



Hilary Term  
[2026] UKPC 8  
Privy Council Appeal No 0092 of 2024

## **JUDGMENT**

**Anheuser-Busch International Inc and another  
(Respondents) v Commonwealth Brewery Ltd  
(Appellant) (The Bahamas)**

**From the Court of Appeal of the Commonwealth of  
the Bahamas**

before

**Lord Reed  
Lord Hodge  
Lord Hamblen  
Lady Rose  
Lord Richards**

**JUDGMENT GIVEN ON  
2 March 2026**

**Heard on 5 November 2025**

*Appellant*

Tony Singla KC

Ali Al-Karim

(Instructed by Delaney Partners (Bahamas))

*Respondent*

Alan Gourgey KC

Christopher Jenkins KC

Chizelle Cargill

(Instructed by Lennox Paton (Bahamas))

## **LORD HODGE:**

1. The question which this appeal raises is how the court should assess whether a period of notice for the termination of a distribution agreement is reasonable.

### **1. Factual background**

2. Commonwealth Brewery Ltd (“CBL”) is a company incorporated in the Bahamas, a brewer of beer, and a distributor of beer, wines and spirits. At the time of the termination of the distribution agreement discussed below, CBL and Burns House Ltd (“BHL”) were subsidiary companies in the Heineken group of companies. In 2018 CBL merged with BHL which was its subsidiary, and which had till then carried on that business. CBL then took on BHL’s claims, debts, liabilities and obligations.

3. Anheuser-Busch International Inc (“ABI”) is a corporation organised under the laws of the State of Delaware in the United States of America. It is the wholly owned subsidiary of a Belgian company, Anheuser Busch InBev NV (“AB Inbev”), which produces and markets various beer brands, including Budweiser beer. Cerveceria Nacional Dominicana SA (“CND”) is a company incorporated under the laws of the Dominican Republic. It produces and markets beer, malt, carbonated and energy drinks, water and spirits. In 2012 AB InBev became the indirect controlling shareholder of CND. Thereafter, CND became AB InBev’s official partner in the Caribbean and in that role has supplied AB InBev’s products to BHL.

4. In 1975 BHL and ABI entered into an oral contract for the sale and distribution of beer in the Bahamas (“the Distribution Agreement”), which gave BHL the exclusive right to distribute AB InBev’s products in the Bahamas. Under the Distribution Agreement which continued until 2015, ABI provided BHL through CND with shipments of AB InBev products and marketing material. ABI or CND invoiced BHL for the goods when they were shipped, and each invoice identified that payment was due within one month of the date of the invoice. The Distribution Agreement was never set out in writing and may have developed over time.

5. Charles J, in para 10 of her judgment at first instance in the Supreme Court of the Bahamas, described the terms of the Distribution Agreement as including the following:

“(a) Periodic visits to BHL by ABI during which BHL was required to explain its distribution performance, discuss marketing activities and agree on an annual plan;

(b) BHL to provide monthly sales reports to ABI Representative;

(c) BHL to provide annual marketing plan to ABI Representative;

(d) BHL and ABI to discuss and agree annual marketing budgets of which each party would bear 50% thereof;

(e) BHL to report to ABI research on parallel imports;

(f) BHL was required to have in place an experienced brand manager dedicated to ABI's brands amongst other allocated human resources; and

(g) ABI provided shipments of ABI products, and payment was generally expected within sixty (60) days from the date of delivery of the shipment.”

The parties do not challenge that description.

6. BHL provided brand development support for CND's products. It employed a senior brand manager and three or four other employees exclusively for AB InBev brands. As required by ABI, BHL had in place a letter of credit in ABI's favour in the sum of \$250,000 which was automatically renewable annually but which ABI never had to call upon. Charles J recorded that the parties worked well together for over 40 years. BHL always met its obligations under the Distribution Agreement.

7. BHL was not tied to AB InBev or CND but was free to market and distribute products, such as beer, wine and spirits produced by other companies, including competitors of AB InBev and CND. At the time of the termination of the Distribution Agreement AB InBev/CND products represented about 15 per cent of BHL's turnover in beer and less than 10 per cent of its overall turnover.

8. BHL had and has a warehouse and a refrigeration plant within its warehouse in which it stored products of several producers, including those of AB InBev and CND. About four years before the termination of the Distribution Agreement it invested in an upgrade of its refrigeration plant in the warehouse.

9. In December 2014 AB InBev assigned and novated the Distribution Agreement to CND, transferring both its rights and liabilities. Charles J records in para 16 of her judgment that BHL was not a party to this agreement and did not consent to it, but she also records that the novation was intimated to BHL, which did not query the arrangement and engaged with CND thereafter. No challenge has been made to the validity of the novation agreement. As both AB InBev and CND are parties to this litigation no issue arises on this appeal as to the effectiveness of the transfer of AB InBev's liabilities to CND.

10. At a meeting in ABI's offices in Florida on 4 August 2015 BHL first learned that ABI intended to terminate the Distribution Agreement. On 12 August 2015 ABI and CND through their Bahamian attorneys, Lennox Paton, issued a termination letter giving BHL about three months' notice of the termination of the Distribution Agreement. In that letter ABI stated that BHL was owned by a global competitor of CND and AB InBev (ie Heineken) and that the Distribution Agreement was not compatible with AB InBev's global strategy of maintaining closer control over its international brands. The letter made clear that there was no criticism of BHL's performance as a distributor. The letter continued:

“As you are aware, the Distribution Agreement is an informal arrangement not reflected by any written contract by which [BHL] has had (sic) enjoyed the right to distribute our client's beverage products within the Commonwealth of the Bahamas for a number of years. As you are further aware, AB InBev novated and assigned its agreement with you to CND in early 2015.

In circumstances where the Distribution Agreement contains no express terms as to the right of either party to terminate, our client is entitled to terminate on providing reasonable notice in accordance with the principles set out in the English Court of Appeal decision of Alpha Lettings Ltd v Neptune Research and Development Inc [2003] EWCA Civ 704.

Having regard to the aforementioned legal authority, it is our client's view that a period of 3 months represents reasonable notice. Accordingly, our client hereby provides 3 months' notice of the termination of the Distribution Agreement.”

The letter stated that the Distribution Agreement would be deemed to be terminated as of 12am on 1 November 2015 and that any remaining unsold CND/AB InBev products

would be re-purchased from BHL at the price which BHL had paid plus any duties paid. The letter ended:

“Lastly, our client expects, that consistent with the current good faith relationship existing with [BHL], during the notice period [BHL] will continue to honour its obligations under the Distribution Agreement, and will work constructively with our client to ensure a smooth transition.”

Although the matter was not expressly mentioned in the judgments of the Bahamian courts, it was common ground before the Board that after the notice of termination ABI and BHL were obliged to continue to perform their obligations under the Distribution Agreement until that contract terminated.

11. BHL’s counsel and attorneys, Delaney Partners, responded by letter dated 25 August 2015 arguing among other things that a reasonable period of notice would be three and a half years, being approximately one month for each year of the Distribution Agreement. On 1 September 2015 Lennox Paton wrote on behalf of ABI and CND to extend the period of notice to 1 December 2015. The effective period of notice therefore ran from 12 August to 1 December 2015, a period of over three and a half months.

12. Between 7 June and 9 September 2015 ABI issued 74 invoices for products supplied to BHL by CND. The total sum due on the invoices was \$598,511.68. BHL did not pay those invoices because it took the view that ABI had not given reasonable notice of the termination of the Distribution Agreement. Following the last shipment on 9 September 2015, ABI and CND stopped supplying AB InBev’s products to BHL on the ground of non-payment of the invoices.

13. Further correspondence passed between the parties’ counsel before, on 14 January 2016, ABI and CND raised proceedings against BHL in the Supreme Court of the Commonwealth of the Bahamas for payment of the invoices. Thereafter, BHL filed a defence denying repudiatory breach of the Distribution Agreement and asserting that it was entitled to refuse to pay the invoices to mitigate its losses from the unlawful termination of that agreement. BHL pleaded that it had a right to set off its debts against ABI’s liability in damages arising from its wrongful termination of the Distribution Agreement without giving reasonable notice, which was the subject of BHL’s counterclaim for about \$2.4 million. BHL asserted that the loss of the right to distribute the Budweiser brand, because of its brand prestige, would cause commercial harm to its business and that it would take a period of years to make comparable arrangements.

## 2. The judgments of the Bahamian courts

14. The parties have never disputed that the Distribution Agreement contained an implied term that reasonable notice of termination had to be given. The question throughout this dispute has been whether the period of notice which ABI/CND gave was reasonable.

15. Charles J in her judgment dated 19 May 2022 made findings of fact which were not challenged and which the Board has summarised above. In para 86 of her judgment she concluded that BHL suffered a loss of revenue in the first year after the termination of the Distribution Agreement. In her discussion of what was a reasonable period of notice Charles J described the commercial relationship between ABI and BHL as “a long-standing one with fixed terms and conditions”. In her discussion of relevant case law on the assessment of a reasonable period of notice, she drew support for her views from, among other cases, *Australian Blue Metal Ltd v Hughes* [1963] AC 74 (“*Australian Blue Metal*”), *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361; [1971] 2 All ER 216 (“*Decro-Wall*”), *Alpha Lettings Ltd v Neptune Research & Development Inc* [2003] EWCA Civ 704 (“*Alpha Lettings*”), and *Hamsard 3147 Ltd (trading as “Mini Mode Childrenswear”) v Boots UK Ltd* [2013] EWHC 3251 (Pat) (“*Hamsard*”).

16. At para 142 of her judgment Charles J concluded that a reasonable period of notice would have been 15 months and set out five principal considerations to support that conclusion. They were: (i) the parties had had a commercial relationship for nearly 40 years, (ii) despite some changes to the Distribution Agreement over time, the relationship between the parties was “fixed and formal” (a phrase used in evidence by CBL’s managing director, Mr Mulder), (iii) it was reasonable to infer that the parties intended that in the event of termination “each side would be afforded sufficient time and compensation to make alternative arrangements without damage to the other’s business interests”, (iv) BHL had invested in the ABI brands through the allocation of personnel exclusively to it and through investment in recent years in the improvement of the refrigerated section of its warehouse, and (v) (drawing on the evidence of Mr Neven (the managing director of CBL) and Mr Townend (a chartered accountant who gave expert evidence on behalf of BHL)) BHL suffered loss from the termination of the Distribution Agreement in late 2015 and during 2016 but thereafter replaced the lost business by developing the distribution of other brands.

17. ABI appealed to the Court of Appeal which, in a judgment dated 28 November 2023, allowed its appeal and held that the period of notice of three and a half months which ABI gave was within the range of reasonable periods of notice. The Court of Appeal referred to *Alpha Lettings* and *Hamsard*, which Charles J had discussed, and to *W Nagel v Pluczenik Diamond Co NV* [2017] EWHC 1750 (Comm); [2017] Bus LR 1691 (“*Nagel*”) and *Zymurgorium Ltd v Hammonds of Knutsford plc* [2023] EWCA Civ 32

(“*Zymurgorium*”), which were not available to Charles J. The Court of Appeal disagreed with the judge that the relationship between ABI and BHL was “fixed and formal”; on the contrary, it was informal and that was an important fact. It stated that the judge did not refer to other important facts, namely (i) BHL was allowed to sell its own products in competition with ABI and (ii) BHL had to use its best efforts to sell ABI products up to the end of the notice period. The Court of Appeal considered that the latter fact militated against a long period of notice to allow BHL to make alternative arrangements fully to replace the business derived from ABI. The court also pointed out that the improvement to the refrigerated plant in BHL’s warehouse was primarily for the benefit of BHL’s products which required refrigeration. While the relationship between ABI and BHL had continued for many years, it was a small proportion of BHL’s business and BHL was able to reallocate staff to promote its own brands. The court concluded that a range of reasonable periods of notice would be from three to six months and that the notice given of three and a half months fell within that range.

18. BHL now appeals to the Board and advances five grounds of appeal:

(i) The Court of Appeal erred in characterising the Distribution Agreement as informal.

(ii) The Court of Appeal misunderstood Charles J’s reliance on *Australian Blue Metal*.

(iii) The Court of Appeal erred in saying that Charles J had failed to refer to the obligation on BHL to use its best endeavours to promote ABI’s products during the notice period.

(iv) The Court of Appeal erred in its treatment of Charles J’s factual findings about expenditure on improving the refrigerated section of the warehouse in the four years before the termination of the Distribution Agreement.

(v) The Court of Appeal erred in stating that it was unclear how Charles J took into account the length of time that BHL took to replace the business lost through the termination of the Distribution Agreement.

### **3. The law relating to reasonable periods of notice**

19. On this appeal there is no dispute that a term is to be implied into the Distribution Agreement that a party must give reasonable notice of the termination of that agreement. It is also not in dispute that whether there is an implied term that reasonable notice is to

be given is assessed by having regard to the circumstances of the parties at the time a contract is entered into.

20. The background to the implication of such a term is that parties have entered a contractual relationship in which they have not specified that a set period of notice be given or that the contract may be terminated without giving a period of notice. Absent an express stipulation of a period of notice of termination, each party is vulnerable to the other's termination of the contract without giving any notice. When the court considers whether the parties had intended that there be a period of notice, it looks to the common purpose of the parties in the sense that each party would wish to receive from the other reasonable notice of the termination of the agreement, and each party would not wish to be tied to the agreement which it had chosen to terminate for longer than was reasonable.

21. In *Australian Blue Metal Ltd* the Board in a judgment delivered by Lord Devlin stated (p 99):

“The question whether a requirement of reasonable notice is to be implied in a contract is to be answered in the light of the circumstances existing when the contract is made. ...The implication of reasonable notice is intended only to serve the common purpose of the parties. Whether there need be any notice at all, and, if so, the common purpose for which it is required, are matters to be determined as at the date of the contract; ...”.

22. In that case the agreement in question involved a non-exclusive licence to mine for magnesite on a site in New South Wales in which there was no obligation on the licensee to carry out any mining activities. The Board interpreted the agreement as an ad hoc arrangement by which the labour and equipment which Australian Blue Metal had available might be employed on the respondents' land to their mutual advantage so long as it suited both parties. It was terminable at will. The Board's discussion of the implication of reasonable notice was not essential to its decision but has been influential in case law thereafter.

23. Absent evidence of other considerations, the court will infer that the common purpose of a reasonable period of notice is to cushion the party receiving the notice of termination from a sudden loss of business and to enable that party to adjust its business arrangements in response. Lord Devlin expressed the matter this way (p 99):

“The common purpose is frequently derived from the desire that both parties may be expected to have to cushion themselves against sudden change, giving themselves time to make

alternative arrangements of a sort similar to those which are being terminated.”

24. In *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 (“*Winter Garden*”), to which Lord Devlin referred, Lord MacDermott (at pp 204–205) described the purpose of an implied term of reasonable notice (or in that case a period of grace) as being to enable the person being given the notice “to adjust himself to the new situation” and not to prolong a contractual arrangement merely for the benefit and convenience of that person.

25. While the question whether a requirement of reasonable notice is to be implied into a contract is answered by looking at the circumstances existing when the contract was made, the length of the notice that is taken to be reasonable is ascertained in the light of the circumstances in which the notice is given, as the Board determined in *Australian Blue Metal* at p 99.

26. In the influential judgment of the Court of Appeal in *Alpha Lettings*, which strangely has not been reported, Longmore LJ stated (para 30):

“There is little authoritative guidance on the appropriate notice for termination of exclusive agencies or (as lawyers sometimes prefer to call them) distributorships. One possible view is that the reasonable notice period should equate to the time needed to find an alternative supplier and get a new product approved. Another view is that it need only reflect the time required for an orderly winding down of the distributorship. The only common ground between the parties was that, in the absence of any express term, the question, of what notice of termination is to be taken as reasonable, must be determined as at the time of termination.”

27. In *Alpha Lettings* the party terminating the contract was Neptune which was the manufacturer in the United States of America of specialist valves used in medical and scientific equipment and instruments. Alpha imported and sold Neptune’s products in the United Kingdom in an arrangement which started before 1983. In that year in an exchange of letters it was agreed that Alpha would be Neptune’s exclusive distributor in the United Kingdom but that Neptune reserved the right to sell directly to United Kingdom customers. Alpha also dealt with similar goods produced by other manufacturers and Neptune’s products accounted for about 20 per cent of Alpha’s turnover. In 1998 Neptune terminated the arrangement on one month’s notice and litigation followed. The relevant issue in that litigation was: what was a reasonable period of notice?

28. Longmore LJ stated that the degree of formality in the relationship was a very important consideration; a formal agreement would provide for a fixed notice period whereas “the more relaxed the relationship, the less likely it will be that the law would impose a lengthy notice period” (para 31).

29. Longmore LJ played down the significance of the length of time (15 years) for which the arrangement lasted in that case and did not see a contract of employment, in which longer periods of service may often lead to longer periods of notice, as analogous with a distributorship agreement. The length of a relationship was a factor to be taken into account but was not in any way critical since businesspeople expect to run risks in the ordinary course of business. He continued at para 32: “while initial capital investment and business expenses out of the ordinary run of things may well be relevant to the amount of notice, ordinary and recurring expenditure is unlikely to have much relevance.”

30. During the period of notice Neptune was obliged to fulfil orders placed by Alpha and Alpha was under an implied obligation to use its best reasonable endeavours to promote the sale of Neptune’s products. Longmore LJ continued (para 33):

“The concept of a party to a contract being obliged to use its best endeavours to promote the products of the other party after notice of termination has been given (by whomsoever it may be given and in whatever circumstances) is a difficult one and must also militate in favour of a shorter rather than a longer period of notice.”

There was some discussion on this appeal as to what difficulties Longmore LJ was referring to in this passage in the context of the present case. The Board considers that the difficulties were the practical ones that BHL would be required to utilise its staff who had been allocated to the ABI relationship in promoting ABI’s products in the same way as before the notice of termination while at the same time adjusting its business to cope with the termination by using its staff and other resources to seek alternative products or promote its own products, and ABI, while wishing to set up a new distribution arrangement, would be obliged to provide products to BHL which would be wanting to reallocate its resources to the promotion of future business.

31. Longmore LJ found that the judge’s decision that a reasonable period of notice was 12 months was outside the range of reasonable periods. He considered the right range to be between three and six months and, having regard to the absence of a covenant against competition, regarded the reasonable period as four months. He stated (para 38):

“That should have provided ample time to bring the business to an orderly conclusion and, if this was wanted, to make

*substantial progress* towards obtaining another supplier, for the distribution of whose goods Alpha could become responsible.”  
(Emphasis added)

32. Another influential decision, which (as discussed below) has been cited by courts in Australia, New Zealand and Hong Kong, and to which Longmore LJ referred in *Alpha Lettings*, is the judgment of McHugh JA giving the majority judgment of the Court of Appeal of New South Wales in *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438 (“*Crawford Fitting*”). This concerned an exclusive distributorship agreement between a distributor and a manufacturer of specialised fittings and valves for high pressure gases and liquids which bound the distributor not to distribute other products, and which tended to involve the customer giving repeat business after the distributor had achieved an initial sale. The principal question on that appeal was whether it is ever relevant to take into account expenditure or effort of a distributor which has created opportunities for consequential earnings in the future when determining the reasonableness of a period of notice (p 441). McHugh JA referred to *Winter Garden*, *Australian Blue Metal* and *Decro-Wall*, and stated (p 444):

“When a contract is terminable on reasonable notice, the period of notice must be sufficiently long to enable the recipient to deploy his labour and equipment in alternative employment, carry out his commitments, to bring current negotiations to fruition and to wind up the association in a businesslike manner.”

33. McHugh JA distinguished between ordinary capital expenditure and extraordinary capital expenditure by a distributor. He recognised that it would often be the common purpose of the parties that a distributorship would continue for long enough to enable the distributor to recoup any extraordinary expenditure or effort; otherwise there would be no incentive for the distributor to incur such expenditure or make such effort for the mutual benefit of the parties. Ordinary expenditure and effort were not such a factor in the assessment of a reasonable period of notice as the inability to profit from such expenditure is part of business risk. The prospect of obtaining profits in the future was therefore not relevant unless it was the consequence of incurring extraordinary expenditure. He summarised his analysis at p 448:

“The chief purpose of a notice for a reasonable period, therefore, is to enable the parties to bring to an end in an orderly way a relationship which, ex hypothesi, has existed for a reasonable period *so that they will have a reasonable opportunity to enter into alternative arrangements and to wind up matters which arise out of their relationship. Matters to be wound up will include carrying out existing commitments,*

*bringing current negotiations to fruition, and, where appropriate, obtaining the fruits of any extraordinary expenditure or effort carried out within the scope of the agreement.* The line between ordinary and recurrent expenditure and effort and extraordinary expenditure and effort will not always be easy to draw. But in general it will be determined by what the parties would reasonably have contemplated was extraordinary effort or expenditure.” (Emphasis added)

34. In that case the majority of the court held that the distributor had not established that a notice period of six months was not reasonable. There had not been extraordinary expenditure or effort before the notice of termination and negotiations did not require more than six months to come to fruition. He observed that the distributor had been successful in its new agreements after the end of the notice period; while that was not decisive, he considered that it supported the submission that six months was a reasonable period of notice.

35. An example of a case where the court took account of the effort and expenditure undertaken by an exclusive distributor in performing its obligations under a distributorship agreement which would not confer real benefit on the distributor for a considerable time is *Decro-Wall*. The case involved an oral agreement between the French manufacturer of decorative tiles and a United Kingdom distributor which had lasted for three years and amounted to 83 per cent of the distributor’s activity. The Court of Appeal held that a reasonable period of notice was 12 months, and Sachs LJ opined that no distributor would proceed unless he knew that the agreement could not be terminated by notice of less than 12 months.

36. In an earlier case, *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556 (“*Martin-Baker*”), which concerned an agreement by which the manufacturers of aircraft ejection seats licensed the defendant, a Canadian company, to manufacture and sell those products in the American continent, the Court of Appeal attached importance to the defendant’s investment in the business and the purchase of plant to benefit from the contractual licence in fixing the notice period at 12 months.

37. The Board also refers to three first instance English cases which illustrate the factors to which the courts have had regard.

38. In *Jackson Distribution Ltd v Tum Yeto Inc* [2009] EWHC 982 (QB) Royce J addressed the termination of a sole distributorship agreement for the sale of branded clothing and a skate shoe. In fixing the reasonable period of notice at nine months, Royce J referred to *Alpha Lettings* and treated as relevant factors: (i) the lack of formality of the

relationship, (ii) the absence of a prohibition against selling competing products, (iii) the length of the relationship, (iv) the significant early investment in the arrangement by Jackson (the distributor), and (v) the fact that the sales of the brand were less than 50 per cent of Jackson's turnover. He accepted Jackson's evidence that it would take time to establish an alternative shoe brand and three years to achieve profitability with a new brand. It is implicit in Royce J's acceptance of nine months as a reasonable period of notice that he saw the notice period as allowing for a period of adjustment rather than the maintenance of the profitability of the recipient of the notice.

39. In *Hamsard Norris J* addressed a distributorship agreement, which had been entered into in February 2009 to replace an earlier trading relationship since 2002. Boots terminated the relationship on nine months' notice in November 2009. In addressing what was a reasonable period of notice, Norris J referred to Lord Devlin's statement in *Australian Blue Metal* that the common purpose of the parties was a desire to cushion themselves against sudden change. He saw the period of notice as addressing the immediate needs of the parties rather than their long-term needs, and allowing them to adjust to accept the fact that there was no long-term future in their relationship (paras 70, 71 and 78).

40. In *Nagel Popplewell J* addressed a brokerage agreement between a diamond broker, Nagel, and a Belgian diamantaire. Nagel purchased rough diamonds wholesale from De Beers in "Sights" held in London ten times a year and provided them to Pluczenik to process and sell. The arrangement had originated in the 1960s and continued thereafter. When De Beers moved its Global Sight from London to Gaborone in Botswana in 2013 Pluczenik terminated the brokerage arrangement with immediate effect as it wished to enter into a direct relationship with De Beers' selling organisation. Nagel initiated legal proceedings claiming for lost commission and compensation under The Commercial Agents (Council Directive) Regulations 1993 (SI No 3053 of 1993) ("the Regulations") and in the alternative for damages including for failing to give a reasonable period of notice. Nagel's claim under the Regulations failed because Popplewell J found that they did not apply to the relationship between Nagel and Pluczenik. Popplewell J held that the termination of the agreement involved a breach of a commission variation agreement between the parties which involved an undertaking by Pluczenik to continue to use Nagel as its broker with the result that a question of reasonable notice did not arise. Nonetheless, Popplewell J addressed that issue briefly, between paras 89 and 97 of his judgment, concluding that a reasonable period of notice, if there had been no commission variation agreement, would have been three months or, if longer, two Sights.

41. Popplewell J referred to *Martin-Baker*, *Decro-Wall* and *Alpha Lettings* and identified seven factors as relevant in the case. They were (i) the custom and practice in the relevant market, which pointed to either no notice or a short period of notice, (ii) the informality of the relationship—it was not recorded in a written document and lacked formality, (iii) the length of the relationship—Nagel's contribution to Pluczenik's ability to obtain diamonds had been significant at first but by 2013 had become relatively

minimal, (iv) the Supplier of Choice contract structure and Nagel’s work on the contract proposal questionnaire, (v) Nagel’s ability to make adjustments for loss of the agency, (vi) the fact that the Regulations (which did not apply) require a minimum of three months’ notice to terminate an agency contract which has lasted for three or more years, and (vii) the nature of Nagel’s obligation.

42. More recently, in 2023, the Court of Appeal returned to the question of a reasonable period of notice in *Zymurgorium*. *Zymurgorium*, which manufactured drinks, particularly gin and gin liqueurs, entered into an agreement with Hammonds, a drinks wholesaler, for the distribution of its products in 2015. Their relationship caused Hammonds’ business to expand dramatically but ended in 2018 when Hammonds discovered that *Zymurgorium* had started to supply a major customer without going through Hammonds. *Zymurgorium* sued for unpaid invoices and Hammonds counterclaimed for damages for breach of contract. HH Judge Pearce ([2021] EWHC 2295 (Ch)) upheld the breach of contract claim in relation to five customers and held that a reasonable period of notice for those contracts was three months. The issue on that appeal which is relevant to the current appeal is whether the three-month period was a reasonable period of notice or whether it should have been 12 months as Hammonds contended. The Court of Appeal in a judgment delivered by Nugee LJ, with whom Falk and Nicola Davies LJJ agreed, upheld the judge’s conclusions. At para 88 Nugee LJ quoted the propositions which the judge, at paras 33–36, derived from *Alpha Lettings*, namely (i) the degree of informality is important, (ii) if the distributor has spent considerable capital in the early stages of the relationship to build up the business with lesser expenditure thereafter, this may point in favour of a longer period of notice in the early years, and (iii) if the relationship involves an obligation on a party to continue to use its best endeavours to promote the products of the other party after receipt of notice of termination, this militates in favour of a shorter period of notice.

43. In para 89, Nugee LJ quoted para 165 of the first instance judgment in which the judge stated that the reasonable period of notice would be a short one. The judge stated that not even 12 months would have been sufficient for Hammonds to develop and market another product which was successful to the same degree as those of *Zymurgorium*, but he continued:

“this factor is of limited significance where, during the notice period, the distributor would be restricted from (or at least would consider that it should not) taking steps to market competitive products and where in any event it would be duty bound to continue to promote the manufacturer’s products. In my judgment, any notice period in excess of three months would have imposed unreasonable obligations from the point of view of both parties. Their failure expressly to agreed [sic] terms of their relationship is consistent with an approach that

there was only a small limitation on the parties' rights to disengage.”

Nugee LJ concluded that the judge was right in finding that three months was a reasonable period of notice.

44. There are several Commonwealth cases from which the Board has derived assistance. In *Pacific Products Pty Ltd v Howard* [2005] SASC 290 the Supreme Court of South Australia addressed an agreement between the manufacturer and wholesaler of supermarket products and the distributor of its products in South Australia. The agreement had lasted for seven years. Relying on the judgment of McHugh JA in *Crawford Fitting*, Bleby J rejected as an irrelevant consideration in fixing a reasonable period of notice the period that the distributor needed to replace the share of business that he had lost (paras 21–26). He considered that four factors were relevant: (i) the business worked on a six-month promotional cycle, (ii) the time taken for the distributor to negotiate new arrangements, (iii) the nature of the relationship between the parties, and (iv) the industry in which they operated. The question, he stated (at para 32) was: “how did these factors affect the ability of the parties to make alternative arrangements and extract themselves as smoothly as possible from their association?”

45. The New Zealand Supreme Court in *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26 (“*Paper Reclaim*”) addressed Paper Reclaim’s termination without notice of a long-standing contract by which Aotearoa exclusively exported its waste paper. The High Court had considered that eight years’ notice was reasonable whereas the Court of Appeal had found that 12 months was reasonable. The Supreme Court concluded that it could not be said that the Court of Appeal was wrong. Blanchard J, giving the judgment of the Supreme Court, rejected the suggestion that Lord Devlin in his much-quoted statement at p 99 of *Australian Blue Metal* had been suggesting that a reasonable period of notice must necessarily be sufficient for the recipient to be able to build up a business comparable to that which it enjoyed under the terminating contract or which it enjoyed before the contract was entered into. He referred to the judgment of McHugh JA in *Crawford Fitting* and observed that Aotearoa had not sought to protect itself by an express period of notice but, by having an informal arrangement which would be understood as terminable on reasonable notice, had taken the risk that it might be disadvantaged to some extent if notice were given. The chief purpose of a reasonable period of notice was to allow parties to bring their relationship to an end in an orderly way (paras 8–10).

46. The Hong Kong Court of First Instance also adopted McHugh JA’s “chief purpose test” at page 448 of his judgment in *Crawford Fitting* (para 33 above) in *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2007] 1 HKLRD 685 (“*Good Earth*”) which concerned the termination of an exclusive distributorship agreement for the

distribution of Good Earth’s animal feed products in Southeast Asia. At para 106 Stone J adopted the approach of McHugh JA in *Crawford Fitting* which he described:

“In other words, that there should be afforded to the party whose distributorship is to be terminated a reasonable period in order to enable an orderly winding up of matters arising out of the existing long-standing relationship, and to accord to the party terminated a reasonable opportunity to enter into alternative arrangements.”

47. Turning to Canadian case law, the Supreme Court of British Columbia in *Western Equipment Ltd v A W Chesterton Company* [1983] BCJ No 1831; (1983) 46 BCLR 64 (“*Western*”) considered what would have been a reasonable period of notice for the termination of a long-standing exclusive distributorship agreement for the sale and distribution of Chesterton’s industrial products in British Columbia and Alberta. In his judgment Hinds J summarised the case law on reasonable notice periods in Canada and referred to *Martin-Baker* and *Decro-Wall* from England and Wales. At para 31 and following of his judgment he listed five factors relevant to the assessment of a reasonable period of notice: (i) the length and type of the relationship between the parties (including whether the distributor could sell competing products), (ii) the extent of the distributor’s sales force dedicated to Chesterton’s products, the effort made and the results achieved, (iii) the importance of the exclusive distributorship to the distributor, (iv) that party’s acquisition of inventory from Chesterton, and (v) the time needed by the distributor to acquire a replacement line of products and to re-establish a viable business in selling those products. He concluded that a notice period of ten months would have been sufficient, giving particular weight to the length of the relationship and the percentage of the distributor’s total sales which comprised the defendant’s products.

48. Hinds J in the British Columbia Court of Appeal again addressed the reasonable period of notice in an exclusive distributorship of musical instruments in *Yamaha Canada Music Ltd v MacDonald & Oryall Ltd* [1990] BCJ No 1273; (1990) 46 BCLR (2d) 363 (CA). He affirmed the discussion in *Western* of the relevant factors, which were less compelling in this case because of the shorter length of time that the agreement had been in place, the smaller sales force, and smaller inventory. He also took into account the time taken to order and obtain delivery of the inventory and when, during the year, was the peak period of sales. He fixed the reasonable period at six months in place of the first instance judge’s finding of 16 months.

49. Certain propositions arise from this examination of English and Commonwealth authorities.

50. First, whether a term that reasonable notice must be given before a party terminates an agreement is to be implied into a contract is answered in the light of the circumstances existing when the contract is made.

51. Secondly, the implication of a reasonable period of notice serves the common purpose of the parties. That purpose is to be determined as at the date of the contract. In *Australian Blue Metal* Lord Devlin, at p 99, was careful in his statement that the common purpose is *frequently* derived from the desire that both parties may be expected to have to cushion themselves against sudden change. He thereby left open the possibility that there could be other circumstances known to the parties or foreseeable by them at the time of contracting which support the implication of such a term. In most circumstances, however, the purpose of the implication of such a term is to allow the party receiving the notice an opportunity to adjust its businesses to the termination of the contractual arrangement.

52. This can readily be inferred as a common purpose because a distributor, who may be the more commercially vulnerable party in a relationship with a large manufacturer, needs some assurance that he or she will have an opportunity to obtain a return from the capital and effort of building up a market for the product. Similarly, the supplier will know that it needs to motivate the distributor to take on its business and devote money and effort to its development. In other cases, a powerful distributor may know that a supplier, which is commercially dependent upon its distribution system to a significant degree, needs time to allow an opportunity to identify and engage with a replacement distributor, which it would not have if the distributor terminating the relationship were entitled to terminate without notice.

53. Judges have expressed the aim of the giving of the period of notice in different terms. But essentially they are at one: the aim is to enable the parties to achieve an orderly end to their relationship, which is what McHugh JA in *Crawford Fitting* (para 33 above) described as the “chief purpose” of the notice period. This involves both the winding up of the relationship being terminated and giving the recipient of the notice an opportunity to make substantial progress towards entering into alternative arrangements for its business (see Longmore LJ in *Alpha Lettings* at para 38, Bleby J in *Pacific Products* at para 32, Blanchard J in *Paper Reclaim* at paras 8–10, and Stone J in *Good Earth* at para 106). As Nugee LJ explained in para 89 of his judgment in *Zymurgorium* it is not the purpose of the reasonable period of notice to protect the recipient of the notice from all loss of profit resulting from the termination of the relationship. In any event, one can readily see that such an outcome would often be impracticable as the recipient of the notice would have to continue to devote staff and other resources to the relationship until it was terminated and only redeploy them thereafter, and the party terminating the relationship would be tied into a relationship which it wished to bring to an end for what might often be an unreasonable time.

54. Thirdly, where there is an obligation to give reasonable notice, the court will assess the length of time which is reasonable in the light of the circumstances existing at the time at which the notice is given.

55. Fourthly, the factors which are relevant to the assessment of what is reasonable notice will depend upon the circumstances of the parties and the markets in which they are operating. In almost all cases those factors will be relevant only to the extent that they have a bearing upon what McHugh JA described as the “chief purpose” of the period of notice, namely the orderly winding up of the relationship and giving the recipient of the notice an opportunity to make progress in adjusting to the impending termination of the commercial relationship.

56. The case law which the Board has discussed identifies several such factors. Some will carry more weight than others in a multifactorial assessment. Before discussing those factors it is important to emphasise that a factor will be relevant and have weight only to the extent that it has an effect on what is a reasonable period of time for the recipient of a notice to adjust in the sense described in para 53 above.

57. First, one factor which has been recognised in the case law is the formality of the contract. Whether the contract is in a formal document or is constituted in a less formal way does not affect the period of time needed to allow the recipient to adjust in the sense discussed above. Formality in that sense cannot be relevant in commercial relations in which important contracts can be entered into orally or through an exchange of informal documents. The relevance of whether there is or is not a written contract is indirect: the court takes into account that the parties have not chosen to protect themselves by stipulating a set period of notice. That is why the law may step in to imply into the contract that there be a reasonable period of notice. The fact that the parties have not agreed a period of notice is a factor which points against a long period of notice if other things are equal. The factor of formality may be more directly relevant if “formality” is used in the sense that the relationship between the parties is well established and is not just ad hoc and occasional. A business relationship which is conducted on established terms and on a regular basis is likely to be more significant to the recipient of notice than a relationship conducted on an ad hoc or occasional basis. The recipient of the notice in a relationship of this kind may find it more difficult to adjust to its loss.

58. Secondly, the length of time during which the relationship has been in operation has been identified as a factor in the assessment of a reasonable period of notice. It is relevant in so far as it reflects the significance of the business in question to the recipient of the notice and the recipient’s ability to adjust to its loss. Clearly, the loss of a long-established business relationship which has given the recipient of the notice a relatively high proportion of its turnover will force the recipient to make more significant adjustments to its business than the loss of a relationship which, while long established, amounts to a smaller proportion of the recipient’s turnover.

59. Thirdly, the cases have referred to the significance of the relationship to the business of the recipient of the notice. The Board considers this to be a factor of central importance because it will in large measure determine whether the recipient can adjust to the loss of the relationship with ease or with difficulty. If the relationship being terminated makes up a high proportion of the recipient's turnover, the loss of the relationship will pose a greater difficulty to the recipient in adjusting its business, and conversely it will be easier to adjust if the relationship constitutes only a small proportion of that business. The relative formality of the contract and the length of time in which the relationship has been in existence, as discussed above, are relevant to the extent that they affect this factor. The ability of the distributor to sell competing products during the currency of the relationship is relevant to this factor and to the seventh factor below: the ease or otherwise by which the parties can adjust their business during the period of notice.

60. Fourthly, and closely related to the previous factor, the extent to which the recipient of the notice has invested financial, management and personnel resources into the relationship is clearly a relevant factor in many cases. If a recipient of notice had only a small part of its workforce engaged in servicing the relationship, often those employees may readily be redeployed elsewhere in the business. On the other hand, if it had a large proportion of its workforce engaged in the business relationship being terminated, that would suggest difficulty in adjusting its business and point towards a longer period of notice.

61. Fifthly, a factor which may point towards a longer period of notice as being reasonable would be where the recipient of the notice had, with the knowledge and assent of its counterparty to the relationship, incurred extraordinary capital expenditure or business expenses specifically for the performance of its part of that business relationship a short time before the relationship was terminated. Where the product of that capital expenditure cannot readily be used for alternative business and the recipient of the notice has not had an opportunity to obtain benefit from the expenditure, that may point towards a longer period of notice (see *Decro-Wall*, *Alpha Lettings* and *Crawford Fitting*).

62. Sixthly, the recipient of the notice may face other difficulties in terminating the relationship, for example where it has entered into contractual commitments with third parties to service that relationship which themselves cannot readily be terminated. Again, those difficulties might point towards a longer period of notice.

63. While several of those factors may point towards extending the period of notice which would be considered reasonable, the court in assessing reasonableness must bear in mind both that commercial relationships involve risk-taking and that the period of notice is designed not to protect the recipient of the notice from all financial loss caused by the termination of the relationship, but to give a period for adjustment to the change in business circumstances caused by the impending termination: para 53 above.

64. Seventhly, a factor which points strongly against a long period of notice is that both parties, in the absence of a supervening agreement, are obliged to continue to perform their contractual obligations during the period of notice, at a time when one party wishes to terminate the relationship and the other needs to reallocate its resources. Whether the obligation on the party is characterised as a requirement that it use reasonable efforts or its best efforts in performing the contract to be terminated (a matter which the Board need not decide), the longer the period of notice the greater the difficulty it will face in performing that obligation. This, in the Board's view, is what Longmore LJ was referring to in *Alpha Lettings* (paras 41–43) when he spoke of the difficulties arising during the period of notice.

65. The Board would not wish it to be inferred that this list is exhaustive of the relevant factors to be considered when assessing what is a reasonable period of notice. The custom and practice in the relevant market may be a relevant consideration, as Popplewell J stated in *Nagel*. The time of year when the notice is given may be relevant if sales are significantly higher in one part of the year than another. Each case will depend upon its particular circumstances.

66. Nonetheless, it does not follow from a focus on the circumstances of the particular case that a court should not have regard to the decisions of courts in similar cases; they may provide a helpful check on the outcome of a court's assessment of the circumstances of the case with which it is dealing. The court would be expected to treat like cases in a like manner and analogous cases are a useful guide to that end.

67. The parties agree on the test for appellate interference with a trial judge's assessment of a reasonable period of notice. Such an assessment is not the exercise of a discretion but an assessment or evaluation of the relevant considerations in applying the objective legal test of reasonableness. The appellate court may set aside the decision of a trial judge if the judge took into account irrelevant considerations or failed to take account of relevant considerations, erred in law or principle, or reached a view which was plainly wrong. An appellate court can overturn a trial judge's conclusion as to a reasonable period of notice if it is outside the range of periods of notice reasonably available to him or her: *Alpha Lettings*, Longmore LJ at para 38.

#### **4. Applying the law to the facts of this case**

68. The Board is satisfied that the Court of Appeal was entitled to set aside the order of Charles J because her judgment was undermined by errors of law in taking account of an irrelevant consideration and a failure to take into account relevant considerations.

69. In the Board's view, the most striking error was the fixing of the period of notice at 15 months on the basis that that was the period over which the termination of the

Distribution Agreement had reduced BHL's profits (see para 142(5) and (6) of her judgment). That is not a relevant consideration. This is because the court, in fixing a reasonable period of notice as a means of allowing parties to adjust to the termination of an agreement, is not seeking to preserve the profits of the recipient of the notice from all diminution (see para 53 above). A commercial organisation which agrees to take part in a commercial arrangement without stipulating for a fixed period of notice and in reliance on receiving a reasonable period of notice takes the risk that it may suffer a loss of turnover and a loss of profits while it seeks to replace that which it had from the arrangement and otherwise adjusts its business to the termination of that relationship. That is a risk of commercial life.

70. Charles J (in para 142(4)) also gave weight to BHL's expenditure on its sales manager and staff allocated to the Distribution Agreement when there was no finding of fact to support a conclusion that such expenditure was other than normal expenditure in a distributorship business and there is no finding that those members of staff could not promptly be allocated to the marketing and sale of other products. Similarly, the expenditure by BHL on upgrading the refrigeration plant in its warehouse provided benefit in relation to all products which BHL distributed which required refrigeration. The Court of Appeal was entitled to infer from the relatively small contribution of AB Inbev products to BHL's overall turnover that products being distributed under the Distribution Agreement formed a similarly small proportion of the products which were refrigerated. The expenditure on upgrading the refrigeration plant does not appear to be extraordinary expenditure attributable only or principally to the Distribution Agreement.

71. The judge does not appear to have attached any weight to several important factors which point towards a shorter period of notice. Those factors are: (i) under the Distribution Agreement BHL was allowed to distribute its own products and products of other producers which were in competition with ABI, (ii) the business generated by the Distribution Agreement amounted to about ten per cent of BHL's turnover, (iii) the interest of ABI in having the opportunity to set up a new distributorship within a reasonable period of time and (iv) the difficulties which both parties would face by being tied into an arrangement which was going to come to an end and the commercial risk that one or other party might "take its foot off the pedal" notwithstanding its contractual obligation to perform its part of the contract during the notice period. The latter factor was a particular risk for ABI because BHL traded in competing products. The first two factors point towards the conclusion that it would be easier for BHL to adjust to the loss of turnover from the Distribution Agreement than it would have been for a distributor dependent for its business on distributing the products of others and upon the product of a particular producer for a high percentage of its turnover. The second two factors are a reminder that it is necessary to consider the interests of both parties to the contract when fixing the reasonable period of notice.

72. Although it makes no difference to the outcome of this appeal, the Board would not have given the weight which the Court of Appeal appears to have given to the fact

that the Distribution Agreement was not set out in a formal document. That is relevant to the point that the parties have not chosen to stipulate a fixed period of notice and each party is to be taken to be content with an implied term entitling it to a reasonable period of notice from the other. When the judge spoke of the relationship being “fixed and formal” she was referring to there being an established commercial relationship whose terms had not changed materially over time and which formed a long-term part of BHL’s business. This was no ad hoc or ephemeral relationship. Had the business generated by the Distribution Agreement made up a large proportion of BHL’s turnover, the fact that it was an established and relatively unchanging business arrangement would have been a factor which, other things being equal, pointed towards a longer period of notice.

73. Having correctly set aside the order of Charles J, the Court of Appeal was entitled to conclude that ABI had given a reasonable period of notice. The balance of the factors discussed above point towards a relatively short period of notice as being sufficient to cushion the effect on BHL of the termination of the Distribution Agreement. While each case must depend upon its particular circumstances, the case law concerning analogous distributorship agreements supports the conclusion which the Court of Appeal has reached.

## **5. Conclusion**

74. The Board will humbly advise His Majesty that this appeal should be dismissed.