

JUDGMENT : His Honour Judge Grenfell : QBD. 4th May 2007.

1. Mr Chris Cutchey has for some time operated a company that specialises in the transporting of waste metal, such as nickel catalytic converters. In 2003 the company changed its name from Chris Cutchey Ltd to Catalyst Recycling Ltd ("Catalyst"), although it retained its same number at Companies House. This company has had a longstanding business relationship with a German company, Nickelhütte Aue GmbH ("NHA"), whose specialist plant processed the waste. Until January 2005 the two companies operated to an agreement by which Chris Cutchey Ltd/Catalyst had the exclusive right within the UK and Irish Republic to source this kind of waste and transport it to NHA (the "Agency Agreement").
2. Needless to say, there is a strict regulatory framework for the transporting of this kind of waste and, in particular, between countries of the EU, provided by EU Regulation 259/93 (the "European Regulation"). I shall refer in more detail to the relevant Regulations. The significant requirement under Article 27 of the European Regulation, is for there to be in place an adequate financial guarantee by which the return of any such waste can be secured, should that become necessary. It is common ground that this is an essential requirement. It is also common ground that at all times there was in place such a financial guarantee provided by West Deutsche Landesbank ("WestLB").
3. The town of Aue, where NHA's plant is situated, comes within the area of the Regierungspräsidium Dresden, the competent authority of destination which oversees shipments of waste to NHA. In December 2004 the Regierungspräsidium through its officer Herr Beer became concerned as to whether there was a valid financial guarantee for Catalyst in the light of his discovery of the change of name. He, therefore, issued a Bescheid on the 17th December 2004 declaring the financial guarantee was not accepted as valid or sufficient. It is NHA's case that, until evidence of a satisfactory financial guarantee was provided, the notified shipments of waste by Catalyst were unlawful. Notwithstanding the expressed concerns of the Regierungspräsidium and the Bescheid, Catalyst made 3 shipments to NHA (the GB shipments under notification GB005852) and one from the Irish Republic (the Irish shipments under notification IE041764).
4. On the 23rd December Catalyst issued a Widerspruch, an appeal against the Bescheid. Ultimately, on the 28th January 2005 the Regierungspräsidium decided the Widerspruch in Catalyst's favour and discharged the Bescheid, indicating that it should not have been issued, albeit for technical reasons that it was unnecessary. Some time later, the Regierungspräsidium accepted that a valid financial guarantee had been in place at all relevant times. Nevertheless, it maintains that, until it was satisfied that there was a valid financial guarantee in place, shipments of waste by Catalyst were unlawful as a matter of German Administrative Law.
5. In the event, the local police visited NHA's plant and, as a result, the shipments were quarantined.
6. It is NHA's case that, because all the shipments were unlawful, then, as a result, it was entitled to terminate the Agency Agreement. It sought to terminate the agreement on the 31st January 2005. It is Catalyst's case that they were lawful; that NHA was not so entitled; that Catalyst was so entitled to terminate on the ground that NHA's termination was a wrongful repudiation of the agreement. Each claims consequential damages: NHA for damage to its business in January 2005, by not being able to process the waste which was quarantined following the intervention of the police and the legal proceedings; Catalyst for its loss of business at having to terminate the Agency Agreement.
7. The duration of the Agency Agreement was 5 years from the 22nd October 2001 'terminable thereafter by either party with 1 year's notice in writing.' It is common ground that, if NHA is found to have been in breach, damages for loss of profit should be limited to the earliest date on which the Agreement could have been lawfully terminated. There is an issue of interpretation as to whether that would be October 2006 or 2007, to which I shall return.
8. A substantial provider of waste nickel catalytic converters was the UK company, Johnson Matthey Catalysts Limited ("JMC"). Around mid 2004 it became clear to Catalyst that NHA were in discussion with JMC with the object of sourcing waste metal direct from JMC, which would amount to a breach of the Agency Agreement. Rather than terminate the Agency Agreement for anticipatory breach, unsuccessful attempts were made by Catalyst and NHA to renegotiate the agreement. These led to assertions that JMC were accusing Catalyst of improper charging and that, as a result, JMC no longer desired to deal with Catalyst. There is no evidence to back such assertions. On the contrary, such documentary evidence as there is indicates that JMC adopts a neutral stance in this regard. Mr Chris Cutchey denies that there was anything improper about their charging regime. One thing is clear, however, that as a result of the events of December 2004 and January 2005, Catalyst did lose the JMC business. Catalyst, nevertheless, still sources and supplies waste from other companies to NHA.
9. The issues, limited by the Order of His Honour Judge Seymour QC to liability and the basis on which damages could be recovered, but not their quantification, are:
 - i) Did Catalyst make illegal shipments to NHA:
 - a) Under notification GB005852?
 - b) Under notification IE041764?
 - ii) Was NHA entitled to terminate the Agency Agreement on the grounds of Catalyst making illegal shipments of waste? If NHA was not so entitled, it is common ground that Catalyst was entitled to terminate the Agency Agreement.
 - iii) Did NHA breach the Agency Agreement by contracting directly with JMC for the supply of waste metal?

- iv) If NHA is found to be in breach of the Agency Agreement:
 - a) Did that breach cause Catalyst to lose its business with JMC?
 - b) Is Catalyst entitled to recover damages based on its loss of profits?
 - c) If so, should loss of profits be calculated to 22 October 2006 or 22 October 2007?
 - d) In the alternative, is Catalyst entitled to recover damages based on the additional profits made by NHA as a result of its breach and/or the costs which NHA would have incurred in obtaining release from the exclusivity provisions of the Agency Agreement?
 - e) Is Catalyst entitled to recover wasted expenditure made in reliance on the expected continued validity of the Agency Agreement?
- v) If Catalyst is found to be in breach of the Agency Agreement:
 - a) Is the claim for lost production too remote to be recoverable?
 - b) If it is recoverable, how should NHA's loss of production be assessed?
 - c) What loss was caused to NHA by the alleged breach?
- vi) In relation to Catalyst's claim for unpaid invoices:
 - a) Has there been a settlement or waiver of the claim?
 - b) Should an account be taken, considering all payments made between Catalyst and NHA?

The Regulatory Framework

10. The following provisions of the European Regulation are relevant.
11. Article 6 required Catalyst to notify the intention to ship waste for recovery to the competent authority of destination, here the Regierungspräsidium Dresden, with copies to the competent authority of dispatch and transit, here the UK Environment Agency and to the consignee, NHA. The notification must specify various information (Article 6(5)).
12. Article 7(1) requires the Regierungspräsidium to acknowledge the notification within 3 days of receipt.
13. Article 7(2) provides that the competent authorities of destination, dispatch and transit have 30 days from acknowledgement to object to the shipment on the grounds specified in Article 7(4). Alternatively, the competent authorities can give written consent before the expiry of the 30 days.
14. Within 20 days of the acknowledgement the competent authorities can lay down conditions for the transport of the waste within their jurisdiction.
15. Article 8 allows the shipment to be effected if no objection is lodged within the 30 days or if the competent authorities have given their written consent.
16. Article 9 allows the competent authorities with jurisdiction over a specific recovery facility, such as NHA's plant at Aue, to decide that generally they will not raise objections to shipments of certain types of waste to that facility.
17. Where such a decision has been made under Article 9, notification must still be given under Article 6 prior to dispatch to that facility. Under Article 9(3) only the competent authorities of dispatch and transit may raise objections or impose conditions under Article 7. Such a decision is in fact evidenced by the letter dated 12th October 2000. The decision made clear the following:
"This decision does not affect the requirement that complete notification documents must be submitted for planned transportation of the named waste materials to Nickelhütte Aue GmbH."
This was a sensible reminder to ensure that everyone applied their minds to complying with the European Regulation, in particular, Article 27.
18. Article 27, as I have indicated, requires a financial guarantee or equivalent insurance to cover all shipments. Shipping waste without the necessary financial guarantee is unlawful. This is the key Regulation in this case.
19. Under Article 9(1), the Regierungspräsidium had made a decision that it would not object to shipments to NHA's plant under Article 7.
20. On the 21st September 1999 WestLB issued a financial guarantee in favour of Chris Cutchey Ltd.
21. On the 28th April 2003 Chris Cutchey Ltd changed its name to Catalyst Recycling Ltd.
22. Mr Cutchey maintains that on the 27th May 2003 he sent a fax to the Regierungspräsidium informing them of the change of name, but the Dresden Authority maintains that it has no record of the fax. There is a factual issue in this respect, which does not ultimately affect the central issue as to whether the shipments were unlawful. I am satisfied that Mr Cutchey did send such a fax, but that either it was not received or went missing; that the fax did not find its way to the relevant file; that Herr Beer had not seen it by the time of the query which he raised in December 2004. I am equally satisfied, however, that the Regierungspräsidium had received documentation in which Catalyst was named as Mr Cutchey's company for the purpose of shipping waste to Aue. In short, whether the Regierungspräsidium had received the fax is immaterial, because the notification was clearly in the name of Catalyst.
23. The significance of the change only became apparent when Herr Beer started looking into the validity of the financial guarantee in the December.

Were the Shipments Unlawful?

24. Mr Wheeler submits that the only requirements imposed by the European Regulation were that the Regierungspräsidium be notified of the shipments and that a financial guarantee actually be in place.
25. Mr Jack submits that, notwithstanding the European Regulations, German Administrative Law entitled the Regierungspräsidium to intervene and to require evidence of a valid financial guarantee, without the evidence of which shipments were unlawful.
26. The Regierungspräsidium was notified of the shipments on the 2nd July 2004 and sent acknowledgement on the 8th. On the 8th July the UK Environment Agency in relation to the notification issued a certificate of satisfaction that there was in force a financial guarantee issued by WestLB Dusseldorf. On the 4th August the Regierungspräsidium gave its consent to shipments under the notification and issued a permit, expressed to be valid if a 'sufficient amount [had] been provided which [covered] the costs for a return transport as well as the costs of the removal and/or disposal of the waste.'
27. Mr Wheeler submits that the permit was unnecessary because the right to object had been waived under Article 9, but, even if it were necessary, it merely reiterated the obligation in respect of a financial guarantee that already existed under Article 27.
28. On the 3rd January 2005 delivery 8 arrived at the NHA premises and was quarantined on Herr Beer's advice. WestLB wrote on the 6th January saying that, if the guarantee were called upon 'it would be established whether Catalyst Recycling Ltd is identical with Chris Cutchey Ltd and whether this fact is sufficiently proven through the Certificate of Incorporation of Change of Name dated 28 April 2003, of which we have a copy.' Herr Beer took the view that this letter was equivocal as to the validity.
29. On the 14th January 2005 delivery 9 arrived at the NHA premises and was also quarantined.
30. I turn now to the German Waste Transport Law ("AbfVerbrG").
31. Article 7(2) of the AbfVerbrG places the primary responsibility for determining the suitability of the financial guarantee on the competent authority of the place of shipment, here the UK Environment Authority, but if the competent authority of destination has reason to believe that the financial guarantee is insufficient, then it is entitled to intervene to determine the suitability.
32. It is now common ground following the evidence of both experts in German Law, that the Bescheid of the 17th December 2004 had no legal effect. In any event, Mr Wheeler submits that the Widerspruch lodged on the 23rd December had the effect of suspending the Bescheid, so that any prohibition which it purported to make was suspended.
33. It is submitted by Mr Jack, that, as to the GB deliveries, the Regierungspräsidium (Herr Beer, Herr Bürkel and Dr Hasenpflug), as the competent authority in the country of destination was entitled to ensure that security has been provided. I can see nothing wrong in the officers of that authority wanting to satisfy themselves that the required financial guarantee was in place, but it is quite another matter as to whether shipments of waste, which otherwise were quite lawful within the EU regulatory framework, could be made unlawful where officials are not satisfied, although the financial guarantee as a matter of fact were in place. That is the central issue in this case.
34. The issue which I have to determine is whether German Law is any different to English Law in that it can render a shipment unlawful which was all along in fact lawful in the sense that it complies with the regulatory framework. Common sense would suggest that this cannot be so, but regulatory and administrative law in any country can be a minefield.
35. I have to be guided by the expert evidence that I have heard with regard to the interpretation of German Law. In this respect, I am presented with two very different approaches: Dr Malterer, the commercial and administrative lawyer, on the one hand and Professor Dr Müller, the academic lawyer with speciality in waste law, on the other. I am invited to reject Dr Malterer's evidence on the basis that he was demonstrated to have no particular knowledge of waste law, in that he was unaware of a significant decision in relation to waste law, albeit unconnected with the issues in the present case. I am invited to reject Professor Müller's evidence on the basis that his approach was too partisan and his evidence entirely aimed at justifying the stance that all the shipments were unlawful. For similar and opposite reasons I am invited to reject Dr Malterer's opinion.
36. Dr Malterer gives advice in the course of his practice on the interpretation of the statutes that are relevant to this case. I accept Dr Malterer's expertise in determining the proper interpretation of the relevant German law. Professor Müller's expertise is rightly not challenged. The fact that Dr Malterer was unfamiliar with an ECJ decision on section 8 of the German Waste Transport Law, which was irrelevant to this case, as is section 8 of the Waste Transport Law, was hardly a 'killer' point. Dr Malterer's assistance was required in the interpretation of German public law administrative statutes in general. In my view, the fact that Dr Malterer had a less specific knowledge of waste law than Professor Müller, was only one factor to be balanced in the comparison of the two experts.
37. For my part, I have to say that I found Dr Malterer's evidence of much greater assistance than that of Professor Müller, in that he gave me a clear idea of the principles of German Administrative Law and how they would be applied to a situation such as obtained in this case. Professor Müller's evidence, on the other hand, both in the form of his report and of the evidence he gave orally, was much less clear and, it seemed to me, surprisingly

confused. Professor Müller did not have the Statements of Case, witness statements, or the relevant case documents when he wrote his report. In fact, he went to the offices of the Regierungspräsidium and asked them to provide him with certain documents from which made his own investigation of the relevant facts, on which he based his report.

38. This case illustrates the problems that can emerge at trial where experts have not conferred as directed. The experts themselves were quite unable to agree the terms on which they should confer. In such circumstances, the experts or either of them were entitled to seek the directions of the Court under Part 35.14 Civil Procedure Rules. Neither could be expected to be aware of that most useful rule, but the solicitors for both parties, in my view, should have known that it was vital to seek the Court's direction. Moreover, under Part 1.3 the solicitors had a duty to co-operate with each other to ensure compliance with the direction that the experts confer. The kind of unsatisfactory situation that emerged in this case, I thought, was a thing of the past. The rules are designed to avoid the parties indulging in recriminations as to who was at fault, when the duty lay on their solicitors to ensure that the experts conferred and produced a joint statement of areas of agreement and disagreement under Part 35.12. I am told that the problem was raised at the pre trial hearing before His Honour Judge Seymour QC; that the Claimant's counsel (not Mr Wheeler) assured the Court that Dr Malterer would meet Prof Müller to discuss matters; that in reliance on that assurance the Judge did not make any order. Perhaps in hindsight an Order was still necessary nonetheless, particularly where it had been stated that an Order of the UK Court had been requested.
39. The result is that unnecessary and valuable time has had to be taken up in court to determine the areas of agreement and disagreement.
40. It seems to me that the experts start from the common position provided by Section 35 of the German Administrative Procedures Act ("VwVfG"):
"An administrative act is every decree, decision, or other sovereign measure that an authority makes for regulating a single case in the area of public law that is intended to have direct legal effect in an outward direction."
The Regierungspräsidium was clearly such an authority; its decisions are made in the area of public law; insofar as it made any decision directed at the shipment of waste in December 2004, such decision was clearly intended to have an outward legal effect on Catalyst.
41. Dr Malterer concludes that at no time was Catalyst prevented from shipping waste to NHA; that the Bescheid of the 17th December was without force and in any event was suspended with retrospective effect by the Widerspruch and was later "repealed" with retrospective effect by the Regierungspräsidium itself; that the validity of the financial guarantee in place was not affected by the claimant company's change of name; that the Regierungspräsidium was aware of the change of name and did not cite the change of name as a reason for issuing the Bescheid; that section 326 of the German Criminal Code ("StGB") is not applicable. Therefore, he concludes that Catalyst's shipments of waste were lawful at all relevant times.
42. When put to him in cross-examination, Professor Müller accepted that the first and second sentences of section 4(2) of Waste Transport Law refer only to the competent authority of despatch and relate to shipments of waste out of Germany. However, his report refers to section 4(2) as being the basis on which the authority of destination can formally verify the notification documents submitted to it "in accordance with" that section. When initially it was put to Professor Müller that his report was inconsistent with what the statute actually says, he suggested (contrary to his earlier evidence and to the wording of the statute) that section 4(2), sentence 2 referred to the competent authorities of both despatch and destination. It was then pointed out that in fact the original German version of Professor Müller's report referred not to sentence 2 but to sentence 3 of section 4(2). As a result, Professor Müller changed his argument to say that sentence 3 of section 4(2) had the effect which he described in his report by making reference to article 6 of the European Regulation. Whether sentence 2 or sentence 3 is referred to, it is plain that section 4(2) does not have the effect contended for in Professor Müller's report and is not relevant at all to the shipment of waste into Germany.
43. I accept Mr Wheeler's submissions in respect of Professor Müller's evidence in the following respects.
44. Professor Müller referred in his report to the competent authority of destination being obliged by section 7 of the German Waste Transport Law to carry out a verification of the financial guarantee. This was fundamental to his overall opinion that the shipments were unlawful, in my view. That description, however, is inconsistent with what section 7 says, namely that the burden in this respect usually on the authority of despatch with the authority of destination only responsible in exceptional cases. Professor Müller accepted that his report contained only a partial account of section 7 but relied on Article 6 of the European Regulation, which had the effect which he had wrongly ascribed to section 7 in his report.
45. Professor Müller's report made wide claims for the effect of article 6 of the European Regulation. He initially gave as his opinion that the obligations referred to were found in article 6(4), but accepted under cross-examination that article 6 did not in terms contain the obligations which he alleged it contained. Nevertheless, he considered that article 6(4) spelt out the consequences of those obligations. I cannot see that article 6 contains the obligations which Professor Müller said that it contains.
46. Professor Müller gave as his opinion in his report that section 7 of the Waste Transport Law was enacted specifically on the basis of article 42 of the European Regulation. I agree that Professor Müller was not able to

explain how it was relevant. I accept Mr Wheeler's submission that Article 42 is irrelevant to this case and could not have been the basis on which section 7 was enacted.

47. Professor Müller made a similarly inexplicable reference to Article 4(2)(b) of the European Regulation. He accepted that this Article is not relevant but then went on to suggest that if there was no provision dealing with a certain matter in the relevant articles, it was legitimate to look elsewhere at Articles that were otherwise inapplicable in order to fill the gap. I agree that this is a novel and surprising method of statutory interpretation. It is unknown in the English interpretation of EU Regulations and I was left unconvinced that there was any reason to suppose that such an approach applied in Germany either.
48. It was surprising, in the context of Professor Müller's saying that he would completely ignore any contractual disputes between the parties, that he gave an assessment of the appropriateness of NHA's purported termination of the Agency Agreement. When asked in cross-examination how it could arise from the contents of his report, Professor Müller gave a defence of NHA's conduct, which went beyond his remit as an independent expert on the interpretation of German Law. In his defence, however, I formed the view that Professor Müller had been inadequately briefed as to his rôle as an expert under the regime of the Civil Procedure Rules and, therefore, felt that part of his duty was to justify NHA's case that the shipments of waste were unlawful.
49. Under section 4(2) of the German Waste Movement Law,
"The [notifier] shall submit all documents necessary for the notification, including the necessary copies to the competent authority. The rights and obligations from the ... [EU] Regulations on Waste Movement for the [notifier] are not thereby affected."
There is no question that Catalyst submitted all necessary documents.
50. Section 7 of the Waste Movement Law is the crucial provision:
"Responsible for the determination and release of the security¹ is the competent authority of the place of shipment.² If in the event of the trans-frontier shipment of waste into the area where this law is applicable,³ the competent authority at the place of shipment² does not make the decision ... dependent on the deposit of a security or the proof of a corresponding insurance cover or if the domestic authority⁴ has reason to assume that the security¹ or insurance cover requested by the authority at the place of shipment² is not suitable to cover all costs and risks stated in Article 27 of the EU Regulation ..., it determines the required security¹ or insurance cover itself by way of condition or obligation."
51. The key question, therefore, the circumstances in which the obligation arises on the competent authority of destination, here the Regierungspräsidium, to intervene in determining the validity of the financial guarantee. In my view, assisted in particular by the evidence of Dr Malterer, the authority of destination only intervenes in exceptional circumstances where there is reason to believe that the competent authority of despatch has failed in its duty to decide properly whether a valid financial guarantee is in place.
52. The problem arose when Herr Vierling came across an insurance policy issued by Bray Wintour Patis plc which he and Herr Beer assumed was the financial guarantee. On this assumption it was not surprising that Herr Vierling established that it was not sufficient. This was the basis for the Bescheid of the 17th December. It was only when NHA informed the Regierungspräsidium that the relevant security was the West LB financial guarantee of 1999 in favour of Chris Cutchey Ltd that the officials became concerned as to whether it was affected by the change of name of the company of which they were by this time aware. The initial concern, therefore, was based on an error. The surprising feature of the officials' thinking at this stage was that none of them considered checking with the UK Environment Agency as to whether the name change made any difference to the validity, in particular, because the Agency had plainly accepted the West LB financial guarantee as valid.
53. Much has been made of the WestLB letter of the 6th January 2005 and whether it was equivocal as to the validity. Herr Beer thought it meant that the validity was in doubt. In my interpretation, it meant no more than this: provided that Catalyst was one and the same as Chris Cutchey Ltd then the financial guarantee would be met. The UK Environment Agency had indicated its satisfaction. It remains one of the mysteries of this case why the Regierungspräsidium Dresden did not simply check with the Environment Agency.
54. The real problem emerged in the course of the evidence, in my view. It became apparent to me that Herr Beer's initial concern was not based so much on the change of name, which after all should not have come as any great surprise, but rather on his mistaken belief that the Bray Wintour Patis insurance policy was the financial guarantee in question. It was not until it became apparent that the WestLB guarantee was the correct financial guarantee for the purposes of Article 27, that the issue of the change of name came to the fore, by which time the shipments had been commenced. In the meantime, Catalyst through Mr Cutchey was convinced that the Bescheid was ill founded, hence the Widerspruch. So far as Catalyst was concerned it was the same company that would be covered by the WestLB financial guarantee.
55. I think that Herr Beer read the West LB letter against the background of having issued a Bescheid which was based on erroneous information and thought, wrongly, in my view, that it threw doubt on the validity of the

¹ in this case the financial guarantee.

² in this case the UK Environment Agency.

³ Germany.

⁴ The Regierungspräsidium Dresden.

financial guarantee. Unsurprisingly, he seized on that to justify his actions, which in turn led to the involvement of the criminal agencies.

56. I have read or heard nothing in the evidence of the experts in German Law to indicate that a change of name of a company has any effect different to that which would obtain in English Law. In other words, I am satisfied that a financial guarantee issued in the name of Chris Cutchey Ltd held good for Catalyst, because they were one and the same company.
57. My conclusion, therefore, supported by Dr Malterer's evidence which I accept, is that the Regierungspräsidium did not have sufficient reason to believe that the financial guarantee was invalid. It follows, in my judgment, for this reason, that there was no breach of section 7 of the German Waste Law and that it is unlikely that a prosecution based on an alleged infringement of German domestic law would succeed. For the present, as I accept, there are outstanding criminal proceedings against Mr Chris Cutchey, but they have not been determined and I accept Dr Malterer's opinion that they cannot affect the question whether at the relevant time any of the shipments were unlawful.
58. Ultimately, I am not persuaded by anything that I have heard about German Law that the mere concern on the part of officials of the Regierungspräsidium as to the validity of the financial guarantee, which was in fact in place at all times, was sufficient to render unlawful that which was plainly lawful under Article 27 of the European Regulation. There was no sufficient reason without first checking with the UK Environment Agency to believe that the financial guarantee was anything other than valid, as it clearly was. The general consent provided under Article 9 rendered the intervention of the Regierungspräsidium unnecessary, unless section 7 of the German Waste Law gave it authority to do so. I have found that it did not do so. Accordingly, I am satisfied in the first place that the GB shipments were lawful.
59. I turn now to the Irish shipments.
60. The Irish notification was different. Notifications were sent to the competent authorities on the 4th November 2004. On the 13th December Cork County Council, the competent authority of dispatch issued in relation to the financial guarantee its certificate of satisfaction, which was faxed to the Regierungspräsidium. The relevant documents were lost in the post and never received by the Dresden Authority. Replacements were sent on the 15th December. Mr Chris Cutchey maintains that in a telephone conversation on the 17th December Herr Beer of the Authority confirmed receipt of the notification and undertook to send an acknowledgement. I accept this evidence. A fax including further copy documents was sent to the Authority on the 20th December. On the 21st December Herr Beer sent the acknowledgement dated 16th December. The first shipment under the notification was made on the 29th December. On the 4th January 2005 Herr Beer wrote objecting to this shipment, requesting evidence of hauliers' permissions and insurances and of a financial guarantee drawn on a German bank. On the 28th January Herr Beer issued a formal consent for the shipments under the notification.
61. For the reasons I have already given, I find that there was no sufficient reason to object, but in any event, the objection was too late to render the shipment unlawful, had there been any sufficient basis for the objection.
62. The intervention of the Regierungspräsidium occurred, of course, against the background of the failed negotiations between Catalyst and NHA for a new Agency Agreement and the declared intention of NHA to move to direct dealing with JMC. Further, I accept Herr Kramer's evidence that he was upset at having the shipments quarantined and, in particular, by the visit of the local police. I consider that the description of the visit as a 'raid', from what I have heard of it, is an exaggeration. It was nothing of the kind. Nevertheless, for a well run organisation like NHA it was a matter of concern. Possibly, against a rather different background of relations with Catalyst, NHA might have been quicker to reassure the Regierungspräsidium and Police that there was nothing wrong with the financial guarantee; they might have wished to do so in order to avoid the very problems that occurred with being unable to process the shipments; they would possibly have regarded the whole affair as a misunderstanding and carried on with the Agency Agreement regardless. That, however, is a matter of speculation only.
63. Whatever the legality of the shipments, I should not have been disposed to regard what happened in December and January 2005 as sufficient cause to terminate the Agency Agreement.
64. Had Catalyst been in breach of contract, I am satisfied on Herr Kramer's evidence that it was foreseeable that undue delay to the shipments at NHA's end was liable to disrupt the nickel campaign of the 27th December; that accordingly any loss that would have been attributable to such breach would not have been too remote and would have been recoverable as damages for breach of contract. However, it is common ground that the issues of causation in this respect are to be determined later.
65. There are three main issues in respect of Catalyst's loss that arises out of NHA's breach of contract flowing from my finding that the shipments were lawful and the early termination of the Agency Agreement. First whether the breach caused Catalyst to lose its business with JMC; second, whether Catalyst can establish a loss as a result of not having the exclusive right to source the waste in the UK; third, what is the minimum length of time for which the Agency Agreement could have subsisted.
66. Taking the third issue first, in my judgment, the answer is a straightforward question of interpretation of the Agreement itself. Mr Wheeler argues that notice to terminate could not be given until the 5 years was up. Mr Jack argues that, where it says the Agreement could be terminated after 5 years, it means that the 12 months notice could be given before the expiry of the 5 years. There are comparable situations, for example tenancy

agreements where notice is given before the expiry of the term. In my judgment, in the absence of words to the contrary, I should favour interpreting this Agreement as giving a right to give 12 months notice at any time prior to the expiry of the 5 year contractual period, but, of course, no earlier than 12 months before. I find, therefore, that the cut off date for damages flowing from the breach to be the 22nd October 2006.

67. It is common ground in that event that the relevant loss concerns the JMC business.
68. The dealings between NHA and JMC in the earlier part of 2004 were, it seems, the driving force behind NHA's desire to terminate Agency Agreement. JMC wanted a global contract with NHA, including the UK, but the Agency Agreement with Catalyst prevented the inclusion of the UK in such an agreement. NHA initially wished to pursue a direct deal with JMC in any event and to find a means of keeping Catalyst involved in some new capacity, albeit no longer dealing directly with JMC. NHA's position was that Catalyst would not lose out financially. The negotiations came to nothing. In the course of the negotiations much was made of Catalyst's charges. NHA told Catalyst that JMC was furious about their charges. It seems to me that this was used to persuade Catalyst to agree to the proposed break clause and also as a possible justification to terminate the Agency Agreement. The evidence, however, does not support the suggestion that JMC was furious with Catalyst and was no longer prepared to deal with it. No one from JMC was called to give evidence of the supposed fury. JMC has not acted in a manner consistent with being furious with Catalyst. JMC has never directly complained to Catalyst about its conduct and has continued to have dealings with, and to pay the charges of, Catalyst without complaint.
69. In my judgment, there is no evidential basis for the proposition that Catalyst would have lost the JMC business whether or not the Agency Agreement was terminated. There is no evidence from JMC that it would not have been willing to deal with Catalyst had the Agency Agreement continued. NHA has continued to obtain catalyst waste from JMC in the UK. If the Agency Agreement had continued, NHA would have been obliged to source that waste through Catalyst. There is no evidential basis on which I could find that the JMC business would have ceased if the Agency Agreement had continued. I agree that, if the Agency Agreement had not been terminated, some sort of renegotiation might have been concluded allowing JMC and NHA to deal directly. However, in my view, more likely than not, Catalyst would have retained a rôle and been in a financially equivalent position to that in which it would have been, had the Agency Agreement continued unchanged.
70. For these reasons, I am satisfied that the termination of the Agency Agreement has caused Catalyst to lose the business which it would otherwise have done with JMC.
71. The final question in this regard concerns the basis on which the loss of profit can be determined. It is agreed that damages should be calculated to the earliest date at which the agreement would have been terminated, which I have found to be the 22nd October 2006.
72. Mr Jack's argument is that damages should be assessed on the basis of NHA's minimum obligation under the Agency Agreement. The agency agreement, he submits, was a mere umbrella agreement: each delivery was the subject of individual negotiations between NHA and Catalyst; there was no duty on NHA under the Agency Agreement to purchase anything. So, he submits, in order to claim damages, Catalyst must establish an implied term that NHA would make purchases on the basis of *Paula Lee v Robert Zehil & Co* [1983] 2 All ER 390 at 393, 394 and 396. Because no implied term is pleaded, he argues that the claim necessarily fails.
73. Mr Wheeler does not seek to rely on any implied term. He accepts that where there are alternative ways of performing a contract, damages for breach are to be assessed on the way that would have been the least disadvantageous to the defendant. Here, he submits it is a question of fact what that would have been had there been no breach.
74. In the *Paula Lee* case Mustill J formulated the principle as follows at p394:
"There is one further distinction which must be mentioned, namely that which exists between (a) an obligation expressed in terms of a range of alternatives from which the promisor may choose and (b) a single obligation expressed in an indefinite way. A duty of the latter kind may often be construed as an obligation to act reasonably, and the damages will be assessed on the basis of what would have been reasonable. That this distinction does exist cannot, I think, be disputed, and it presents no serious theoretical difficulty when it is possible to say that there is one reasonable mode of performance, and one alone. But what of the case where there is more than one reasonable method, or a whole range of reasonable methods, shading into one another? One possible view is that the court should try to forecast how the defendant would have performed but for the repudiation. In my opinion this approach is inconsistent with principle, since the defendant may in the event have done no more than was necessary to qualify as reasonable, and to assess damages on any other basis would be to penalise him for failing to do something which he was not obliged to do. The answer must, in my judgment, be that the court is to look at the range of reasonable methods, and select the one which is least unfavourable to the defendant, bearing in mind, of course, that in deciding what methods qualify as reasonable the question must be approached with the interests of both parties in mind."
75. Lord Diplock in *Lavarack v. Woods of Colchester Ltd* [1967] 1 Q.B. 278 expressed the principle with words which, in my view, represent common sense at p295:
"The events extraneous to the contract, upon the occurrence of which the legal obligations of the defendant to the plaintiff thereunder are dependent, may include events which are within the control of the defendant: for instance, his continuing to carry on business even though he has not assumed by his contract a direct legal obligation to the plaintiff to do so. Where this is so, one must not assume that he will cut off his nose to spite his face and so control

these events as to reduce his legal obligations to the plaintiff by incurring greater loss in other respects. That would not be the mode of performing the contract which is 'the least burthensome to the defendant.'"

76. In the instant case, I have to remind myself that the Agency Agreement was designed to benefit both parties to the agreement. It was in NHA's interests to do as much business in respect of the sourcing of materials from the UK with which to process at its plant as possible. It cannot be assumed that for some speculative reason NHA would have reduced its business within the UK until the expiry of the Agency Agreement. It is a question of fact whether the JMC business would have continued under the agreement. For the reasons I have given, I have heard nothing to suggest that it would not have continued until the end of the term of the Agency Agreement in October 2006. I am satisfied that it would have been in the interests of NHA and JMC to continue at a rate similar to that which obtained prior to the repudiatory breach in January 2005.
77. In my judgment, that should be the primary basis on which loss of profits is determined. The reality is that NHA has in fact dealt with JMC directly since the termination of the Agency Agreement. Factually, therefore, the solution is to take that rate of trading as the basis for the claim for Catalyst's loss of profit. Had the Agency Agreement remained in force, Catalyst would have made a profit on each waste shipment transaction between JMC and NHA. Because I accept Mr Cutchey's evidence that work was done by Catalyst to justify the charges it made, it seems to me that the cost of such work should be taken into account when calculating the profit that would otherwise have been made on each transaction. Equally fees which would not in fact have been claimed by the Claimant would not be included in the computation of loss of profit.
78. In any event, it is clear that the Agency Agreement had a value to Catalyst, which has to be reflected in the damages for breach. Even if there had eventually been a renegotiated agreement between NHA and Catalyst in respect of the JMC business, I am satisfied that it would only have been on the basis that Catalyst did not lose out financially in respect of the business it would have lost as a result.
79. I am not attracted to the suggested alternative of attempting to assess the financial benefit to NHA in being able to deal with JMC direct. However, in reality I anticipate that the answer would inevitably be similar to the exercise that I prefer.
80. Since completing my draft of this judgment, I have been referred to the decision of the Court of Appeal in *WWF – World Wide Fund for Nature v World Wrestling Federation Entertainment inc* [2007] EWCA Civ 286 (2nd April 2007) in which the leading judgment of Chadwick LJ recites the development of the law from the basis of damages awarded in *Wrotham Park Estate Company Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 through to *Attorney General v Blake* [2000] 4 All ER 385 and *Experience Hendrix LLC v PPX Enterprises inc* [2003] EWCA Civ 323. This confirms that damages may be awarded notwithstanding the fact that no claim for an injunction has been made, where the defendant is in breach of contract, the equivalent of a breach of restrictive covenant and where the court is satisfied that an award on the *Wrotham Park* basis is the just response to circumstances where the due compensation cannot be measured.
81. Should it not prove possible to measure damages on the basis of loss of profits, Catalyst's primary case, then, it would plainly not be just for there to be a nominal award. Damages, in those circumstances would have to be assessed on the basis of a sum which it would have been reasonable for NHA to pay to be released from the Agency Agreement.
82. I turn to the issue whether Catalyst is entitled to recover wasted expenditure made in reliance on the expected continued validity of the Agency Agreement. It follows from the reasoning I have set out above that any wasted expenditure which can properly be attributed to the breach of contract in this way is in principle a head of loss recoverable by Catalyst.

The unpaid invoices.

83. In my view, there is a simple answer to the claim for the unpaid invoices. It is not disputed that the invoices represent charges which were properly incurred. NHA rightly complains that they are old and that it could have assumed that they would have been pursued at the time they were due. However, unless there can be shown to have been a waiver of the invoices, it is clear that NHA has no defence in respect of the claim for payment of those invoices. There is no evidence of any such waiver, either express or to be implied from the delay. There needs to be something more than mere delay.
84. Mr Jack's argument is that an account is the standard remedy between principal and agent: Bowstead on Agency (18th Ed, 2006) paragraph 6-093. He submits that the raising and payment of Catalyst's invoices gives rise to a settled account between the parties: *ibid* paragraph 6-096. In any event, he submits, it would be unjust, if Catalyst can raise late invoices, for NHA not to do the same.
85. Mr Wheeler counters by submitting that it amounts to no more than a claim for debt under individual contracts; that there is no reason to make it any more complicated; that should it wish to do so, NHA can pursue any under payments. I agree.
86. The claim in respect of the unpaid invoices is made out. Should NHA find that it has any claim for monies due from Catalyst, it is free to make a claim. In my judgment, to order an account between the parties would be an unwarranted complication.
87. I conclude, therefore, that the December 2004 GB and Irish shipments were lawful; that NHA's termination of the Agency Agreement constituted a repudiatory breach of the agreement. Catalyst's loss is to be determined on the

basis that NHA has in fact dealt with JMC directly since the termination of the Agency Agreement; that this rate of trading should form the basis for the claim for Catalyst's loss of profit, based on the profit on each waste shipment transaction between JMC and NHA that would otherwise have been sourced through Catalyst. The cost of the work that Catalyst would have done in respect of each transaction should be taken into account when calculating the profit that would otherwise have been made on each transaction. Alternatively, and only in the event that Catalyst is unable to establish its primary case on damages, damages should be assessed on the basis of a sum which it would have been reasonable for NHA to pay to be released from the Agency Agreement. Catalyst is entitled to recover wasted expenditure made in reliance on the expected continued validity of the Agency Agreement.

88. There will be judgment in respect of the unpaid invoices simply.

Mr Giles Wheeler (instructed by Squire Sanders & Dempsey) for the claimant

Mr Adrian Jack (instructed by Bates Wells & Braithwaite) for the defendant