

What is 'reasonable notice'?

In the absence of a formal written agreement, how will the courts determine 'reasonable notice' for termination?

Anna Lancy & Robert Strang consider the key factors

IN BRIEF

► In the absence of an express provision in an agreement, termination must be on reasonable notice.

► What is reasonable notice will depend on the circumstances. The factors that a court will generally consider were summarised in the case of *Jackson Distribution Limited v Tum Yeto Inc* [2009] EWCA 982 (QB).

► If reasonable notice is not given the termination will still be valid, but the other party will likely be entitled to damages. The measure of damages is likely to be the party's loss of profits during what would have been a reasonable notice period, subject to the duty to mitigate.

First: can the court imply a reasonable notice period to terminate an agreement?

Reasonable notice

Where a contract is silent on term or termination rights, it can still be terminated on 'reasonable notice' on the part of one or both parties (*Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173). Reasonable notice will be determined according to the ordinary principles that apply to the implication of terms into a contract and with regard to the facts in existence at the time the notice was given, as opposed to at the time the contract was entered into (*Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556).

The court will look at the nature and structure of the contract and decide whether the parties intended that it was perpetual or that it could be terminated. For example, a right to terminate by reasonable notice may be implied where it is obvious or where it is necessary to give the contract business efficacy. The case for an implied term is strong where one can argue that the parties cannot have intended the contract to last forever (and there is no other way to end the contract, short of a repudiation). In such circumstances, the contract is unworkable without a right to termination by reasonable notice.

[What is reasonable notice to terminate an agreement where there is no formal written agreement?](#)

It is unlikely that specific termination rights will be available in an unwritten

arrangement. Where an agreement for an indefinite term exists that does not include any provision for its termination, a court is likely to imply a term that it should be terminable on reasonable notice. What is reasonable will be a question of fact for a court, taking all the relevant circumstances into account. With reference to *Jackson Distribution Ltd v Tum Yeto Inc* [2009] EWHC 982 (QB), [2009] All ER (D) 107 (May), what the courts consider 'reasonable' very much depends on the individual circumstances of the case.

In *Jackson*, the High Court held that where there was no formal written agreement governing a distribution arrangement, a reasonable notice period of termination was nine months. The parties had discussed the arrangements in a series of emails but no formal agreement was ever signed, although each party submitted a draft agreement to the other. It was held that the emails constituted an agreement between the parties and that the distributor had not, on the facts, committed a repudiatory breach of the agreement entitling the supplier to terminate without notice.

The facts in the *Jackson* case were as follows: the claimant (Jackson Distribution Ltd) was a distribution company and the defendant (Tum Yeto Inc) was a fashion and skate show brand. The parties had met at a trade show in San Diego in September 2004 and discussed the possibility of Jackson becoming a distributor for Tum Yeto. The discussions continued by email. On 10 March 2005, Jackson sent Tum Yeto an email asking them to confirm that Jackson was to act as sole distributor for them in the UK and Ireland. Tum Yeto replied saying that the claimant should act as distributor but they should agree terms. However, on 14 March, Tum Yeto sent samples to Jackson and later confirmed that Jackson would be their sole distributor in the UK and Ireland. While Jackson was carrying on distributorship duties for Tum Yeto, there were further discussions around a written agreement. Jackson sent a draft formal document, but it was never signed. Subsequently, Tum Yeto sent a different draft agreement, but this was also never signed. In July 2007, Tum Yeto purported to terminate the arrangements between the parties, ostensibly giving Jackson six months' notice. However, at the same time, Tum Yeto alleged that Jackson

had breached the agreement and so the arrangements were effectively terminated without notice from August 2007.

The judge did not believe that the parties intended in such circumstances for the agreement to last in perpetuity (see [28] and [29], relying on *Martin-Baker*). The judge held that there was an implied term that the sole distribution agreement could be terminated on reasonable notice. In consequence, he was satisfied that there was an agreement in March 2005 under which Tum Yeto agreed that Jackson should be its sole distributor in the UK and Ireland. It was an implied term of that agreement that Tum Yeto would supply the products in a timely manner and in good workmanship. It was an implied term that either party was entitled to terminate the agreement on reasonable notice to the other party.

[What factors does the court take into account when determining a reasonable notice period?](#)

In *Jackson*, the judge held that nine months would have been a reasonable notice period in the circumstances. Tum Yeto had alleged that four to six months would be sufficient and Jackson contended that two years would be reasonable. The judge applied the following factors (which were taken into account in *Alpha Lettings Ltd v Neptune Research & Development Inc* [2003] EWCA Civ 704, [2003] All ER (D) 273 (May) to reach his decision, including:

- a. **Degree of formality:** although both parties put forward their respective drafts for a more formal arrangement, neither draft was agreed and therefore there was no great degree of formality.
- b. **Selling products in competition with the defendant:** there was no clause preventing the claimant from selling a product which competed with the defendant's products. However, the judge accepted that the claimant would not have done so and neither party envisaged that the claimant would.
- c. **The length of the relationship and the extent of the early investment by the distributor:** the relationship lasted for two and a half years. The claimant invested a considerable amount of time, effort and money in those early years, including £35,000 on promotional shows.
- d. **The percentage of the distributor's turnover made up by the supplier's products:** by the time of termination, turnover had decreased. There were signs of improvement but the judge stated that it seemed likely that the turnover percentage would have remained less than 50% at least for a year or two.

Other factors the courts have considered in determining what is a reasonable period of notice include (see *Alpha Lettings and Martin-Baker*):

- how long the terminated party would need to replace the lost contract;
- how much the terminated party depends financially on the contract;
- the parties' commitments when the notice is given; and
- whether the notice was unexpected or there had been some prior warning.

Although the *Jackson* case does not create any new law, it is a useful illustration of the factors that a court will take into account when deciding whether a notice period is reasonable, in the absence of express terms. It will be necessary to consider whether in the circumstances of the particular contracting parties' relationship there are any terms which can be implied into the contract, such as to: prices, the regularity of price reviews, and the methods that the parties may use to notify the other of price variation (or any other contract variation for that matter).

It is important to note that as the assessment of reasonable notice is so fact-specific, previous cases are not a reliable guide to future decisions. However, they can illustrate how the courts approach this

question. A further example is the case of *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat), [2013] All ER (D) 12 (Nov), where the court held nine months' notice was long enough to terminate an informal, temporary, constantly changing supply contract, even though a predecessor company had agreed an 18-month notice clause.

What happens if reasonable notice is not given?

If reasonable notice is not given, the termination will still be valid, but the non-terminating party will likely be entitled to damages. The measure of damages will be to place the non-terminating party in the same position, so far as money can do it, as if the contract had continued during what would have been a reasonable notice period, subject to the duty to mitigate.

The terminating party should check the basis on which they are terminating and ensure the appropriate action is taken. It is important for the innocent party to take steps to mitigate their loss; the innocent party will not be able to recover their losses in the event this could have been avoided.

What if the agreement is perpetual?

If the agreement is perpetual, ensure that it actually is. Perpetual can mean 'never

ending' in the sense of incapable of being brought to an end or, as in the case of *BMS Computer Solutions Ltd v AB Agri Ltd* [2010] EWHC 464 (Ch), [2010] All ER (D) 228 (Mar), it can mean operating without limit on time. If an agreement is determined as 'never ending', there would be no right to terminate on reasonable notice.

How should notice be given in the absence of notice provisions?

Where the parties to the agreement are entitled to terminate on reasonable notice, the terminating party will need to give formal notice of termination. In the absence of express notice provisions in the agreement, common law will apply. Common law does not prescribe specific forms of notice, but established notice should be clearly communicated by the terminating party (*Italmare Shipping Co v Ocean Tanker Co Inc; The Rio Sun* [1982] 1 All ER 517) and unequivocal in its intention (*Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448).

However, it is much better for parties to have clear termination and term clauses in the contract which the parties can refer to. **NLJ**

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