COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/00032

BETWEEN

ANHEUSER-BUSCH INTERNATIONAL INC.

First Plaintiff

-AND-

CERVECERIA NACIONAL DOMINICANA, S.A.

Second Plaintiff

-AND-

~~BURNS HOUSE~~ COMMONWEALTH BREWERY LIMITED

Defendant

Before:	The Honourable Madam Senior Justice Indra H. Charles
Appearances:	Mr. Christopher Jenkins with him Ms. Chizelle Cargill and Mr. McFallough Bowleg of Lennox Paton for the Plaintiffs Mr. John Delaney QC and Ms. Lena Bonaby of Delaney Partners for the Defendant
Hearing Dates:	23, 24, 25 March, 20 July 2021 (oral submissions)

Contract – Termination of Distribution Agreement – No termination clause – Long-term commercial relationship – Implied term of reasonable notice – What constitutes reasonable notice – Degree of formality – Novation of contract – Breach of contract – Damages for termination without reasonable notice – Economic torts – Damages – Set - off

In or around 1975, Anheuser-Busch International Inc. ("the First Plaintiff") and Burns House Limited (which, during the course of these proceedings, merged with Commonwealth Brewery Limited) ("the Defendant") entered into a Distribution Agreement for the Defendant to be the exclusive distributor of ABI brands including Budweiser and Bud Light in The Bahamas. Under the Distribution Agreement, the Defendant would market and distribute ABI products in The Bahamas. The Distribution Agreement had never been reduced to writing. The Defendant committed substantial resources to the Distribution Agreement and always met its contractual obligations.

Cerveceria Nacional Dominicana, S.A. ("the Second Plaintiff") is a sister company of the First Plaintiff. On or about 27 December 2014, the First and Second Plaintiffs (together "the Plaintiffs") entered into a Novation and Assignment Agreement whereby the First Plaintiff agreed to novate and assign the distribution agreements it held with other third-party importers in the region to the Second Plaintiff. The Defendant was not a party or consented to any purported novation. Following the Novation and Assignment Agreement, the First Plaintiff, on two different occasions in February 2015, notified the Defendant that the Distribution Agreement with it had been assigned to the Second Plaintiff. The Defendant never queried the arrangement. Following the Novation and Assignment Agreement and in accordance with the terms of the Distribution Agreement, the First Plaintiff through the Second Plaintiff continued to provide the Defendant with the agreed products together with marketing paraphernalia and the Defendant continued to accept supply of these products and to engage with the Second Plaintiff for all its distribution needs, up until the Distribution Agreement was terminated.

By letter dated 12 August 2015, the Plaintiffs terminated the Distribution Agreement giving about 3½ months' notice up to 1 December 2015. In response, the Defendant immediately ceased making payments in relation to beverage shipments being supplied to it by the First Plaintiff. On 15 September 2015, in response to the failure of the Defendant to pay 74 invoices ("the Unpaid Invoices"), the Plaintiffs stopped supplying the Defendant with beverage products.

By specially endorsed Writ of Summons filed on 14 January 2016 (and amended on 29 July 2016), the Plaintiffs commenced an action against the Defendant seeking payment of the Unpaid Invoices. The Defendant counterclaimed, seeking damages for wrongful termination of the Distribution Agreement, alleging that the notice period for termination was inadequate and subsequently caused it to suffer loss. The Defendant (in its Amended Defence filed on 7 May 2021) claimed that a reasonable notice period would have been 3 ½ years. The Defendant does not deny that the sums claimed in the Unpaid Invoices are owed to the First Plaintiff, though claims the right to set off such amounts from damages it claims are owed to it for breach of the implied term to provide reasonable notice (or in the alternative, damages for alleged economic torts committed by the Plaintiffs).

HELD: finding that the Plaintiffs did not give reasonable notice to the Defendant before terminating the Distribution Agreement on 1 December 2015 and finding that 15 months' notice is reasonable notice.

1. The relationship was fixed and formal and both parties enjoyed a healthy and profitable relationship for 40 long years. The fact that it existed for nearly 40 years speaks volumes about this relationship.

2. The length of reasonable notice must always depend on the particular facts of the particular case - **Hamsard 3147 Limited (trading as "Mini Mode Childrenswear") v JS Childrenswear Limited (in Liquidation) and Boots UK Limited** [2013] EWHC 3251 and **Alpha Lettings Limited v Neptune Research and Development Inc.** [2003] EWCA Civ 704 applied.

3. The length of notice to be given is to be assessed in light of the circumstances obtaining when the notice is given. It does not mean that the circumstances at the time of the contract are irrelevant. That is because the implication of the requirement to give **reasonable notice is "intended to serve only the common purpose of the parties"**, and **the "common purpose for which [the notice] is required" is a matter to be determined as at the date of the contract: Australian Blue Metal Ltd v Hughes** [1963] AC 74 at page 99 – per Lord Devlin.

4. An important factor which the Court ought to take into account in determining reasonable notice is the degree of formality. The more relaxed the relationship, the less likely it is that the law will imply a lengthy notice period: **Alpha Lettings Limited v Neptune Research and Development Inc.** [2003] EWCA Civ 704 applied. In the present case, despite the fact that (i) there was no written contract; (ii) the concession by the Defendant's witness that he did not know whether the relationship was fixed and formal prior to 2015 and; (iii) the payment terms have changed to allow for longer payment of the invoices as well as the requirement for a guarantee which was first introduced in 1989, the relationship was a fixed and formal one. The fact that it existed for nearly 40 years speaks volumes about this healthy relationship

5. Another significant factor that the Court ought to consider is how quickly the Defendant would be able to replace the business lost. No doubt, the Defendant would need to take time to find another supplier. The onus is on the Defendant to demonstrate the effect that the termination had on the business in the 15 months following the termination.

6. In the present case, the "good faith" term is not an implied term in the Distribution Agreement. The Plaintiffs had a contractual right to terminate the relationship on reasonable notice. They were free to exercise that right provided that reasonable notice is given. The right was not subject to a qualification that it could only be exercised in "good faith." Even though it was a long relationship, all that the Plaintiffs were obligated to do is to give reasonable notice on termination. **France v Kumon** 2014 ONSC 5890 and **France v Kumon Canada Inc** 2014 ONSC 7181 distinguished.

7. The Second Plaintiff is a proper plaintiff in these proceedings and is therefore not a tortious interloper. In addition, it is too late in the day for the Defendant to raise any objections since it continued to do business with the Second Plaintiff. Although the Defendant was not a party to the Novation and Assignment Agreement, it was twice notified of the same since February 2015 and it did not complain or object to it. Instead, it continued to do business with CND.

8. The Defendant is entitled to set-off the Unpaid Invoices in the final award after the issue of quantum of damages is dealt with.

JUDGMENT

Charles Sr J:
Introduction

[1] This is a case where the Court is venturing into uncharted territory. Both parties agree that this trial raises a novel point of law in The Bahamas.

[2] At the heart of the dispute between the parties is whether the First Plaintiff, Anheuser-Busch International Inc ("ABI") and the Second Plaintiff, Cerveceria Nacional Dominicana S.A. ("CND") (collectively "the Plaintiffs") gave reasonable notice to the Defendant, Burns House Limited ("BHL") now Commonwealth Brewery Limited ("CBL") when they terminated a distribution agreement (the "Distribution Agreement") which the parties have initially entered into in and around 1975 but which was never reduced to writing.

[3] BHL (for ease of reference) is of the view that it should have gotten 3 ½ years' notice while the Plaintiffs alleged that 4 months' notice was reasonable in the circumstances. To be exact, the Plaintiffs gave nearly 3 ½ months' notice when it terminated the Distribution Agreement on 1 December 2015.

The parties

[4] ABI is a corporation organized under the laws of the State of Delaware in the United States of America and is a wholly owned subsidiary of Anheuser-Busch In Bev ("AB InBev"). CND is the sister company of ABI. CND is incorporated under the laws of the Dominican Republic and it carries on the business as a brewery

engaged in the production and marketing of beer, malt, carbonated and energy drinks, water and spirits. CND is majority owned by the company AmBev which is a subsidiary of AB InBev.

[5] BHL is a company incorporated under the laws of The Commonwealth of The Bahamas and carrying on business as a distributor and brewer of beer, wines and spirits for several decades up to 6 December 2018. CBL is the parent company of a group (CBL Group) of companies concerned in the sale and/or manufacturing of beer, spirits and other beverages. On 6 December 2018, BHL merged with its parent company, CBL. CBL is the surviving entity resulting from that merger. By operation of law, the assets and liabilities of BHL have been subsumed into CBL.

[6] On 23 March 2021, this Court made an order (by consent of the parties) that given the merger on 6 December 2018 between CBL and BHL whereby CBL is the surviving entity from that merger, CBL is substituted as the Defendant in these proceedings. By operation of law, the assets and liabilities of BHL have been subsumed into CBL.

[7] Despite this Consent Order, for ease of reference, I shall continue to use BHL as the name of the Defendant since the cause of action and the termination of the Distribution Agreement predate the merger of BHL and CBL.

Background facts

[8] Some of the facts are agreed between the parties. To the extent that there is any departure from the agreed facts, then what is expressed must be taken as positive findings of facts made by me.

[9] In or around 1975, ABI entered into a Distribution Agreement with BHL, whereby it was agreed that BHL would distribute AB InBev beer products in The Bahamas. The Distribution Agreement between the parties was never reduced to writing however it was agreed, informally, that CBL had the exclusive right to distribute certain AB InBev products in The Bahamas.

[10] The terms of the Distribution Agreement included 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.

[11] AmBev subsequently acquired CND. Thereafter, the Anheuser Busch-InBev group of companies (AmBev, ABI, and CND) developed a strategy to centralize the business operations of the various companies in the group, within the Northern Caribbean region. As part of this strategy, CND was designated as the company in charge of the Northern Caribbean region and was responsible for coordinating the source chain for AB InBev's products, with distributors in the various territories in the region. As the company in charge of the Northern Caribbean region, CND was also in charge of overseeing the commercial relationship between ABI and BHL.

[12] Although BHL continued to directly place its product orders with ABI, BHL and CND had a good commercial relationship. CND had full autonomy to make decisions on behalf of ABI and was also able to enter into agreements with BHL. As the team responsible for managing the business relationship with BHL, CND would follow up on orders posted by BHL with ABI and would also provide brand development support to BHL in the local market.

[13] BHL allocated significant resources for the performance of the Distribution Agreement. It had in place a guarantee by way of security in the form of a letter of credit in ABI's favour in the sum of $250,000. It was automatically renewable annually.

[14] The Parties worked well together for over 40 years. BHL always met its obligations under the Distribution Agreement. This is supported by the fact that ABI never had to utilize the letter of credit.

[15] BHL allocated specific human resources to ABI's brands for the purpose of the Distribution Agreement. This included a Senior Brand Manager exclusively for ABI brands and about 3 to 4 employees who were dedicated to the ABI's brands.

[16] On 27 December 2014, the Plaintiffs entered into a Novation and Assignment Agreement (the "N&A Agreement"), whereby ABI agreed to novate and assign the distribution agreements it held with other third-party importers in the region to CND. The N&A Agreement included, but was not limited to, the Distribution Agreement between ABI and BHL. BHL was not a party to nor consented to the N&A Agreement.

[17] Following the N&A Agreement, ABI notified BHL that the Distribution Agreement with it had been assigned to CND. In a letter dated February 2015, ABI wrote to BHL, stating the following:

> "Please be advised that Anheuser-Bush International, Inc ("ABI") has novated and assigned its agreement with you to Cerveceria Nacional Dominicana ("CND/AmBev) with respect to the following Brands: **Budweiser, Bud Light, Bud Light Lime, O'Douls & Michelob Ultra**. As a result of this change, CND is deemed the "Seller" under the agreement with you and all rights and obligations of ABI are now extinguished.
>
> Please direct all communications, including questions concerning prior or pending orders to CND/AmBev. Any future requests for Products, and/or agreements to purchase the Products should be

directed to Cerveceria Nacional Dominicana ("CND"), an affiliate of AmBev, at Dominican Republic.

We appreciate your cooperation over the years." [Emphasis added]

[18] In a second letter, also in February 2015, ABI wrote to BHL stating the following:

> "Please be advised that Anheuser-Bush International, Inc ("ABI") has novated and assigned its agreement with you to Cerveceria Nacional Dominicana ("CND/AmBev) with respect to the following Brands: **Jupiler, Stella Artois, Hoegaarden and Leffe**. As a result of this change, CND is deemed the "Seller" under the agreement with you and all rights and obligations of ABI are now extinguished.
>
> Please direct all communications, including questions concerning prior or pending orders to CND/AmBev. Any future requests for Products, and/or agreements to purchase the Products should be directed to Cerveceria Nacional Dominicana ("CND"), an affiliate of AmBev, at Dominican Republic.
>
> We appreciate your cooperation over the years." [Emphasis added]

[19] Notwithstanding that BHL was not a party nor consented to the N&A Agreement, on being given notice that the Distribution Agreement had been novated and assigned to CND, BHL did not query the arrangement. Following the assignment, and in accordance with the terms of the Distribution Agreement, ABI, through CND, continued to provide BHL with the agreed products (together with marketing paraphernalia) and BHL continued to accept supply of these products and to engage with CND for all its distribution needs, up until the Distribution Agreement was terminated. The products supplied included Bud Light, Budweiser, Michelob Ultra and O'Douls.

[20] BHL often received multiple shipments of AB-InBev beer products every month for which BHL would be invoiced by ABI upon the products being supplied. Each invoice reflected that payment was due within 30 days although there was an agreement in or about 1999 for payments to be made within 60 days from the date of delivery of the shipment.

[21] During the period of 7 June 2015 - 9 September 2015, ABI, through CND, issued to BHL 74 invoices for beer and marketing products, which totaled $598,511.68 ("the Unpaid Invoices").

[22] The fact that BHL received AB-InBev products from ABI/CND, in the total sum of $598,511.68, is not in dispute. In fact, at paragraph 9 of its Counterclaim, BHL pleads the following:

> **"As to Paragraph 8, while BHL denies that CND supplied it with any product as alleged, BHL admits that during the period of 07 June 2015 to 09 September 2015 products in the total amount of $598,511.68 were supplied to it by or on behalf of ABI".**

[23] It is also not in dispute that BHL has not paid the Unpaid Invoices. At paragraph 12 of its Counterclaim, BHL admits that it has intentionally withheld payment for the same and states:

> **"Moreover, BHL asserts that the institution of these proceedings by ABI and CND (like their allegation of repudiatory breach by BHL) is a bogus and shameful effort calculated to mask ABI and CND's own egregious conduct, as more particularly set out in the Counterclaim. BHL states (and ABI and CND knew or ought reasonably to have known) that payments respecting invoices for the stated period were being withheld and continue to be withheld, by BHL towards mitigating substantial damages being and yet to be sustained by BHL as a consequence of the wrongful or unlawful conduct of ABI and CND. In any event, as aforesaid, ABI had the benefit of a bank guarantee by way of security for payments due and outstanding and previously chose or failed to call upon the guarantee."**[Emphasis added]

[24] BHL accepts that the sums claimed on the Unpaid Invoices are to be paid to the Plaintiffs, subject to any right of set-off that it may have with respect to its Counterclaim.

[25] During the summer of 2015, the Plaintiffs invited BHL to a meeting which was convened on 4 August 2015 in Miami, Florida. BHL's then Managing Director, Mr.

Hans Neven with their Sales Director dutifully attended the meeting believing it to be a meeting to discuss a marketing plan for the following year.

[26] At the meeting, BHL's team was taken by surprise to find the Plaintiffs' Regional Director "armed" with their in-house and external legal representatives present. BHL was even more surprised to be informed that the Plaintiffs intended to terminate the Distribution Agreement by 31 October 2015.

[27] Following the meeting, Lennox Paton, acting on behalf of the Plaintiffs, formally issued a termination letter dated 12 August 2015 (the "termination letter") to BHL giving about 3 months' notice of termination of the Distribution Agreement. The Plaintiffs later extended the notice period and, on 1 September 2015, informed BHL that it would be granted an additional 1 month notice, up to 1 December 2015, bringing the total notice period to about 3½ months.

[28] In the letter written by Lennox Paton on behalf of the Plaintiffs, the Plaintiffs stressed that the decision to terminate the Distribution Agreement had nothing to do with the performance of BHL as a distributor and wished to thank BHL for its efforts during the years.

[29] The Plaintiffs ceased the supply of beverage products on 15 September 2015 despite giving 3½ months' termination notice. This was in response to the failure of BHL to pay 74 Unpaid Invoices for beverage shipment supplied during the period 7 June 2015 to 9 September 2015. To date, BHL has not paid the Invoices.

[30] On 29 October 2015, representatives of CND and BHL, along with their counsel, met in Miami at which time CND again confirmed that the Distribution Agreement had been terminated.

[31] Following that meeting, on 16 November 2015, Delaney Partners, acting on behalf of BHL, wrote to Lennox Paton suggesting that the termination notice was too short and instead, the Plaintiffs ought to have been given 3½ years notice to BHL.

[32] Further, on 27 November 2015, Delaney Partners wrote to Lennox Paton giving notice that BHL intended to commence an action against the Plaintiffs for what it deemed to be a threatened breach of contract should a resolution not be reached by 30 November 2015.

[33] On 16 December 2015, Delaney Partners again wrote to Lennox Paton advising them that if ABI did not provided a response to its 27 November 2015 letter by 18 December 2015, it will take appropriate measures in furtherance of its rights.

[34] The Plaintiffs asserted that their decision to terminate the Distribution Agreement with BHL was a business decision which they were entitled to make so long as notice of the termination was given. No wrongdoing on the part of BHL was alleged.

[35] Less than a month after Delaney Partners advised that if a response is not provided, it will take appropriate measures including the institution of legal proceedings, Lennox Paton filed a specially endorsed Writ of Summons (amended on 29 July 2016) against BHL seeking, among other things, damages for breach of contract in the sum of $598,511.68.

[36] BHL filed its Defence and Counterclaim on 19 February 2016. By its Counterclaim, BHL has claimed that ABI (and/or CND) has acted in breach of contract as a result of its alleged wrongful termination of the Distribution Agreement. BHL claims loss and damage – a liquidated sum of $145,202.00 regarding agreed marketing expenses and loss of profits at $2.4 million (reduced to $2.3 million during these proceedings).

[37] The gravamen of BHL's claim is that ABI and/or CND failed to give reasonable notice on terminating the Distribution Agreement. It claims loss and damage as a result. BHL also claims damages against ABI for what it alleges was a breach of an implied duty of good faith and contractual honesty, by ABI assigning the Distribution Agreement to CND. The essence of BHL's claim is set-off.

The Issues

[38] The following issues arise for determination namely:

1. Whether the Plaintiffs gave BHL reasonable notice on the termination of the Distribution Agreement on 1 December 2015?

2. If the Court finds that reasonable notice was not given, what period of notice would have been reasonable in the circumstances?

3. What damages would flow if reasonable notice was not given? and

4. Whether CND was a party to the Distribution Agreement?

The evidence

[39] At the trial, the Plaintiffs called their only witness, Marcio Juliano to testify on their behalf. His evidence in chief is contained in a witness statement which was filed on 12 February 2021. Mr. Juliano is the General Director of CND and has held this position since 2019. He has been part of the Anheuser-Busch-Inbev group for more than 20 years.

[40] He stated that, in February 2015, BHL was informed that the Distribution Agreement had been assigned to CND. Once ABI informed BHL that the Distribution Agreement had been novated and assigned, BHL continued doing business with CND in accordance with the terms of the N&A Agreement. BHL directly communicated with CND with respect to its product needs and other distribution requirements and, at no time, did BHL object to the N&A Agreement or raise any concerns about CND's role in the distribution relationship.

[41] Mr. Juliano asserted that, following the N&A Agreement, CND continued to coordinate the sale and delivery of Anheuser Busch-Inbev's products to BHL. ABI also continued to facilitate the issuing of invoices to BHL as well as the collection of payment through its credit department. BHL received multiple shipments of beer products each month. BHL would be invoiced by ABI, upon the products being

shipped, and each invoice reflected that payment was due within one month of the date of the invoice.

[42] Mr. Juliano stated, and it is not disputed, that during the period of 7 June 2015 to 9 September 2015, ABI, through CND, issued to BHL, 74 invoices for beer and marketing products, which amounted to $598,511.68. BHL has failed and/or refused to pay the sums due and owing on the Invoices.

[43] Mr. Juliano maintained that, it is for this reason, following the 9 September 2015 shipment, that the Plaintiffs ceased supplying Anheuser Busch-Inbev's products to BHL.

[44] Mr. Juliano spoke of at least 5 demands for payment requesting BHL to pay the Unpaid Invoices. To date, BHL has failed and/or refused to satisfy the Invoices and consequently, the Plaintiffs have been and continue to be deprived of the sums owed to them.

[45] Mr. Juliano also stated that CND, with the agreement of ABI, made a business decision to terminate the Distribution Agreement as it was in their best interest. He further stated that the decision to terminate the Distribution Agreement was not as a result of the Unpaid Invoices although those remain unpaid.

[46] Under extensive cross-examination by learned Queen's Counsel Mr. Delaney who, with Mrs. Boanby, appeared for BHL, Mr. Juliano stated that the main reason why ABI terminated the Distribution Agreement was inadequate support for the brands and they could grow more with the other distributors. He agreed that BHL bore 50% of the marketing costs for the ABI's brands in The Bahamas.

[47] Mr. Juliano stated that he is not personally aware of all the specifics of the human resources/employees that BHL devoted to the Distribution Agreement but it will not surprise him if BHL had a Senior Manager dedicated exclusively to the distributorship of ABI brands in the Bahamas. He was also unable to say if the

person is 100% dedicated or not but having a person behind the brand is the kind of support he expects from the distributors of the ABI brand.

[48] Equally, Mr. Juliano was unable to say whether 12 employees were allocated to this brand. However, in general terms, what is expected from their distributors is to have a structure in place allocated to support the development of their brands. He also acknowledged that the distributors would need the basics to support the brand, for example, warehouses, trucks and vehicles. Visibility on the shelves of the stores to display the products is also necessary.

[49] When asked whether or not, prior to the August 2015 meeting, ABI communicated to BHL that it had an issue with BHL's performance and it will therefore terminate the Distribution Agreement, Mr. Juliano stated "*no, we did the ---we did the formal meeting to talk about termination in August*. *Okay. There at this point in time, we talk about performance and that is the main reason for the termination. Prior to that, what I am saying is, that normally we carry performance meetings, when we review performance. In doing this process, we talk about performance and we talk about expectation and we talk about gaps*."

[50] When questioned again on this issue, Mr. Juliano stated that "*this kind of discussion about termination, is a kind of topic that is discussed with the higher level role of our Company. In this case, it is my role"*.

[51] Mr. Juliano confirmed that, during the performance meetings, ABI would tell the distributor if its performance is not meeting expectation.

[52] When asked whether paragraph 4 of the letter written by Lennox Paton on 12 August 2015 which states that *"Our client wishes to stress that this decision is not a reflection on the performance of Burns House as a distributor, and wishes to thank Burns House for its efforts over the years"* is a true statement, Mr. Juliano said "*Well, yeah. I am saying here, we have high expectations for the performance of Burns House*." He clarified by saying "*Also, I do not have comments to make about all of this. I would say, in our master plan, we were pretty sure that by moving*

our Brand from Burns House to Sands, it was the case in Bahamas, we could have a better performance. And this is what happened. The years after the move, we could accelerate growth, confirming what we would expect from our Brand there and the support it could have."

[53] Mr. Juliano stated that the decision to terminate was not as a result of outstanding invoices but it had to do with performance despite the letter from their attorneys, Lennox Paton, that the decision to terminate had nothing to do with performance. In my judgment, he flip-flopped on whether the decision to terminate the Distribution Agreement was as a result of any wrongdoing on the part of BHL.

[54] Mr. Juliano agreed that a Letter of Credit Guarantee, in favor of ABI, in the amount of $250,000 was in place and ended in January 2016. ABI did not withdraw under the Guarantee for any unpaid invoices in the months following the Termination of the Distribution Agreement. They took no steps to use the Guarantee.

[55] He reiterated that the Plaintiffs could have a better position in the Bahamian market if BHL was paying more attention to their brand. He said that market share and performance were the principal reasons for terminating the Distribution Agreement.

[56] BHL called their current Managing Director, Mr. Jürgen Mulder, to testify on their behalf. BHL also called an expert witness, Simon Townend.

[57] Mr. Mulder has been the Managing Director of CBL since August 2018. CBL merged its operations with BHL in 2018 resulting in one entity, CBL. Prior to taking up his appointment at CBL, he was briefed on all matters pertaining to the prior relationship that had existed between ABI and BHL.

[58] Mr. Mulder is aware of what is contained in Hans Neven's affidavit. Mr. Neven was the Managing Director at the time that the Distribution Agreement was terminated and the Court permitted his two affidavits to stand as evidence in chief.

[59] He stated that the terms of the Distribution Agreement were as follows:

a. ABI provided shipments of ABI products and payment was generally expected within 60 days from the date of delivery of the shipment;

b. BHL provided to ABI monthly sales reporting;

c. BHL prepared an annual marketing plan;

d. BHL bearing 50% of all marketing costs;

e. BHL provided regular research on parallel imports and reported the same to ABI;

f. ABI periodically visited BHL during which BHL was required to explain its distribution performance. The parties also discussed marketing activities and agreed on the plans for the ensuing year; and

g. The parties also agreed and prepared an annual marketing budget; the costs of which were borne by ABI and BHL equally.

[60] Mr. Mulder stated that in order to ensure efficient distribution of the ABI products, it was also agreed that BHL would allocate and it did allocate substantial resources to enhance the sales of ABI products in The Bahamas, especially the Budweiser brand. Mr. Mulder asserted that BHL also allocated specific human resources to the ABI brands including a Senior Brand Manager devoted exclusively to the ABI brands and approximately 12 employees specifically tasked with the marketing and distribution of the ABI brands.

[61] Since Mr. Mulder has taken over, he noted that the termination of the Distribution Agreement had adversely affected their business. He said, up to today, they have not found an American beer that covers more than 15 percent of their Portfolio. He further stated that brand loyalty and brand impact of the ABI's products which were built up over years in The Bahamas have been adversely impacted. For example,

Bud Light and also Budweiser complimented their Portfolio up until 2015. BHL built the Light brands together with ABI design for 40 years.

[62] Under cross-examination by Mr. Jenkins, appearing with Ms. Cargill for the Plaintiffs, Mr. Mulder confirmed that he was briefed in relation to this matter on two occasions, firstly, during his pre-visit to The Bahamas and secondly, on his arrival in August 2018. His source of information was Mr. Neven himself and the documentation.

[63] He accepted that CBL/BHL is a brewer of beers, malt products and blend rums. BHL brew Kalik, Heineken and Guinness and Heineken holds the majority share in BHL. According to him, Heineken and Kalik are premium brands and Heineken is a global competitor of ABI. He agrees that he is responsible for the overall performance of BHL. He acknowledged that the best selling beer in 2015 was Kalik Regular, followed by Guinness, Heineken and Bud Light.

[64] When questioned what percentage of BHL's sales in terms of revenue were ABI's products, Mr. Mulder said that he was unsure and he would need to check it out but what he knows from the documentation is that it is 15% of the Beer Portfolio. He stated that in 2013, it was 7.2 million and in 2012, it was 8.5 million and that was disclosed in the KPMG Report.

[65] Mr. Mulder was taken to the Report which was commissioned by KPMG at the request of BHL to provide an analysis of the financial impact on BHL of the unilateral termination of the Distribution Agreement.

[66] Mr. Jenkins cross-examined Mr. Mulder as to the reason why the relevant general ledger which was provided to KPMG was not disclosed to the Court but Mr. Mulder insisted that it is referred to in the letter by KPMG dated 20 December 2016. Since that Report, BHL has not updated the Townend Report written 5 years ago because according to Mr. Mulder, in theory, there is no longer any revenue related to ABI products. In other words, zero revenue.

[67] Mr. Mulder accepted that the business relationship was very profitable and successful for both parties. He was unable to say whether BHL made a huge profit over the 40 years but he is able to speak to the years, 2012 to 2014. According to him, the determination of success is not only in financial terms. It is the brand preference and efforts by the consumers over the years. In his view, success is not only based on monetary success. But, in his opinion, it was a successful relationship over the years. He added that Budweiser is still today a very strong brand.

[68] Mr. Mulder said that no one lost their job at BHL when the Distribution Agreement was terminated because the company does not like to terminate people. And up to 2019, they did not have to. They consumed the costs and relocated staff to other jobs, where possible.

[69] Mr. Mulder agreed that some of the staff allocated for ABI's products were doing other things but there should have been at least 3 to 4 dedicated people for the ABI brand.

[70] He acknowledged that there was improvement to a refrigerated section of the pre-existing warehouse, done before 2015, and it was used to improve the quality of their wine and beer products. After the termination of the Distribution Agreement, Kalik Light Platinum was introduced in 2016 and Miller Light in 2018. He was unsure when Coors Light was introduced but before his arrival in The Bahamas in 2018. Besides Heineken Zero, BHL does not sell any other non-alcoholic beers but they do sell a wide range of light beers. BHL do sell a range of beer beyond Heineken, Red Stripe and the Kalik series. BHL also sells Miller Light, Coors Light and Colt 45.

[71] Mr. Mulder stated that the Distribution Agreement was fixed and formal for 40 years. The terms change but it was still a healthy relationship for 40 years.

[72] Under re-examination, Mr. Mulder stated that BHL never objected to the termination by the Plaintiffs but with respect to the winding up process. He

expected that ABI would sit down together and discuss the two elements; compensation and time. With respect to the Chairman's message and that of the Managing Director, he stated that was in part done to comfort shareholders.

[73] Simon James Townend filed his witness statement on 12 February 2021. He is a Fellow Chartered Accountant, having qualified with the Institute of Chartered Accountants in England & Wales in 1994. He has 30 years' experience in providing audit and advisory services and he is a partner of KPMG Advisory Services Ltd ("KPMG"). He was engaged by BHL to prepare his Expert Report on the estimated financial impact on BHL as a result of the unilateral termination of the Distribution Agreement by ABI.

[74] Mr. Townend stated that KPMG conducted a gross margin analysis on all products covered by the Distribution Agreement based on historical information for the financial years ended December 2012, 2013 and 2014. The gross margin calculation considers revenue, the direct cost of goods sold, and direct marketing costs associated with the products. He also performed a high-level valuation of the impact of the termination of the Distribution Agreement on BHL's value and based on an estimate of foregone projected future gross cash flows from the Distribution Agreement.

[75] Mr. Townend asserted that in preparing his witness statement, KPMG personnel witnessed the extraction from BHL's general ledger of the values used for the gross margin analysis and he reconciled these values to the Audited Financial Statements for the same periods.

[76] Based on a gross margin analysis of all products covered by the Distribution Agreement between the Plaintiffs and BHL, he estimated an average gross margin loss of $2,338,152 per year. This was based on the years ended 31 December 2012, 2013 and 2014 and considered account revenue, cost of goods sold and direct marketing costs associated with the products.

[77] He opined that it is reasonable to assume that it will take BHL at least 3 years to replace the lost revenues and potentially even longer. The gross margin loss over a 3-year period is estimated to be $7,014,456.

[78] According to him, if BHL were never able to replace the lost business, then based on a perpetuity approach, the potential value of lost business for BHL is estimated in excess of $20 million. To place this in context, the market capitalization of BHL as at 30 November 2015 was approximately $230 million.

[79] Under cross-examination by Ms. Cargill, Mr. Townend stated that he had access to the general ledger for beer sales by BHL which included information on all of the different brands sold by BHL. The scope of his analysis focused on Budweiser brands.

[80] When asked whether he was engaged to provide an updated analysis of any actual loss that may have been suffered by BHL in the years following the termination, Mr. Townend stated that KPMG's engagement did not end upon preparing the expert report and in preparing his witness statement, he took into consideration public information, annual reports etc. and, in paragraph 36 of his witness statement, he has included a lot of variables since the date of the termination of the Distribution Agreement which makes it very difficult to determine the impact of the loss of this distributorship, for example,

- Whether and how quickly BHL was able to redirect its working capital, to identify new suppliers, contract with these suppliers and bring the new products into inventory;

- Whether and how quickly, BHL was able to fill an emptied warehouse and shelf space with other products that sold at similar inventory turnover and gross margins to the loss ABI products;

- Any additional investments in sales, marketing, equipment, stores that BHL might have made to compensate for the lost ABI revenue;

- The activities of BHL's competitors during the period after the unilateral termination of the Distribution Agreement and the impact of these on BHL and;

- The changes in the macro-economic environment during the period after the termination of the Distribution Agreement and the impact on BHL's performance generally.

[81] When pressed by the Plaintiffs with respect to an updated report, Mr. Townend stated that it would be almost impossible to measure quantum of losses because of the very many factors that come out of such impact. He however conceded that he would have been in a better position to address the variables (above) than at the time of the creation of his Report. He then explained that these are all variables and it would be impossible to come up with a financial model because the variables are moving parts.

[82] Mr. Townend accepted that, for the most parts, these are now known facts as opposed to just being variables but there are still variables in a financial analysis.

[83] He acknowledged that, based on the annual reports and public information, the sale of Heineken, Kalik and other similar products that BHL offered increased. The revenues of the business have increased since the termination which would imply that the sales of the other products and new products that BHL is now selling fetched a higher revenue than they had at the time. He said that, in 2015, ABI Product Portfolio account accounted for a little below 10% of BHL's overall revenue.

[84] Under further cross-examination, Mr. Townend was referred to the 2019 Annual Report. He acknowledged that there was a slight dip of about 4.7% in revenue between 2015 and 2016 but, for the following years, 2016 to 2017 there was an increase in the overall revenues and profitability between those two years. However, according to Mr. Townend, you also have to look at the flip side. If BHL had not lost the Distribution Agreement, instead of being 133 million in 2017, the

revenues might have been 8 or 9 million more which is the issue that you have with the impact of the loss of a contract.

[85] Under re-examination, Mr. Townend stated that when one looks at the “Financial Highlights”, there is a Segment Information Section of the Additional Bundle titled: CBL Annual Report 2015 to 2019 at page 58 which does not give each company’s individual performance or results of the balance sheet. What the Report does is give you a more high-level segment analysis which breaks down their wholesale operation from their retail operation. He agreed that the revenue in the Annual Report is not attributable to BHL. According to him, if BHL had not lost the contract, it would have made the same level of profits or even more. He said that the ABI brands are still very much present in the Bahamian market place and the competitor company says that the Budweiser Brand was the Number One Import into the country.

[86] In assessing the evidence of the witnesses, on a balance of probabilities, I prefer the expert evidence of Mr. Townend on the financial impact caused by the loss of the Distribution Agreement. However, I do not agree with him that it will take at least 3 years or potentially longer for BHL to replace the lost revenues. The 2019 Annual Report shows a slight dip of about 4.7 % in revenue between 2015 and 2016 but the following years, 2016 to 2017, there was an increase in the overall revenue and profitability between those 2 years. So, the loss in revenue was effectively felt in the first year of the termination of the Distribution Agreement. True, the revenue might have increased because of BHL’s mitigation stance by introducing new products but there are many variables that are involved when such a lengthy relationship comes to almost an abrupt end.

[87] While the evidence of Mr. Juliano and Mr. Mulder was indeed helpful, I took their evidence with a grain of salt as they both have their own respective axes to grind. Both hold the top positions in their respective companies and so I am afraid that I did not feel confident about believing everything they said unless it was corroborated by some other independent or documentary evidence.

[88] To my mind, Mr. Townend was more straightforward and clear in his testimony. On the whole, I am satisfied that he was telling the truth and his opinions were sincere.

The law

What constitutes reasonable notice to terminate?

[89] A convenient starting point on what constitutes reasonable notice in the context of a distribution agreement, where the agreement is not in writing and contains no defined terms of termination, is the English Court of Appeal case of **Decro-Wall International SA v Practitioners in Marketing Limited** [1971] 2 All ER 216, [1971] 1 WLR 361. The brief facts of the case being that a distribution agreement between Decro-Wall, a French Manufacturer of tiles and an English distributor was terminable by reasonable notice on either side. In order to develop the bathroom tile market in the UK, the English Company spent a substantial amount of money on national advertising campaign, increasing its warehouse capacity and training new staff. The net profits were expected to be low in the first few years owing to the substantial startup costs with greater records anticipated later on. Within three years the French tile business constituted 83% of the distributor's turn over. The Court held that, in view of the expenditure and work which the distributor had put into carrying out the agreement, reasonable notice to terminate was twelve months.

[90] About 30 years later, in **Alpha Lettings Limited v Neptune Research and Development Inc.** [2003] EWCA Civ 704, the English Court of Appeal once again had to consider the question of what constitutes reasonable notice where there was no written agreement between the parties governing how the relationship should be terminated.

[91] The brief facts are that Neptune manufactured specialist medical and scientific valves which Alpha sold in the UK, as exclusive agent. The parties had no formal written contract but had been operating on this basis for over 15 years. Neptune's

business accounted for only 20% of Alpha's overall turnover, and Alpha was not restricted from selling competing products.

[92] On 31 March 1998, Neptune gave one month's notice of the termination of the agency agreement. Alpha challenged this in an action for wrongful termination. At first instance, it was held that reasonable notice in the circumstances was 12 months and that Alpha was entitled to damages for loss of profit in that period. Neptune appealed on the basis that the notice period awarded by the trial judge was excessive. The Court of Appeal held that it was a breach of contract to terminate the agreement on one month's notice, but that the twelve month notice period awarded by the trial judge was outside the range of notice period reasonably open to him to award. The correct range, according to the Court of Appeal, was between three and six months. For the purposes of calculating damages, the Court fixed the period of reasonable notice at four months.

[93] Longmore LJ, in giving his reasoning for the reduced notice period, identified a number of principles which should be taken into consideration when determining what amounts to reasonable notice on terminating an agreement. At paras 30 – 35 of the Judgment, Longmore LJ had this to say:

> **"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.**
>
> **31. One very important consideration will be the degree of formality in the relationship. A completely formal agreement would probably have its own provisions for termination so no problem about assessing a reasonable period for termination will arise. But the more relaxed the relationship, the less likely it will be that the law would imply a lengthy notice period. There was evidence in the present case that at an early stage in the relationship, Alpha had wanted a more formal relationship than then existed and had proposed, among other**

things, a contractual period of notice of 12 months. Mr Sule did not, however, want any formal relationship and nothing came of the discussions. One result of not having any formal written contract was that Alpha were entirely free to sell products of other suppliers to their customers even if those suppliers were competitors of Neptune. No doubt not all products so supplied could be described as competitive products but the fact is that Neptune's business only accounted for 20% of Alpha's overall turnover. This is an indication that a lengthy notice of period should not be implied.

32. Mr Jones sought to emphasise the length of time which the parties' relationship had lasted (15 years from 1983 - 1998) as a factor in favour of a lengthy notice period. He likened the position to that of a valued and long-serving employee who would be entitled to a longer period of notice than an employee who had served a lesser period of time. I do not consider that a contract of employment is sufficiently analogous to an exclusive agency or a distributorship contract to be helpful. In the first place a distributor may have to spend or invest considerable capital at an early stage of the relationship to build up the business which may thereafter run with moderate annual expenditure. This would militate in favour of a lengthier notice period in the earlier years of the relationship and perhaps a lesser period once the business is up and running. No doubt it is right to lay some stress on the length of the relationship but I would not myself regard that as, in any way, critical, since businessmen expect to run risks in the ordinary course of business while employees have a legitimate (and often contractual) expectation that their services, rendered for the benefit of their employers, will be properly and adequately recognised. As McNair J said in Martin-Baker Ltd v Canadian Flight and Murison [1955] 2 QB 556, 580-1, one of the few English cases to touch on the issue of reasonable notice for the purposes of a distributorship agreement:-

> **"It is the common experience that people, who are prepared to put up capital for the development of new business, do run risks."**

It follows from this that 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.

33. It must not be forgotten that every distributorship is a bilateral contract. There was some debate before us as to the appropriate implied obligation of a supplier in the position of Neptune in the present case but, in the end, both parties were prepared to agree that it was necessary to imply a term that Neptune would accept and fulfil orders placed by Alpha in respect of both standard and special valves if such valves were in Neptune's current range and were ordered in reasonable quantities. The existence of this implied term is, of course,

> **of great importance when it comes to assessing any damages for breach of contract on the part of Neptune for giving an unreasonably short period of notice, once such breach is proved. But there will have been a correlative obligation on Alpha, the extent of which was not debated before us, but is most likely to have been that Alpha were under an implied obligation to use their best reasonable endeavours to promote the sale of Neptune's valves in the United Kingdom. The concept of a party to a contract being obliged to use his 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.**
>
> **34. One matter which should not be regarded as important is the means of termination. The ending of a long-term relationship will often occur for many different reasons some of which may be more legally reputable than others. A termination with no notice or less than due notice will be a breach of contract and damages must be assessed appropriately. But the fact that the termination may be a deliberate breach or may be accompanied by the telling of falsehoods, of which the court disapproves, ought not to affect the question of what the period of reasonable notice actually is. The reasonable notice period will have to apply to both amicable and vitriolic partings of the way. In coming to his conclusion that twelve months was the appropriate notice period in the present case, the judge referred both to Neptune's misrepresentation that the valve being supplied to Chiron had been discontinued (para. 125) and to the fact that the notice had been given without warning (para. 127). With respect to him, I do not think either of these considerations is relevant to the determination of the appropriate notice period.**
>
> **35. There is no doubt that Mr Peirce and his employees were convinced that Neptune intended to set up Neptune Research UK Ltd under Mr Gary Stephens in order to cut Alpha out of their distributorship and poach their customers (see eg Mrs Pleece's statement para. 13). The judge made no specific findings as to that but, once again, this must be irrelevant to the length of notice contractually required."** [Emphasis Added]

[94] The issue of reasonable notice when terminating an agreement was again considered by the English High Court in **Jackson Distribution Limited v Tum Yeto Inc** [2009] EWHC 982. In this case, the claimant, a distribution company and the defendant, a fashion and skate show brand first met at a trade show in San Diego in September 2004 and they discussed whether the claimant should become a distributor for the defendant. Those discussions were continued via email spanning a number of months. On 10 March 2005 the claimant sent the defendant

an email asking for confirmation that they would be the sole distributor for the defendant in the UK and Ireland. The defendant replied to confirm this but stated that terms would need to be agreed. Negotiations concerning a formal written agreement continued but the parties never signed a formal agreement. Despite the lack of a formal agreement, the parties fully commenced their business arrangement and the claimant acted as the sole supplier for the defendant in the UK and Ireland for more than two years. In 2007, the defendant purported to terminate the arrangement between the parties without giving notice. The claimant sued the defendant. In the absence of a written agreement, the court ruled that the distribution arrangement should be terminable on reasonable notice. It then had to decide what was "reasonable notice" in the circumstances? The court considered the previous decision in **Alpha Lettings** and set out the following factors that would be used to determine what is reasonable notice:

- the length of the relationship between the parties;
- the degree of formality between the parties;
- the extent of the early investment by the claimant;
- the percentage of the claimant's turnover made up by the defendant's products;
- How quickly the claimant was able to replace the business lost;
- How long it would take to find a new brand to distribute and achieve profitability.

[95] Several other factors also influenced the judge's decision, such as the fact that the business was seasonal in nature, the claimant had taken on new employees and vehicles, a new warehouse had been brought into operation and further business premises had been planned. All these factors led the judge to conclude that nine months was a reasonable notice period for termination.

[96] More recently, the High Court considered what is "reasonable notice" in the case of **Hamsard 3147 Limited (trading as "Mini Mode Childrenswear") v JS Childrenswear Limited (in Liquidation) and Boots UK Limited** [2013] EWHC 3251. The facts are that, in March 2002, Boots Company Plc ("Boots 1") entered

into a number of agreements with successive companies for the supply of baby clothes which culminated in a new long term “Joint Venture” agreement in July 2007 (the “2007 Agreement”). The 2007 Agreement was subsequently assigned by Boots 1 to Boots UK Ltd. (“Boots”). The supplier of baby clothes, Adams Childrenswear Limited (the then parent company of Mini Mode Childrenswear Limited) (“Mini Mode”)), ran into financial difficulties in early February 2009 and Mini Mode entered into administration soon thereafter. The relationship with Boots was taken over by JS Childrenswear Limited who acquired the business and assets of Mini Mode from the administrator. The business was subsequently vested in Hamsard. The 2007 Agreement was not accepted by Boots as being suitable for this new arrangement and the parties tried to reach an alternative agreement whilst continuing to do business based on short term arrangements which were entered into on an almost weekly basis. Hamsard ran into financial difficulties which ultimately led to Boots looking for a new baby clothing provider. This was confirmed by Boots in correspondence on 27 November 2009. Boots sought to give notice to terminate the contract between Boots and Hamsard, on giving 9 months’ notice of termination. Hamsard alleged that it was entitled to 18 months’ notice as contained in the 2007 Agreement. Boots took the position that a new agreement existed between the parties and that the 2007 Agreement was irrelevant and that what was reasonable must be judged by reference to the circumstances in which the notice was served. Norris J. at paras 64 – 69, identified a number of principles which should be taken into account when deciding what period of notice is reasonable:

- **What length of notice is reasonable must depend on the particular facts of a particular case, so that other cases are of limited assistance.**

- **What is "reasonable notice" is to be judged as at the time when the notice is given**. In this case, Norris J stated that the existence of an 18 month notice period in the 2007 Agreement was of no relevance to what in November 2009 was a "reasonable" period of notice. He stated that the 2007 Agreement, which was negotiated between commercial parties, was not some sort of pre-estimate of what would be reasonable.

- **The degree of formality in the relationship is an important consideration**. The less formal the relationship, the less likely it is that the court will imply a lengthy notice period. Norris J stated that the notice period cannot be divorced from the realities of operating the contract. *The manner in which the contract was being performed at the time notice was given, and foreseeably how it would be performed during the notice period, are legitimate factors to take into account in assessing what was "reasonable" in all the circumstances.*

- **The circumstances pertaining at the time are still relevant**. These circumstances could be used to shed light on the common purpose of the parties. In this case, Norris J stated that the object the parties had in view by agreeing upon reasonable notice (their 'common purpose') was that they should have a period to adjust themselves to the fact that their current interim operational arrangement (brought about by necessity) had no long term future and would have to be brought to a close and that a 9 month period was ample time to do that.

- **General circumstances and practices of the trade may be relevant**. The facts of a particular case may include the general circumstances and practices of the trade which could help an objective observer to assess what the parties may have agreed as to "reasonable notice". However, Norris J thought that there was no evidence in relation to this implied contract to assist him in determining what constitutes reasonable notice.

Discussion

Issues 1 and 2: Whether reasonable notice was given and if not, what period of notice is reasonable notice?

[97] The key issue which arises for determination is whether the Plaintiffs gave BHL reasonable notice on the termination of the Distribution Agreement. The Plaintiffs submit that, in the circumstances of this case, 4 months' notice on termination was reasonable. BHL contends that 3 ½ years' notice would have sufficed.

[98] Mr. Jenkins who appeared as lead Counsel for the Plaintiffs submitted that, in a case where the relationship is a long one and where the relationship has been informal, the notice period would tend to be shorter, not longer. The idea is that because the relationship has been a long one, the distributor has already made all

of the capital expenditures that it would need to make and is, at the point of termination, simply just reaping the benefits.

[99] According to Mr. Jenkins, Mr. Mulder, upon re-examination, essentially agreed with this proposition when he said that, when a brand is first launched, you invest more than your income. Mr. Mulder stated that "*you need to invest before you can harvest*", acknowledging that any substantial investment would have been made at the start of a brand launch, as opposed to on the back end. This may be true to a certain extent but, as the relationship continued, provisions ought to be made for things like the replacement of vehicles and renovation of warehouses as highlighted by Mr. Mulder in his evidence.

[100] Mr. Jenkins submitted that having regard to the principles laid down out **Alpha Lettings**, the evidence is highly supportive of a short notice period of termination. In the circumstances, a notice period of 4 months is reasonable.

[101] According to Mr. Jenkins, BHL's contention that the 40-year relationship was "fixed and formal", thereby attracting a longer notice period, is not borne out in the evidence.

[102] It was not disputed that there was no written contract. Additionally, Mr. Mulder conceded that he could not say whether the relationship was fixed and formal prior to 2013, which was as far back as he had reviewed the documents. He could only say that there had not been any dialogue or renegotiation of operational terms in the documents during this time which, to my mind, lends support to the fact that the relationship was a fixed and formal one.

[103] Mr. Jenkins next submitted that there had been no major capital investments in recent years that might also militate towards a longer notice period. He argued that although Mr. Mulder testified that in the last 4 years of the distribution relationship there was an improvement to a refrigerated section of a pre-existing warehouse, there was no evidence that this 'improved warehouse' was used solely and exclusively for AB InBev's brands or that any other warehouses were constructed

or outfitted in the later years of the agreement for that purpose. Any capital expenditures made in reliance on the continuation of the Distribution Agreement had been made long before and had long since paid for themselves in profits. According to him, there was no evidence of any other capital expenditures made in the years prior to the termination of the Distribution Agreement that might have been relied on in support of a longer notice period.

[104] Learned Counsel further argued that the proportion of the supplier's inventory to the total business of the distributor is also a relevant consideration. He submitted that while BHL had not in fact disclosed any direct evidence of the proportion of sales of AB InBev's products, as compared to its other products, the evidence of Mr. Townend (who stated that he had been provided only with sales ledgers) was that AB InBev's products amounted to "a little under 10%" of the total revenue, and approximately 15% of beer revenue. The former number is the important one, says Counsel.

[105] Mr. Jenkins submitted that, at the time the Distribution Agreement was terminated, BHL was owned by the Heineken Company and owned the Kalik brands. BHL also brewed both Kalik and Guinness locally. Bud Light was the fourth most popular AB InBev brand sold by BHL, after Kalik, Heineken, and Guinness. None of the AB InBev products attracted the status of "Premium Brands" which was afforded to Heineken or Kalik.

[106] He further argued that the reason that the proportion of the business of the distributor, derived from the Distribution Agreement, is relevant is that it is suggestive of the relative impact of the loss of the Distribution Agreement. According to him, the loss of the Distribution Agreement is barely noticeable in the financial data for BHL and appears to have been absorbed and mitigated by the reapportioning of resources (including Human Resources), the introduction of new brands, and the simple fact that BHL continued to sell a large number of comparable products. He referenced the following:

a. There was no evidence of any measurable dip in profits following the termination of the Distribution Agreement. While the consolidated financial statements showed a flat performance in 2015 and a 4% drop in profits in 2016, with steady growth since, BHL was at pains to demonstrate that, as these were consolidated statements, no reliance could be placed therein. Mr. Mulder also conceded that this data also likely reflected the introduction of VAT in 2015 and the impact of hurricanes including Matthew in 2016. Mr. Townend's report was completed in 2016, and therefore used only historical data rather than any data from the years since, that could show what the actual impact of the loss of the Distribution Agreement was. For my part, this evidence stands uncontroverted and it is the only evidence available. It is also difficult in these situations to show actual loss because of the very nature of the business.

b. Mr. Townend conceded that he had not been asked to go back, more recently, to include an analysis of recent data, which at the time of trial, he admitted would have been available to him. Instead, Mr. Townend offered a reason why this would be difficult - he said that it would be very difficult to distinguish between lost profits from the Distribution Agreement, and increased profits from the sales of BHL's other brands, on the basis of sensible decisions made by management following the divorce from ABI. However, says Mr. Jenkins, Mr. Townend's emphasis appears to be based on 'compensatory' principles, rather than analyzing the 'effect' on BhL's business in the years following termination. The burden of proof of showing such an impact was on BHL, not ABI. The evidence simply does not show any measurable impact at all. In my opinion, an updated Report would have served a useful purpose.

c. According to the Plaintiffs, while Mr. Delaney QC in his Opening Submissions was at pains to emphasize the Human Resources that were dedicated to the Distribution Agreement, Mr. Mulder's evidence on cross-examination evidenced:

    i. That a senior brand manager and about 3 to 4 employees worked solely on AB InBev's brands. No documentary evidence was adduced by BHL to support even this assertion however I found Mr. Mulder to be credible on this point.

    ii. Mr. Mulder also confirmed that no employees at all lost their jobs as a result of the loss of the Distribution Agreement, contradicting the

clear implication of Mr. Delaney's submissions. Rather, employment in the BHL group grew steadily in the years since the termination.

d. In terms of other capital costs, Mr. Mulder conceded that no new warehouse had been built subsequent to the loss of the Distribution Agreement. The only capital cost in recent years had been an improvement to the refrigerated section of a preexisting warehouse. Mr. Mulder was not sure when this was done, save that it was before his time, and he believed before 2015. Again, while no documentary evidence was adduced by BHL of this or any other recent capital expenditures, I found Mr. Mulder to be a credible witness on this point.

e. The 2015 Managing Director's Report of the then Managing Director, Hans Neven, spoke directly to the termination of the Distribution Agreement, and struck an optimistic tone, stating the following:

> **"In early December we parted ways with Anheuser Busch. <u>This is no question that it hurt our bottom line at the end of 2015 and will again in 2016</u>. But we believe that the separation nets more benefits than drawbacks, as it clears the way for us to truly promote the value of our brand without competing against ourselves with the brewer of Budweiser beers".** [Emphasis added]

f. Mr. Jenkins submitted that, when this statement was put to Mr. Mulder, he accepted that this was correct. Mr. Mulder's response to Mr. Neven's message in the 2015 Director's Report, which is set out at page 59 of the 25 March transcript 2021, at lines 3 -16, is as follows:

> **"So, what it shows, and how I — and again, I read it the same as you do. If I put it in a context, what it shows, it shows two things. It shows that CBL or Brunei's (sic) House at the time, sacrificed part of the Heineken Portfolio to let Budweiser grow.**
>
> **So that's where you see that and that's what it says. And then by taking it out of the Portfolio, there's more space for Heineken brands, yes."**

g. It is clear that the management of BHL successfully and quickly made up for the loss of the Distribution Agreement. Mr. Mulder also stated, at page 38, lines 21 – 36 of the 25 March 2021 transcript, that:

> **"And of course, in 2016, we tried to limit the damages, as good as we can, right."**
> **….**
>
> **"There's an obligation to our consumers and to ourselves. I mean, it's impossible to lose an important part and not do anything".**

h. The measures that were taken included BHL having its comparable current brands fill the gap, and the introduction of new and successful brands of comparable beer such as Kalik Light Platinum, which was introduced in 2016 and which was highly successful. In fact, in his address in BHL's 2016 Annual Report, Mr. Neven, when referring to the impact that Kalik Light Platinum had up to that point, stated the following:

> **"Kalik Light Platinum has augmented its place as a must-stock brand in restaurants, bars and celebrations from Grand Bahama to Inagua. The resounding success of this Kalik varietal demonstrates the perfect fusion of company vision, marketing prowess and customer demand. Kalik Light Platinum has played a major role too in filling the gap in our light beers segment left by the departure of the Anheuser Busch InBev PORTFOLIO. The growth of Coors Light, too, in or retail business and trade portfolio helped to offset the loss of some lost brands."**

g. This statement was put to Mr. Mulder and he accepted that this was correct.

h. Coors Light and Miller Light were also introduced around this time.

i. Mr. Mulder also conceded, on cross-examination, that Bud-Light (the best selling of the AB InBev brands) and Budweiser were pale lagers, and that there were numerous lagers that BHL sold with similar alcohol contents including: Heineken, Red Stripe, Kalik, Kalik Light, Kalik Light Platinum, Kalik Gold, Coors light, Miller light and Colt 45. Mr. Mulder also conceded that there was a non-alcoholic equivalent of AB InBev's O'Doulls - Heineken Zero.

j. Additionally, Mr. Mulder accepted that even if a customer came to one of the stores for a Bud Light, it was likely that the customer may purchase one of the other brands, rather than leave empty handed.

[107] Mr. Jenkins argued that the terms of the Distribution Agreement were not fixed and formal as there had been changes to the payment terms in 1999 (with payment terms being then 30 days, and a request from BHL to change it to 90 days and an agreement on 60 days). The correspondence between ABI and BHL also showed that the requirement for a guarantee was not always a part of the agreement between the parties but was introduced in 1989. Mr. Mulder accepted that, in fact the agreement changed over time and evolved, as the companies themselves evolved. Furthermore, the exact terms relating to marketing arrangements were the subject of continual discussion and evolution. Mr. Mulder viewed these discussions as part and parcel of a normal relationship between supplier and distributor. I do not agree with Mr. Jenkins that because the terms charged over time, the Distribution Agreement was not fixed and formal. In my opinion, these changes were not substantial and such changes do not negate the fact that the relationship was a long-standing one with fixed terms and conditions. Indeed, it was a fixed and formal healthy relationship.

[108] Mr. Jenkins submitted that **Alpha Lettings** also demonstrated that where a party to a contract may still be required to use his best efforts to promote the products of the other party after notice of termination, this must also militate in favour of a shorter, rather than a longer period of notice. In this case, the nature of the Distribution Agreement between the parties was such that it would have required BHL to continue to market and promote the AB InBev brands, even after notice of termination had been given, until the agreement was at an end.

[109] Further, says Mr. Jenkins, despite BHL's complaints about the manner in which the termination was communicated to them, **Alpha Lettings** makes it clear that the means of termination is entirely irrelevant to the question of what the period of reasonable notice actually is. As such, BHL's claims that:

a. it had not been forewarned about the impending termination;

b. it had attended the August 2016 meeting in Miami under the guise of it being a marketing meeting (which is denied by the Plaintiffs as no such intentions were communicated to BHL), and

c. that shortly following termination of the Distribution Agreement the Plaintiffs engaged another local distributor to distribute the AB InBev brands,

are all inconsequential and should not be factored into the Court's decision.

[110] BHL, through Mr. Mulder, maintained that 3 ½ years' notice was reasonable in the circumstances given the duration of the Distribution Agreement, substantial investment and BHL was substantially dependent on the Distribution Agreement amongst other factors. In that regard, BHL stated that:

a. there was a Senior Manager exclusively dedicated to the performance of the Distribution Agreement. Ms. Bonaby, who made submissions on behalf of BHL, submitted that under minimum standards of employment law, a senior manager in entitled to compensation plus one month notice per year per employment and therefore, 4 months' notice was grossly inadequate to disengage or re-assign employees without material financial cost to BHL;

b. Mr. Mulder spoke to capital improvements before 2015 to the warehousing to improve quality of wine and beer products;

c. The Distribution Agreement was a substantial segment of BHL's operations:

(i) BHL's entire business operation had resources geared to perform the requirements of the Distribution Agreement. ABI's witness conceded in in testimony at trial that the loss of ABI brands represented a material component of BHL's operation and;

(ii) A substitution for the business loss could not be adequately found in 3 months (takes years). As stated by Mr. Mulder, "you build a brand very slow. And also, if you lose it, it takes a long time to recover…Brands are very emotional to people."

[111] BHL also identified the guiding principles enumerated in **Hamsard** which they relied upon together with the companion Canadian cases of **France v Kumon** 2014 ONSC 5890 and **France v Kumon Canada Inc** 2014 ONSC 7181 to bolster its argument that 3 ½ years' notice is reasonable notice. In the latter Canadian cases, the Ontario Superior Court implied a right of unilateral termination with reasonable notice into a franchise agreement and then drew on both commercial and employment law principles to determine the length of reasonable notice.

[112] In my considered opinion, these cases are unhelpful as they dealt with a franchise agreement which bears closer resemblance to an employment agreement than it does to a distribution agreement. Even then, the Court pointed out that it had not created any hard and fast rule for reasonable termination notice in similar situations.

[113] BHL also submitted that the element of bad faith by ABI is a relevant consideration in determining reasonable notice. In this regard, Ms. Bonaby, who assisted Mr. Delaney QC, referred to **France v Kumon** where the Ontario Court found that whether the parties acted in good faith was a consideration on the question of reasonable notice. BHL argued that ABI (aided, abetted and/or induced by CND) acted in bad faith by:

a) wrongly contriving that ABI had exited the Distribution Agreement and attempting to construct the veneer of a new "novated" contract with CND, as opposed to the long-established relationship with ABI. In retrospect, it now appears that the wrongful scheme had been concocted by ABI and CND since at least the beginning of 2015;

b) wrongly contriving, inconsistent with long custom and practice under the Distribution Agreement, that product was due to be paid for within one month of invoicing;

c) wrongly concocting ‘marketing’ as the pretext for the August 2015 meeting, then, with BHL attending the meeting under that understanding, ABI abruptly giving news of the termination of the Distribution Agreement;

d) unfairly not affording BHL an opportunity to have prior notice of the true purpose of the August 2015 meeting, which would have afforded BHL also to have legal representation;

e) wrongly discontinuing the supply of product in less than one month after giving notice yet dishonestly purporting to have given *three months’ notice* of termination. The Court observed that some of these invoices were outstanding from 7 June 2015 and BHL did not attempt to pay them in the 60 days’ period allotted for such payment of invoices;

f) dishonestly failing to acknowledge that at all material times ABI had the security of a letter of credit guarantee arranged by BHL with respect to the Distribution Agreement at the value of $250,000.00. I also observed that the Unpaid Invoices totaled $598,511.68 so the $250,000 would have not been sufficient and;

g) disingenuously commencing these proceedings to misportray a position of being wronged by BHL when ABI and CND had behaved egregiously and was under notice that BHL would commence legal action.

Analysis and conclusion

[114] It is common ground between the parties that, where there is no written agreement governing how a relationship should be terminated, it should be terminated on reasonable notice which must be determined at the time of notice of termination.

[115] Counsel for the Plaintiffs relied on **Alpha Lettings** to reinforce his argument that the 3½ months was a reasonable notice period for the termination of the Distribution Agreement while Counsel for BHL relied on **Hamsard** as well as the companion cases of **France v Kumon** (supra) to suggest that 3½ years was

reasonable notice period where there are no defined terms providing for the same. In **Hamsard**, Norris J considered **Alpha Lettings** in arriving at what is a reasonable notice period to terminate a distribution agreement.

[116] For my part, a good starting point is to consider the applicable legal principles which are derived from **Alpha Lettings**, **Hamsard** and kindred cases.

[117] First, what length of notice is reasonable must always depend on the facts of the case. Other cases may not be very helpful. So, what are the facts of the present case?

[118] Simply put, the Plaintiffs and BHL entered into a Distribution Agreement nearly 40 years ago. The relationship between the parties was "fixed and formal" and despite the Plaintiffs' contention that it was not, they were at pain to argue to the contrary. The Plaintiffs held fast to two somewhat inconsequential events to argue that the relationship was not a fixed and formal relationship namely (i) the changes to the payment terms of the invoices by BHL in 1999 from 30 days to 60 days and the requirement in 1989 for a guarantee was not always part of the agreement between the parties. As Mr. Mulder correctly asserted, in a relationship lasting for 40 years, terms are bound to change and evolved. That said, it does not necessarily mean that the relationship between the parties was not fixed and formal. Indeed, the relationship was fixed and formal and both parties enjoyed a healthy and profitable relationship for 40 long years.

[119] The second principle that the Court must consider is the particular facts might well involve consideration of the general circumstances and practices of the trade in which the parties are involved. The Plaintiffs broadly applied **Alpha Lettings** without giving consideration to any other case. It must be noted that each case will turn on its own peculiar facts and circumstances. In doing so, the Plaintiffs gave a mere 3 ½ months' notice to terminate an agreement which was in existence for nearly 40 years. In my opinion, the Plaintiffs, by relying entirely on **Alpha Lettings**,

failed to unwind the contractual relationship in accordance with industry practice namely to address the loss to BHL by way of reasonable compensation and time.

[120] The third principle for me to consider is that 'reasonable notice' is to be judged as at the time when notice of termination is given. In **Hamsard**, Norris J applied the principles in **Alpha Lettings** and stated that the existence of an 18 month notice period in the 2007 Agreement was of no relevance to what in November 2009 was a "reasonable" period of notice. He stated that the 2007 Agreement, which was negotiated between commercial parties, was not some sort of pre-estimate of what would be reasonable.

[121] Learned Counsel Mr. Jenkins submitted that when the particular facts of the present case are juxtaposed with the principles set out in **Alpha Lettings** as well as **Hamsard**, a period of 4 months is considered "reasonable notice".

[122] Learned Queen's Counsel Mr. Delaney, in written submissions, emphasized the long relationship between the parties and that BHL was substantially financially reliant of the Distribution Agreement. Mr. Delaney submitted that Mr. Juliano conceded that the loss of ABI's brands represented a material component of BHL's operation. Such a factor was cited as a material consideration in **Jackson Distribution.**

[123] Mr. Delaney further stated that BHL had substantial commitments, costs and expenses regarding the distribution and marketing of ABI brands and had devoted substantial resources to the same.

[124] In **Hamsard,** Norris J referred to **Paper Light Ltd v Swinton Group Limited** [1998] CLC 1667 where Clarke J. identified **the choice as lying between the circumstances at the time when the contract was made and the circumstances at the time when notice was given**. He then said:

> **"It seems to me that the correct answer to that question in principle is that, whereas the question whether a term is to be implied must be judged at the time of the contract, once it is decided that a term as to**

> **reasonable notice should be implied, the question what period of notice would be reasonable must be judged at the time the notice is given. It will be known at the time the contract is made that circumstances may change between the time of the contract and the time of the notice, which may be many years later. Thus it would be unsatisfactory and make no commercial or other sense to hold that the reasonable period of notice should be determined long before the notice was to be given."**[Emphasis added]

[125] One of the cases that Clark J relied upon was the decision of the Privy Council in **Australian Blue Metal Ltd v Hughes** [1963] AC 75 where, at page 99, Lord Devlin (who gave the opinion of the Board) said:

> **"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 length of the notice, if any, is the time that is deemed to be reasonable in the light of the circumstances in which the notice is given."**[Emphasis added]

[126] The fourth principle which requires consideration is the length of notice to be given is to be assessed in light of the circumstances obtaining when the notice is given which does not mean that the circumstances at the time of the contract are irrelevant. That is because the implication of the requirement to give **reasonable notice is "intended to serve only the common purpose of the parties"**, and **the "common purpose for which [the notice] is required" is a matter to be determined as at the date of the contract**.

[127] This was the view of the Board in **Australian Blue Metal** at page 99 where it concluded that:

> **"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 sort similar to those which are being terminated."**[Emphasis added]

[128] Applying these principles, the common purpose for which the notice is required is a matter to be determined as at the date of the contract. Due to the substantial nature of the Distribution Agreement, in my judgment, it is 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 party's business.

[129] The fifth principle which the Court ought to take into account in determining reasonable notice is the degree of formality. The more relaxed the relationship, the less likely it is that the law will imply a lengthy notice period: **Alpha Lettings.**

[130] Despite the fact that (i) there was no written contract; (ii) Mr. Mulder's concession that he did not know whether the relationship was fixed and formal prior to 2015 and; (iii) the payment terms have changed to allow for longer payment of the invoices as well as the requirement for a guarantee which was first introduced in 1989, the relationship was a fixed and formal one. The fact that it existed for nearly 40 years speaks volumes to this healthy relationship. Indeed, Mr. Mulder could not speak to what took place before he became the Managing Director. In addition, the Distribution Agreement had a high degree of formality including:

a) Regular practice of team meetings concerning plans with BHL as distributor, sales reporting, marketing plan, brand discussions, budgeting discussions, performance discussions, annual market planning;

b) BHL bore 50% of marketing the ABI brands annually;

c) BHL employed a brand manager for ABI brands;

d) BHL as local distributor would have to monitor and to study parallel in the market (i.e. product brought into the market for sale by non-authorised persons and outside of the Distribution Agreement);

e) BHL secured (and was so expected) adequate warehousing for brand products, trucks and vehicles for distribution of products to stores, and shelving space for brand products within stores; and

f) BHL provided ABI with security for payments in the form of a Guarantee.

[131] A fifth and important principle that the Court ought to consider is how quickly BHL would be able to replace the business lost. No doubt, BHL would need to take time to find another supplier.

[132] It is a fact that, at the time the Distribution Agreement was terminated, BHL was owned by the Heineken Company and owned the Kalik brands. BHL also brewed both Kalik and Guinness locally. Bud Light was the fourth most popular AB InBev brand sold by BHL, after Kalik, Heineken, and Guinness. None of the AB InBev products attracted the status of "Premium Brands", afforded to Heineken or Kalik.

[133] That said, I do not accept the Plaintiffs' submission that the loss of the Distribution Agreement was barely noticeable in the financial data for BHL.

[134] In my judgment, BHL has suffered as a result of the termination of the Distribution Agreement without proper notice. There is no doubt in my mind that BHL hit the ground running after the Plaintiffs abruptly relayed that it will terminate the Distribution Agreement. BHL acted expeditiously in order to mitigate some of its losses. Otherwise, it may have suffered more had it not done so by the reapportioning of resources (including Human Resources) and the introduction of new brands.

[135] I agree with Mr. Delaney QC that any attempt by Mr. Jenkins during the cross-examination of Mr. Mulder to minimize the impact of BHL's loss by referencing remarks by BHL's Managing Director made in the 2016 Consolidated Annual Report of the BHL/CBL Group and intended to be optimistic for BHL Group Shareholders, were put in their proper context and then dismissed by Mr. Mulder.

[136] Moreover, Mr. Townend, during cross-examination, stated:

> **"…the fact is, you know, the most reliable information we have, is the information in the Company's Records, that show that for the three years leading up to the termination, the Company's profits, gross margin, along with its business line and product line of 2.3 million a**

> **year. 2.3 million on average over three years. And that comes straight from the Company's General Ledgers. Anything looking forward, what it might have earned from the ABI Brand is subject to a lot of judgment."**

[137] The Plaintiffs attempted to diminish the value of Mr. Townend's evidence because his Report was completed in December 2016 and the fact that Mr. Townend conceded that he had not been asked to go back, more recently, to include an analysis of recent data, which at the time of trial he admitted would have been available to him. However, Mr. Townend offered a reason why this would be very difficult to distinguish between lost profits from the Distribution Agreement and increased profits from the sales of BHL's other brands, on the basis of sensible decisions made by management following the divorce from ABI.

[138] The Plaintiffs also argued that Mr. Townend's emphasis appeared to be based on 'compensatory' principles, rather than analyzing the 'effect' on BHL's business in the years following termination and it is BHL that bears the burden of proof of showing such an impact, not the Plaintiffs. I agree. That said, Mr. Townend's expert evidence stands uncontroverted and, as I stated earlier, he appeared to be the only witness who brought some objectivity to these proceedings.

[139] Another principle that the Court considered in **Hamsard** is that the claimant had taken on new employees and vehicles, a new warehouse had been brought into operation and further business premises had been planned.

[140] In the present case, Mr. Juliano was unable to say whether 12 employees were allocated to this brand. However, he stated that, in general terms, what the Plaintiffs expect from their distributors is to have a structure in place allocated to support the development of their brands. He also acknowledged that BHL would need the basics to support the brand, for example, warehouses, trucks and vehicles. On cross-examination, Mr. Mulder stated that there was a Brand Manager and 3-4 employees dedicated to the Brand and that no new warehouse had been built subsequent to the loss of the Distribution Agreement. The only capital cost in recent years had been an improvement to the refrigerated section

of a preexisting warehouse. Mr. Mulder was not sure when this was done, save that it was before his time, and he believed before 2015.

[141] Another factor which BHL alluded to is the element of bad faith. According to BHL, ABI's conduct at the time of terminating the Distribution Agreement is a relevant consideration in determining reasonable notice. In **Hamsard**, the Court rejected the suggestion that a term obliging the parties to act in good faith should be implied into the agreement. Similarly, in this case, I find that the "good faith" term is not an implied term in the Distribution Agreement. The Plaintiffs had a contractual right to terminate the relationship on reasonable notice. They were free to exercise that right provided that reasonable notice is given. The right was not subject to a qualification that it could only be exercised in "good faith." Even though it was a long relationship, all that the Plaintiffs were obligated to do is to give reasonable notice on termination.

[142] Applying all of the principles referred to above to the facts of the present case, in my judgment, fifteen (15) months was an appropriate notice period. To reiterate, some of the non-exhaustive factors which I considered were:

1. The relationship between the parties spanned a period of nearly 40 years;

2. Despite two changes to the terms of the Distribution Agreement, the relationship between the parties was fixed and formal and a healthy and profitable one for both parties;

3. The circumstances pertaining at the time are still relevant. These circumstances are used to shed light on the common intention of the parties. In this case, due to the substantial nature of the Distribution Agreement, it is 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.

4. BHL has substantially invested in the ABI brand by having a senior manager and 3 to 4 employees exclusively dedicated to the brand. In addition, in recent years, there had been an improvement to the refrigerated section of a preexisting warehouse.

5. A very important consideration is the length of time that BHL was able to replace the business loss and to find a new brand to distribute and achieve profitability. In my opinion, the 2015 Managing Director's Report paints the best picture. Mr. Neven spoke directly to the termination of the Distribution Agreement in this manner:

> **"In early December we parted ways with Anheuser Busch. <u>This is no question that it hurt our bottom line at the end of 2015 and will again in 2016</u>. But we believe that the separation nets more benefits than drawbacks, as it clears the way for us to truly promote the value of our brand without competing against ourselves with the brewer of Budweiser beers.** [Emphasis added]

6. The unchallenged evidence of Mr. Townend is particularly instructive.

Issue 3: Quantum of damages

[143] Now that liability has been determined, there will be a directions hearing on 31 May 2022 at 10.00 a.m. on the issue on quantum of damages to BHL.

Issue 4: Whether CND is a party to the Distribution Agreement?

[144] In its pleaded case, BHL denied that CND ever supplied it with any of ABI's products. BHL stated that, at all material times, it did business with ABI as its counterparty under the Distribution Agreement and that, lately, from about the year 2012, on ABI's behalf, CND acted as a liaison.

[145] The Plaintiffs argued that this is a non-issue. I agree with the Plaintiffs for the following reasons:

a) Although BHL was not a signatory to the Distribution Agreement, it was notified by two letters in February 2015, that the Distribution Agreement had been assigned to CND. There was no complaint from BHL. In fact. BHL

continued doing business with CND. BHL communicated directly with CND with respect to product need and other distribution requirements. At no time did BHL object to the N&A Agreement or raise any concerns about CND's role in the distribution relationship;

b) By its conduct in not raising any objections and continuing to do business with CND in the place of ABI, BHL impliedly assented to the transfer of the Distribution Agreement to CND. The commercial reality was that BHL was fully aware that CND had assumed all rights, liabilities and obligations under the Distribution Agreement, having been notified of the same, and did not protest this, but rather continued to transact with CND in the place of ABI. Therefore, by their conduct, BHL should be regarded as having consented to the N&A Agreement and;

c) BHL cannot be permitted, at this stage, to resile from this reality since they had carried on, as of February 2015, in a manner which any reasonable observer would accept as being congruent with the Distribution Agreement having been novated and assigned.

[146] In addition, the N&A Agreement provides that the Distribution Agreement was both novated and assigned. If it is that the novation was not validly effected, the N& A Agreement provides that, that part of the agreement may be severed and the remainder of the agreement shall continue.

[147] In this regard Clause 8(d) provides as follows:

> "Total Agreement: Amendments: Severability. This Agreement contains all the agreements and understandings between the Parties in relation to its purpose and substitutes and derogates all prior or contemporaneous agreements understandings in that respect. This Assignment Agreement may only be amended by the express, written agreement of the Parties. If any provision of this Assignment Agreement shall be determined to be unenforceable, void or otherwise contrary to law, such condition shall in no manner operate to render any other provision of this Assignment Agreement unenforceable, void or contrary to law, and this Assignment Agreement shall continue in force in accordance with the remaining terms and provisions hereof, unless such condition invalidates the purpose or agreement of this Assignment Agreement."

[148] Further, ABI was entitled to, and did, assign its contractual rights under the Distribution Agreement to CND, and did not require the consent of BHL to do so. CND's participation in these proceedings is therefore justified and, despite BHL's claims, there has been no increase in any costs as a result.

[149] CND is therefore a proper plaintiff in these proceedings and is not a tortious interloper.

Ancillary issues

Economic torts

[150] Given the finding above, this issue does not arise for consideration.

Set-off

[151] BHL is entitled to set-off for the Unpaid Invoices in the amount of $598,511.68 with interest.

Conclusion

[152] On the basis of the evidence before me, I find that fifteen (15) months' notice period accords with the facts of the present case.

[153] BHL owes the Plaintiffs the sum of $598, 511.68 (with interest) which will be set off against the final award after the issue of quantum of damages is dealt with. There will be a Directions Hearing on 31 May 2022 at 10.00 a.m.

Costs

[154] Both parties submitted their respective Bill of Costs ahead of this Judgment. I am grateful for that. However, I will order that each party bear its own costs given the divided success. No costs are awarded.

Dated this 19th day of May, 2022

Indra H. Charles
Senior Justice