be adopted in determining the rights and liabilities of parties to a contract;

(b) the meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean;

(c) that requires consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract;

(d) appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating';

(e) unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the

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[7] *Mannai Investments Co. Ltd v Eagle Star Life Assurance Co. Ltd* [1997] AC 749.
[8] *Antaios Compania Nariera S.A. v Sales Rederierna A.B.* [1985] 191 per Lord Diplock at 201.

assumption 'that the parties ... intended to produce a commercial result';[9] and

(f) a commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'.

20. Mr Stephenson echoed *Woodside* by citing the plurality in the subsequent High Court decision in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* (2015) 256 CLR 104 at [46] ff, for the following like principles:

(a) the rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose;

(b) in determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean;

(c) that enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract;

(d) ordinarily, the process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning;

(e) however, sometimes it may be necessary in determining the proper construction where there is a constructional choice, to have recourse to objective events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is

[9] *Re Golden Key Ltd* [2009] EWCA Civ 636, per Arden LJ.

evidence of the parties' statements and actions reflecting their actual intentions and expectations;

(f) identifying the commercial purpose or objects of the contract is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating"; and

(g) unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties ... intended to produce a commercial result" ... so as to avoid it "making commercial nonsense or working commercial inconvenience".

21. There being no material differences between the parties on this issue, I proceed on the basis of those principles as recently organised in *Public Service Commission v Public Service Tribunal* [2020] TOSC 63 at [92]:

> *"To construe the terms of a commercial contract, the Court asks 'what a reasonable businessperson would have understood those terms to mean'.*[10] *To answer that question, 'the reasonable businessperson [is] placed in the position of the parties'.*[11] *The terms are construed objectively and the subjective intentions of the parties are irrelevant.*[12] *The objective approach requires reference to the text and its ordinary meaning, together with the context, being the entire text of the contract including matters referred to in the text; and the purpose. Unless a contrary intention appears in the contract, the court is entitled to approach the task of interpretation on the assumption that the parties intended to produce a commercial result, and should construe it so as to avoid a commercial nonsense.*[13] *However, the court does not weigh the commerciality of the agreement, and business common sense is a topic on which reasonable minds may differ.*[14] *Further, at common law, a court may supply, omit or correct words to avoid absurdity or inconsistency.*[15]

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[10] *Siemens Gamesa Renewable Energy Pty Limited v Bulgana Wind Farm Pty Ltd* [2020] VSC 126 citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-7 [35] (French CJ, Hayne, Crennan, and Kiefel JJ); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [47] (French CJ, Nettle and Gordon JJ).
[11] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551 [16] (Kiefel, Bell and Gordon JJ).
[12] Ibid.
[13] *Woodside* (2014) 251 CLR 640, 656-7 [35] (French CJ, Hayne, Crennan, and Kiefel JJ).
[14] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 198 [43] (Gleeson CJ, Gummow and Hayne JJ).
[15] *Fitzgerald v Masters* (1956) 95 CLR 420, 426-7 (Dixon CJ and Fullagar J); *MAAG Developments Pty Ltd v Oxanda Childcare Pty Ltd (as trustee for the Oxanda Education Services Trust)* [2018] VSCA 289, [53]-[55] (McLeish, Hargrave JJA and Almond AJA); *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* (2019) 99 NSWLR 317, [6]-[10] (Leeming JA).

22. More specifically, however, this first limb to Royco's case calls for exclusivity to be inferred from the proper construction of the express terms of the agreement. It has been suggested that terms deduced by implication or interpretation from the express terms of the contract may be a separate and distinct category.[16] It is likely that such terms may now be found to be part of the contract either by interpretation, or as terms implied into particular contracts. The question of whether a term is to be logically implied from the words used is a matter of construing the intention of the parties: *Commissioner of Inland Revenue v Mitsubishi Motors New Zealand Ltd* [1994] 2 NZLR 392 (CA) .

Nature of the agreement

23. In endeavouring to ascertain the presumed intention of the parties, particularly on this now disputed issue of exclusivity, it is important, at the outset, to identify the nature of the agreement and the rights and obligations it imposes on each of the parties to it.

24. Mr Edwards described the agreement as a supply agreement. He referred to the following provisions:

> **Recital A:**
>
> The Contractor [Matson] is a company incorporated in the Kingdom of Tonga which carries on the business of providing (inter-alia) stevedoring services in the Kingdom of Tonga as necessary to load and unload the cargo on to and from the Company's [Matson] vessels at the Port of Nuku'alofa.
>
> **Recital B:**
>
> The Company is a company incorporated in New Zealand and wishes to engage in the Contractor to provide the stevedoring services set out in the Schedule One to this Agreement ("Stevedoring Services") at the Port of Nuku'alofa in the Kingdom of Tonga.
>
> **Clause 1.2:**
>
> The Contractor agrees to provide to the Company the Stevedoring Services.

Schedule 1 to the agreement defined the Stevedoring Services to be provided by Royco as:

> 1. Unloading and loading of containers, either full or empty, or more to the vessel and to or from the wharf apron.

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[16] *Westpac Banking Corp v Savin* [1985] 2 NZLR 41 (CA) at 45; *Vickery v Waitaki International Ltd* [1992] 2 NZLR 58 (CA) at 64; and *Boote v Brake* [1984] 1 NZLR 318 .

2. Unloading and loading of break bulk or loose cargo from or to the vessel and to or from the wharf apron.

3. Lashing and unlatching of containers prior to discharging such containers.

4. Opening and closing of pontoons (the ships hatches).

5. Operation of ship's cranes to unload and load cargo.

Clause 1.3:

The Company agrees to remunerate the Contractor for the Stevedoring Services in accordance with the rates, costs, interest and charges set out in Schedule Two of this Agreement and any other charges provided for (expressly and impliedly) under this Agreement ("Stevedoring Charges").

25. Mr Edwards submitted further that:

(a) when read together, those clauses provide that Royco agreed to provide Matson the stevedoring services, and that in exchange, Matson agreed to remunerate Royco for the services in accordance with the rates and charges set out in Schedule 2 of the agreement; and

(b) on "a true construction of the agreement", Royco was to be paid for the stevedoring services it provides "for each of [Matson's] vessels it provides the services for".

26. Mr Stephenson submitted that, upon its proper construction, the agreement was a pricing contract, by which:

(a) Royco agreed that it was capable of providing certain stevedoring services to Matson for a certain price;

(b) Matson agreed that "when it engaged the services" of Royco, it would compensate Royco for those services at the prices stipulated by Royco under the agreement;

(c) the agreement did not stipulate that Matson wished to engage Royco's services for all of its vessels;

(d) there was no requirement that Matson must use Royco's stevedoring services, but if it did, then Matson must pay the agreed rates. The agreement was effective on that basis; and

(e) "there is nothing that flouts business common sense in terms of a contract that provides that one party agrees to provide services, on a non-exclusive basis, at an agreed price, which must be paid when that other party employs the first party's services. That just makes sense."

27. In my view, both party's submissions on the nature of the agreement are, to a certain extent, correct. It may be described as a supply agreement pursuant to which Royco agreed to provide stevedoring services on specified terms and prices and Matson agreed to pay for the services it received from Royco on those terms and at those prices. However, I do not agree with Royco's submission that without exclusivity, the agreement would impose no obligations on Matson. As noted, the agreement imposed an obligation on Matson to pay Royco, at agreed rates, for the services Royco provided Matson. But unlike a normal supply agreement, the agreement here did not impose any obligation on Matson to engage Royco to service any, or any specified number, of Matson's vessels during the term of the agreement.

28. However, such a perceptible characterization of the agreement tends to obscure rather than illuminate the present issue for determination.

29. The real question is whether the express obligation on Matson is be construed as including an automatic request by Matson for Royco to service 'all' Matson's vessels for the entire term of the agreement; or, 'any' of them. In other words, the constructional choice presented on this issue is whether the parties, by the terms of their agreement, intended that Royco would provide stevedoring services for 'all' of Matson's vessels berthing in Nuku'alofa during the term of the agreement, or only 'as required' by Matson.

30. Self-evidently, the agreement does not contain any express provision whereby Royco was entitled to receive, and Matson was obliged to give, all of its stevedoring work for all Matson's vessels berthing in the Port of Nuku'alofa. However, other express terms of the agreement which do shed some light on the parties' intentions include:

Clause 2.0: Term and Termination

This Agreement shall be in force and effect as from the date stipulated and expressed as the "Commencement Date" set out in clause 13 of this Agreement and shall terminate, without any further notice required, on the fifth anniversary date of the Commencement Date unless sooner terminated pursuant to the provisions herein.

The reference to clause 13 appears to be a typographical error. Clause 13 does not contain any definition of the commencement date. However, clause 24 provided:

Commencement Date - The commencement date of this Agreement is 13 January 2017 (being the date on which MV Islander, the first of the Company's ships to do so, arrived at Nuku'alofa and was Steve adored by the Contractor during 2017).

Clause 3.0: Labour-based

The Contractor will provide sufficient labour for the performance of the Stevedoring Services, but always contingent upon labour being available to the Contractor hereunder. The Contractor shall not be responsible for any loss, damage, delay or non-performance hereunder whatsoever arising from labour shortage, strikes, lockouts, deliberate work slowdown or stoppage or other labour difficulties, including any delays arising from the performance by Port Authority of any of its functions, supervisory or otherwise carried out on or at the wharf, including, cartage from wharf apron to storage and vice versa whether pursuant to statute or otherwise.

Clause 5.0: Equipment

The Contractor will provide all normal gear and equipment for the efficient performance of the Stevedoring Services unless otherwise agreed or stipulated herein or otherwise provided by the carrier located on the ship, including cranage.

Clause 22.0: Entire Agreement

This Agreement constitutes the entire Agreement between the Parties. This Agreement may only be amended or modified by an instrument in writing signed by an officer of the Company and an officer of the Contractor.

31. Royco's submissions in support of its contention that exclusivity is to be inferred from the express terms of the agreement as a whole was bifurcated into two arguments, namely:

(a) if, upon its "true construction", the agreement was not exclusive, the agreement would have to contain provisions specifying when the services were to be provided and in respect of which of Matson's vessels ("***the notice argument***"); and

(b) clause 13, particularly subclause 13.3, supports the inferred obligation of exclusivity ("***the clause 13 argument***").

The notice argument

32. On the notice argument, Mr Edwards elaborated that if exclusivity was not inferred, "surely there must be a need for an express notice provision where the Plaintiff will be notified in advance which of the Defendant's vessels arriving at Nuku'alofa will be stevedored by the Plaintiff and which of the Defendant's vessels it will not be stevedoring ... Conversely, if the Plaintiff was not required to provide its services to all of the Defendant's vessels and was not required to give notice of that intention in the absence of a notice requirement in the agreement, ... that would be considered a material failure of the Plaintiff to perform its obligations under the agreement contrary to clause 13.2. Where there is an absence of an express term for when the services would and would not be provided, the agreement must be taken to mean that the stevedoring services were to be provided for all of Matson's vessels".

33. It was further submitted that the scope of services described in Schedule 1, during the term of the agreement, "can only mean that the services (would) be provided to all of (Matson's) vessels".

34. Mr Stephenson countered Royco's notice argument by submitting that, practically, it could not really be so because Matson "would clearly give (Royco) reasonable advance notice of a vessel arrival for which it wished to engage (Royco's) services, and if it did not give such reasonable notice, then (Matson) could not reasonably expect (Royco) to be obligated to provide the services or be penalized for failure to do so ...".

35. For my part, the logic of Royco's submission was, on the one hand, circular, and on the other, elusive. To suggest that, in a contract negotiated by relatively

sophisticated companies with access to legal advice, one missing term (i.e. exclusivity) should be inferred by reference to another missing term (i.e. prior notice to Royco by Matson as to which of its vessels were to be serviced by Royco) was difficult to comprehend, let alone accept. On closer examination, the submission more resembled a plea for rectification of the agreement, which of course, was not pleaded.

36. In this regard, by their pleadings, submissions and communications during the course of this proceeding, the parties agreed on the following facts:

(a) from 2013 to 2016, that is, prior to the commencement of the subject agreement here, "by mutual agreement", Royco provided stevedoring services for all of Matson's vessels in Nuku'alofa;

(b) during the term of the subject agreement, the parties conducted their operations by use of a two month advance schedule which informed Royco as to which Matson vessels were sailing to Nuku'alofa and their estimated date of arrival. From that, Royco prepared itself in terms of personnel and equipment to service those vessels as and when they arrived;

(c) from the commencement of the subject agreement until termination of it by Matson, Royco serviced all Matson's vessels. However, Matson says that, for its part, having Royco service its vessels was a matter of convenience, not contractual obligation; and

(d) during the term of the agreement, Royco also serviced non-Matson vessels.

37. It is important to note that while the matrix of facts admissible for the purpose of construing a contract may include 'background knowledge that was, or would reasonably have been, available to the parties at the time, and evidence such as previous documents, identifying objectively the commercial or business object of the agreement', it does not include evidence of the parties' subjective intentions, facts not known or reasonably available to the parties, the course of negotiations or post-contractual conduct: *Kaukauloka v Luna'eva & Sons Co Ltd* [2020] TOLC 11; *Lehman Bros International (Europe) (in administration) v Exotix Partners LLP* [2020] 1 All ER (Comm) 635; *Re Coroin Ltd; McKillen v Misland (Cyprus)*

Investments Ltd and another [2012] All ER (D) 41 (Mar). Post contractual conduct is only admissible for the purpose of determining whether an agreement was made, identifying the parties to it or defining its subject matter.[17] I therefore proceed on the basis that the agreed facts as to the parties' post contractual conduct is not admissible for the purposes of construing the terms of their agreement.

38. Further, while the earlier informal arrangement between the parties from 2013 to 2016 may have been of the kind considered by Lord Hoffmann in *Carmichael v National Power plc* [2020] 1 All ER (Comm) 635 at 665 where the parties left their agreement to be inferred from their conduct or must be taken to have accepted that it would be, the subsequent formal agreement hereunder consideration is clearly not of that kind.

39. However, the reference to the use of the two monthly schedule is important. The agreement did not contain any provision as to the use of such schedules. Nevertheless, the parties appear to have proceeded satisfactorily on that basis. Whilst it was not directly addressed in any of the material, I infer that prior to inception of the subject agreement, the parties likely used similar schedules for notifying which of Matson's vessels were voyaging to Nuku'alofa and when they would arrive for Royco to service. In that context, the use of the schedules is admissible evidence forming part of the background facts known to both parties at the time of entry into the subject agreement.

40. From that, I consider it far more commercially sensible to infer that the parties intended to conduct the subject agreement by reference to such forms of notice. The schedules acted effectively as Matson's requests for Royco's services, that is, as required. Upon Royco receiving such notice, and in the absence of any indication by it to Matson that for whatever reason Royco would be unable to service any of the vessels on the schedule, Royco was obliged to provide stevedoring services for *those* vessels and Matson was obliged to pay for *those*

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[17] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 at [80] to [89]. In the earlier decision on *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [108], the High Court considered it unnecessary in that case to resolve the controversy about the admissibility of post-contractual conduct even though differing views have been expressed in that Court, other Australian courts and overseas courts. See also *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193.

services according to the terms of their agreement. Viewed in that light, the agreement worked according to its express terms.

41. Accordingly, I do not accept Royco's submission that because the agreement did not contain express terms specifying which of Matson's vessels were to be serviced by Royco or a procedure for giving notice about same, the agreement must therefore be construed as meaning that all of Matson's vessels were to be serviced by Royco. Rather than searching for other unexpressed terms which Royco now sees as being to its benefit, the actual express terms upon which the parties did agree do not support that conclusion.

42. Subject to the discussion which follows in relation to clause 13, there is no language in the agreement which can be construed, literally or implicitly, as conferring on Royco the right to service all of Matson's vessels. I am fortified in that view by the (admissible) fact that, between 2013 and 2016, the parties enjoyed an (presumably informal) arrangement by which it appears Royco serviced all of Matson's vessels. However, that they then decided to formalise their relationship going forward by entering into the subject agreement, but without any express term as to exclusivity, militates against the inference contended for by Royco. Put simply, and as a matter of common sense and commerciality, it is in my view more likely than not that the parties, as reasonable business 'men', intended a different formal arrangement to their previous informal one. If not, there would be little, if any, point in entering into the formal agreement.

The clause 13 argument

43. As noted above, paragraph 11 of the First Amended Statement of Claim cross-referenced paragraphs 5 to 10 thereof as the bases for the plea of inference and/or implication of exclusivity. Paragraph 5 simply pleaded the existence of the agreement. Paragraph 6 was not relevant for present purposes. Paragraphs 7 to 9 referred to the termination provisions of clause 13. Paragraph 10 contained the allegation that from the commencement of the agreement to March 2020, Royco carried out all of Matson's stevedoring services in the Port of Nuku'alofa, which I have addressed above.

44. Clause 13 of the agreement provided:

Clause 13.0: Default and Rights of Termination

13.1 In the event of the failure of Company to pay for services rendered by the Contractor at any time or if Company materially fails to perform its obligations hereunder and in the manner herein specified (a "Company Default"), the Contractor may elect to terminate this Agreement without process of law, provided, however, that the Company ... shall be given 30 calendar days notice in writing stating the nature of the default in order to permit such defaults to be remedied by the Company within the said 30 calendar day period ("Cure Period").

13.2 In the event of the material failure of the Contractor to perform its obligations hereunder and in the manner herein specified, (a "Contractor Default"), the Company may elect to terminate this Agreement with or without process of the law, provided, however, the Contractor shall be given 30 calendar days notice in writing stating the nature of the default in order to permit such defaults to be remedied by Contractor within the said 30 calendar day period ("Cure Period").

13.3 During a Cure Period or at any time while a default is continuing, *[1]* **the Party not in default shall be relieved of its obligations under this Agreement until such time as the default has been remedied by the other Party.** *[2]* **If the Company is in default of its obligations to pay Stevedoring Charges, the Contractor shall not be required to provide further services to the Company** unless the Company pays in advance to the Contractor amount satisfactory to the Contractor necessary to pay for the charges for such services, which payment may be applied by the Contractor in its sole discretion to reduce outstanding indebtedness incurred under this Agreement or otherwise cure such Company ... Default. Payment by the Company to the Contractor of interest on any charges due and owing under this Agreement shall not cure or excuse the Company's Default in connection with such amounts due and payable. *[3]* **If the Contractor is in default, the Company shall not be obliged to ntilise the Contractor to provide Stevedoring Services until the default is remedied.** Interest, default and all other remedies of either Party hereunder are cumulative and not in the alternative, and both parties further reserve any other remedies in the event of a Default whether arising under law, equity, statute or otherwise.

[emphasis and excerpt numbering added]

13.4 In addition to the rights of termination set out in subclauses 13.1 and 13.2 either Party may at any time terminate this Agreement for any reason or for no reason upon giving three calendar months notice in writing to the other.

45. Mr Edwards submitted that:

(a) clause 13.3 was "simply a statement affirming what the position legally is";

(b) Matson could certainly engage another stevedore in the circumstances permitted by clause 13, "but it neither adds nor subtracts from the position

that (Matson), on the proper construction of the agreement, is not at any time bound to exclusively to engage (Royco's) services";

(c) when read with clause 13.3, the fact that clause 13.4 did not provide with specificity that, during the three month notice period, Matson could engage stevedore, must mean exclusivity was imported into the terms of the agreement; and

(d) if the agreement was not exclusive, then Matson's right of termination was not required, because all Matson would need to do was simply not engage Royco's services.

46. Mr Stephenson submitted that:

(a) clause 13.4 did not state that Matson could engage the services of another stevedore, because it did not need to;

(b) nothing else in the agreement suggested that exclusivity was required, for business efficacy or any other reason;

(c) the fact that clause 13.3 specifically provides for the right to engage another stevedore during the default cure period does not mean that that right outside of the terms of clause 13.3 is excluded or not otherwise available;

(d) there were several categories of circumstances in which it was desirable, if not indeed necessary, for the parties to have a right to formally and finally bring their contractual relationship to a formal close, such as: sufficient levels of non-performance, unacceptable levels of loss or damage to cargo, causing physical damage to Matson's ships (up to and including structural damage possibly resulting in a significant pollution incident in Nuku'alofa harbour), illegal conduct by one of the parties or where another stevedore approached Matson offering services at a more attractive rate; and

(e) it does not follows that if the agreement was not exclusive, then Matson's right of termination was not required because termination provisions allow for a clear end to be brought to the contract, which would avoid any potential future argument. Such provisions are commercially sensible. Although, as Mr Edwards suggested, Matson could simply not engage Royco further,

bringing the agreement to a formal end would be a more commercially and legally prudent approach. Without the termination provisions of clause 13, that more prudent approach would not be available under the agreement.

47. During oral submissions, I drew counsels' attention to excerpt 3 from clause 13.3 recited above, to the effect that if Royco was in default, Matson was not obliged to utilize Royco's services until the default was remedied, and asked whether that provision supported the converse, namely, that if Royco was not in default, Matson was obliged to utilise Royco services. Perhaps, unsurprisingly, Mr Edwards embraced that hypothesis. Mr Stephenson on the other hand, perhaps equally unsurprisingly, submitted that the provision ought be construed as confined only to when Royco was in default and that it did not follow, that when Royco was not in default, Matson was obliged to use Royco's services exclusively. Otherwise, he submitted that the statement reflects nothing more than the position at law, with or without exclusivity.

48. As compelling as the postulated deduction at first blush appeared, there is force in Mr Stephenson's construction. After careful consideration, I have come to the view that it is to be preferred, albeit by a slightly different path of reasoning.

49. Rather than asking whether excerpt 3 in clause 13.3 may be construed to produce a converse obligation on Matson to use Royco's services (and on Mr Edwards' submission, only Royco's services) whenever Royco was not in default, the starting point in clause 13.3 is in fact the passage in excerpt 1. There, the general statement provides that at any time while a default is continuing, the non-defaulting party shall be relieved of its obligations under the agreement until the default is remedied by the other party.

50. That calls into sharp focus what were Matson's obligations under the agreement. As previously identified, the only relevant obligation imposed on Matson by the express terms of the agreement (clauses 1.3 and 4) was to pay Royco for its services in accordance with the schedule of rates annexed to the agreement. As none of the express terms of the agreement required Matson to use Royco's services exclusively for all of Matson's vessels berthing at Nuku'alofa, the obligation on Matson stated above must be construed as one in which it was

required to pay Royco for such of Royco's services as Matson requested and received.

51. By that reasoning, I incline to the view that the constructional choice referred to above favours construing the agreement as one in which Matson was obliged to pay Royco for its services *as required.* By transposing that broad interpretation of Matson's primary obligation to the provision found in excerpt 3 of clause 13.3, I conclude that the words *"... (Matson) shall not be obliged to use (Royco) to provide Stevedoring Services..."* were intended by the parties to mean that Matson was not obliged to use Royco services *at all* during any period of default. By such conditioning of Matson's obligation, it follows that Matson was entitled to request (and required to pay for) Royco's services whether that be for none, some or all of Matson's vessels.

52. Accordingly, I find that on the proper construction of clause 13, exclusivity was not inferred or implicit in the agreement.

Is a term of exclusivity to be implied?

Approach to implication of terms[18]

53. In addition to terms to which they have actually agreed, the parties to a contract are bound by terms implied in it. Implied terms serve at least two purposes. First, they fill gaps in the contract. No contract can (even if the party tries to) address all the contingencies that may affect its operation. Issues may therefore arise for which its actual terms do not provide and they can be resolved by implying terms. Second, and more importantly, implied terms are a means of regulating the performance and enforcement of contracts. The law has a legitimate interest in regulating the conduct of contracting parties, if only because contracts are the dominant means of economic exchange in modern communities. Hence, the law imposes obligations on contracting parties which ensure the just operation of contracts. Implied terms thus give effect to 'the anxiety of the court, by various techniques, to promote fair and reasonable contract performance': *Renard*

[18] The statements of principle set out in paragraphs 53 to 57 are derived from Cheshire & Fifoot's Law of Contract, 8th Australian edition, Chapter 10.

Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 271.

54. While it is not the function of the court to make the parties' contract, the court may in certain circumstances be prepared to imply a term that the parties have omitted.[19] In principle, the court implies terms only to the extent to which this is consistent with the actual terms of the contract. This means that the parties can expressly agree to exclude terms which would otherwise be implied. But even if not expressly excluded, a term will not be implied if it conflicts with the actual agreement of the parties. It follows that before considering whether a term should be implied, the court must first establish what the actual terms of the contract are: *Hawkins v Clayton* (1988) 164 CLR 539 at 569-70.

55. There are three different kinds of implied terms:

    (a) universal terms, meaning obligations implied in all contracts, for example, obligations of cooperation and of good faith;

    (b) generic terms involving obligations implied in particular classes or types of contracts, for example, the duty of reasonable care in contracts for professional services. Such terms may also be implied on the basis of custom or usage; and

    (c) specific terms being obligations implied in a specific contract.

56. A distinction is conventionally made between terms implied by law, independently of the intention of the parties, and terms implied in fact, to give effect to the present intention of the parties: *Byrne v Australian Airlines Ltd* (1995) 131 ALR 422 at 426-7, 441-2, 447-50. Thus, universal and generic terms are generally regarded as implied by law, and specific terms as implied in fact. But although that the distinction between terms implied by law and terms implied in fact obscures rather than illuminates the true nature of the court's power to imply terms, in truth, implied terms begin where the intentions of the parties leave off and the law steps in. Presumed or imputed intention is an oxymoron which is best discarded as a classifying tool in the realm of implied terms. As the High

[19] *Otago Harbour Board v Reid Farmers Ltd* [1990] 1 NZLR 115 (HC) at 118.

Court put it in *Butts v O'Dwyer* (1952) 87 CLR 267 at 286, 'the law raises an implication from the presumed intention of the parties where it is necessary to do so'. In that sense, all implied terms, whether universal, generic or specific, are implied by law.

57. Traditionally, Courts are slow to imply terms. In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1981-1982) 149 CLR 337 at 346, Mason J said:

> *"For obvious reasons the Courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question."*

58. Implication is also to be distinguished from rectification of a contract. In *Codelfa*, supra, Mason J explained:

> *"The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it - it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention."*

59. The common law approach to, and test for, implication of terms in contracts was recently confirmed and restated by the U.K. Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2016] 4 All ER 441. Following judicial observations on implied terms

which the majority of the Court considered represented a clear, consistent and principled approach, the following principles, in summary, are distilled:[20]

(a) For a term to be implied, it must:

(i) be reasonable and equitable;

(ii) be necessary to give business efficacy to the contract so that no term would be implied if the contract was effective without it;

(iii) be so obvious that it went without saying;

(iv) be capable of clear expression; and

(v) not contradict any express term of the contract.

[the "***conventional test***"]

(b) The implication of a term is not critically dependent on proof of an actual intention of the parties when negotiating the contract.

(c) A term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considered that the parties would have agreed it if it had been suggested to them; those are necessary but not sufficient grounds for including a term.

(d) It is questionable whether the first requirement, reasonableness and equitableness, would usually, if ever, add anything: if a term satisfied the other requirements, it is hard to think that it would not be reasonable and equitable.

(e) Although the requirements are otherwise cumulative, the second and third requirements, business necessity and obviousness, could be alternatives in the sense that only one of them needed to be satisfied, although in practice it would be a rare case where only one of those two requirements would be satisfied.

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[20] At [17]–[23], [26]–[29], [57], [75]–[77]. *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20, *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, *Equitable Life Assurance Society v Hyman* [2000] 3 All ER 961 and *A-G of Belize v Belize Telecom Ltd* [2009] 2 All ER 1127 considered. See also *The Moorcock* (1889) 14 P.D. 64 per Bowen LJ at 68; *Liverpool City Council v Irwin* [1977] AC 239 per Lord Cross at 258 and per Lord Edmund-Davies at 266; Stephen J in *Helicopter Sales (Australia) Pty Ltd v Rotor-Work Pty Ltd* (1974) 132 CLR 1 at 13; and Isaacs J in *Hart v MacDonald* (1910) 10 CLR 417 at 431.

(f) If the issue is approached by reference to the 'officious bystander', it was vital to formulate the question to be posed by him with the utmost care. In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918-19] All ER Rep 143 (CA) and *Shirlaw v Southern Foundries (1926) Ltd* [1930] 2 All ER 113 (CA) it was said:

> *"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course'".*[21]

(g) Necessity for business efficacy involves a value judgment; a more helpful way of putting the second requirement was that a term could only be implied if, without the term, the contract would lack commercial or practical coherence.

(h) Further, a term may be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied, provided that:

(i) the reasonable reader was treated as reading the contract at the time it was made; and

(ii) he considered the term to be so obvious as to go without saying or to be necessary for business efficacy.

(i) Whilst both the process of construing the words used in a contract and the process of implying terms into the contract involved determining the scope and meaning of the contract, and on that basis could properly be said to be part of construction of the contract in a broad sense, they were different processes governed by different rules. The express terms of a contract must be interpreted before any question of implication can be considered.

60. Further:

(a) No term will be implied where it is impossible to conclude with confidence what the parties' reaction would have been had the matter been drawn to

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[21] See also the formulation of the principle adopted in *Southland Harbour Board v Vella* [1974] 1 NZLR 526 (CA) and *Roberts v Independent Publishers Ltd* [1974] 1 NZLR 459 (CA) following *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 (HL) at 268.

their attention at the time the contract was made: *Otago Station Estates Ltd v Parker* [2003] 3 NZLR 567 (HC).

(b) In the case of terms implied in fact, the onus of proving that a term should be implied into the contract rests on the party so alleging: *Luxor (Eastbourne) Ltd v Cooper* [1941] 1 All ER 33 (HL). Where, however, the term in question is of the variety implied in law (whether by the court or by statute) the onus is different. Once the contract has been shown to be of a nature that justifies an implication (whether under the common law or statute), it is up to the party who alleges that the term should not be implied to so prove: *Heimann v Commonwealth* (1938) 38 SR (NSW) 691 (NSWSC) at 695 and 696. In the case of terms implied by virtue of custom or usage, the onus is on the party alleging that a custom or usage exists: *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 235 and 238.

(c) Where it is alleged that a term should be implied by law into a contract, the court is not limited to a consideration of the contract itself. Extrinsic evidence is admissible to support or rebut implication even if the parol evidence rule is otherwise applicable: *Mears v Safecar Security Ltd* [1982] 2 All ER 865 (CA). The main consideration with respect to terms implied in fact is the construction of the contract; regard may also be had to the circumstances surrounding the contract in order to establish the factual matrix against which the parties contracted: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444. However, evidence of the parties' negotiations is not admissible for the purpose of implying a term: *Codelfa*, supra.

The "Rehau" approach

61. Royco relies on the New South Wales Court of Appeal decision in *Rehau* as an example of a case in which, relevantly, a term of exclusivity was implied into a supply agreement. To understand the finding and the approach taken to arrive at it, the facts must be briefly stated.

62. In 1999, Rehau and AAP entered into a supply agreement, under which Rehau agreed to provide AAP with nine specified plumbing articles. The agreement was for a term of one year but would be extended by one year each time it was due to expire, unless a notice of termination had been given at least three months before the date of expiry. The parties agreed that the terms of their agreement would apply for each "call-off order placed" under the agreement. A "call-off order" was determined to be the same as a "blanket order" meaning "a purchase order which a customer places with its supplier to allow multiple delivery dates over a period of time, often negotiated to take advantage of predetermined pricing" or "a purchaser's request for a delivery of goods or services which have been ordered in full but are to be supplied on demand; (occasionally also) a contract for order and delivery of this kind."

63. Between 2000 and 2002, Rehau and AAP also entered into a number of further agreements relating to the manufacture and supply of other articles not covered by the Supply Agreement.

64. In 2012, Rehau asked AAP for price reductions for the articles required by Rehau and sought an *"understanding"* that until discussions concluded, AAP should cease production. Notwithstanding, Rehau continued to place orders until 11 July 2013. On 2 June 2014, AAP's solicitors sent a letter to Rehau asserting that it had breached the Supply Agreement by failing to order the relevant articles. It asserted that Rehau had repudiated the agreement by its conduct, that AAP accepted the repudiation and would seek damages.

65. The primary Judge distinguished between two kinds of implied terms in a contract. The first comprises implications contained in the express words of the contract. The second consists of implications from considerations of business efficacy. The distinction drawn by the primary Judge was consistent with the conventional classification of implied terms.[22] The Judge held that, as a matter of construction, a term should be implied into the agreement, obliging Rehau to purchase all its requirements for the nine specified articles exclusively from AAP.

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[22] *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61 at [28] and authorities cited there (Heydon JA). The other two categories, not relevant to the present case, are implications from the "nature of the contract itself" and implications from usage.

Rehau's failure to place orders with AAP after July 2013 constituted a repudiation of that agreement, which had been accepted by AAP.

66. On the issue of implication of the exclusivity term, the Court of Appeal[23] upheld the primary judge's decision albeit by the following analysis:[24]

(a) The parties agreed on fixed prices for the nine articles to be manufactured and supplied by AAP to Rehau. The prices were to apply for a period of one year. As cases such as *Colonial Ammunition Co v Reid*[25] demonstrated, an agreement to provide goods at a fixed price during a particular period was not necessarily inconsistent with the other party being free to purchase the articles from other sources. But the parties' agreement in *Rehau* on fixed prices for the articles provided the context within which other provisions in the agreement needed to be understood.

(b) A provision of the agreement that Rehau "shall purchase" the nine articles from AAP suggested that, while Rehau would be free to determine the quantities to be purchased from AAP, it would purchase all its requirements at the agreed prices exclusively from AAP.

(c) The articles specified in the agreement were to be produced in accordance with drawings, tooling, models and the like made available by Rehau to AAP. All such items remained the property of Rehau and any tooling manufactured by AAP used in the production process was to become the property of Rehau. Aids to production supplied by Rehau or manufactured by AAP to Rehau's specifications could be used only for orders from Rehau and were not to be made available to any third parties. Moreover, AAP was obliged at its own cost to keep the tooling up to date and ready for use. Those elaborate arrangements for the manufacture and supply of a limited range of articles meeting Rehau's design specifications for which prices had been agreed suggested that the manufacturer was to be the exclusive supplier of the articles to Rehau for the term of the agreement.

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[23] Sackville AJA (Macfarlan JA and Emmett AJA agreeing).
[24] [78], [82], [105]. *Colonial Ammunition Co v Reid* (1900) 21 NSWR 338 distinguished; *Codelfa Construction Pty Ltd v State Rail Authority* (1982) 149 CLR 337 referred to.
[25] (1900) 21 NSWR 338.

(d) The agreement obliged AAP to maintain sufficient production capacity for the quantities of articles required by Rehau. The agreement did not specify the quantities required by Rehau during any particular period. While there may have been some doubt as to the meaning of the provision, it apparently contemplated that Rehau was to inform AAP from time to time of the quantities of articles it needed (although not yet necessarily ordered). AAP was then to ensure that it had sufficient production capacity to meet the anticipated demand if and when those indications translated into orders from Rehau.

(e) AAP was required to maintain a "minimum buffer stock of 2 months of the articles ... free of charge". The minimum quantities were not specified in the agreement but were to be ascertained following "the breakdown of quantities to be delivered as stipulated by Rehau". The obvious commercial purpose of maintaining a buffer stock was to ensure that AAP could meet Rehau's anticipated requirements for the articles. AAP's obligation to maintain buffer stock was not decisive of itself, but in combination with the other provisions, strongly supported the implication of the exclusivity term into the agreement.

(f) The agreement provided that if AAP failed to meet the "absolutely binding" deadlines, Rehau was to be "further entitled to make covering purchases to maintain production". That language implied that, provided AAP met the imposed deadlines, Rehau would purchase all its requirements for the articles from AAP. Otherwise, there would be no need to specify that Rehau was entitled to make "covering purchases".

(g) Finally, Rehau was entitled to withdraw from the agreement if non-complying deliveries were made repeatedly. As the primary Judge observed, that provision would not have been necessary unless the parties intended that Rehau should purchase the articles exclusively from AAP.

67. The Court of Appeal accepted, as observed by Owen J in *Colonial Ammunition Co v Reid,*[26] that where a written agreement contains express covenants on the

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[26] *Colonial Ammunition Co v Reid* at 349.

part of one party, the Court ought not to imply an unexpressed covenant by the same party except in the clearest case. However, as referred to by Mr Edwards in his submissions in the present case, the Court of Appeal in *Rehau* distinguished the decision in *Colonial Ammunition Co v Reid*. There, a company agreed to supply certain ammunition to the Government of New South Wales for seven years. Clause 4 of the agreement provided that if the Government required different kinds of ammunition, it would give the company six months' notice. If the company did not state in writing that it would be able to execute orders for the supply and delivery of special ammunition, the Government had the right to purchase the ammunition elsewhere. The Government required special ammunition but gave no notice to the company and simply purchased the special ammunition elsewhere. The Supreme Court of New South Wales held that cl 4 did not require the Government to purchase all special ammunition from the company. The Court interpreted cl 4 as being for the benefit of the company which otherwise "might have been called upon at a moment's notice to supply ammunition for any number of weapons of different patterns".[27] The purpose of cl 4 was to give the company a chance to decide whether or not it wished to supply the special ammunition. Clause 4 bore little resemblance to the terms of the supply agreement in *Rehau*.

68. Further, in *Rehau*, the supply agreement expressly imposed virtually no obligations on Rehau, except the obligation to purchase the articles. The terms of the agreement were held to be inconsistent with Rehau retaining the right to obtain supplies of the articles from sources other than AAP. When read as a whole, the agreement made commercial sense only if it was construed as requiring Rehau, while the supply agreement remained in force, to purchase its requirements for the articles exclusively from AAP. The Court held that it was a sufficiently clear case to warrant implying the exclusivity term.

69. In view of that conclusion, it was not necessary to consider whether the primary Judge was correct to conclude that the exclusivity term should be implied in the

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[27] *Colonial Ammunition Co v Reid* at 346 (Darley CJ); see also Owen J at 349.

supply agreement on the conventional principles stated in decisions such as *Codelfa* and *BP Refinery*.

70. Finally, as the documentation in evidence relating to the further supply agreements went no further than establishing that a series of orders for products were placed by Rehau and filled by AAP on prices and terms agreed from time to time, the Court of Appeal held that the primary Judge correctly concluded that the further supply agreements were simply ad hoc ordering arrangements and that there was nothing in the dealings between the parties that could incorporate the exclusivity term into the further supply agreements.

71. In the instant case, and by analogy to the approach adopted in *Rehau*, Mr Edwards asserted that if Matson could engage another stevedore to provide the services, the following provisions of the stevedoring agreement would be unnecessary:

> 2.0 TERMINATION
>
> This Agreement shall be in force and effect as from the date stipulated and expressed as the "Commencement Date" set out in clause 13 of this Agreement and shall terminate, without any further notice required, on the fifth anniversary date of the Commencement Date unless sooner terminated pursuant to the provisions herein.
>
> 3.0 LABOUR
>
> The Contractor will provide sufficient labour for the performance of the Stevedoring Services, but always contingent upon labour being available to the Contractor hereunder..."
>
> 5.0 EQUIPMENT
>
> The Contractor will provide all normal gear and equipment for the efficient performance of the Stevedoring Services unless otherwise agreed or stipulated herein or otherwise provided by the carrier located on the ship, including crane-age.
>
> 8.3 All work performed as a consequence of this Agreement is to be the responsibility of the Company, including charges for account of other parties, such as delays due to defective ship's equipment.
>
> 9.0 INSURANCE
>
> The Contractor agrees to carry and include in the rates quoted under Schedule Two, Public Liability Insurance for third parties. The Contractor also agrees

to insure against its Legal Liability for Damage to vessel and its equipment and for loss of or damage to cargo.

10.0 HIMALAYA CLAUSE:

10.1 It is hereby expressly agreed that no servant or agent of the Contractor (including every independent contractor from time to time employed by the Contractor) shall in any circumstances whatsoever be under any liability whatsoever to the Carriers, Shipper, Consignee, Owner...

16.0 US FOREIGN CORRUPT PRACTISES ACT

The Contractor is familiar with the United States Foreign Corrupt Practices Act ("FCPA") ... The Contractor agrees not to violate the FCPA and that no payments received by it from the Company shall be is used for any purpose that would violate the FCPA.

21.0 ASSIGNMENT:

A Party must not assign this Agreement to [sic] any right under this Agreement to any person without the written consent of the other Party but such consent shall not be unreasonably withheld.

25.2 GEAR AND EQUIPMENT

The Company shall ensure that as soon as possible after arrival at the port of Nuku'alofa its ship, the ship's cranes and other cargo handling equipment, and the cargo itself are made ready for cargo working in a safe and normal manner by the Contractor; and that the Contractor has safe and timely access to all necessary cargo spaces on the ship; and that any cargo handling equipment on board is made available to the Contractor if required.

72. Mr Edwards elaborated, by posing a series of questions to the effect that if Matson could cease using Royco and engage other stevedores:

(a) what would be the purpose of Royco having to provide sufficient labour for the term of the agreement;

(b) what would be the purpose in requiring Royco to provide all the equipment necessary;

(c) when would Royco have to ensure that it had sufficient equipment if it was not advised which of Matson's vessels it would be required to service? (Although that question was effectively answered by the parties' use of the two monthly forward schedules); and

(d) for which vessel/s would clause 25.2 apply?

73. Further, Mr Edwards returned to the termination provisions of clause 13 and submitted that, if exclusivity was not implied, subclauses 13.2, 13.3 and 13.4 would be unnecessary because:

    (a) excerpt 3 of clause 13.3[28] would only apply if Royco was in default, in which case, Matson would then be entitled to utilize another stevedore;

    (b) otherwise, that provision and the remainder of the termination provisions would be unnecessary; and

    (c) there would be no need to give three months' notice as required by clause 13.4 because if there was no exclusivity, it would be unnecessary to give notice of termination for any reason. For example, if Matson used Royco for the first year of the agreement, and thereafter, ceased using Royco and instead used different stevedores, the term would be unnecessary as the agreement would practically be at an end;

74. Mr Edwards called in aid the observation of the primary judge in *Rehau* that:[29]

> *"If the agreement between AAP and Rehau was one which merely regulated the arrangements between the parties in the circumstances when Rehau ordered product from AAP, many or all of the provisions to which I have referred would be unnecessary. All that would be necessary would be for Rehau to stipulate how AAP was to perform its task in meeting the supplies requested at any given time by Rehau. Moreover, it is difficult to see what consideration is provided by Rehau for the requirements in clause III of the Supply Agreement if Rehau was under no obligation ever to order the articles from AAP."*

75. By application to the instant case, Mr Edwards submitted that if the parties intended that their agreement was to apply only to some of Matson's vessels, then the only terms and conditions necessary would be express terms for each of the vessels Royco was required to service, for which it would be paid a fee, "and there would be express representations and warranties when the services are provided for those particular vessels".

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[28] If (Royco) is in default, (Matson) shall not be obliged to utilize (Royco) to provide the Stevedoring Services until the default is remedied.

[29] [44]

76. Mr Stephenson submitted, for the following reasons, that Royco's reliance on *Rehau* was misplaced:

(a) even though the legal principles applied by the NSW Court of Appeal reflect those of the common law of England, as an Australian decision, *Rehau* was not binding and only persuasive in Tonga;[30]

(b) the decision was based on the specific facts of that case, including, most relevantly, the form and text of the agreement in that case;

(c) the facts in *Rehau* are distinguishable from the present case:

(i) *Rehau* concerned a supply agreement between AAP (a manufacturer of plumbing products) and Rehau (a wholesale supplier of plumbing products);

(ii) the agreement applied to nine different plumbing products each with its own fixed price;

(iii) the agreement had an initial term of one year with automatic renewals for successive years unless either party gave notice of termination three months prior to expiry of the then current term;

(iv) the agreement did not contain any exclusivity provision, nor did it contain any minimum purchase or "take to pay" requirements, nor did it lock in any purchase orders from Rehau or indicate the quantities that might be involved;

(v) the agreement simply contemplated that purchase orders could be issued under the agreement and the terms of the agreement would then apply to each order (including 'call off' or blanket orders);

(vi) the agreement stated that Rehau "shall purchase" the plumbing products from AAP;

(vii) AAP was required to reserve production capacity to meet Rehau's requirements;

(viii) AAP was required to maintain a minimum buffer stock of two months;

[30] Sections 3 and 4 of the *Civil Law Act* and s.166 of the *Evidence Act*.

(ix) Rehau was entitled to make covering purchases to maintain production if AAP failed to supply; and

(x) Rehau was required to provide AAP with tooling so that it could manufacture the products and AAP was obliged to keep the tooling up to date with revisions to drawings and always ready for use;

(xi) after a number of years of orders made under the terms of the agreement, the parties failed to agree on price reductions and Rehau then began purchasing from a different manufacturer or otherwise started making the products itself. Rehau did not provide any effective notice of termination under the agreement, but AAP asserted that Rehau had repudiated the agreement and claimed damages as a consequence.

(d) By contrast, the stevedoring agreement here does not contain any provision which required:

(i) that Matson "shall purchase" the stevedoring services. Royco simply agreed to provide them and Matson agreed to pay for any such services it used at the agreed rates (i.e. a pricing agreement);

(ii) Royco to ensure the equivalent of "reserve production capacity" in terms of, for example, labour for its services to Matson. On its plain reading, clause 3 did not in fact impose any strict obligation on Royco to provide labour at all because the obligation was completely contingent upon labour being available to Royco;

(iii) Royco to undertake similar obligations on AAP to maintain a minimum buffer stock of two months or any obligation on Matson the equivalent of Rehau having to provide AAP with tooling for the manufacture of the products or on Royco the equivalent of AAP having to keep the tooling up to date with revisions to drawings and always ready for use. Clause 5 only required Royco to provide all normal gear and equipment for the efficient performance of the stevedoring services. That gear and equipment was necessary for Royco to be able to perform stevedoring services not just for Matson, but also for any other vessel owner/operator for which Royco agreed to provide services, which

under the terms of the agreement, Royco was entitled to do (discussed further below);

(iv) automatic renewal, unless a party gave three months' notice, or at all. The agreement here entitled either party to terminate upon three months' notice with or without cause.

77. In relation to the various provisions Mr Edwards contended would, without exclusivity, be rendered unnecessary, Mr Stephenson submitted that regardless of whether the agreement was exclusive or not, each of those provisions were "necessary and sensible". For instance, in relation to:

(a) clause 3, it made sense that Royco would warrant that it has the labour necessary to provide the stevedoring services (although, for reasons that will be discussed below, clause 3 was not an "absolute warranty");

(b) clause 5, it again made sense that Royco would warrant they it had the necessary equipment to provide the services, whether or not the agreement was on an exclusive basis. Further, Royco did not warrant to Matson any exclusivity or priority in terms of the equipment; just that it had the equipment necessary to provide the services;

(c) clause 9, it was necessary for Royco to warrant to its clients, such as Matson, that it carried appropriate insurances, whether or not its services were being provided on an exclusive basis;

(d) clause 10, the 'Himalaya clause', was inserted for the benefit of Royco by limiting its liability and was therefore necessary whether the agreement was exclusive or not;

(e) clause 16, U.S. *Foreign Corrupt Practices Act*, was necessary for Matson, as an international shipper and carrier and a subsidiary of a U.S. entity, regardless of whether the agreement was exclusive or not;

(f) clause 21, assignment, it makes commercial sense for Royco not to be able to assign its rights to provide services to Matson to another stevedore without Matson's consent; and

(g) clause 25.2, the obligation on Matson to ensure that once any of its vessels arrived at the Port of Nuku'alofa, the ship's cranes and cargo handling equipment were ready for cargo handling was, particularly for Royco, clearly a necessary undertaking, again, regardless of whether Royco was to service all, some or only one of Matson's ships.

78. Mr Stephenson's position in relation to clause 13 (in particular, subclause 13.3) and whether, as Mr Edwards contended, it would be rendered unnecessary in the absence of exclusivity, was as per his submissions on the " clause 13 argument" addressed above.

79. There can be no doubt that the facts in *Rehau* are highly distinguishable from the present case. However, that alone does not produce a satisfactory answer to this part of Royco's case. Instead, it is necessary to consider and apply the approach taken by the New South Wales Court of Appeal, at least in part, in seeking to identify whether, without exclusivity (inferred or implied), other express terms of the agreement would be rendered unnecessary. It will be seen that that approach is but a variant of the business efficacy test and the more general approach to construction of commercial contracts which proceeds on the assumption that the parties, as reasonable businessman, intended to produce a commercial result. By extension, the parties are further presumed to have included each of the terms of their agreement for the purpose of recording their common intent and ensuring the operation of their agreement. They are not presumed to have included unnecessary terms.

80. During oral submissions, Mr Edwards revealed that his submissions in this regard were premised on Matson not using Royco's services at all. It appeared he had not considered that if Matson used Royco services for one vessel or 100 vessels, during the term of the agreement (and reserving clause 13 for separate consideration shortly), all the other provisions referred to by Mr Edwards would be necessary for the operation of the agreement. For instance, the requirement in clause 9 for Royco to carry insurance was not limited to any number of vessels. Such insurance would have to have been in place regardless of whether Royco serviced one or 100 of Matson's vessels. Similarly, clause 16, which constituted an undertaking by Royco to comply with the US *Foreign Corrupt Practices Act*,

applied regardless of the number of Matson vessels Royco may have serviced. It was simply a promise by Royco to abide by that legislation during the term of the agreement. Upon acknowledging that analysis, and with the exception of clauses 21 and 13, Mr Edwards did not seek to maintain that the other clauses would be unnecessary in the absence of exclusivity.

81. It also transpired during the course of argument that Mr Edwards' reference to clause 21 (assignment) being unnecessary in the absence of exclusivity was in fact a product of a misconception as to the meaning of the provision. Mr Edwards submitted that clause 21 had the effect that if Matson engaged another stevedore, without Royco's written consent, Matson would be assigning Royco's rights under the agreement to that other stevedore, in breach of the agreement. Clause 21 does not say that. More specifically, with or without exclusivity, the simple engagement by Matson of another stevedore could not, as a matter of law, constitute an assignment by Matson of the agreement or any rights thereunder.

82. In relation to clause 13, Mr Edwards developed his submission to this: if Matson stopped using Royco and started using other stevedores instead, the agreement would be at an end and therefore the termination provisions in clause 13 would be unnecessary.

83. I do not accept that submission.

84. Firstly, and fundamentally, the nature of the agreement must be recalled. If it transpired, and regardless of whether Matson actually engaged Royco to service any of Matson's vessels, that either party no longer wished to be bound by the rates one was prepared to accept and the other to pay because, for instance, there had been a shift in the market for stevedoring services which saw a recalibration of competitive pricing, clause 13.4 in particular provided a mechanism by which either party, or both, could free themselves of the binding prices under the agreement. The same might apply to any other operative term of the agreement which could not successfully be varied by mutual agreement.

85. Secondly, and from a practical perspective, subclauses 13.1 to 13.3 naturally and necessarily governed the parties' rights and obligations in the event of default.

Again, they applied whether Royco serviced one or 100 of Matson's vessels. In the event Matson failed to pay for services it had received, Royco did not have to service any further ships until payment was received (including payment in advance). The converse, which is addressed in subclause 13.2 and excerpt 3 to subclause 13.3, applied whenever Royco failed to perform its obligations under the agreement in the manner specified. What obligations might they be? By the first limb of clause 3, Royco was required to provide sufficient labour for the performance of the services but always contingent upon (meaning "subject to") labour being available to Royco. Therefore, if a Matson vessel arrived at Nuku'alofa but for whatever reason Royco did not have sufficient labour to service the vessel, Royco would not be in breach of clause 3. Therefore, if Royco was not in default, then excerpt 3 to clause 13.3 would not be engaged. In that event, and on Royco's hypothesis of exclusivity, Matson would be caught in not being able to have its vessel serviced but at the same time not being able to have a different stevedore service the vessel without breaching the agreement. Alternatively, pursuant to clause 13.2, Matson could, in that circumstance, terminate the agreement, but only upon giving Royco 30 days within which to remedy the default. That again would produce an unworkable scenario whereby Matson's vessel would be sitting in dock waiting for up to 30 days for Royco to find sufficient labour, failing which, only then could Matson terminate the agreement with Royco and engage another stevedore. The same would apply in relation to clause 5 and Royco's obligation to provide all normal gear and equipment for the efficient performance of its services. In my view, such a 'paralysing' effect on Matson could not have been the parties' mutual and commercially sensible intention. That analysis alone weighs against a finding of implied exclusivity.

86. Thirdly, and logically, any engagement by Matson of another stevedore would not automatically bring the agreement between Matson and Royco to an end. In this regard, Mr Edwards submission depended for its success upon characterising any engagement by Matson of another stevedore as a repudiation of its agreement with Royco. Such circular reasoning assumes exclusivity. The problem with that approach is that there is no clear provision in the agreement which requires Matson to use Royco at all.

87. Fourthly, there are a number of reasons why the three months' notice in clause 13.4 would not only be necessary but desirable regardless of whether the agreement contained a term of exclusivity or not. For instance, if Royco terminated pursuant to the provision, the three months' notice period would give Matson time to secure the services of other stevedores while at the same time being secure in the knowledge that any vessels which had already been communicated to Royco for servicing during that period and which Royco had agreed to service, would be serviced. Where, as here, Matson terminated, Royco would have the opportunity to reorganise its labour and other resources for the purposes of servicing other vessels while at the same time being able to continue to service any vessels which Matson had communicated to Royco prior to the date of termination. The notice period would also have the effect of locking in the price as agreed for any work carried out during that period and also allow for other obligations under the agreement to be completed such as, for example, any insurance claims.

88. Finally, on this part of Royco's case, I consider the agreement here to be more akin to that considered in *Colonial Ammunition v Reid*. As in that case, Matson did not expressly contract to take all the stevedoring services it required from Royco and there is, in my view, nothing in the agreement to bind Matson to take all the stevedoring services it required from Royco. Moreover, in addition to there being no express provision of the agreement which obliged Matson to use Royco's services for all of Matson's vessels, the agreement was entirely silent about any lesser number of vessels whether that be some, one or none. Consequently, there is no provision of the agreement to the effect that Matson would be in breach of its obligations under the agreement if it failed to provide Royco with a specified number of ships per year, say, during the term of the agreement. That was not something contemplated by clause 13.1 which was only concerned with a Matson default being a failure to pay for services rendered. In turn, the agreement did not contain any provision which imposed a sanction on Matson if it failed to use Royco for any specified number of vessels per year (or other interval during the term of the agreement), or at all.

89. Accordingly, I find that the *Rehau* approach in this case does not support the implication of a term of exclusivity.

The conventional test

90. In his written submissions,[31] Mr Edwards repeated the assertions pleaded in paragraph 11 of Royco's Amended Statement of Claim to the effect that a term of exclusivity fulfilled the requirements of the conventional test (often referred to as the "*BP Refinery test*") for implication discussed above in that it was reasonable and equitable; necessary for business efficacy; so obvious that it went without saying; capable of clear expression; and did not contradict any express term of the agreement.

91. Succinctness in submissions is to be lauded. However, conclusions bereft of analysis will rarely assist a court's appreciation of the case sought to be advanced. Therefore, in order to afford Royco a full opportunity to present this part of its case, Mr Edwards was invited during oral argument to expand upon his written submissions. To that end, and to the best of my understanding, Mr Edwards submitted, in summary:[32]

    (a) The term is reasonable because it "clears up any misunderstanding" or uncertainty between the parties due to the agreement not providing for any notice to be given as to which vessels were required to be serviced by Royco and when.

    (b) The term is equitable because "it's fair" that if Royco was going to contract with Matson to provide stevedoring services for Matson's vessels, then Matson shouldn't be able to "go off to someone else". If Royco was providing Matson a good service and "doing a very good job", then it's fair that Matson pay Royco the agreed rates for that service. If Matson decided to terminate and go elsewhere, that was fair as well. But during the term of the contract, if Royco set its rates and provided Matson with the services fairly and in accordance with the agreement, and did not breach it, then Royco was entitled to expect that it would be servicing all of Matson's vessels. "It just doesn't make sense that (Matson) would go to another stevedore to have certain vessels stevedored from time and time and then come back to (Royco) because" it is not fair on an operator for, here, Matson to "choose

[31] [7.23]
[32] Commencing transcript page 34.

to go to another person for two or three months and then come back to (Royco)" when it chooses because that would create uncertainty for Royco. If Royco breached the agreement, then it was "equitable" for Matson to take its business elsewhere. But if Royco was "performing the contract according to the law" and Matson was "happy with it", then Royco "should be entitled to the exclusive rights to the contract".

(c) The requirement that the term be equitable is also to be mutual. Here, exclusivity in favour of Royco is also equitable for Matson because if Matson was dissatisfied with Royco's services, Matson could terminate the agreement.

(d) The term is necessary to give business efficacy to the contract because it provides "greater certainty" (for Royco).

(e) The term is so obvious that it goes without saying because the agreement was "performed that way".

(f) The term is capable of clear expression (with which Mr Stephenson agreed).

(g) The term does not conflict with any express term of the agreement. In relation to the first limb of clause 3 (discussed in paragraph 85 above), Mr Edwards said that he did not "know why Matson allowed that provision ... because (it) clearly works against them and their interests" and otherwise sought to focus on the second limb as the basis for no conflict.

92. Mr Stephenson submitted, in summary, that:

(a) "The court ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted": *Re Comptoir Commercial Anversois v. Power, Son & Co.* (1920) 1 K.B. 899. To similar effect, "(i)f there is any reasonable doubt whether the parties intended to enter into such a contract as is sought to be enforced the documents should be looked at and all the surrounding

circumstances be considered, and if the document is silent and there is no bad faith on the part of the alleged promisor, the court "ought to be extremely careful" how it implies a term. It is not enough to say that it would be reasonable to make a particular implication, nor that it would make the carrying out of the contract more convenient, nor that it is consistent with the express provision of the contract or with the intentions of the parties as gathered from those provisions, nor will a term be implied where a contract is effective without the proposed term": Halsbury's Laws of England, 4th edition, Vol. 9, [356].

(b) The exclusivity term is neither reasonable nor equitable because it is a unilateral term of exclusivity which would bind Matson to Royco's services only, while Royco is at liberty to provide services for any and all other shipping lines. Further, by the first limb of clause 3, Royco was excused from performance if it was unable to muster sufficient workers to stevedore a vessel. If exclusivity is implied, that would leave Matson in a position which was neither reasonable nor equitable.

(c) The term is not necessary to give business efficacy to the agreement and the agreement is effective without it. Mr Edwards' submission to the effect that a lack of exclusivity 'would not give business efficacy as (Royco) understood it to be' is not objective and does not apply the sensible commercial business test. The business basis of the contract was that the parties agreed that if Matson engaged Royco to service its vessels at the Port of Nuku'alofa, Matson would remunerate Royco for those services at the agreed rates. Matson was then contractually obliged to make payment for having availed itself of Royco's stevedoring services at the agreed rate. Royco could seek recourse from the Courts under the agreement if Matson did not so pay. There is nothing legally or commercially repugnant about that arrangement. Perhaps it was not the arrangement Royco wanted or perhaps thought it should have, but it is not the role of the Court to cure such shortcoming. By way of analogy, the agreement operated similarly to a lawyer's engagement, wherein a client agrees to engage a lawyer's services for general representation, and to pay the lawyer at the rates and terms agreed but is still free to engage the services of other lawyers if the

client so wishes. Similarly (subject to any issues of conflict), the lawyer is entitled to accept instructions from other clients as well. Further, Royco's submission that the term is unnecessary because, without it, the agreement would be at an end if Matson engaged another stevedore should be rejected. Matson's engagement of another stevedore would not necessarily bring the agreement to an end.

(d) For the same reason, the term cannot be considered so obvious that it goes without saying.

(e) Matson conceded that the term is capable of clear expression.

(f) Implying the term would contradict the entire agreement provision of clause 22 which evinces a clear and apparent intention on the part of both parties to the agreement that its express terms comprise all of the terms agreed between them, leaving no room for implying a further, unexpressed term. The parties further agreed that the agreement could only be modified by an instrument signed by an officer of each party, and no such instrument has been pleaded.

93. After considering the parties' submissions on each of the elements of the conventional test for implication, I generally prefer those of Matson and therefore make the following findings.

94. The term is neither reasonable nor equitable. It has been said that 'fairness' will do to describe such a requirement.[33] However, not much can be said by way of abstract elaboration of such 'categories of indeterminate reference', which are encountered in all departments of law. Although fairness is not a sufficient condition of implication, it is a necessary one. Here, the term is not reasonable insofar as it is only advanced as a measure of greater convenience and/or commercial benefit to Royco. The 'fairness' submitted by Royco was only so for Royco. As Mr Edwards correctly agreed that this measure is to be mutual, the term did not confer any apparent benefit or convenience on Matson. Royco's obligations as specified in the agreement amounted to little more that Royco agreeing to provide its services for a stated price. Unlike AAP in *Rehau*, such a

[33] Cheshire & Fifoot's "Law of Contract", 8th Australian edition, [10.57].

generic level of commitment could not sensibly be expected to attract exclusivity or any commensurate and unexpressed commitment by Matson to only use Royco. Similarly, that the effect of the term is to bind Matson solely to Royco for receipt of stevedoring services but does not bind Royco to solely provide its services to Matson renders the term, in my view, inequitable. Further, the express terms of the agreement are not suggestive of any misunderstanding or uncertainty associated with the absence of any express provision for notice of which of Matson's vessels were to be services by Royco and when. On the contrary, the absence of such a term strongly suggests that the parties intended that Royco would service Matson's vessels as requested.

95. The term is not necessary to give business efficacy to the agreement and the agreement is effective without it. The term sought to be implied must be needed 'in order to make the agreement work, or conversely, in order to avoid an unworkable situation': *BP Refinery*, ibid, at 292. 'Clear necessity' is required: Codelfa, ibid, at 346. Consideration is required of what would make the contract workable in a business sense: *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at [390]. As noted above, that the term may have been more desirable or advantageous to Royco does not mean that exclusivity was necessary to make the agreement work. The agreement, properly characterized, was perfectly effective without implied exclusivity. Royco agreed to service Matson's vessels as requested, for which Royco was to invoice Matson for the agreed price of those services and Matson agreed to pay that price for the services it received. It was evident from the express terms upon which the parties agreed that there was no need for any alleged "greater certainty".

96. Royco's submission that the term is so obvious that it goes without saying because the agreement was "performed that way" must be rejected. As discussed above, post-contractual conduct is inadmissible in construing the terms of an agreement. Equally, Royco's 'bootstraps' argument for implication here is misconceived. The time at which any implied term is to be determined is when the parties entered into the agreement; not at the end of it through the lens of hindsight and individual performance and/or expectations.

97. Admittedly, this element of the test is apt to mystify, since the parties did not, after all, think of expressing it: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 66. It must therefore be taken to refer to what the parties 'would most likely have agreed had they considered the point': *Codelfa* at 346, 355, 374. But to hypothesise in this fashion is a delicate undertaking. The court is properly reluctant to guess at what the parties might have ordained for they appear in dispute before it, and their original intentions must often have become clouded as a result. The courts have sought to resolve this dilemma by utilising the hypothesis of the 'officious (or 'reasonable'[34]) bystander' referred to above: see *BP Refinery* at 285, 286. In the instant case, I cannot be satisfied having regard to the proper construction of the express terms of the agreement, the admitted and admissible surrounding circumstances as revealed on the pleadings and the nature of the proposed term of exclusivity that had the parties been asked at the point at which they were about to execute the agreement whether Royco was to have exclusive rights over all of Matson's vessels for the term of the agreement, they both would have said "oh, of course". If several terms are equally justifiable in the circumstances, none of them can be said to be so obvious as to go without saying: e.g. *Codelfa*. Here, in my view, a term of exclusivity is as equally justifiable as a term that Royco would service Matson's vessels as required.

98. It was common ground that the term is capable of clear expression. However, I must say that it is not at all apparent where the proposed term might have been inserted within or among any of the express terms for the simple reason that none of them specify any quantitative measure for the number of Matson vessels to be serviced (e.g. Schedule 1) or the level or extent to which Matson was required to use Royco's services. As previously opined, I do not consider that by that drafting preference, the parties intended that Royco would be entitled to all of Matson's vessels. A more commercially sensible construction is that Royco agreed to service Matson's vessels as requested.

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[34] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68 at [159].

99. Finally, on the conventional test, I find that the proposed implied term conflicts with clauses 3 and 22.

100. In relation to clause 3, I am afraid that Mr Edwards' submission was misplaced and did not assist this issue. The first limb/sentence of the clause, properly understood, qualifies Royco's obligation to only providing labour for its services to the extent that labour is available to it. Therefore, and at the risk of repetition, but hopefully convenience of the reader, if a Matson vessel arrived at Nuku'alofa which Royco had agreed to service, but for whatever reason, Royco did not have sufficient labour to service the vessel, Royco would not be in breach of clause 3. As such, excerpt 3 of clause 13.3 (by which Matson would not be obliged to utilize Royco until the default was remedied) would not be engaged. The practical result, on Royco's hypothesis, would be that Matson would not be able to engage another stevedore, and pursuant to clause 13.2, would have to wait 30 days to be able to terminate the agreement if Royco failed to remedy the default. Further, by the second limb of clause 3, Royco would not be liable to Matson for damages or compensation where a labour shortage was due to any of the causes specified therein. In those circumstances, the only sensible commercial construction of clause 3 would be to permit Matson to engage another stevedore. However, the proposed implied term, in combination with Royco's interpretation of excerpt 3 in clause 13.3, would prevent Matson from doing so without being in breach. Accordingly, an implied term of exclusivity would conflict with the proper construction and operation of clause 3.

The entire agreement clause

101. In relation to clause 22, Mr Edwards contended[35] that it "cannot be taken to mean that clauses cannot be implied in the contract". Mr Stephenson's submissions on this issue were originally distracted by Mr Edwards' reference to clause 21 (assignment) as support for his stance on clause 22. Moving past that misconception (as explained above), during his oral submissions, Mr Stephenson emphasised that the first sentence of the entire agreement clause - that the agreement constitutes the entire agreement between the parties – must preclude

[35] Primary written submissions at [8.4].

the implication of the exclusivity term. In reply, Mr Edwards, initially at least, *appeared* to concede Mr Stephenson's submission.[36] However, after having reviewed the transcript, his position is difficult to discern.[37]

102. The starting point is the correct construction of the entire agreement clause itself: *Jabbcorp (NSW) Pty Limited v Strathfield Golf Club* [2020] NSWSC 1317 at [63]. A clearly worded clause has the effect of answering the question whether a contract is contained wholly in the written terms: *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611 at 614 per Lightman J. It has also been suggested that such a clause may limit the use that can be made of extrinsic material in interpreting the contract and thereby exclude any such evidence either to prove terms additional to or different from the written instrument or collateral contracts or to construe the instrument in a way different from the meaning to be inferred solely from its terms. However, such a clause does not prevent the admission of evidence in support of a claim of deceit or misleading conduct or of rectification: *MacDonald v Shinko Australia Pty Ltd* [1999] 2 Qd R 152 at 156.

103. In *Hart v MacDonald* (1910) 10 CLR 417, the clause "there is no agreement or understanding between us not embodied in this tender" was held not to preclude implication. Issacs J stated:

> *"It was urged that this provision excluded implications. But that is not so. It excludes what is extraneous to the written contract: but it does not in terms exclude implications arising on a fair construction of the agreement itself, and in the absence of definite exclusion, an implication is as much a part of a contract as any term couched in express words."*

104. In *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348, the contract provided, relevantly:

> "This agreement and lease as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof and there is no other understanding agreement warranty or representation express or implied in any way binding extending defining or

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[36] Transcript, p. 55.

[37] Mr Edwards: "...that argument that he made it's only in suggesting that in terms of when the agreement is applicable that we drew that implication and we said that the implied terms can be and third as opposed to the expressed terms because this agreement when it refers to this agreement constitutes the entire agreement it doesn't say express the terms we would argue that it could express and implied terms any contract can be inferred in terms of the entire agreement that the parties."

> otherwise relating to the equipment or the provisions hereof on any of the matters to which these presents relate."

Dixon J, with whom Rich J agreed and with apparent approval from Evatt and McTiernan JJ, referred to that clause as 'effectually excluding' an implied condition.

105. In *Johnson Matthey Ltd v AC Rochester Overseas Corp.* (1990) 23 NSWLR 190 at 196, after reviewing the authorities, McLelland J opined:

> *"The effect of any particular clause will of course depend on its own terms and context, but in general it may be said that... an entire contract clause will bind the parties in accordance with its terms, properly construed".*

106. For a Tongan illustration, in *Public Service Association Incorporation v Kingdom of Tonga* [2018] TOSC 41, Paulsen LCJ rejected the implication of a term which required the Kingdom of Tonga to share grant aid or other revenue it received upon an outright sale or other disposition of a satellite orbital position for reasons which included that the posited term would have been contrary to the entire agreement clause in that agreement.

107. In *Rehau*, the Court of Appeal decision did not refer to whether the agreement there contained an entire agreement clause. In the decision appealed from,[38] the primary judge, too, did not record any provision of the agreement which might be recognized as an entire agreement clause. In those circumstances, one can surmise with a reasonable degree of confidence that there was no such clause in that agreement, which, if it were otherwise, may well have been a relevant factor in the outcome.

108. In the instant case, even though the first sentence of clause 22 - "This Agreement constitutes the entire Agreement between the Parties" – does not expressly preclude implied terms, in my view, it could hardly be a clearer statement of common intention that the express terms of the agreement comprised the totality of parties' agreement. When combined with the analyses above on the other elements of the conventional test, I am satisfied, on the balance of probabilities, that clause 22 weighs in favour of the view that the parties did not agree on

[38] *AAP Industries Pty Ltd v Rehau Pte Ltd* [2017] NSWSC 390.

exclusivity nor did they intend for any such term to be implied in addition to, or in qualification of, the written terms of their agreement.

109. On that basis, I find that any implication of the exclusivity term, as well as the term itself, would contradict clause 22.

110. Accordingly, the exclusivity term does not meet the requirements of the conventional (or *BP Refinery*) test for implication of terms.

Consumer Protection Act

111. In its Defence,[39] Matson pleaded that the term of exclusivity should not be implied for to do so would contravene, and place Royco in breach of, s.24 of the *Consumer Protection Act* ("***CPA***"). On that basis, Matson further says that if the term is to be implied, then the agreement cannot or should not be enforced by reason of illegality.

112. Section 24 provides:

> **24 Exclusive dealing**
>
> (1) Any trader who, in the course of a trade or business, except with the written approval of the Director granted in the interest of the national economy, engages in the practice of exclusive dealing, commits an offence.
>
> (2) A trader engages in the practice of exclusive dealing if such trader —
>
> (a) supplies any goods or services;
>
> (b) charges a price for the supply of any goods or services; or
>
> (c) gives or allows a discount, allowance, rebate or credit in relation to the supply of any goods or services,
>
> on the condition, or subject to a contract, arrangement or understanding, that the person to whom such trader supplies goods or services —
>
> (i) shall not, or shall to a limited extent only, acquire goods or services from a competitor of such trader; or
>
> (ii) in the case where such trader supplies goods —
>
> (aa) shall not, or shall to a limited extent only, supply any of the goods to particular persons or to persons included in a particular class of persons; or

[39] Paragraphs 26 to 31.

> (bb) shall not, or shall to a limited extent only, in particular places supply any of the goods to other persons; or
>
> (d) requires, as the condition of the supply to a person of goods or services of a kind that he could not lawfully supply but for the issue or grant to the trade of a licence, permit, authority or registration under any written law, that the person acquire all or part of his requirements of other goods or services directly or indirectly from such trader; or
>
> (e) requires, as a condition of the supply to a person of goods or services, that the person acquire all or a part of his requirements of other goods or services directly or indirectly from a second person.

113. Mr Stephenson submitted, in summary, that:

(a) as a supplier of services, Royco is a 'trader' under the Act;

(b) to the extent it is relevant, Matson, as a user from time to time of Royco's services in Tonga, is a 'consumer';

(c) the effect of s. 24 is that exclusive dealing agreements, without the approval of the Director,[40] contravene the Act;

(d) here, an implied term of exclusivity as contended for by Royco, would have the effect that, without the approval of the Director, Royco supplied services and charged a price for them, on condition that Matson was not pemritted to acquire such services from a competitor of Royco;

(e) consequently, by asserting that the agreement is upon an exclusive basis, Royco is effectively acknowledging that it has acted in breach of s.24, thereby potentially exposing itself to prosecution and penalty under the Act;

(f) business commonsense would surely dictate that a prudent trader/supplier, before entering into a supply contract on the basis of exclusivity, would apply for approval under the terms of the Act to avoid any unwanted legal consequences;

(g) the allegation that Royco did not obtain the approval of the Director was neither denied nor addressed in its Reply;

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[40] Director of the Consumer Affairs Division of the Ministry of Trade and Economic Development, as appointed and established under s.4 of the *Consumer Protection Act.*

(h) as a matter of public policy, the Court should not imply a term into a contract in the Kingdom which would have the effect of instigating a breach of statutory law; and

(i) it could not reasonably be said to have been the intention of the parties to enter into a contract that breached statutory law and exposed Royco to penalty.

114. Mr Edwards submitted, in summary:

(a) the CPA commenced on 2nd July 2001;

(b) the *Ports Authority Act* ("***PAA***"), which commenced on 1 October 1998, affects the rights of stevedores to contract. Section 40(5) thereof provides that a stevedoring company permitted under the Act may contract with a shipping company or local agent to provide stevedoring services for a particular vessel during the time the vessel is in port;

(c) being earlier in time, the PAA affects the enforceability of the CPA;

(d) the *Ports Management Act* ("***PMA***") commenced on 1 October 2003. Section 12(4) thereof also provides that a stevedoring company permitted under that Act may contract with a shipping company or local agent to provide stevedoring services for a particular vessel during the time the vessel is in port;

(e) that provision governs the stevedoring agreement in this case, not s.24 of the *CPA* because:

(i) s.24 conflicts with s.12 of the PMA;

(ii) the PMA is the later legislation;

(iii) a contract to provide stevedoring services for a vessel during the time it is in port, would mean that every time the vessel visits the port, the stevedore company that has a contract with the shipping company, has the right to provide the services for that vessel;

(iv) on Matson's argument based on s.24 of the CPA, the contract permitted by s.12 of the PMA would contravene the CPA;

(v) as s.24 of the CPA, the earlier Act, is irreconcilable with s.12 of the later PMA, then pursuant to s.16 of the *Interpretation Act*, s.24 of the CPA is taken to have been impliedly repealed;

(vi) further, the PMA is an Act that specifically provides for stevedores, whereas the CPA does not make any reference to stevedores or a stevedore contract;

(vii) therefore, the subject stevedoring agreement, with the implied term of exclusivity, is consistent with and does not contravene the PMA;

(f) alternatively, Royco did not intentionally engage in any exclusive dealing. While s.24 of the CPA does not refer to intention, s.26 does. There, a trader cannot do any act with the intent of either preventing entry of that person into the market or preventing a person engaging in competitive behavior in that market. In the absence of any intention by Royco to lessen competition in the market, or prevent any person entering the market, it did not engage in exclusive dealing;

(g) further,[41] the subject agreement with implied exclusivity is "a practice adopted by the industry, where each of the shipping companies and/or their agents utilize the services of each stevedore on an exclusive and/or contractual basis; and

(h) finally,[42] the agreement does not constitute exclusive dealing because Matson "could terminate the agreement, subject to its terms, by giving notice at any time to end its arrangement with Royco and could engage the services of another stevedore at any time for any period of time. The practice is not price driven nor is it based on any 'non-competition' clause or condition".

115. In reply, Mr Stephenson submitted, in summary:

(a) The PMA does not apply because s.3 designates the scope and applicability of that Act as being Ports in Tonga *other than* Nuku'alofa.

(b) The PAA designates that it is applicable to the Port of Nuku'alofa.

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[41] Paragraph 10(b) of the Reply.
[42] Paragraph 10(c) of the Reply.

(c) Even if that were not the case, Royco's interpretation of s.12 of the PMA is not the reasonable, plain language interpretation of that section, but rather a strained interpretation that has been imagined by Royco in an attempt to circumvent the prima facie applicability of s.24 of the CPA where Royco asserted that exclusivity can and should be implied into the agreement.

(d) Further, on a purposive approach to s.12(4), it is clear that the purpose of the PMA is to stipulate that only stevedores that are duly licensed under the PMA can provide stevedore services for vessels at the Ports to which the Act applies. No purpose is served in that regard by impinging upon freedom of contract and permanently tying a shipping company's vessels to one stevedore, and it cannot have been the intention of the PMA to do so.

(e) The Legislature is presumed not to deliberately pass conflicting legislation. But where two statutes are purportedly in conflict, and a reasonable interpretation of the latter statute is available that would avoid the conflict, that interpretation should be applied. That is also an answer to s.16 of the *Interpretation Act*.

(f) Even if the PMA could apply here, there is no conflict between the terms of that Act and the CPA. The terms of s.24 of the CPA are applicable to the subject stevedoring agreement.

(g) No issue of intention arises on a consideration of s.24 of the CPA. Matson does not rely on ss 26 (or 27). Mr Edwards acknowledged[43] that "the problem for the plaintiff is not alleviated on a strict interpretation of s.24". As stated in *BP Refinery*:

> *"...It is not to be imputed to a party that he is assenting to an unexpressed term which will operate unreasonably and inequitably against himself."*

(h) By seeking to imply a term of exclusivity into the stevedoring agreement, Royco must have intended to establish exclusive dealing, in breach of s.24.

116. Undeterred, Mr Edwards made the following further oral submissions on this issue:

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[43] Paragraph 3.6 of his Further Submissions.

(a) He conceded that the PMA has no application to the instant case.

(b) As the PAA, which does apply, predates[44] the CPA[45], no issue of any implied repeal of s.24 arises.

(c) The PAA applies to the agreement and the CPA does not. Sections 2, 11, 12, 29, 40, 42, 43, 48, 66, 72 and 79 of the PAA are to the effect that the whole stevedoring process is controlled by the Port Authority whereas the purpose of the CPA is to protect the interests of consumers. The CPA has "separate work to do".

(d) Exclusivity does not offend s.40(5) of the PAA.

(e) The express terms of the agreement do not include any prohibition against Matson engaging another stevedore.

(f) "The whole industry is engaged in exclusive dealing".

(g) There is no real competition between licensed stevedores in Tonga.

(h) He conceded that the present construction task does not call for any determination as to whether a breach of s.24 has occurred but rather an ascertainment of whether the parties intended that their agreement should contain an implied term which could place Royco in breach of s.24.

(i) On the issue of intent, his earlier reference to s.26 of the CPA was in error. He intended s.27, which prohibits monopolies. After further discussion, he conceded that s.27 has no application to the present case.

(j) He confirmed that, Royco did not seek or obtain the approval of the Director to engage in exclusive dealing with Matson either before or during the term of their agreement.

(k) Royco did not intend to infringe s.24 because the agreement permitted Matson to terminate it at any time.

(l) Any breach of s.24 by Royco should also apply to Matson as it was "implicit" [sic].

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[44] 1 October 1998

[45] 2 July 2001

(m) He conceded that there is in fact no conflict between s.24 of the CPA and s.40(5) of the PAA.

117. In light of the narrowing concessions by Mr Edwards, which I must say, with respect, were patently required and correctly made, my analysis of this issue may thankfully be briefly stated.

118. Firstly, it is more than arguable that, without the prior approval of the Director, the effect of any implied term of exclusivity as contended for by Royco is likely to place it in breach of s.24 of the CPA. The application of s.24 to the agreement here is plain. If implied, the effect of the exclusivity term, in short, would be that Royco supplied stevedoring services to Matson, at certain prices, on condition that Matson was not permitted to engage another stevedore (a competitor) to provide those services. That is precisely the offence of exclusive dealing created by s.24

119. Without having to decide the substantive point, I do not accept the inherently improbable assertion by Mr Edwards that there is no real competition (and therefore, 'no competitor') between licensed stevedores in Tonga.

120. Secondly, I agree with Mr Edwards that exclusivity does not offend s.40(5) of the PAA. However, that is because neither that provision nor any other within the PAA seeks to regulate the terms on which stevedores can contract with ship owner/operators. Moreover, the PAA does not contain any provision which purports to exclude or remove stevedoring agreements from the reach of the CPA in respect of exclusive dealing. Conversely, the CPA does not exempt stevedoring agreements from its reach in that regard (or at all). Given Mr Edwards' concession that there is in fact no conflict between s.24 of the CPA and s.40(5) of the PAA, the PAA actually has no bearing on this issue at all.

121. Thirdly, Mr Edwards' submission to effect that the express terms of the agreement did not preclude Matson from engaging another stevedore, and therefore (I interpolate) the agreement did not offend s.24, while at the same time contending that the posited implied term of exclusivity does prohibit Matson from engaging another stevedore, demonstrated an unfortunate, contorted and semantic attempt at approbation and reprobation. The object of Matson's defence based

on the CPA is the effect of the exclusivity term if it were to be implied. There is no suggestion that any the express terms might offend s.24. For the reasons given, the proposed implied term does.

122. Fourthly, if exclusivity was mutually intended, one would expect that the agreement, having been negotiated by the parties and their lawyers, would have contained some acknowledgment of s.24 and some provision/s to guard against any potential breach of it. Alternatively, one would expect the agreement to record that, for the purposes of s.24, Royco had obtained the approval of the Director to contract with Matson on an exclusive basis (if it had in fact done so). That the agreement does not contain any such provisions further weighs against any conclusion that the parties intended lawful exclusivity.

123. Fifthly, Mr Edwards accepted that, in the context of the present construction exercise, borne of the manner in which the parties pleaded their respective cases, and the lack of any evidence which ordinarily and necessarily justifies an Order 25 rule 4 separate trial, the Court could not take into account his assertion that 'the whole industry is engaged in exclusive dealing'. In any event, even if the assertion were accepted, it does not advance Royco's case on the implied term in its discrete agreement with Matson (as opposed to any other stevedore's agreements) nor could it spare Royco (or any other stevedore who engages in exclusive dealing without the approval of the Director) from the potential consequences of s.24 of the CPA if the term were to be implied.

124. Sixthly, Mr Edwards' submission that the agreement with the implied term would not offend s.24 because Matson had the ability to terminate the agreement at any time on three months' notice and engage other stevedores was misguided. The issue is whether the agreement, from its inception, may have offended s.24 by reason of the implied term of exclusivity. In my view, and for the reasons stated, it is highly likely that it would have.

125. Seventhly, Mr Edwards' submission that Matson ought also be held liable with Royco for any contravention of s.24 was even more misguided. The CPA is aimed at protection of consumers. Section 24 only creates an offence by the supplier of

the services, not the consumer. Even if it did, such combined outcome would serve to add weight in favour of Royco's position on this issue.

126. Eighthly, as Mr Edwards accepted, this issue does not call for a determination as to whether a breach of s.24 has occurred but rather whether the parties intended that their agreement should contain an implied term which could place Royco in breach of s.24. It ought be regarded as trite that in endeavouring to ascertain the objective intentions of the contracting parties, and in the absence of any express term to the contrary, the court presumes that the parties did not intend that any term of their agreement would or could render their agreement illegal or otherwise place any of them in breach of a statutory prohibition. The presumption applies equally, if not more so, to the posited implied term. That is because, in addition to the parties' presumed common intention, by application of the conventional test, any implied term which actually or even potentially renders the agreement illegal or places any of the parties thereto in breach of a statutory prohibition could not be regarded as reasonable or equitable, necessary for business efficacy or so obvious as to go without saying. Finally, in so returning to the conventional test analysis, Mr Edwards' earlier submission that the express terms of the agreement did not contravene s.24, also returns 'boomerang like' to defeat Royco's position on s.24. For if, as Mr Edwards submitted, the express terms of the agreement are to be construed as not prohibiting Matson from engaging other stevedores, it must follow that the implied term, which does, would contradict the express terms.

127. For those reasons, I find that the prohibition in s.24 of the CPA against exclusive dealing does not support the implication of a term of exclusivity.

Conclusion

128. In answer to the question for separate trial stated in paragraph 7 hereof, and for the reasons stated above, I conclude that the stevedoring agreement between the parties did *not* include any inferred or implied term conferring on the plaintiff an exclusive right to provide stevedoring services for all of the defendant's vessels at the Port of Nuku'alofa during the term of the agreement including the three-month termination period ending on 8 June 2020.

129. As the alleged implied term of exclusivity was the sole basis for Royco's claim for damages, it would appear that the decision on the separate question disposes of Royco's claim and renders any further trial unnecessary. In that circumstance, order 25 rule 4(2) permits the court to enter judgment. Further, on the basis that Matson's counterclaim appears to have been satisfied by Royco (save potentially for any claim for interest between 1 April 2020 and 18 June 2020), albeit only after the counterclaim was issued in this proceeding, my tentative view is that the following dispositive orders for the proceedings as a whole are appropriate:

    (a) The plaintiff's claim is dismissed.

    (b) The defendant's counterclaim has been admitted and paid by the plaintiff and is therefore struck out.

    (c) The plaintiff is to pay the defendant's costs of and incidental to the proceeding (claim and counterclaim), including the separate trial, on a party/party basis, to be taxed in default of agreement.

130. Should either party seek further or different orders, submissions are to be filed by 19 February 2021. If no submissions are filed by that date, the above tentative orders shall become final.

NUKU'ALOFA
10 February 2021

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE