CA on appeal from QBD. (Mr Justice Andrew Smith) before Waller LJ; Hale LJ; Carnwarth LJ. 26th November 2003.

JUDGMENT : Lady Justice Hale:

1. The defendants appeal against the order of Andrew Smith J made in the Queen's Bench Division on 19 February 2003, giving judgment for the claimants on their claim for damages for breach of contract. He also awarded damages of £725,260 for part of the claim and ordered an inquiry into a claim for loss of cash flow but we are not concerned with questions of quantum. The issue is whether, having granted the claimants the exclusive right to supply them with transport services for a three year period, it was a breach of contract for the defendants voluntarily to merge their business with another group in such a way that their transport requirements could no longer be separately identified.

The facts

2. The claimants ("CEL") are the holding company for a group of companies in the container road haulage and related businesses. The defendants ("NLL") were the UK subsidiary of the Nedlloyd Group, a shipping line. They entered into a written agreement dated 18 July 1996 whereby CEL would provide road haulage and transportation services for NLL for a three-year period beginning 1 January 1996. The judge held that that contract gave CEL the exclusive right to provide such services for NLL. Though hotly disputed at trial, that is no longer in dispute.

3. The context to that agreement is set out in detail by the judge. There had for some years been a joint venture between NLL and CEL to undertake all NLL's haulage requirements (with limited exceptions) within the United Kingdom (apart from Northern Ireland) through subcontractors. For various reasons, NLL wished to renegotiate their arrangements. The negotiations started in 1994. A letter of intent from the Nedlloyd Group dated 26 August 1994 attached a draft agreement which stated:
"The TU [Transport Unit] will provide container transport by truck and rail within the United Kingdom excluding Northern Ireland and NEDLLOYD will undertake to forward all their overland transport requirements in this area for execution by the TU for the duration of the Agreement . . . "
CEL confirmed that this represented the intentions of the parties. A new draft was sent on 19 December 1994 which contained the following recital:
"CEL are haulage and transport operators and NLL wish to grant to CEL the exclusive right to provide overland haulage and transportation services . . . within the United Kingdom excluding Northern Ireland on the following terms and conditions . . . "

   No formal agreement was concluded then and negotiations 'went off the boil' while the joint venture continued as before.

4. In December 1995 NLL proposed that CEL should make available a 'dedicated fleet' of 35 vehicles in order to provide a particularly high standard of service to NLL's most valued customers. CEL's response was that they could not be expected to invest in a dedicated fleet on the basis of a letter of intent or a contractual commitment terminable at short notice. Nevertheless they did agree to provide a dedicated fleet and to guarantee to provide available traction for all orders received by stated deadlines. Apart from the dedicated fleet of 35 vehicles, NLL's requirements would continue to be met by contracting the work out, either to individual owner-drivers or to sub-contracting companies.

5. Drafts of the proposed agreement continued to be exchanged until it was finalised in July 1996. The recital was in identical terms to that quoted in paragraph 3 above. Under clause 1, the agreement was deemed to have commenced on 1 January 1996 and was to continue until 31 December 1998. Under clause 2, the organisation of 'the services required under this agreement' were to be as agreed between the parties. Clause 3 provided for the price of 'the services' to be as set out in Schedule A, and made special provision in the event of an increase in fuel duty surcharge.

6. Clause 4 dealt with the 'haulage base' as follows: *"The road haulage fleet which will provide the services shall consist of three separate but conjoint sections, namely the 'Dedicated Fleet', the 'Owner Driver Fleet' and the 'Subcontractor Base'. The sections shall be described as follows:*

   (a) THE DEDICATED FLEET

(i) The Dedicated Fleet shall consist of a minimum of thirty vehicles which shall be supplied by CEL, and dedicated specifically and exclusively to the provision of the NLL services unless agreed to the contrary from time to time by NLL. Within six months of the date hereof CEL hereby covenant with NLL that the Dedicated fleet shall be further enlarged by the additions of further dedicated vehicles of not less than five, or more than ten, in number and further:

(ii) In the event that on any particular day or days NLL shall not require the services of any of the vehicles in the dedicated fleet (as defined in Clauses 4(a)(i) and 4(a)(ii) hereof), NLL shall pay a daily sum to CEL of £160 for each and every one of those vehicles which are surplus to NLL requirements on that day.

(iii) The Dedicated Fleet shall be primarily (but not exclusively) designated to provide the services to accounts designated by NLL as 'Nedlloyd VIP', 'Nedlloyd Premier' and "'Nedlloyd Vulnerable' Accounts". A list of accounts designated under these headings in the sole discretion of NLL, shall be provided to CEL by the Operations Manager of NLL at the commencement of this Agreement and regularly updated thereafter.

(iv) …

(b) THE OWNER DRIVER FLEET

(i) The Dedicated Fleet shall be supplemented by The Owner Drive Fleet ("OD Fleet") which shall consist (unless agreed by mutual consent) of not less than forty 'owner-driver' vehicles, such term being construed in accordance with general commercial practice.

(ii) NLL shall have the unfettered right of veto on an owner-driver being included on the OD Fleet list, and further shall have the right to demand, in its sole discretion, immediate removal of any owner-driver from the OD Fleet list, such demand be acceded to by CEL forthwith.

(c) THE SUBCONTRACTOR BASE

(i) The Dedicated Fleet and the OD Fleet shall be supplemented by a Subcontractor Base ("SCB"). Vehicles in the SCB are to fulfil the balance of the services required by NLL under this Agreement other than those carried out by the Dedicated Fleet or OD Fleet.

(ii) The vehicles in the SCB shall be selected and approved jointly by CEL and NLL with regular reviews regarding cost efficiency and performance.

(iii) NLL shall have the unfettered right of veto on any vehicle being included in the SCB, and further shall have the right to demand, in its sole discretion, immediate removal of any vehicle from the SCB, such demand to be acceded to by CEL forthwith.

7. By Clause 5, 'Performance', CEL undertook to provide the haulage services required within defined performance criteria. Clause 6 provided for the penalties payable by CEL in the event of default beyond the agreed non-performance parameters. By clause 7, 'Availability', CEL warranted to fulfil without exception all requests for services received by stated deadlines and NLL undertook to use every endeavour to ensure that services required were notified on a timely basis. CEL undertook to use every endeavour to provide services requested even if notified late. Clause 8 provided for the penalties payable by CEL in the event of default in the availability warranted in clause 7. Clause 9 provided that the agreement ended on 31 December 1998; and also that NLL would be able to terminate if default in either performance or availability above the agreed limits continued for more than 20 days.

8. Among the other clauses may be noted Clause 11, 'Profit share', which provided for CEL to reimburse to NLL any profits over 7 per cent per annum. Clause 13 provided that payment was due 28 days from the date of invoice. This gave CEL a cash flow advantage in dealing with owner-drivers and subcontractors who were paid later. Clause 20 provided that the Agreement constituted the whole agreement between the parties. Clause 22, 'Force majeure', provided that both parties should be released from their obligations under the contract in the event of national emergency and the like.

9. At the end of 1996 the Nedlloyd Group merged with the P & O group. P & O had their own haulage business, P & O Roadways Ltd. At first things continued as before, but beginning in May 1997, NLL's business was merged with P & O's and it was no longer possible to separate it out. There ceased to be any discrete NLL business and CEL were not afforded exclusive haulage rights in respect of any part of the merged business. Although CEL continued to do work for the merged group, this was not at the level anticipated when the contract was made. There was still enough work to keep the dedicated fleet

busy, but the flow of orders for the owner-driver and sub-contractors' vehicles was much reduced. This had in fact been more profitable for CEL than the dedicated fleet. Hence these proceedings.

The judge's decision

10. The contract contained no express term that NLL would stay in business or continue to have haulage requirements over the three-year period. Having held that the contract did indeed give CEL the exclusive right to provide haulage services for NLL, the judge went on to hold that there was an implied term in the contract that 'NLL would do nothing of their own motion to put an end to the "state of circumstances" whereby NLL required services by way of overland haulage within the UK'. Their voluntary merger and loss of an identifiable discrete business was a breach of this term.

11. The judge relied upon the principle stated by Cockburn CJ in ***Stirling v Maitland*** (1864) 5 B & S 840, at p 852: *"I look on the law to be that, if a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."*

That proposition was accepted by the House of Lords in ***Southern Foundries (1926) Ltd v Shirlaw*** [1940] AC 701. Indeed Lord Atkin, at p 717, preferred not to base the proposition on an implied term but upon *"a positive rule of law that conduct of either promiser or the promisee which can be said to amount to himself 'of his own motion' bringing about the impossibility of performance is in itself a breach. If A promises to marry B and before performance of that contract marries C, A is not sued for breach of an implied contract not to marry someone else but for breach of his contract to marry B."*

The ***Stirling v Maitland*** proposition has been applied by the Court of Appeal in ***Bournemouth & Boscombe AFC v Manchester United FC***, unreported, 21 May 1980, and by Gatehouse J in ***Orient Overseas Management and Finance Ltd v Nile Shipping Co Ltd, the 'Energy Progress'*** [1993] 1 Lloyd's Rep 355.

12. The judge distinguished this case from the well known line of cases about agents' commission, most notably ***Luxor (Eastbourne) Ltd v Cooper*** [1940] AC 108, in which it was held that a property owner was under no implied obligation not to deal with his property in such a way that the estate agent was deprived of the opportunity of earning the agreed commission. As Brandon LJ put it in ***Alpha Trading Ltd v Dunnshaw-Patten Ltd*** [1981] 1 QB 290, at p 304A, when considering the case of *L* ***French Ltd v Leeston Shipping Co Ltd*** [1922] 1 AC 303: *"A person is free to deal with his property as he chooses, and a person is entitled either to carry on his business or to give up his business as he wishes. It would not be right, therefore, to imply in a contract between him and an agent a term that he should not be free to deal with his property as he chooses, or should not be able to continue or to give up his business as he wishes."*

The issue before us

13. The issue before us is whether the judge was right to imply the term that he did. For NLL Mr Alexander Layton QC made three main points:
    (1) The judge's reasoning was circular. He implied a term that NLL would continue to supply work in order to protect a contractual right to such supply, when CEL only had that right by virtue of the term which he implied. He was thus rewriting the parties' bargain, converting what was no more than a promise not to supply work to other hauliers into a promise to maintain a flow of work to CEL.
    (2) The facts are closer to the agency line of authorities than to ***Stirling v Maitland***. In ***Stirling v Maitland***, the claimant had a right to be repaid money he had paid out to discharge another's debt by way of commission earned in an insurance agency; the insurance company could not therefore prevent his securing that repayment by transferring their business to another company. In this case there was no right to be supplied with work.
    (3) Even if a term could be implied, the term implied by the judge was insufficiently precise to fulfil the normal requirements for such implication: see eg ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1958) 52 ALJR 20 (PC).

14. For CEL, Mr Richard Lord QC responded:

(1) It was necessary to construe the terms of the contract. Properly construed, the exclusive right to provide services for NLL meant more than that NLL would not go elsewhere for those services. It gave CEL the right to all the defined haulage work arising in the ordinary course of NLL's business.
(2) The contract has to be construed against its factual matrix. The important background facts here were the long period during which NLL had had a substantial requirement for overland haulage and CEL had exclusively provided the services to meet that requirement, NLL's desire for a dedicated fleet, with the substantial investment which that involved, and for a guarantee of certain levels of service, and the recognition that a formal three year agreement was needed to protect CEL's interests as well as NLL's, to give both parties certainty.
(3) The narrow view taken by NLL was contrary to commercial sense. Business contracts have to make business sense. It is also contrary to the officious bystander test.

Discussion

15. Despite the copious citation of authority before us, there was no real disagreement about the applicable law. Everything depends upon the true construction of the contract in question. If the agreement was that CEL would have the exclusive right to provide for all the defined haulage requirements of NLL's business over the three year period, then there is no difficulty about implying a term (or applying a rule of law) that NLL would do nothing of their own motion to make it impossible for CEL to supply those requirements. If the agreement was simply that NLL would not go elsewhere for their haulage requirements, then there is nothing to prevent NLL disposing of their business in whatever way they saw fit.

16. At first sight, clause 4(a)(ii) seemed to present a difficulty for the claimants. If on any day NLL did not require the services of all the vehicles in the dedicated fleet, they were to pay a fixed sum per vehicle per day. This sum represented the standing fixed costs of having those vehicles. Was this, therefore, the express term designed to cater for a downturn in NLL's requirements? Why then had the claimants not sued for liquidated damages based upon it? The answers we were given were, first, that there had still been enough work from P & O Roadways for the dedicated fleet, but second, that this had been a comparatively small proportion of the work overall: before the transfer there had been something like 150 to 175 jobs per day, so that the work for the dedicated fleet would have been at most one fifth of the total. This term could not, therefore, be seen as a liquidated damages clause which would shut out the possibility of a claim for unliquidated damages. It was an extra protection for CEL.

17. Moreover, clause 4(a)(ii) made it clear that NLL did have positive obligations beyond simply paying the price for such services as were ordered. NLL accepted that clause 4(a)(ii) imposed a positive obligation either to supply enough work to keep the dedicated fleet busy or to pay the fixed sum. It then became a question of whether their positive obligation extended further than that. CEL did not contend that the contract obliged NLL to keep up the expected or any particular flow of work. If matters outside their control had led to a downturn in demand, there would have been no breach. The contention was that the contract gave CEL the exclusive right to such work as NLL's business required. NLL did not go out of business in any real or practical sense. They merged their operations with another group and the merged group organised its business in a different way. But there is nothing at all to indicate that the business which had previously come through NLL was not still there to be done. It was merely that the corporate entity was no longer there and the merged group so organised its affairs that what had been its business was no longer ascertainable on a daily basis. It was common ground when it came to the assessment of damages that without the merger and reorganisation the work would have continued at the same volume throughout the three-year period.

18. Once the question is posed in that way, it is quite clear that on its true construction this contract did give CEL the right to provide for all the defined haulage requirements arising in the ordinary course of NLL's business. The preamble states that 'NEL wish to grant CEL the exclusive right to provide overland haulage and transportation services . . . '. *Clause 2 refers to 'the services required under this agreement'. Clause 4 refers to the 'fleet which will provide the services . . .'* The force majeure provision in

clause 22 applies to both parties and does not make sense if the only obligations undertaken by NLL are not to go elsewhere and to pay for such services as they have bespoken.

19. Furthermore, the meaning of those provisions has to be construed in the context in which this agreement was negotiated. The parties had been doing business together for some years on the basis that NLL supplied the joint venture with all its haulage business. This was big business with a substantial turnover. The investment in the dedicated fleet was substantial. Even if compensated by the sums paid down in clause 4(a)(ii), it meant that CEL had agreed to forego a proportion of the more profitable owner-driver and sub-contractor work. This would not have made business sense without a right to supply the transport requirements of NLL's business for a reasonable period of time. The new arrangements were obviously beneficial to NLL.

20. In ***Bournemouth and Boscombe AFC v Manchester United***, unreported, 21 May 1980, Manchester United had bought a player from Bournemouth for about £200,000. Approximately £175,000 was paid. The balance of around £25,000 was to be paid when the player had scored 20 goals for Manchester United. But within a relatively short time the player was transferred to another club without having scored the 20 goals. The judge held that there was an implied term that Manchester United would afford him a reasonable opportunity of scoring those goals. Donaldson LJ said this: *". . . I have on occasion found it a useful test notionally to write into the contract under consideration a declaratory clause expressing the fact that the parties are not subject to the obligations which would flow from the clause which it is urged should be implied. I think it is useful in this case. We then get a contract reading****: 'It is further agreed that Manchester United Football Club will pay a further sum of "27,770 to Bournemouth & Boscombe Football Club when Edward MacDougall has scored 20 goals in first team competitive football for Manchester United . . .provided always that Manchester United shall be under no obligation to afford MacDougall any reasonable opportunity of scoring 20 goals.'*** *It at once becomes clear that the inclusion of the proviso renders this part of the contract* ***'inefficacious, futile and absurd',*** *to use the words that Lord Salmon used in* ***Liverpool City Council v Irwin*** *[1977] AC 239, at p 262."*

21. Adopting that approach in this case, one might add into the termination clause, Clause 9, *"provided also that NLL are at liberty to dispose of their business as a going concern to whomsoever they please whenever they please during the period of this contract."* Such a declaration would have rendered the exclusive right to provide for their transport requirements similarly inefficacious, futile and absurd.

22. In my view, therefore, the judge was right to imply a term that NLL would do nothing of their own motion to bring to an end their own requirements for road haulage services. By their own act they made it impossible for CEL to exercise the right which NLL had given them.

Lord Justice Carnwath:

23. The only case-law required for this decision is a proposition stated by Cockburn CJ as long ago as 1864. It has been cited with approval in the House of Lords on numerous occasions, dating back at least to 1876 (see ***Rhodes v Forwood*** (1876) 1App Cas 256, 272, 274). Its resilience, as a proposition of law and common sense, is confirmed by its citation verbatim in the current edition of Chitty on Contracts para 3 – 012. However, like any such proposition in the law of contract, it needs to be read in the context of the particular contract, interpreted against the factual matrix in which it was made. That is all the law one requires for this case.

24. We were, however, provided with a bundle of some twenty-four authorities dating back more than 100 years. Without disrespect to the expertise of Mr Layton QC in guiding us through them, I found the exercise less than unhelpful. The difficulty is that, over that period of time, and given the variety of the contracts under consideration, it is inevitable that different judges will use different terminology to describe essentially the same idea.

25. One of the curses of the common law method in the 21st century is unlimited accessibility to authorities, reported and unreported, and apparently unlimited resources for copying them. (See the Practice Direction on Citation of Authorities [2001] 1 WLR 2001) On the other hand, one of the blessings is the availability of up to date and authoritative textbooks on almost every relevant subject, in which the material cases have been sorted out and digested. For my part, at least where I am

concerned with common law rather than statute, I find it most helpful to start by looking for a succinct statement of the relevant principle: either in a recent binding decision of the higher courts, if there is one; or, if not, in a leading textbook (or, where available, a Law Commission report). Of course, that is only the starting point. Authorities may be needed to qualify, expand, or merely illustrate the basic principle. However, it is important to be clear for which of those purposes any case is being advanced. Furthermore, where the purpose is to qualify or expand, it is not enough simply to cite an authority, without being able to articulate with reasonable precision the proposition which it is said to support.

26. Occasionally, and exceptionally, the uncertainty of the law in a particular area may require a detailed examination of cases going back over a long period. In such cases, for my part, I welcome all the help I can get. In most disputed areas of the law, it is possible to identify a recent, informed academic treatment of the subject by a recognised authority, with a full discussion of the relevant cases. Proliferation of academic articles is no more welcome than proliferation of authorities. However, an objective academic review can often provide the best framework for the discussion in court, and a useful corrective to the necessarily partisan viewpoint of counsel.

27. This is not such a case. For the reasons given by Hale LJ, I agree that the appeal should be dismissed.

Lord Justice Waller:

28. For the reasons given by Hale LJ I agree that this appeal should be dismissed. I would also strongly support the views expressed by Carnwarth LJ. As can be seen from the judgment of my lady, this appeal involved the construction of a particular contract and the application of well known principles. In such a case only a very limited citation of authority is necessary, and a good starting point has to be a leading text book or where available (and I am able to place even greater emphasis on this than modesty can allow either my lady or my lord), a Law Commission report.

Order: Appeal dismissed, the Appellant do pay the Respondents their costs of the appeal, such costs to be subject of a detailed assessment, if not agreed; the appellants do pay £35,000 on account of such costs within 28 days; further orders as per agreed draft. (Order does not form part of the approved judgment)

Lady Justice Hale: This is a judgment of the court

1. This is a postscript to the judgment we handed down on 27 November 2003 ([2003] EWCA Civ 1716 (26 November 2003)). The order to be made was agreed save for the basis upon which the respondent's costs of successfully resisting the appeal were to be assessed. The respondent seeks indemnity costs with interest at an enhanced rate. The appellant resists both.

2. On 20 May 2003, the respondent made a Part 36 offer to settle the appeal for £5000 less than the aggregate value of the sums it was entitled to under the first instance judgment, later damages settlement, interest and costs. This was open for acceptance until 11 June 2003. The appellant rejected this offer by a counter offer which was in turn rejected.

3. The appellant accepts that CPR rule 36.21 applies once a respondent has bettered his offer, even by the narrowest of margins, and that the court will order indemnity costs with interest unless it considers it unjust to do so. The appellant argues that it would be unjust in this case, for two reasons. First the discount offered was so small as not to be a genuine and realistic offer to settle. Second the respondent had the benefit of a conditional fee agreement covering its solicitor's fees (but not counsel's) so that there was little risk to it in continuing to fight but a greater potential liability to the appellant in doing so.

4. In our view, the respondent should have its costs on an indemnity basis from 11 June 2003. This Court has held, in ***Utaniko Ltd v P & O Nedlloyd BV*** [2003] EWCA Civ 174, [2003] 1 Lloyd's Rep 265, that a respondent who wants to protect itself against the costs of the appeal cannot rely on a Part 36 offer made before trial but must make a further Part 36 offer. Everyone should know where they stand. In particular, the appellant should know whether the respondent has resiled from the earlier offer and what its position now is. But in our view too much should not be expected of a respondent who merely wishes to retain the benefit of the judgment it has already obtained, especially in an all or nothing appeal such as this. The respondent cannot seriously be expected to make an offer based on giving up a substantial part of what it is currently entitled to, when the appeal turns on a pure point of

construction to which there is only one answer, whether that proffered by the appellant or that proffered by the respondent.

5. We do not see that the CFA affects that. It increases the appellant's risks of losing, because the paying party will have to pay the success fee and after the event insurance premium. That may enhance the attractions of keeping the other costs to a minimum by settling before the appeal is heard. But it is a factor which any litigant faced with an opponent with a CFA will have to take into account at every stage in the overall calculation of the costs and benefits of continuing to fight the case.

6. The respondent argues for interest on its appeal costs at 4% above base rate from a mean date of 1 September 2003 to avoid the expense of ascertaining when each element of costs was incurred. The appellant argues for interest at 2% above base rate from 24 October 2003. We agree that it is sensible to avoid the extra expense and the mid point between 11 June when the offer could have been accepted and the hearing of the appeal on 7 November, ie 1 September 2003, is an appropriate date. We accept, however, that the existence of the CFA will have affected the sums actually required from the respondent in respect of solicitor's fees, so that a rate of 2% would be appropriate.

Alexander Layton QC (instructed by Davies Arnold Cooper) for the Appellant
Richard Lord QC (instructed by Prettys) for the Respondent