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fact that the contract called for the abnormally high profit of two hundred per cent.[22]

Nearly all of the litigation over the proper meaning of the word "cost" in cost-plus contracts could have been prevented by careful draftsmanship. Due to the unsettled state of the law in the area and the relative lack of authority,[23] the attorney faced with the task of drafting such an agreement would be well advised to carefully define the specific items intended to be covered by or excluded from "cost."

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Contracts—Indefinite Duration of Exclusive Sales Agreements—Distributor's Right to Prospective Profits for a Reasonable Time

In the recent case of *General Tire & Rubber Co. v. Distributors Inc.*,[1] the North Carolina Supreme Court, by way of dictum, approved the majority view that an exclusive sales and distributors contract, which expresses no time for its duration, will by implication of law be considered to run for a reasonable period of time.[2]

The parties orally agreed that the defendant would be the sole and exclusive distributor of plaintiff-manufacturer's product in North and South Carolina for an indefinite period of time. Shortly thereafter, due to insufficiency of defendant's working capital, the parties executed a written agreement, known as a "Warehouse Agreement," whereby the plaintiff agreed to consign goods to defendant while retaining legal title to them. A year later this agreement was altered by an oral modification which provided that plaintiff would continue his consignment of goods as before for a stated period of three years, during which time the defendant would purchase the goods by monthly installments. Under this purchasing agreement, the defendant, who was in arrears in payments, refused to surrender the goods upon request and plaintiff brought this action to recover their

[22] The court quite properly held that cost was intended to include only actual out-of-pocket expenses. Loewy v. A. Rosenthal, Inc., 104 F. Supp. 496 (E.D. Mich. 1952).

[23] North Carolina has never explicitly ruled on the construction of a cost-plus contract, but in Harris & Harris v. Crain & Denbo, 256 N.C. 110, 123 S.E.2d 590 (1962), the court clearly implied they were inclined to the majority view that overhead cannot be considered part of cost.

[1] 253 N.C. 459, 117 S.E.2d 479 (1960).

[2] E. I. Du Pont Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224 (8th Cir. 1933); J. C. Millett Co. v. Park Tilford Distillers Corp., 123 F. Supp. 484 (N.D. Cal. 1954); Elson & Co. v. Beselin & Co., 116 Neb. 729, 218 N.W. 753 (1928).

possession. The defendant counterclaimed for $50,000 damages, alleging that plaintiff, by demanding the goods, had breached the distributorship contract.[3] On the single issue of whether plaintiff wrongfully took possession of the goods, the jury found for the plaintiff and the defendant appealed. The supreme court reversed on other grounds,[4] but further stated the modern majority rules that a distributorship contract which expresses no time for its duration is terminable only after it has run for a reasonable time. Previously the majority rule had been that a principal generally had the right to cancel at will a selling agency contract which was silent as to time, particularly where the agency was not coupled with an interest and the cancellation was in good faith.[5] However, as the result of the increasing number of distributor contracts and the fact that under these contracts the agent is required to expend large sums of money and to undertake other obligations in preparation for performance, the courts have more recently held that the agent has a substantial interest in the contract and therefore should not be placed at the mercy of the manufacturer.[6] Evidence of such expenses and acts of

[3] Although the court concluded that the subsequent oral agreement of July 1957 contemplated that the distributorship would continue as long as the purchasing agreement, the two contracts were in fact separate and distinct.

[4] The trial court submitted the following single issue to the jury, "Did the plaintiff wrongfully take its inventory from the defendant's warehouse?" The Supreme Court reversed on this point and said that this issue alone would not decide the case. Before the plaintiff would be entitled to the possession of the goods, the jury would have to find (1) that the plaintiff was the rightful owner; (2) that the defendant had breached the "Warehouse Agreement" as modified by the parol agreement; (3) that the defendant refused to relinquish possession of the goods and thereby was wrongfully retaining them.

[5] Victor Talking Mach. Co. v. Lucker, 128 Minn. 171, 150 N.W. 790 (1915); Meyer v. Pubitizer Pub. Co., 156 Mo. App. 170, 136 S.W. 5 (1911); Codrad v. Golden, 275 App. Div. 946, 89 N.Y.S.2d 689 (1949); Winslow v. Mayo, 123 App. Div. 758, 108 N.Y. Supp. 640, *aff'd,* 195 N.Y. 551, 88 N.E. 1135 (1908); Price v. Confair, 366 Pa. 538, 79 A.2d 224 (1951).

[6] Allied Equip. Co. v. Weber Engineering Prods., 237 F.2d 879 (4th Cir. 1956); Bach v. Freedin Calculating Mach. Co., 155 F.2d 361 (6th Cir. 1946). See also WILLISTON, CONTRACTS § 1027A (rev. ed. 1936): "[Q]uite properly [this contract of indefinite duration] has been held an enforceable executory contract, binding upon each party for a reasonable time. It is the settled law of agency that if the agent or employee furnishes a consideration in addition to his mere services, he is deemed to have purchased the employment for at least a reasonable time where the duration of the employment is not otherwise defined. A similar result should be reached though the dealer is a buyer-distributor rather than a technical agent, where in addition to undertaking to pay for the manufacturer's products as ordered, he promises to establish or maintain adequate sales and demonstration facilities or to provide a maintenance and repair service for handling said products."

preparation create an inference that a definite or reasonable period of employment was actually contemplated.[7] The majority view today is that a contract which calls for continual performance or additional expenditures by the agents or distributor and which makes no reference to its duration is to run for a reasonable time.[8]

Until the principal case, North Carolina has had only two occasions to decide this questions and on both occasions has held, contrary to the modern majority rule, that these exclusive sales contracts were terminable at will.[9] However, with the dictum in the principal case, it would appear that the old rules has been abrogated and North Carolina has adopted the majority rule.

The court in the principal case also indicated that where a distributorship agreement of indefinite duration is breached by the manufacturer, the measure of damages recoverable by the distributor is the prospective net profits that could be realized during the reasonable period of time which the contract should run. In determining what constitutes a reasonable time, the trial court should consider the distributor's preliminary and promotional expenditures;[10] the length of time the distributorship has been in operation before the notice of termination;[11] what the prospects for future profits are; and whether the distributorship has proven profitable during its actual operation. The amount of initial outlay and expenditures is not recoverable as such, but is evidence for the jury to consider in determining whether the distributor has had a reasonable time for performance under the contract. The purpose of allowing a reasonable time for the contract is to provide the distributor with a reasonable opportunity to recoup his expenditures. But under the circumstances, if recoupment is impossible, then he is not entitled to recover expenses as a separate item of damages in his action against the manufacturer for breach. Under the general rule, if the distributor would have had these expenses if the contract had been fully performed, then he is not entitled to recover them.[12]

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[7] Cummings v. Kelling Nut Co., 368 Pa. 448, 84 A.2d 323 (1951); Slonaker v. P. G. Pub. Co., 338 Pa. 292, 13 A.2d 48 (1940).

[8] Note 2 *supra;* Jacks Cookie Co. v. Brooks, 227 F.2d 935 (4th Cir. 1955).

[9] Fulghum v. Selma, 238 N.C. 100, 76 S.E.2d 368 (1953); Erskine v. Chevrolet Motors Co., 185 N.C. 479, 117 S.E. 706 (1923).

[10] The defendant offered testimony that he had expended $22,915.91 in promoting the plaintiff's line of floor covering in the Carolinas.

[11] Snead v. Sutherland, 118 Vt. 361, 111 A.2d 335 (1955).

[12] Smith v. Onyx Oil & Chemical Co., 218 F.2d 104 (3d Cir. 1955); Units Oil Ref. Co. v. Ledford, 125 Colo. 429, 244 P.2d 881 (1952); Gibbs v. H. T. Henning Co., 189 Ga. 675, 7 S.E.2d 238 (1940); Mississippi Power

The present case is to be distinguished from the earlier case of *Erskine v. Chevrolet Motors Co.*[13] in which the court allowed the distributor to recover not only the difference in the contract and resale price of the cars, but also his initial outlay or preparatory expenditures.[14] In the principal case, while profits were allowed, the court said that since the contract was not terminable at will, the distributor could not recover initial expenses. This outlay was part of the consideration for the contract, and to allow the distributor to recover original expenses in addition to prospective profits would permit him to obtain a double recovery.

The court, in the *Erskine* case, although not adhering to the majority rule, suggested that where the manufacturer breaches a distributor contract the distributor might recover on the basis of either fraud[15] or quasi-contract.[16]

The policy of allowing the distributor a reasonable period of time in order that he may have the chance to recoup his expenditures is equitable, because the distributor has generally spent a considerable amount of money and time preparing for performance of the contract. When the manufacturer breaches the contract, the distributor should, at least, be placed in the same position as before the agreement was made.

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& Light Co. v. Pitts, 181 Miss. 344, 179 So. 363 (1938); Platts v. Arnet, 50 Wash. 2d 42, 309 P.2d 372 (1957).

[13] 185 N.C. 479, 117 S.E. 706 (1923). Here the plaintiff had contracted with the defendant to be its agent to sell its cars. In reliance on the oral promises of the defendant's manager, the plaintiff spent a considerable sum in preparing for the performance of the contract. In addition he put in an order for more cars than was the usual practice. After shipping only a few cars to the plaintiff, the defendant repudiated the contract, and the plaintiff sued for damages.

[14] "It cannot well be assumed that the court intended that the outlay was to be recovered in addition to profits. If the profits were to be taken as the difference between the total sales during the period of the contract and the purchase price of the automobiles to be sold with these expenses added, the case would be different. If this probable net operating income was what was meant by the court, the dictum is not contrary to the general rule." Annot. 17 A.L.R.2d 1300, 1319 (1951).

[15] If the distributor relies on the fraud theory, he must prove not only that he relied on the representations of the manufacturer to his detriment, but also that at the time the representations were made, the state of mind of the manufacturer was such that he never intended to perform the contract. Rudsill v. Whitner, 146 N.C. 403, 59 S.E. 995 (1907).

[16] In the use of the quasi-contract theory, the distributor must show he performed services or expended money upon the express or implied request of the manufacturer. In such a case, the law will imply a promise on the part of the manufacturer to pay for this benefit, and in this way prevent unjust enrichment. Thompson v. Hunter's Ex'r, 269 S.W.2d 266 (Ky. 1954); Roper v. Clanton, 258 S.W.2d 283 (Mo. 1953).