

**IN THE DISTRICT COURT
AT MANUKAU**

CIV-2010-092-1947

BETWEEN IAN JOHNSON PHARMACY LTD
Plaintiff
AND GLAXOSMITHKLINE NZ LTD
Defendant

Hearing: 5 August 2011

Appearances: P David and J Gurnick for Plaintiff
A Ross and G Peachey for Defendant

Judgment: 26 September 2011

JUDGMENT OF JUDGE GA ANDRÉE WILTENS

A. INTRODUCTION.

[1] This case concerns the recall of suspected faulty medication. The issue to be determined was whether or not pharmacies who take part in such recalls were entitled to charge the manufacturers for their incurred costs.

B. FACTS.

[2] Ian Johnson Pharmacy Limited (“IJPL”) carried on the business of a pharmacy. GlaxoSmithKline (“GSK”) carried on the business of manufacturing medicines.

[3] In its day to day business operations, IJPL purchases medicines manufactured by GSK and others, which it then dispensed for a fee to patients who held requisite prescriptions.

[4] On 28 January 2010, IJPL (and some 900 other Pharmacies in New Zealand) received a facsimile from GSK signed by the General Manager informing it that batch 35222 of Marevan 3mg Tablets (commonly known as Warfarin) was to be recalled because of a manufacturing problem that could have resulted in the quantity of anti-coagulant in each tablet being greater than the labelled amount. If so, that was potentially life-threatening.

[5] The facsimile stressed the importance of the matter and requested that IJPL provide the following services in order to facilitate the recall:

- (a) Contact all patients who had been dispensed Marevan 3mg since 23 November 2009 to advise them to return their tablets to IJPL for replacement and to contact their prescriber or clinic to determine if their clinical status needed to be assessed;
- (b) For affected stock in its possession, IJPL was to:
 - (i) Quarantine all stock from the affected batch immediately;
 - (ii) Complete and return an “Inventory of Medicines Returned” form, whether IJPL had any affected Marevan or not; and
 - (iii) By 29 January 2010, return any affected stock by courier to Healthcare Logistics labelled as “Recalled Stock”.
- (c) For patient-returned Marevan, IJPL was to:
 - (iv) Collect and quarantine Marevan returned and enter each patient’s return on a “Recalled Medicine Patient Returns” form;
 - (v) Replace the number of tablets returned from a new batch of Marevan, supplied by GSK;

- (vi) Send the completed "Recalled Medicine Patient Returns" form by facsimile to a provided number;
- (vii) Send the original "Recalled Medicine Patient Returns" form and patient-returned stock by courier to Healthcare Logistics labelled as "Recalled Patient Returns".

[6] As requested, IJPL on or about 28 January 2010:

- (a) Contacted seven patients affected by the recall and relayed to them the advice set out in the facsimile;
- (b) Quarantined all of its stock from the affected batch, completed the "Inventory of Medicines Returned" form and sent this to the number provided by GSK by facsimile;
- (c) Returned the original "Inventory of Medicines Returned" form together with its stock from the affected batch to Healthcare Logistics (marked as "Recalled Stock");
- (d) Collected and quarantined patient-returned supplies of affected Marevan tablets and completed the "Recalled Medicine Patient Returns" form;
- (e) Replaced the affected Marevan tablets returned by patients from a new batch of Marevan tablets provided by GSK;
- (f) Sent the completed "Recalled Medicine Patient Returns" form to the number provided by GSK by facsimile; and
- (g) Returned the original "Recalled Medicine Patient Return" form and the patient-returned Marevan stock (by courier) to Healthcare Logistics (marked as "Recalled Patient Returns").

[7] On 5 March 2010, IJPL wrote to GSK enclosing an invoice (dated 28 February 2010) for the services performed for the following amount:

Work Completed	Amount
Contacting seven patients x 15 minute average per patient	\$210.00
Dispensing fee for replacing four patients' Marevan tablets -- 4 x \$5.30	\$21.20
Administration, briefing staff, liaising with GPs, internal stock management and GSK paper work	\$120.00
Subtotal	<u>\$351.20</u>
GST	\$43.90
Total (including GST)	\$395.10

[8] By letter dated 15 March 2010, GSK advised IJPL that it refused to pay any of the invoice.

C. CLAIM.

[9] IJPL's claim to recover from GSK their costs incurred during the recall was founded under numerous heads which I now detail.

(i) Contract.

[10] IJPL maintained that a contract had been formed when IJPL undertook the steps requested by GSK in its facsimile. The basis for that was said to be that where a request was made in which payment was not specified, the contract formed when the request was performed must be subject to an implied term that reasonable payment would be provided for the services rendered.

(ii) Unjust enrichment.

[11] Alternatively, IJPL submitted that a claim in unjust enrichment could be established for the payment of a reasonable fee for the services rendered.

[12] IJPL recognised that it remains uncertain whether it is possible to bring an independent cause of action for unjust enrichment under New Zealand law. Notwithstanding that, it was submitted that the best view was to accept that New Zealand law does recognise such a cause of action. In support of this, IJPL referred to *National Bank of New Zealand Limited v Waitaki International Processing (NI) Limited* [1999] 2 NZLR 211, and *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (hereafter *Villages*) (2006) 8 NZBLC 101.

(iii) Quantum Meruit.

[13] It was submitted that whatever the position in relation to independent causes for unjust enrichment, New Zealand law recognised an action in *quantum meruit*, which essentially brings about the same result as a claim in unjust enrichment - although as a non-contractual cause of action.

[14] IJPL stressed that GSK had requested the services provided. Given the terms of the facsimile, and the nature of work entailed in the recall, IJPL submitted that GSK either knew or should have known that IJPL would expect to be paid for responding as requested.

[15] IJPL submitted that the services provided benefited GSK, and that it was no answer for GSK to submit that IJPL was ethically obliged to undertake the work.

(iv) Necessity.

[16] IJPL submitted that the principles of restitution for services rendered in circumstances of necessity also provided a good basis for the claim. IJPL submitted that where a service was rendered in an emergency (or out of necessity) and this benefited another, the service provider was entitled to recover reasonable

remuneration: *Coskery v Gee* [1957] NZLR 586; *Matheson v Smiley* [1932] 2 DLR 787.

(v) Breach of Fair Trading Act 1986.

[17] IJPL submitted that the wording of the facsimile created a natural assumption that payment would be made for the services requested. Accordingly, as there was a subsequent refusal to pay, there had been a breach of s 9 of the Fair Trading Act 1986, which entitled IJPL to a remedy under s 43(2) of that Act.

D. DEFENCE.

[18] A number of contentions were raised in defence to the claims, which I now detail.

(a) Pro-active defences:

(i) Source of recall obligations.

[19] GSK noted that it held a licence subject to a number of conditions to sell medicines pursuant to the Medicines Act 1981. One of the conditions was that GSK must comply with relevant parts of the New Zealand Code of Good Manufacturing Practice for Manufacturing and Distribution of Therapeutic Goods (“the GMP”).

[20] Part 5 of the GMP sets out the “Uniform Recall Procedures for Medicines and Medical Devices”. It describes the actions to be taken when a medicine is to be recalled and states that every New Zealand agent should have in place a written recall procedure describing how a recall is to be initiated and carried out. The Uniform Recall Procedure was developed following agreement between industry representatives.

[21] GSK noted that it had abided by the procedure laid out in Part 5, in conjunction with advice from Medsafe. This process involved notifying the Ministry of Health and planning communications to affected parties.

[22] It was accepted that not all pharmacies responded to recall communications. However, GSK maintained that if it was unable to obtain the co-operation of a pharmacy, GSK would simply hand matters over to Medsafe. It was submitted that such action would end GSK's responsibility in the recall process.

[23] GSK submitted that during the Marevan recall, 98.4% of pharmacies responded to the recall notice. GSK confirmed that it had not, and asserted that it was not obliged to, contact any remaining affected patients. GSK maintained that it was impossible for it to do so as it did not have access to the necessary patient information. Accordingly, GSK submitted that IJPL (and other pharmacies) did not "do GSK's work". It was reiterated that GSK's obligations were limited to compliance with Part 5 of the GMP.

(ii) Pharmacies.

[24] GSK noted that under the Pharmacy Services Agreement (the "PSA") between the District Health Board ("DHB") and pharmacists, IJPL followed a claims process to cover medicine subsidy and dispensing costs associated with supplying prescribed pharmaceuticals to patients. Pharmacies were reimbursed for the total cost of medicine and were paid dispensing fees by the DHB (currently \$5.30), less any prescription fee paid to the pharmacy by a patient.

[25] GSK submitted pharmacists were subject to the compulsion power contained in Regulation 50 of the Medicines Regulations 1984. This provides:

50 Withdrawal of medicines, etc

- (1) The Director-General may issue to any importer, manufacturer, or seller of any medicine, related product, or medical device an order—
 - (a) Directing the withdrawal from sale of any medicine, related product, or medical device in respect of which there is in force a notice given by the Minister under section 35 or section 37 of the Act, or of any portion of the produced quantity of any such medicine, related product, or medical device, if the Director-General believes on reasonable grounds that such withdrawal is necessary to protect the public; or
 - (b) Directing the withdrawal from sale of any medicine, related product, or medical device, or any portion of the produced quantity of any

medicine, related product, or medical device, that does not conform to the specifications claimed for that medicine, related product, or medical device; or

- (c) Requiring the disposal of any medicine or related product, or any specific quantity of a medicine or related product, that has been directed to be withdrawn under paragraph (a) or paragraph (b) of this subclause; or
 - (d) Requiring the disposal or destruction of any medical device, or any specific quantity of any medical device, that has been directed to be withdrawn under paragraph (a) or paragraph (b) of this subclause.
- (2) The importer, manufacturer, or seller shall, on receipt of an order made under subclause (1) of this regulation, advise the Director-General of the manner and time in which he proposes to comply with the order, and shall give written notice to the Director-General when the order has been complied with.
- (3) Notwithstanding anything in subclause (2) of this regulation, the Director-General may issue directions to the recipient of an order made under subclause (1) of this regulation as to the manner and time in which the order is to be complied with.

[26] Accordingly, if a pharmacy failed to voluntarily participate in a recall, they could be compelled to do so under the Regulations. It was noted that there was no provision for payment in such an event.

[27] GSK further submitted that pharmacists were obliged to replace defective goods under the Consumer Guarantees Act 1993.

[28] Finally, GSK noted that IJPL was under an ethical obligation to prevent harm to patients in accordance with the Pharmacy Council of New Zealand's Code of Ethics.

(iii) The legal relationships in selling pharmaceuticals.

[29] GSK noted that the contractual relationship between IJPL and GSK was governed by a series of contracts. More specifically, GSK sold Marevan to wholesalers, who would on-sold the drug to pharmacies (such as IJPL).

[30] IJPL had a contract with its wholesaler, Pharmacy Wholesalers Russells (“PWR”) which governed its supply of Marevan tablets. The following clauses in that contract were said to be apposite:

- (a) PWR excluded all statutory or implied conditions or warranties to the extent permitted by law;
- (b) To the extent permitted by law, PWR limited its liability under any condition or warranty which could not legally be excluded to the following :
 - replacement of goods or supply of equivalent goods;
 - repair of goods;
 - payment for goods, replacing goods, or requiring equivalent goods; or
 - payment of costs for having the good repaired
- (c) PWR accepted no liability for consequential, special or indirect loss or damage under any circumstances (clause 8.5).

[31] It was submitted that where contractual arrangements already existed covering the situation the Court should not get involved by creating further obligations.

(b) Responses to the claims made:

(i) Contract / implied term.

[32] GSK did not accept that a contract existed. GSK submitted that the 28 January 2010 facsimile lacked all the basic indicia of a contract, namely:

- (a) Intention to create legal relations;
- (b) Offer on ascertainable terms; and

(c) Unqualified acceptance by the person to whom the offer was made.

[33] The 28 January 2010 facsimile was not legally enforceable as a contract given this was not the parties' intention - an agreement reached between two or more parties would only be legally enforceable as a contract where the parties to that agreement intended such to give rise to legally binding obligations, and GSK had no such intent here.

[34] In the event that the facsimile were held to be a contract, GSK submitted that the terms of the document defeated IJPL's claim in that the facsimile specified that consideration for the recall would be the free replacement of the returned product. Were it not for that term, IJPL would have had no recourse at all, pursuant to its contract with its wholesaler.

[35] It was axiomatic that a term could not be implied contrary to an explicit (inconsistent) term.

[36] Further, none of the other circumstances for implying terms applied, namely:

- (a) Failure to provide for an unexpected circumstance;
- (b) Custom; or
- (c) (Business) efficacy.

[37] An implied term for "reasonable payment" was far too uncertain. It was said that in circumstances where a retailer had not incurred any additional cost (e.g. expense or increased overhead), and did not derive income from time-based fees, determining what was "reasonable" was far from straightforward. GSK stressed that there was no industry standard that could be relied upon to assist.

(ii) and (iii) Restitution: unjust enrichment/quantum meruit.

[38] GSK submitted that an essential step in considering a restitutionary claim was to ask whether and how the claim fitted with any particular contracts that the parties

had made. In support, reference was made to *Lumbers v W Cook Builders Pty Limited (in liquidation)* [2008] HCA 27; and the comment of Lord Goff in *Pan Ocean Shipping Co Limited v Credit Corp Limited* [1994] 1 WLR 161 was relied upon:

Serious difficulties arise if the law seeks to expand the law of restitution to redistribute risk for which provision has been made under an applicable contract.

[39] It was suggested that the Court should first enquire whether the application of that framework would be consistent with the parties' obligations pursuant to their contractual undertakings, before embarking on a restitutionary analysis.

[40] In light of the above, it was submitted that any restitutionary claim in the current case must therefore fail at the first hurdle, as there were a series of contracts which existed that already allocated risk. GSK contended the Court could not unilaterally redistribute that risk.

[41] Further, it was submitted that it was legally irrelevant that IJPL learnt of the need to assist in the recall from GSK. GSK submitted that IJPL could equally have:

- (a) Discovered that itself as a result of a patient complaint or personal observation;
- (b) Learned about it from the wholesaler; or
- (c) Been informed by the Ministry of Health/Medsafe.

[42] In all the above situations, IJPL would have been obliged to perform the work that was eventually requested. Accordingly, it was submitted that there was nothing "unjust" (in a legal sense) about the situation that had evolved.

[43] Notwithstanding the above and relying on *Villages*, GSK submitted that there was no cause of action in New Zealand under the head "unjust enrichment". It was however accepted that IJPL could plead an unjust enrichment cause of action where it was "related to an accepted cause of action". That was not the case here.

However, GSK accepted that unjust enrichment principles underlie a *quantum meruit* claim.

[44] GSK noted that, historically, a *quantum meruit* claim was treated as being based upon an implied contract. However, it was submitted that there was a well accepted line of cases that lay to rest the “implied contract” theory. The following statement of Lord Browne Wilkinson in *West Deutsche Landsbank Girozentrale v Islington Borough Council* [1996] AC 669 was illustrative:

...subsequent developments in the law of restitution demonstrate that this reasoning is no longer sound. The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay.

[45] The elements that must be shown to establish a claim in *quantum meruit* (as per *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739; and *Morningstar (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006) include:

- (a) A request to provide services;
- (b) Free acceptance of the services; and
- (c) A benefit from the provision of the services.

[46] Applied to the current case, GSK submitted that none of these elements applied, as GSK had not:

- (a) Requested services. It was obliged to act in the manner that it did in recalling the product. That included alerting pharmacists of their duty to do their part; nor
- (b) “Accepted” any “benefit”. GSK was simply discharging its obligations by writing to, and in some cases following up with, pharmacies. Had pharmacists refused to participate in the recall

procedure, they would have been in punished for such by the authorities (particularly Medsafe).

[47] GSK accepted that in some instances it might not be necessary to prove an actual benefit. However, it was argued that such cases depend upon proof of a shared expectation that the services provided would be paid for, making it “unjust” for a defendant to resile. [I considered this akin to an estoppel argument.]

[48] GSK contended that the current case could be distinguished as:

- (a) GSK did not know that IJPL expected to be reimbursed (beyond direct costs). There was nothing to support IJPL’s anticipation of payment. Although GSK submitted there had never been an understanding that pharmacists would be compensated for their time/effort during the recall;
- (b) IJPL was independently obliged (and paid) to take part in the recall process; and
- (c) IJPL had a moral and ethical obligation to protect its patients.

(iv) Necessity.

[49] GSK submitted that before the retention of a benefit could be deemed unjust by “agency of necessity”, four conditions must be fulfilled (see *Prager v Blatspiel, Stamp & Heacock Ltd* [1927] 1 KB 566):

- (a) The agent must not have been able to obtain the principal’s instructions. It must be practically impossible to get the owner’s instructions in time to determine what should be done;
- (b) There must have been a necessity for the agent to have acted in the way he or she did;

- (c) The agent must satisfy the court that he or she was acting in the interests of the parties concerned; and
- (d) The actions taken by the agent must have been reasonable and prudent in the circumstances and must have been performed to protect the interests of the principal.

[50] GSK submitted that case law has fleshed out the doctrine of necessity with specific principles and control devices: firstly, the situation must be one in which it was essential for someone to intervene in order to protect a defendant or the property of a defendant; secondly, the claimant must be a person who could suitably intervene; and finally, the law on salvage demonstrated that an intervener who acted within his or her pre-existing legal duty should not be entitled to a remedy for necessitous intervention.

[51] GSK did not accept that IJPL had satisfied the above elements, because:

- (a) This was not a situation in which IJPL was unable to seek instructions from GSK;
- (b) IJPL had acted within its pre-existing legal duty and should not be entitled to a remedy for an intervention of necessity. The rationale for this was that the pre-existing duty already provided sufficient incentive for the intervention (see Andrew Burrows *The Law of Restitution* (3rd Ed, Oxford University Press, Oxford, 2011) at page 478-483; and
- (c) The necessity category was confined to private property rescue. The main person who received the benefit must be GSK. In this case, the benefit in question was to members of the public (i.e. patients who would otherwise have taken the recalled medication). GSK did not themselves receive a benefit from IJPL's actions.

(v) Breach of Fair Trading Act 1986.

[52] There was nothing “misleading” about the facsimile of 28 January 2010 that constituted a breach of the Fair Trading Act 1986.

F. DISCUSSION.

(a) The substantive defences:

(i) GMP.

[53] The need for a recall stemmed wholly and only from GSK. IJPL was invited to and did respond to what was in effect GSK’s recall. If IJPL had not responded, then it could not pursue any action against GSK. However, it did respond, as requested; and while not “doing GSK’s work”, IJPL was doing work necessitated by GSK’s error.

[54] I noted that 4.1(l) of the GMP recommended that recall letters “describe... compensation for return and replacement of products”. Further, as I will detail later, there was a clear understanding by IJPL that it would be paid for undertaking the work.

[55] I did not see the GMP as disentitling IJPL’s claim.

(ii) DHB compulsion process.

[56] I accepted that the DHB had an ability to compel pharmacies to participate in recalls. However, the short answer to that point was that the DHB did not instruct IJPL in any way. The recall was managed by GSK. Whether or not IJPL could claim for its costs when GSK took over the recall was unaffected by the DHB’s powers.

[57] Equally, the fact that the DHB could so compel pharmacies without payment being mentioned in the enabling legislation, was not a complete answer to the issue before me.

(iii) Ethical obligations.

[58] The necessity or desirability of complying with an ethical or moral obligation cannot be a basis for disentitling a claim for compensation for the time/effort involved in such compliance.

(iv) Contractual obligations.

[59] The contractual obligations in place between GSK, PWR and IJPL quite obviously do not deal with the situation I am tasked to resolve. I was quite satisfied that the arrangements are deficient in that regard – that is why IJPL was forced to bring the claim.

(b) The various claims:

(i) Contract.

[60] Burrows, Finn & Todd's text *Law of Contract in New Zealand*: Burrows (3rd Ed, LexisNexis, Wellington, 2007) sets out:

In each case the Court must decide whether the parties have, or have not, reduced their agreement to the precise terms of an all embracing written formula. If they have not, the writing is but part of the contract and must be set side by side with the complementary oral terms. The question is at bottom one of intention and, like all such questions, elusive and conjectural.

[61] I considered IJPL's facsimile of 28 January 2010 to be contractual in nature. However, the facsimile plainly did not embody the entire agreement between the parties.

[62] Ms Annabel Young (Chief Executive of the Pharmacy Guild of New Zealand ("Guild")) explained that a Guild employee contacted GSK on 28 January 2010 (in response to the facsimile) and spoke with Ms Vicki Pilcher – a Quality Assurance

Associate. Concerns were raised by the Guild employee over pharmacies (including IJPL) being compensated for work carried out under the recall. Ms Pilcher stated that she did not have answers regarding compensation, but confirmed that the issue would be discussed once the urgent and immediate problem of retrieving the medication had been addressed.

[63] Mr Geoffrey McDonald (General Manager of GSK) confirmed that Ms Pilcher sought guidance from him (on January 28, 2010) regarding the Guild's compensation enquiry. Mr McDonald confirmed that he had instructed Ms Pilcher to inform the Guild that GSK was "busy managing the recall" and could "discuss anything to do with compensation later".

[64] I concluded that the contract in this case should properly be construed as being partly written and partly oral.

[65] As well, I considered it appropriate that further terms could and should be inferred. The *ratio* of *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1977) 16 ALR 363 was applied to New Zealand by the Court of Appeal in *Devonport Borough Council v. Robbins* [1979] 1 NZLR 1, setting out the criteria to be met before further terms will be implied. Those criteria, baldly stated, are that an implied term must:

- Be reasonable and equitable
- Be necessary to the business efficacy of the contract
- Be so obvious it goes without saying
- Be capable of clear expression
- Not be contrary to any express term of the contract
- Be necessary to make the contract work, and
- Correspond with the evident underlying intentions of the parties.

[66] I do not consider that later decisions have altered the law as it is set out above, although I acknowledge that the test has been expressed in a different manner e.g. *McNeill v. Gould* (2002) 4 NZ Conv C 193 557.

[67] What are the appropriate implied terms in this case?

[68] As to the issue of compensation (i.e. the oral part of the contract), I found real merit in IJPL's submission that where payment was intended, but the quantum of such is not specified, the usual implication would be that the contract formed was subject to an implied term that a *reasonable and proper price* was to be provided for the services rendered.

[69] An example of where the Court took such an approach is *Dick v Lee* HC Dunedin CIV-2004-412-310, 31 May 2006.

[70] I noted GSK's claim that the provision of replacement medication constituted consideration, and that this therefore restricted the reading of an implied term as to compensation into the contract. However, I considered the replacement of defective medication as constituting only part of the consideration.

[71] In conclusion, I formed the view that the facsimile constituted a contract between the parties into which a term as to reasonable and proper payment for the services sought to be provided should properly be implied. I did not place weight on GSK's stance at the hearing, but preferred the evidence of what took place at the time, namely that discussion regarding payment was to be dealt with at a later time. Had there been no intention to pay, one might have expected an immediate statement to that effect.

(ii) Restitutionary Claim: *Quantum Meruit* Principles.

[72] The leading New Zealand case on claims in *quantum meruit* is *Morning Star (St Lukes Garden Apartments) Limited v Canam Construction Limited* CA90/05, 8 August 2006.

[73] The Court of Appeal in that case identified the necessary elements to warrant a *quantum meruit* claim as follows:

- (a) A request to provide services;

- (b) Free acceptance of the services; and
- (c) A benefit from the provision of the services.

[74] At [43] the Court emphasised, applying the *obiter dicta* to the present facts, that the purpose of a claim in *quantum meruit* "...is not to force [GSK] to disgorge some wrongfully obtained benefit [but]... to ensure that [IJPL] is accorded fair compensation for the services provided".

[75] If I was incorrect as to my earlier finding, and that indeed there was no completed contract between the parties, then I considered that:

- (i) GSK had requested IJPL to provide the services in question;
- (ii) GSK had freely and gratefully accepted those services; and
- (iii) GSK had derived a benefit from the provision of the services. [I found this to be so, even though IJPL also benefited to some extent.] GSK did not dispute this, and I noted the reasoning in *Morning Star* namely that where a defendant accepted services and knew (or ought to have known) that the provider expected to be reimbursed for those services, the acceptor of the service was deemed to have received a benefit irrespective of whether there was an actual benefit.

[76] Accordingly, I also considered that the claim should succeed on a *quantum meruit* basis.

(iii) Necessity.

[77] I did not consider IJPL could properly rely upon an argument of necessity to establish its claim.

(iv) Independent claim of unjust enrichment.

[78] IJPL's claim under the head of unjust enrichment also found no favour with me. Whether such a claim is even a possibility in New Zealand remains questionable at best in my view.

(v) Breach of Fair Trading Act 1986.

[79] The final basis for the claim rested on a breach of the Fair Trading Act 1986. I did not consider this aspect of the claim to have merit.

F. Quantum.

[80] I noted that the \$120.00/hour fee claimed was not supported by evidence. I was unaware of any "market price" to assist the Court in determining the appropriate amount.

[81] Another pharmacy had previously brought proceedings in the Disputes Tribunal. In that case, it was found that no thought had been given by either party to the matter of remuneration. GSK submitted that the Tribunal's decision as to that was wrong. However, GSK considered the judgment to be of assistance as to quantum, no doubt partly at least because the Tribunal declined to accept an hourly rate of \$120.

[82] Mr Ian Johnson testified that he took the GSK recall request very seriously. In conjunction with his 4 staff members, a strategy was worked out to manage the recall request. A pharmacist and a pharmacy intern were designated to carry out the recall directive. In the course of the recall, those staff members identified the patients concerned and contacted all 7 of them, making the necessary arrangements to retrieve the dispensed Marevan tablets and replace them. That was done by telephone and facsimile.

[83] They also dealt with returning the Marevan to GSK, and with the completion and return of the relevant forms. Mr Johnson supervised the process, and he

described it as “not straight forward”. The whole recall process took about a week to complete, with numerous responses to patients questions being required, several of whom were elderly and needed re-assurance/support, and not all of which could be done in English. In addition, some queries came from doctors and other pharmacists had to be responded to. There was no doubt that the recall was disruptive of IJPL’s normal or usual business.

[84] Mr Johnson apportioned 15 minutes per patient as a “conservative” estimation of the time spent in dealing with the recall. I accepted that as a reasonable assessment bearing in mind all that was involved.

[85] Mr Johnson then sought to allocate an hourly rate of \$120 per hour for the work involved. He did so on the basis that often more than one staff member was involved, and therefore he multiplied the average staff pay rate from the Pharmacy Guild Remuneration survey by three. I gleaned from that the average pay was in fact \$40 per hour.

[86] It appeared to me to be a duplication to multiply the hourly rate and to estimate that 15 minutes was spent with each patient.

[87] The onus was on IJPL to satisfy me that the charges sought to be recouped were reasonable in all the circumstances. Instead, I was of the view that the claim was inflated.

[88] I could see no justification for seeking to make GSK pay for 4 dispensing fees. If such were payable, then the DHB should have been approached.

[89] Equally I could see no justification for what was described as an “Administration” fee being charged out at \$120.

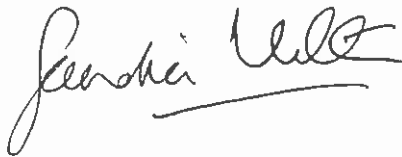
G. Orders.

[90] IJPL's claim must succeed.

[91] I accepted that part of the work was done by Mr Johnson himself, and that he might very well expect a greater sum than the industry average, but I noted also that part of the work was done by a pharmacy intern, and no doubt the hourly charge-out rate for him/her would have been less than the industry average. In all the circumstances, I considered those two factors to cancel each other out. I accepted the sum of \$40 per hour to be reasonable.

[92] The quantum of IJPL's claim must accordingly be reduced to 7 x 15 minutes of time for dealing with the patients, and one hour for what is described as "Administration, briefing staff, liaising with GP's, internal stock management and GSK paperwork", all at the rate of \$40 per hour, plus GST.

[93] IJPL must also be entitled to costs and interest. I invite counsel to file suitable submissions as to quantum within 21 days.



G.A. Andrée Wiltens
District Court Judge

Addendum:

I presided over a Judicial Settlement Conference ("JSC") in relation to this matter. Both leading counsel who appeared at the hearing before me were also involved in that JSC, and both formally consented to my hearing of this case.