IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA613/2021
[2023] NZCA 427

BETWEEN	TUARIKI JOHN EDWARD DELAMERE Appellant
AND	YINGHENG LIU Respondent

Hearing:	22 August 2022
Court:	Cooper P, Mallon and Wylie JJ
Counsel:	A C Beck and J M Elliott for Appellant D B Hickson for Respondent
Judgment:	6 September 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Mr Delamere must pay the respondent's costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Cooper P)

[1] The appellant, Tuariki Delamere, appeals against a judgment of the High Court finding him liable to the respondent, Yingheng Liu, for breach of contract.[1] Mr Liu sought to recover the sum of $350,000 (plus interest) that he paid to invest in TDA Botany Ltd, a company associated with Mr Delamere.

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1 *Liu v Delamere* [2021] NZHC 2445 [High Court judgment].

[2] Two judgments were delivered by Lang J. In the first, he entered judgment in favour of Mr Liu, but rejected Mr Liu's claim against TDA Immigration and Student Service Ltd (TDA Immigration), a company owned and operated by Mr Delamere. He dismissed a counterclaim and set-off advanced by Mr Delamere.[2] In the second he addressed the amounts payable by Mr Delamere for damages, interest and costs.[3] Following the second judgment, these figures were quantified respectively as $326,816.25, $75,437.62 and $56,956.00. In the result, judgment was entered for a total sum of $459,209.87.

[3] The issues raised on the appeal concern the nature and effect of the contractual arrangements between the parties, whether the Judge was right to find liability on the basis of an implied term and whether Mr Liu was entitled to relief in circumstances where he was himself allegedly in breach of contract.

Facts

[4] Mr Beck, for Mr Delamere, accepted the summary of the facts at the outset of the High Court judgment, on which we base the following account. The Judge recorded that Mr Liu is a Chinese national who attended secondary school in Auckland before graduating from Massey University in 2006. Returning to China he became the general manager of a company owned by his parents, which manufactures railway signals. He returned to New Zealand in 2010, and, having become interested in obtaining New Zealand residency, contacted Mr Delamere to assist him to that end.[4]

[5] As noted, Mr Delamere owns and operates TDA Immigration. At one time he was the Minister of Immigration, and he has expertise in immigration matters. In August 2012, Mr Delamere and TDA Immigration agreed to assist Mr Liu to obtain permanent residency in New Zealand. It was proposed that be achieved using a fast-track immigration procedure known as "Business (Entrepreneur Plus)". This required Mr Liu to invest at least $500,000 in a business to be operated in

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2 High Court judgment, above n 1.
3 *Liu v Delamere* [2021] NZHC 3348 [High Court quantum judgment].
4 High Court judgment, above n 1, at [2]–[4].

New Zealand. The business had to employ at least three New Zealand citizens or permanent residents on a full-time basis for at least two years.[5]

[6] The plan was for Mr Liu to satisfy these requirements by acquiring 30 per cent of the shares in a company that would be formed to operate a branch of Mr Delamere's business and situated in Botany. Mr Delamere would hold the balance of the shares. The company would have three directors: Mr Liu, Mr Delamere, and his son, Jean-Paul Delamere. It was also agreed that Mr Liu would use his contacts in China to find potential clients who the company could assist to obtain New Zealand residency. Mr Liu would be paid a commission if the company was engaged to act for persons who he sourced.[6]

[7] Three written agreements prepared by Mr Delamere were signed recording these arrangements on 24 August 2012. At that time TDA Botany had not been incorporated. Mr Liu paid the sum of $500,000 into the bank account of another company owned by Mr Delamere, TDA Immigration Mount Albert Ltd (TDA Mt Albert). That company had been operating for about a year and had several employees. TDA Mt Albert subsequently changed its name to TDA Botany and opened another office in Botany. The Judge found that TDA Botany thereafter assumed responsibility for paying the wages of two of the existing employees of TDA Immigration.[7]

[8] It was intended that of the $500,000 deposited into TDA Botany's bank account, $150,000 would be used as working capital. The balance of $350,000 was placed on term deposit to meet the future needs of the company as agreed by the directors. Mr Liu had the right to veto any proposed use of the money with which he disagreed. Under the agreed arrangements he was to be the sole signatory on the term deposit account and funds could not be removed from the account without his specific agreement.[8]

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5 At [4]–[5].
6 At [6]–[7].
7 At [8]–[9].
8 At [10].

[9] Once Mr Liu obtained permanent residency he had the right to transfer his shares in TDA Botany back to Mr Delamere in return for repayment of the funds held on term deposit. But the agreement did not prescribe what was to happen if his application for permanent residency was declined, as in fact occurred. Immigration New Zealand was not convinced that Mr Liu had committed the funds held on term deposit for use in TDA Botany's business. Further, it considered that TDA Botany had effectively retained the services of two existing employees, and had not created the three new employment positions required in accordance with the Entrepreneur Plus scheme.[9] With Mr Delamere's assistance, Mr Liu appealed unsuccessfully to the Immigration and Protection Tribunal. He was subsequently denied leave to appeal by the High Court.[10]

[10] Mr Liu then asked Mr Delamere to repay the funds held on term deposit, but discovered that most of the money had been transferred to a current account used to meet TDA Botany's operating expenses.[11] Mr Delamere had instructed the bank to transfer the funds because, contrary to the agreement, Mr Liu was not in fact the sole signatory on the term deposit account. Both Mr Delamere and his son had the ability to give the bank instructions about the use of the money on term deposit.[12]

[11] This litigation followed.

The claim in the High Court

[12] Although there were initially other causes of action advanced, by the end of the trial the only remaining claim was based on breach of contract. Mr Liu claimed against both Mr Delamere and TDA Immigration that they breached express contractual terms by failing to ensure Mr Liu was the sole signatory on the term deposit account, and by directing the bank to transfer funds out of the term deposit account into TDA Botany's current account. Mr Liu also claimed the defendants breached an

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9 At [11]–[12].
10 *Liu v Ministry of Business, Innovation & Employment* [2014] NZHC 3074.
11 The Judge found that approximately $80,000 remained in the term deposit: High Court judgment, above n 1, at [13].
12 At [13].

implied term by failing to return the funds held in the term deposit account to him after his application for residency was declined.[13]

[13] In response, the defendants argued the parties had entered into a joint venture under which Mr Liu had assumed an obligation to source clients in China who would engage Mr Delamere and his companies to assist them in obtaining New Zealand residency. Because he failed to introduce any clients Mr Liu breached his obligations under the joint venture arrangement. They sought to recover expenditure that TDA Immigration incurred in meeting TDA Botany's operating costs during the currency of the joint venture.[14]

[14] The Judge identified six issues he considered it necessary to decide.[15] The first was the nature of the contractual arrangements entered into on 24 August 2012, which he referred to as the immigration services agreement, the term deposit agreement and the client sourcing agreement.[16] The Judge rejected an argument advanced by Mr Beck on the basis of evidence given by Mr Delamere that the three agreements did not represent the entire agreement of the parties and that there were matters not reduced to writing which had nevertheless been orally agreed.[17] Those matters allegedly included agreements that Mr Liu had agreed to attract at least nine business clients per year, and that Mr Liu would work full time on the business of TDA Botany.

[15] In rejecting these claims, the Judge said:

> [27] Several factors persuade me that these issues were not orally agreed terms of the agreement between the parties. First and foremost, Mr Delamere did not include them in the Client Sourcing agreement. If they were fundamental, or even important, to his decision to enter into the arrangement one would expect him to include them in the written agreement. Secondly, the statement of defence does not allege that the arrangement was partly written and partly oral. Rather, it responds to several of Mr Liu's allegations by stating that Mr Delamere "relies on the full terms" of the three written agreements and that the agreements "must be construed in their entirety." Thirdly, Mr Beck did not put these issues to Mr Liu in cross-examination as having been agreed between the parties orally. Fourthly, Mr Delamere never raised any concerns about Mr Liu's apparent non-compliance with these

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13 At [14].
14 At [15].
15 At [16].
16 The parties had described what the Judge referred to as the client sourcing agreement as the "Chinese Sourcing Agreement". To avoid confusion, we use the term adopted by the Judge.
17 At [25]–[28].

> obligations in any of the email correspondence that took place after the agreement was signed. If they formed part of the agreed terms of the contractual arrangement one would expect Mr Delamere to have voiced concern when he became aware Mr Liu was not complying with them.

[16] The next issue was whether the funds had been transferred out of the term deposit account in breach of an express term of the term deposit agreement. On seven separate occasions between 26 August 2013 and 12 January 2015 funds had been transferred out of the term deposit account and into the current account on the basis of instructions given by Mr Delamere to his accountant. Mr Liu's agreement was not sought. Mr Delamere said that Mr Liu must have known the funds were needed and being used to meet operating expenses and that TDA Botany needed to continue trading if Mr Liu's application for residency was to be successful.[18]

[17] The Judge rejected this defence, noting that TDA Botany had business income from New Zealand based clients, Mr Liu was not provided with copies of the company's financial statements, and the term deposit agreement clearly required Mr Liu's permission to be sought and obtained. If Mr Delamere had told Mr Liu that the funds were needed for operating expenses, Mr Liu could then have decided what he wanted to do, including whether he wanted to jeopardise the chances of his residency application succeeding by not agreeing to the funds being withdrawn.[19]

[18] The Judge also rejected an argument that Mr Delamere's compliance with his obligations under the term deposit agreement was contingent on Mr Liu meeting his obligations under the client sourcing agreement. Mr Beck argued that the claim could not succeed because the law would not permit a party in breach of contractual obligations under one agreement to enforce obligations under another.[20] The Judge held that the two agreements were not interdependent:

> [37] … The Term Deposit agreement prescribed the terms on which the sum of $350,000 would be held. It made no mention of the Client Sourcing agreement. Similarly, the Client Sourcing agreement made no mention of the Term Deposit agreement. Although the two agreements had their genesis in the same factual matrix they were independent of each other and performed different functions. The obligations imposed on one party by one agreement

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18 At [29]–[30].
19 At [31]–[34].
20 At [36].

> did not depend on the other party performing the obligations imposed by another agreement.

[19] The Judge also rejected a claim that the arrangements overall constituted a joint venture. While he accepted there was a link between the three agreements arising from the fact that Mr Delamere and TDA Immigration were endeavouring to assist Mr Liu to obtain permanent New Zealand residency, he noted the agreements drafted by Mr Delamere distinguished between the participants: while Mr Liu was a party to all three, Mr Delamere and TDA Immigration were only parties to the term deposit and immigration services agreements and TDA Botany was only a party to the client sourcing agreement. It was only Mr Liu and TDA Botany who were to be involved in sourcing clients from China, they alone were subject to the obligations under the client sourcing agreement, and only TDA Botany would suffer loss in the event of a breach of Mr Liu's obligations under that agreement. Each agreement had a different function.[21]

[20] The Judge then dealt with an agency issue. Mr Liu's claim included an allegation that by procuring the transfer of the funds Mr Delamere had breached obligations imposed on him under the term deposit agreement in his capacity as TDA Immigration's agent. The Judge did not accept that was so; rather, Mr Delamere had acted as the agent of TDA Botany. However, there was no dispute that Mr Delamere had caused the transfers to take place and in doing so he had breached his own personal obligations under the term deposit agreement by failing to obtain Mr Liu's prior consent.[22]

[21] The Judge then turned to consider whether the defendants should be required to repay the $350,000 to Mr Liu. The Judge pointed out that the normal contractual relief of putting the plaintiff in the position he would have been in had the breach not occurred would result in the money being returned to the term deposit account. That would not assist Mr Liu, unless there was a further order requiring the money to be paid to him. At the trial, the Judge allowed Mr Liu to amend his pleading to allege an

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21 At [39]–[41].
22 At [43], [45] and [47]–[48].

implied term that the funds held in the term deposit account would be returned to him if his application for permanent residence failed.[23]

[22] Applying *Bathurst Resources Ltd v L&M Coal Holdings Ltd*,[24] the Judge concluded such a term should be implied.[25] He reasoned that it was the intention of the parties that Mr Liu should be able to withdraw from TDA Botany once the outcome of his permanent residency application was known. Under the term deposit agreement, if successful he could seek to be repaid, and transfer his shareholding to Mr Delamere. Alternatively, he could elect to retain his shares and the money in the term deposit account would be paid to Mr Delamere.[26]

[23] The Judge thought the implied term would be reasonable and equitable as it mirrored the consequences that would have followed if Mr Liu's application had been successful. Further, implication of the term was necessary to give the term deposit agreement business efficacy: without it, the agreement failed to provide for one of the two possible outcomes of the residency application; and the term was obvious, capable of clear expression and did not contradict any express term of the agreement. He implied the term accordingly.[27]

The appeal

[24] Mr Beck's argument on the appeal was that the Judge:

(a) wrongly concluded that there were three independent contracts;

(b) failed to take into account breaches of contract by Mr Liu which meant he was not in a position to demand performance by Mr Delamere. This was to allow Mr Liu to benefit from his own wrong;

(c) wrongly found Mr Delamere was personally liable for the transfer of funds which was carried out by TDA Botany;

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23 At [50]–[51].
24 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.
25 High Court judgment, above n 1, at [58].
26 At [55]–[56].
27 At [57]–[58].

(d) wrongly rejected the argument that the parties were engaged in a joint venture, in which Mr Liu owed fiduciary duties to Mr Delamere and TDA Botany, and which he breached by failing to devote himself to his obligations under the venture full time, instead furthering his own interests by devoting most of his time to the family business in China and allowing his own personal interests to conflict with the interests of the joint venture; and

(e) wrongly concluded that a term should be implied in the term deposit agreement. The implied term had not been consistently formulated by the Judge, and was not in fact capable of clear expression. It could not reasonably be concluded that the parties must have intended such a term: it was far from obvious. Further it did not recognise that Mr Delamere was not the person who held the funds. The funds were in fact held by TDA Botany, which was not a party to the proceeding. The Judge had failed to confront the fact that to imply a term the test is one "of strict necessity, a high hurdle to overcome".[28]

[25] Mr Beck was also critical of the Judge's conclusion that the quantum of damages was equal to the sum of $350,000 initially paid into the term deposit account of TDA Botany. He submitted the Judge should have asked what the position would have been if there had been no breach of contract: he contended in that case Mr Liu might have insisted that nothing be paid out of the term deposit and the company be allowed to fail thereby removing any chance of his residency being granted. Alternatively, he might have allowed payments to be made to give his application a chance of succeeding. The reasoning adopted by the Judge did not factor in the possibility that had Mr Delamere asked Mr Liu to agree to some of the deposit money being used to meet operating expenses he might have agreed that should occur, so as not to jeopardise his application for residency if the company could not continue to trade.

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[28] Referring to *Bathurst Resources*, above n 24, at [116(a)].

[26] The Judge had, in Mr Beck's submission, failed to consider the probabilities. While Mr Delamere had effectively made Mr Liu's decision for him, that did not mean that Mr Delamere should be liable for 100 per cent of the loss. The Judge had failed to assess the damages on a proper basis, which would have involved assessing the impact of Mr Liu's lost opportunity to decide whether the money should have been paid towards operating costs.

Analysis

[27] We accept that the three agreements that Mr Delamere drafted and Mr Liu signed were interrelated. All were part of an overall arrangement by which it was intended Mr Liu would be able to achieve the status of permanent New Zealand resident. Although that endeavour was ultimately not successful, the three agreements were designed to show a plausible basis on which it could be claimed Mr Liu had met the investment requirements for residency. He would acquire a minority ownership in a New Zealand company (TDA Botany), employing staff for an effective down payment of $150,000. The company would with his assistance seek to obtain business from persons in China intending to seek New Zealand residency. This involved him, pursuant to the client sourcing agreement, organising seminars in China utilising his personal networks. TDA Botany would arrange for appropriate speakers to present at the seminars organised by Mr Liu and assumed the role of preparing and submitting applications, making submissions and any necessary communications with the relevant immigration authorities.

[28] Under the term deposit agreement, Mr Liu had two options if his residency application succeeded. First, he could sell his shares back to TDA Botany for the amount of the term deposit of $350,000, and 30 per cent of "the remaining net profit not yet paid out" (in accordance with the immigration services agreement, which entitled Mr Liu to 30 per cent of TDA Botany's net profits). In the alternative, if he wished to retain his shareholding, he agreed to pay the $350,000 to Mr Delamere.

[29] It is apparent that these arrangements were such that, at Mr Liu's election, the relationship could be brought to an end once he had achieved permanent residence status. In that circumstance, he would cease to have any interest in the company. His

participation in the arrangements would have resulted in him achieving permanent residence for a cost of $150,000, less his salary, director's fee and 30 per cent of the profits made by TDA Botany from intending migrants whether from China or elsewhere. His ability to terminate the arrangements is consistent with the fact that the client sourcing agreement did not make any specific requirements as to the level of business he was obliged to generate for the company.

[30] The fact that the three agreements were part of an overall arrangement does not mean that their provisions were interdependent in the sense argued for by Mr Beck. Had that been the intention it seems likely that there would have been provisions to that effect in each agreement, and the provisions of each would have been cross-referenced and made contingent on the performance of each. Alternatively, the obligations could have been set out in one agreement. But here, the arrangements could be implemented by the separate performance of each agreement.

[31] We cannot accept the characterisation of the arrangements as constituting a joint venture, in the sense that term is commonly understood, of an association entered into by the parties for the purpose of advancing a common endeavour with a view to mutual profit.[29] We see the purpose of the arrangement as being achievement of Mr Liu's desired immigration status. It is clear that the overall objective was to secure permanent residency for Mr Liu, and to do that it was necessary to show that he had acquired an interest in a New Zealand company carrying on business and employing staff. Profitability was ultimately secondary to securing the successful immigration of Mr Liu and his family to New Zealand.

[32] There were different parties to the agreements. The immigration services and term deposit agreements were between Mr Delamere, Mr Liu and TDA Immigration, but the parties to the client sourcing agreement were Mr Liu and TDA Botany. If, as is now alleged, Mr Liu did not meet his obligations under the client sourcing agreement, TDA Botany, to which those obligations were owed, could have maintained a claim against him. But it was not a party to the present proceeding.

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[29] *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10.

[33] The fact that the $350,000 was placed in a term deposit and was only to be in place for a period of two years is also contrary to the idea that there was a joint venture. This was specifically provided at cl 2(b)(i) of the term deposit agreement which recorded that the parties agreed that the "$350,000 will be placed on term deposit for 2 years". Whatever the nature of the relationship between the parties, the obligations assumed were contractual in nature and we see no room for any suggestion that they had a fiduciary nature.

[34] The term deposit agreement which the Judge held had been breached was specific in the obligations it expressed concerning the use and management of the $350,000 deposit paid by Mr Liu. Clause 3 of the agreement included the following provisions:

> **Use and management of the $350,000 on deposit**
>
> 3. All parties agree that in respect of the $350,000 referred to in 2(b)(i) above:
>
> a. These funds cannot be withdrawn from the deposit account without the specific agreement of Yingheng Liu;
>
> b. The signatory to this account shall be Yingheng Liu solely;
>
> c. All parties agree that interest from the $350,000 deposit shall be paid to Yingheng Liu as income.
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> d. Should Yingheng Liu become physically or mentally incapacitated so that he is unable to competently fulfil his role and duties as a director then the Board of Directors of [TDA Botany] by majority vote may authorise another person to be a signatory to the said account;
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> …
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> f. The funds may be used for whatever purpose as agreed by the Board of Directors of [TDA Botany], subject to Yingheng Liu having a veto vote on any decision affecting those funds.

[35] This money could not be used for any purpose without Mr Liu's agreement. The arrangements contemplated that any necessary contribution by Mr Liu to the

day-to-day operating costs of TDA Botany would be met out of the $150,000 which he had contributed in accordance with cl 4, which was in the following terms:

> **Use and management of the $150,000 on deposit**
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> 4. All parties agree that in respect of the $150,000 referred to in 2(b)(ii) above:
>
> a. These funds shall be deposited into the [TDA Botany] operating account;
>
> b. The management and use of these funds will be as determined and agreed by the Board of Directors;
>
> c. These funds shall be used to fund the day to day operations of [TDA Botany] and overseas venture opportunities;
>
> d. These funds will be used to fund the establishment of [TDA Botany] offices

[36] Preserved intact, as the term deposit agreement provided (unless Mr Liu agreed to its use), once Mr Liu had been granted permanent residency the $350,000 deposit could be used for the purposes set out in cls 5 and 6 of the agreement: either to fund the purchase of his shares in TDA Botany by the company, or alternatively to be paid to Mr Delamere, if Mr Liu wished to retain his shareholding.

[37] The use of any part of the $350,000 deposit without Mr Liu's consent was a breach of the term deposit agreement. We reject Mr Beck's argument that Mr Delamere should not be held responsible for the transfer. It was Mr Delamere who procured the transfer of the funds from the term deposit account in the name of TDA Botany to its current account. In doing so he acted as the agent of TDA Botany. He had no right to do so. He was a director and shareholder in the company and could not as its agent put the company in the position of breaching the provisions of the term deposit agreement. While the Judge was clearly correct to hold that Mr Delamere did not act (as alleged in the statement of claim) as the agent of TDA Immigration in arranging for the transfer of the funds, Mr Delamere was himself a party to the agreement, and personally bound by its terms. The Judge's conclusion on that issue is plainly right.

[38] We turn next to the challenge to the Judge's conclusion there was an implied term in the term deposit agreement to the effect that if Mr Liu failed in his application

for permanent residency, he would be entitled to be repaid the balance of the funds held in the term deposit account in return for transferring his shares in the company back to Mr Delamere. The Judge also held that the implied term would extend to allowing Mr Liu the option of retaining the shares on the basis that the balance of the funds held in the term deposit account would be paid to Mr Delamere.

[39] Mr Beck's principal contention was that it could not be said the implied term was one which the parties must have intended form part of their contract: in other words, the "strict necessity" test for the implication of a term had not been met.[30] Additional points made were that it could not be said that the parties must obviously have intended such a term to apply, and the term which the Judge held should be implied was not capable of clear expression. He argued that the failure of the contract to deal with the situation that would arise if Mr Liu's application for permanent residency was unsuccessful was simply that the parties chose not to deal with that situation in the term deposit agreement.

[40] The term deposit agreement provided only for what was to occur once Mr Liu's application for permanent residency had been granted. The relevant context of the term deposit agreement for present purposes includes the immigration services agreement and the client sourcing agreement. It was in the context of all three agreements that Mr Liu made his investment. It is very clear that he would have made no such investment but for his desire to progress his permanent residency application. It is equally clear that if the application were to fail there would have been no reason or justification for a continued involvement in the arrangements on his part.

[41] The term deposit agreement clearly contemplated that even if his application were successful, he could decide to have no further involvement in TDA Botany. In that case the $350,000 deposit would be returned to him for his shareholding in the company. If he elected to retain his shareholding the $350,000 would go to Mr Delamere. In the result his application was unsuccessful: could it be that the parties contemplated in these circumstances that he would maintain his interest and involvement in TDA Botany?

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30 Referring to *Bathurst Resources*, above n 24, at [116(a)].

[42] We think the answer to that question must be no. We consider that to give the arrangements business efficacy it was necessary to imply a term enabling the return to the $350,000 to Mr Liu in those circumstances. We think the parties must have intended that if the permanent residency application failed Mr Liu would be able to surrender his shares for the return of the deposit, just as he could if it were successful. To hold otherwise would be to construe the agreement as requiring him to maintain his investment in a company when the sole purpose of his investment had disappeared, while at the same time allowing him to withdraw when the objective had been achieved. Not only would that be unreasonable and inequitable, but it would also deny the agreement business efficacy. We consider the Judge was right to conclude that a term should be implied.

[43] Mr Beck was critical of the fact that the implied term was worded by the Judge in different ways. At one stage the Judge said the term was "to the effect that the funds held in the term deposit account were to be returned to [Mr Liu] if he was not granted permanent residency".[31] Later, the Judge referred to an implied term that:

> [58] … if Mr Liu failed in his application for permanent residency, he would be entitled to be repaid the balance of the funds held in the term deposit account in return for transferring his shares in the company back to Mr Delamere. Alternatively, he could retain the shares and the balance of the funds held in the term deposit account would be paid to Mr Delamere.

In the quantum judgment the Judge said that subject to adjustments he would enter judgment for "the amount Mr Delamere ought to have arranged for TDA Botany to repay to Mr Liu once the efforts to obtain permanent residency had failed".[32]

[44] We do not consider these differences in wording have the significance that Mr Beck sought to attach to them. We doubt that it was appropriate to hold that there was an implied term in the contract entitling Mr Liu to maintain his investment in TDA Botany if his application for permanent residency failed. We do not consider such a term would be necessary to give effect to the existing agreement, or give it business efficacy. But otherwise, an implied term that the funds held in the term deposit account would be returned to Mr Liu with all accrued interest if his application

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31 High Court judgment, above n 1, at [51].
32 High Court quantum judgment, above n 3, at [7].

for permanent resident status was not granted, was appropriate.[33] This is effectively what the Judge held, despite minor differences in the wording he adopted. We do not consider his approach was wrong.

[45] Another issue raised by Mr Beck was that the Judge was wrong to hold there was an implied term because TDA Botany was not itself a party to the term deposit agreement. We do not agree. The term deposit agreement recorded at the outset that Mr Liu had invested the sum of $500,000 in TDA Botany, and then set out the agreement of Mr Delamere, Mr Liu and TDA Immigration as to how the money was to be used. TDA Botany was not a party to the agreement, but it did not need to be. Given it was the term deposit agreement that dealt with the use of the money, that was the appropriate agreement in which to imply the term.

[46] This leaves for consideration Mr Beck's criticism of the Judge's approach to the assessment of damages. It was based on what the Judge said in the following paragraph:[34]

> [34] Mr Delamere did not have to take this step. At any stage he could have told Mr Liu that TDA Botany needed to use the funds held in the term deposit account to meet its operating expenses. He could also have told Mr Liu the company could not continue trading unless this occurred. Had Mr Delamere advised Mr Liu of these facts Mr Liu would have been required to decide whether to agree to the funds held in the term deposit account being used to meet TDA Botany's operating expenses. If Mr Liu refused to allow this to occur he would obviously have jeopardised his prospects of obtaining permanent residency. Ultimately, however, this was a decision the Term Deposit agreement required Mr Liu, and not Mr Delamere, to make. In making the decision for him Mr Delamere deprived Mr Liu of the ability to preserve the funds held on term deposit even though this would in all probability have cost him the opportunity to obtain permanent residency.

[47] Mr Beck claimed this was to be seen as a finding of lost opportunity, which the Court later chose to ignore when it came to calculating damages. He submitted that in cases of lost opportunity a breach of contract does not give rise to liability for the whole of the loss. Rather, damages have to be assessed on the basis of the balance of probabilities, taking into account what would have happened had Mr Delamere told Mr Liu that it was necessary for money in the term deposit account to be used to fund

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33 The term deposit agreement provided that interest on the $350,000 deposit would be paid to Mr Liu as income.

34 High Court judgment, above n 1.

the ongoing activities of TDA Botany. The Judge had wrongly failed to analyse the quantum of the claim on this basis. Mr Beck relied for this submission on *Benton v Miller & Poulgrain (a firm)*,[35] a case involving allegations of negligence against a solicitor, and the discussion in *Burrows, Finn and Todd on the Law of Contract in New Zealand.*[36]

[48] In *Benton* it was alleged that if the solicitor, Mr Poulgrain, had given appropriate advice in relation to relationship property claim, the plaintiff, Mr Benton, and his wife would have entered into an agreement declaring a property to be his separate property.[37] But under cross-examination, he appeared uncertain that his wife would have signed such an agreement. In discussing the issue of the standard of proof, Glazebrook and William Young JJ observed:[38]

> [47] In cases which turn on how a plaintiff would have acted in the absence of a breach of duty, the all or nothing approach is usually (although not always: see *Davies v Taylor*) applicable. So if the plaintiff shows that it is more likely than not that he or she would have acted in a particular way, the Court acts on the assumption that this is the way the plaintiff would have acted. If this is not established as being more likely than not, then the Court acts on the basis that the plaintiff would not have acted in that particular way. This approach can be justified in various ways depending on the context. …
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> …
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> These rationales are applicable in cases where the plaintiff has not established on the balance of probabilities that he would have acted differently in the absence of the defendant's breach of duty. They are not of such obvious cogency in cases in which the plaintiff has shown, but only by a narrow margin, that he or she would have acted differently but then seeks full damages on an all or nothing basis. There is no doubt, however, that the all or nothing approach is usually applied in both situations: …

[49] As this passage shows, the proper approach turns on the state of the evidence. The discussion in *Benton* was about what the plaintiff would have done if properly advised, which is not this case. Here the issue is as to the effect of a breach of the clear contractual term requiring the deposit to be retained intact. Mr Beck was forced to rely on the Judge's observation about the decision Mr Liu would have had to make

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35 *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA).

36 Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [21.2.2(f)].

37 *Benton*, above n 35, at [15], citing *Davies v Taylor* [1974] AC 207 (HL).

38 At [47].

had Mr Delamere told him the term deposit money was needed. But he was unable to point to any factual finding establishing that Mr Liu would have approved the expenditure of the money (or some of it) if asked prior to its use. The Judge plainly made no such finding. We heard no argument that the Judge should have found, on the evidence, that Mr Liu would have been prepared to agree to the expenditure of the money.

[50] Had the Judge made such a finding, it would have been contrary to Mr Liu's evidence that, if his application for permanent residency was declined, the money in the term deposit would be returned to him so that his effective loss would be limited to the $150,000 allocated to working capital. Mr Liu stated that his understanding was that $150,000 was all that he was ever risking as part of the arrangements with Mr Delamere.

[51] We see the extract of the judgment we have set out above at [46] as simply underlining the importance of the contractual term that was breached. Absent more factual findings, the damages sustained were the loss of the substantial portion of the term deposit money wrongly taken from the account. In these circumstances the factual basis for Mr Delamere's argument has not been established and we reject it. There is nothing in the discussion in *Burrows, Finn and Todd* which suggests a different outcome. The proper analogy is not to a lost opportunity, but rather to money wrongly taken in breach of a contractual term.

[52] For these reasons we are satisfied that the appeal cannot succeed.

Result

[53] The appeal is dismissed.

[54] Mr Delamere must pay the respondent's costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Upper Hutt Law Ltd, Wellington for Appellant
PCW Law Ltd, Auckland for Respondent