IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA52/2022
[2023] NZCA 385

	BETWEEN	KINGSBEER TRANSPORT LIMITED Appellant
	AND	MARTIN-BROWER NEW ZEALAND Respondent

Hearing:	2–3 November 2022
Court:	Courtney, Venning and Mander JJ
Counsel:	D M Fraundorfer, A G Needham and S A Stretton for Appellant S S Cook, M J Cassaidy and OJD Brown for Respondent
Judgment:	23 August 2023 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The case is remitted to the High Court for determination of quantum.

C The respondent must pay the appellant costs for a standard appeal on a band A basis, with usual disbursements. There is certification for second counsel.

REASONS OF THE COURT

(Given by Courtney J)

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Introduction

[1] In 2017, Tony and Nicky Kingsbeer were operating a small trucking company, Kingsbeer Transport Ltd (KTL), based in Tauranga. One of its clients was Martin-Brower New Zealand (MBNZ), which is part of a global logistics company that serviced McDonalds restaurants in New Zealand. KTL had been responsible for the runs from Auckland to Gisborne and Whakatāne since 2011.[1] Since 2016, these runs had been governed by an individual contractor agreement (the 2016 ICA).

[1] KTL was incorporated in 2014. The Kingsbeers contracted to MBNZ and KTL as a partnership until 2016, when KTL took over the runs. For convenience, we refer to the relevant entity as KTL for the entire period except where it is necessary to differentiate.

Another contractor, Hall's Group Ltd (Hall's), had the contract for runs to Rotorua and the Bay of Plenty. In 2017 MBNZ decided not to renew that contract. Hall's was to cease its Rotorua and Bay of Plenty runs on 28 January 2018. MBNZ had to ensure continuity of service to McDonalds and KTL was well-regarded as a reliable contractor. MBNZ proposed that KTL take on additional runs to Rotorua and the Bay of Plenty (the Additional BOP Runs), with the first delivery on 29 January 2018.

[2] KTL was keen to expand its business with MBNZ. But taking on the Additional BOP Runs involved a significant financial commitment. KTL would need to either buy or lease a truck and two trailers. Any financier or lessor would require certainty as to KTL's contract with MBNZ. Moreover, the necessary modifications would take several weeks from the order being placed. That would mean renting temporary equipment, at higher rate (the short-term costs). The viability of the proposal depended on KTL being able to secure the leased equipment as quickly as possible, in order to minimise the short-term costs.

[3] KTL was dealing with MBNZ's New Zealand Distributions Manager, Andrew Millin. It says that MBNZ, through Mr Millin, agreed to provide a five-year contract for the Additional BOP Runs and to provide a written contract recording the agreement within either six weeks, or a reasonable period, so that it could arrange finance or a long-term lease for the equipment as quickly as possible. KTL also says that MBNZ agreed to meet the short-term costs until the leased equipment was available. There is no written record of the agreement and MBNZ does not accept that any binding agreement was reached.

[4] Mr Millin was made redundant from MBNZ on 15 January 2018. KTL began the Additional BOP Runs on 29 January 2018, using rental equipment. Despite requests made to Mr Millin's successor, no written contract was forthcoming. When KTL raised the question of the short-term costs, MBNZ responded that, in the absence of a written agreement, it had no obligation to meet those costs, though later it did agree to meet some of the costs. By 22 June 2018 KTL had cash-flow problems. MBNZ had finally provided a draft contract for a five-year term. However, the promised payment for some of the short-term costs had not been made. KTL advised MBNZ that it would cease undertaking the Additional BOP Runs on 30 June 2018.

It continued the Gisborne and Whakatāne runs until 3 September 2018, when it gave 12-weeks notice to terminate those as well. KTL was unable to continue operating. It returned the rental equipment, sold its remaining assets and ceased trading.

[5] KTL brought a proceeding against MBNZ asserting a partly-written, partly-oral contract for a five-year term covering the Additional BOP Runs and for payment of the short-term costs. It alleged: (1) breach of the contract or (2) repudiation of the contract or (3) that MBNZ was estopped from denying the existence of the contract or (4) breach of a collateral agreement to pay the short-term costs or (5) misleading and deceptive conduct in breach of the Fair Trading Act 1986 (FTA) and (6) if no agreement was found to exist, then quantum meruit.

[6] MBNZ responded that, if the asserted agreement was found to exist, KTL had affirmed it. Further, it had failed to mitigate its loss. It counterclaimed for breach of contract and unjust enrichment.

[7] Jagose J found that the parties had not entered into an agreement on the terms alleged.[2] Rather, KTL had begun the Additional BOP Runs for MBNZ in the expectation, based on its previous experience with MBNZ, that a new contract would be forthcoming, that it would be paid at its specified rates and in the hope that the short-term expenses would be manageable pending the implementation of the contract.[3] As a result of that finding, KTL's causes of action for breach of contract and for repudiation of the contract both failed.[4]

[8] The Judge also held that MBNZ had not represented that it would enter into a contract for five years, with the result that there was no unconscionable conduct to support the estoppel cause of action, nor any misleading and deceptive conduct in breach of the FTA.[5] The Judge also rejected the assertion of a collateral contract under which MBNZ would pay KTL's short-term expenses pending entry into a formal contract.[6]

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2 *Kingsbeer Transport Ltd v Martin-Brower New Zealand* [2021] NZHC 3494 [decision under appeal] at [68].
3 At [78].
4 At [82].
5 At [85]–[88].
6 At [90].

[9] Finally, the claim in quantum meruit failed save in respect of one particular invoice.[7] In a supplementary judgment the Judge found for KTL in respect of that, giving judgment against MBNZ for $7,876.[8] There is no appeal against the supplementary judgment.

[10] KTL challenges all of the Judge's findings. It says that the Judge erred in finding that there was no agreement of the kind asserted by KTL and that no representations were made as to the five-year term or payment of the short-term costs. The specific complaints are that the Judge:

(a) erred in finding that Mr Millin lacked the authority, either to bind MBNZ in relation to the five-year term and payment of the short-term costs, or to make representations as to either; and

(b) failed to take all the evidence into account.

[11] MBNZ filed a notice seeking to support the judgment on other grounds, namely that:

(a) Any binding five-year contract was conditional upon the parties' agreement to the terms and conditions of a written contract for the Additional BOP Runs.

(b) Any binding five-year contract was conditional upon KTL satisfying certain competency requirements, which it did not do.

(c) MBNZ had complied with the asserted essential terms by: (1) providing draft written contracts on 14 and 19 June 2018; and (2) paying the claimed short-term costs on invoice 131 and remaining prepared to negotiate on the remaining amounts claimed.

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7 At [102].

8 The Judge indicated at [99]–[102] in the decision under appeal that the parties should seek to agree in relation to the invoice and, in the absence of agreement, he would issue a supplementary judgment, which he subsequently did: *Kingsbeer Transport Ltd v Martin-Brower New Zealand* [2022] NZHC 2931.

(d) All iterations of a letter of intent (LOI) provided to KTL were silent as to any obligation for MBNZ to meet the short-term costs and there was therefore no binding agreement to meet such costs.

(e) If there was a binding five-year agreement between the parties, KTL affirmed the agreement by performing the Additional BOP Runs for the period up to 30 June 2018, such that it was not entitled to cancel the agreement, in accordance with s 38 of the Contract and Commercial Law Act 2017 (CCLA).

(f) If there was a binding five-year agreement between the parties, it was terminable by either party on three months' notice.

(g) Alternatively, KTL failed to take reasonable steps to mitigate its losses upon termination of the Additional BOP Runs by not continuing to trade and failing to account for the value of the equipment that would have been used to carry out the Additional BOP Runs.

Approach on appeal

[12] In finding that the parties had not entered into an agreement for five years or for payment of the short-terms costs, the Judge rejected evidence given by the Kingsbeers and by Mr Millin. He held that the Kingsbeers, although not dishonest, had rationalised KTL's circumstances with the benefit of hindsight.[9] He considered that some of Mr Millin's evidence was inconsistent with the contemporaneous documents.[10]

[13] KTL challenges these findings. MBNZ urged caution. Mr Cook, for MBNZ, submitted that, in assessing whether there had been an error this Court must take into account the inherent advantages that the trial Judge had and exercise the "'customary' caution" before overturning them.[11]

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9 Decision under appeal, above n 2, at [77].

10 At [73].

11 Relying on *Sena v New Zealand Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [37]–[38] citing *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13]; and *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2020] 1 NZLR 145 at

[14] Where a Judge has made credibility findings, especially following a lengthy trial, those views ought to be taken into account. Where the findings of fact do not directly engage questions of credibility, however, there is no need to defer to the trial Judge's view.[12] In this case, the Judge did not make adverse credibility findings against either the Kingsbeers or Mr Millin. Although he regarded the Kingsbeers' account as the product of ex post facto rationalisation, he expressly found that they were not dishonest.[13] As for Mr Millin, the Judge referred to his evidence being illogical and confused in relation to the short-term expenses,[14] but gave no indication that he considered Mr Millin to lack credibility.

The High Court decision

KTL's claim and MBNZ's affirmative defence

[15] The Judge focussed on KTL's allegation that the various written and oral communications, between it and MBNZ, through Mr Millin, had culminated in a partly-written, partly-oral agreement containing express terms that:[15]

(a) KTL would undertake the Additional BOP Runs;

(b) the agreement would be for a term of five years;

(c) MBNZ would provide a written contract suitable to enter long-term leases for the plant and/or obtain finance on;[16]

(d) the written contract would be provided within six weeks of the commencement date; and

(e) MBNZ would pay the short-term costs.

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[58]–[59].

12 *Austin Nichols & Co Inc v Stichting Lodestar*, above n 12, at [17].

13 Decision under appeal, above n 2, at [77].

14 At [74].

15 At [52].

16 "Plant" as used in KTL's pleadings refers to rental equipment, including trucks, trailers amd forklifts.

[16] As an alternative to (d) it was said that there was an implied term that MBNZ would provide the written contract within a reasonable time from the commencement date of 29 January 2018.[17]

[17] KTL asserted that Mr Millin had either implied actual authority to offer KTL a five-year contract, with reimbursement of its short-term costs or, alternatively, that he had ostensible authority to make that offer and MBNZ was estopped from denying that fact. MBNZ denied that Mr Millin had either actual or ostensible authority, and in relation to the latter, asserted that KTL must have known that Mr Millin lacked the authority to bind it.[18]

[18] The Judge set out the evidence in some detail at the start of his decision. In considering whether a contract had been entered into, he focussed particularly on the evidence of the Kingsbeers and Mr Millin and concluded that:

> [68] Viewed objectively, I see nothing in the parties' conduct prior to KTL's commencement of the runs from which to infer their respective intentions immediately to be bound, less still to their agreement on essential terms, as pleaded. I take that commencement as the last point to determine if sufficient agreement had been reached, despite the Kingsbeers' insistence such was established earlier.

[19] The Judge identified five reasons for his conclusion (which we consider later) before adding:

> [77] Having heard the witnesses directly over a period of days, my assessment is the Kingsbeers have sought to rationalise KTL's circumstances in hindsight, and adopted immutable beliefs as to how they came to pass. I do not ascribe to the Kingsbeers any dishonesty in doing so; rather, both appear to base their comprehension of what occurred on 'mantra' — as I have noted, in relation to the three to six weeks for MBNZ's provision of the draft contract, but also for a five-year term and with payment of short-term expenses — repeated as gospel. Neither do I overlook the Kingsbeers' desire to escape the competitive stresses of their previous transport business for MBNZ's monopsony. But clearly the actual circumstances of their continuing and expanded work for MBNZ gave rise to unexpected and on-going financial and

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17 Decision under appeal, above n 2, at [52].

18 The second amended statement of defence pleaded that the plaintiff knew or ought to have known that because the draft LOI was to be signed by Cameron Sutherland (the defendant's Operations Director for Australia and New Zealand), rather than Mr Millin, that Mr Millin did not have authority to agree to a multi-year contract, to the provision of a written contract within any specific time frame or to the reimbursement of any additional costs, and/or that such matters would need to be recorded in the final of that draft [LOI] in order to be binding, and at no stage did this occur.

> personal stresses for the Kingsbeers, which may have exacerbated their rationalisations.
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> [78] Ultimately, in my assessment, KTL commenced its provision of the additional runs for MBNZ without any certainty as to the longer-term conditions for that work, in reliance on its knowledge of MBNZ's general requirements for the conduct of and payment for such work and its generally constructive experience with MBNZ since 2011 … It provided those services in the expectation it would be paid at its specified rates, as occurred, and in the hope its additional expenses would not — either in sum, or by reason of MBNZ's contribution to them — be beyond KTL's ability to bear, pending MBNZ's provision of a longer-term contract. In the end, that also is what happened, although by that time the Kingsbeers had moved from their original reliance.
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> (Footnotes omitted.)

[20] The Judge rejected the pleaded alternative implied term that MBNZ would provide a written contract suitable to enter into long-term leases and/or obtain finance on within a reasonable time on the basis that it was not capable of clear expression.[19]

[21] The Judge did not consider the question of Mr Millin's authority to bind MBNZ when discussing whether a contract had been formed. It was not until he came to deal with the issues of estoppel and the FTA that he considered this question, and did so very briefly:

> [86] For all the reasons I have expressed in relation to KTL's first cause of action, I do not find any representation by MBNZ in those terms. I add, for Mr Millin's statements to be attributed to MBNZ, MBNZ must have held him out as having authority to bind it. Nothing in his role as New Zealand distribution manager inherently carried that authority. He witnessed the Kingsbeers' execution of their 2016 contract (the copy in evidence not being executed by MBNZ at all), suggesting he lacked authority to execute it or similar for MBNZ. And the letter of intent only identified him as MBNZ's "main point of contact" for MBNZ, to clarify questions. None is sufficient to convey any sense he carried MBNZ's authority to commit MBNZ in the terms pleaded.
>
> (Footnotes omitted.)

[22] Given the failure of the first to fourth causes of action, the Judge addressed MBNZ's affirmative defence of failure to mitigate only briefly, saying just that, had he been required to consider it, he would have found that, in the circumstances, KTL's

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19 Decision under appeal, above n 2, at [79].

disposal of the means of conducting its business was as reasonable a step to take in mitigation as continuing to trade.[20]

[23] The Judge then rejected the fifth cause of action — assertion of a collateral contract for the payment of short-term costs — essentially for the same reasons as he had found that the contract alleged in the first cause of action had not been formed.[21]

[24] Finally, the Judge dismissed the quantum meruit cause of action, subject to the one invoice that was the subject of the supplementary judgment.

MBNZ's counterclaims

[25] MBNZ had contended that KTL was obliged to give 12 weeks' notice of its termination of the Additional BOP Runs. This was said to have been agreed expressly in terms of the LOI's incorporation of or reference to the ICA or on the basis of implied reasonable notice. The Judge rejected the former argument. He was not satisfied that there was any agreement that the ICA would be extended to encompass the Additional BOP Runs; there was nothing in the communications between the parties to show such agreement and, in any event, if the ICA was to be extended formally, its first or second schedules needed to be executed, which had not happened.[22]

[26] In terms of what notice was reasonable, the Judge considered that reasonable notice would be whatever was sufficient for MBNZ to substitute KTL's services within KTL's continuing rental duration, that being a period reasonable to both parties.[23] Given that MBNZ had substituted KTL's services within eight days of notice being given, he regarded the notice given by KTL as reasonable.[24]

[27] MBNZ had also counterclaimed on the alternative basis of unjust enrichment in the event of KTL succeeding on any of its first to fourth causes of action. Given

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20 At [89].
21 At [90]–[91].
22 At [105].
23 At [107].
24 At [108].

his conclusion regarding those causes of action, the Judge did not regard it as necessary to address that counterclaim.[25] There is no challenge in relation to the counterclaim.

Issue 1: Mr Millin's authority to bind MBNZ

The ground of appeal

[28] Mr Fraundorfer, for KTL, submitted that the Judge failed to apply the relevant principles and to properly assess the evidence on this issue.

[29] Judges are not required to explain their reasoning at length on every issue. However, Mr Millin's authority was clearly relevant in relation to the main issue in the case — whether an agreement had been reached — not just to the estoppel and FTA causes of action. The lack of any discussion about this aspect in connection with the first cause of action leaves us concerned that the issue of authority was not fully considered at that earlier point.

Did Mr Millin have authority to bind MBNZ?

[30] It was common ground that Mr Millin was the most senior MBNZ manager in New Zealand from 2015 until his departure on 15 January 2018. He reported to the Operations Director for Australia and New Zealand, Cameron Sutherland, who was based in Australia. There was, however, limited evidence about Mr Millin's authority.[26]

[31] MBNZ did not produce Mr Millin's employment contract. It produced only a job description for his position of "Distribution Centre Manager – New Zealand". This was framed largely in aspirational language and appears to have been prepared for general recruitment purposes rather than for identifying Mr Millin's actual responsibilities and authority. To the extent it is relevant, we note that it describes the "Pipeline Level" of the position as "Department Manager/General Manager" and the summary of the position as including being "[r]esponsible for the implementation of the operations strategy" and sitting as a "member of the Senior Leadership Team."

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[25] At [110].

[26] It appears that MBNZ first raised this issue in its second amended statement of defence and counterclaim filed on 30 October 2021, two days before the start of the trial.

[32] The only other documentary evidence produced about Mr Millin's authority was a document headed as "APPROVAL CODE MATRIX" that purported to set out the limits of Mr Millin's (and others) authority in dollar figures. However, Mr Millin said he had never seen the document while he worked for MBNZ and only saw it for the first time a few days before the hearing. The Judge properly ascribed no weight to it.

[33] Mr Millin rejected the suggestion he did not have authority to agree to KTL's short-term costs and described his role generally as follows:

> I had complete management control of the New Zealand network. My role was to ensure that the 168 McDonald's restaurants received their deliveries on time and in a safe manner. I was responsible for finding suitable contractors to carry out the work. I had authority to negotiate with the contractors, including rates and routes, and sign off on renewal contracts. [Mr Sutherland], my manager in Australia, was kept abreast of all decisions.

[34] Mr Millin also gave evidence that when MBNZ moved its contract for the Wellington region from Hall's to KAM Transport he had "negotiated all of the rates and routes without needing approval from anyone else." There was no challenge to this evidence. Nor was there any evidence that MBNZ ever cautioned Mr Millin about exceeding his authority. Nor did it take any steps to constrain Mr Millin in his dealings with other contractors or to open a direct line of communication with its other contractors, including KTL.

[35] Nevertheless, there was unchallenged evidence that a change of contractor had to be approved by MBNZ's Managing Director, Yves-Marie Brillant. It was also clear that Mr Millin could not issue a LOI without Mr Sutherland's approval. As a result, we are satisfied that, while Mr Millin had the authority to negotiate with MBNZ, he had did not have actual authority to bind it to a new contract.

[36] We turn to the question of ostensible authority. In *Pascoe Properties Ltd v Attorney-General*, this Court discussed ostensible authority:[27]

> [21] Ostensible authority is created, therefore, by the actions of the principal, who by words or conduct represents to the other party that a person has the necessary authority to enter into the transaction on the principal's

[27] *Pascoe Properties Ltd v Attorney-General* [2014] NZCA 616, [2015] NZAR 457.

> behalf. The authority may be express or implied, and may arise by the principal permitting the agent to act in some way in the conduct of the principal's business with other persons. The representation of authority can be effected through a course of dealing that is sufficiently frequent and understood. It also may arise where an agent is vested with a particular office and that office is of the kind that could reasonably be expected to carry the authority. The perception of authority by the other party must be reasonable. Specific limitations on the authority of an agent may not be effective if the actions of the principal have created the representation of authority.
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> [22] No representation by the agent can create ostensible authority without something more. However an agent's authority may emanate from the joint actions of both the principal and the agent where the principal appoints an agent to a position that enables the agent to then bolster its authority in dealings with a third party.
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> (Footnotes omitted.)

[37] The Judge considered that, not only did Mr Millin not have ostensible authority, KTL should have known that he did not. This conclusion rested on two pieces of evidence — the fact that Mr Millin had witnessed the 2016 ICA rather than signed it on behalf of MBNZ and the fact that Mr Sutherland, rather than Mr Millin, had signed an LOI dated 29 November 2017.[28] Mr Fraundorfer submitted that the evidence did not support the Judge's conclusion.

[38] The unchallenged evidence was as follows. Mr Millin was the only senior MBNZ manager KTL dealt with during the relevant period. Mrs Kingsbeer, who was responsible for the administration of KTL and directly involved in the negotiations with Mr Millin, said that "our instructions and negotiations were with effectively a New Zealand manager, who was Andy Millin." Mr Kingsbeer said that he "got [his] orders" from Mr Millin, whom he described as "my boss."

[39] The only other MBNZ representative KTL dealt with prior to Mr Millin leaving MBNZ was Philip Gordon, the Transport Supervisor, who was responsible for day-to-day operational matters and reported to Mr Millin. Mr Gordon was asked in cross-examination whether he understood Mr Millin's role as being "to go sort out the contract with [Mr Kingsbeer]", to which he answered "[m]ost definitely". Later he said again that he assumed Mr Millin was allowed to offer the contract to KTL.

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[28] Decision under appeal, above n 2, at [86].

[40] MBNZ had therefore placed Mr Millin in a situation where both the contractor (KTL) and the MBNZ representative who reported to Mr Millin (Mr Gordan) were under the impression that he had the authority to enter into a contract with KTL. We turn to the Judge's reasons for concluding that he did not, and that KTL should have known that.

[41] The Judge's first reason was that Mr Millin had witnessed the 2016 ICA, rather than signed it on behalf of MBNZ.[29] When this was put to Mr Kingsbeer in cross-examination, he did not see any significance in the point, saying that he (Mr Kingsbeer) just "signed my name and that's all I know". This seems unsurprising. Even assuming that Mr Kingsbeer saw Mr Millin add his signature as a witness, the difference between a manager witnessing a contractor's signature and actually signing on behalf of the company is unlikely to be recognised by a lay person as having any significance in terms of the manager's authority. Further, the 2016 ICA had been signed more than 18 months beforehand and it is unlikely that the Kingsbeers would have recalled this detail, even assuming they noticed it at the time.

[42] Secondly, on 29 November 2017 Mr Millin sent KTL a LOI signed by Mr Sutherland, which concluded by saying that:

> To ensure and facilitate prompt progress, Andrew Millin will continue to be the main point of contact for [MBNZ] and can clarify any questions. Thank you for working with [MBNZ] in this process.

[43] In our view, the fact that the LOI was signed by Mr Sutherland was not sufficient to dispel the appearance conveyed to both KTL and to Mr Gordan that Mr Millin was authorised to deal on its behalf. To the contrary, Mr Sutherland's advice that Mr Millin would continue to be the main point of contact for MBNZ in New Zealand was more likely to reinforce the fact that KTL was to continue to deal with Mr Millin in the way it had always done.

[44] Viewed in the context of KTL's overall relationship with MBNZ, we consider that the structure MBNZ put in place for the selection and management of new contractors meant that Mr Millin had the ostensible authority to secure a binding

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[29] At [86].

agreement on behalf of MBNZ for the Additional BOP Runs. This means that the Judge's consideration of whether a contract had been reached proceeded on an incorrect basis. We therefore turn to consider the existence of the alleged agreement on the basis that Mr Millin had the authority to bind MBNZ and, as noted earlier, was not the subject of any adverse credibility finding.

Issue 2: was there an agreement reached between KTL and MBNZ for the Additional BOP Runs and, if so, what were the terms?

The parties' positions

[45] Mr Cook, for MBNZ, supported the Judge's conclusions. He summarised MBNZ's view of the arrangement between it and KTL as follows:

> The parties shared a common plan – to enter a written five-year contract for the Additional Runs. However, any five-year contract would be deferred until certain competency requirements were satisfied and a written ICA was executed. In the meantime, KTL would begin the runs on 27 January 2018 (and make its first delivery on 29 January 2018), in accordance with the parties' interim arrangements, which were reduced to writing in an agreed letter of intent (**LOI**).

[46] Mr Fraundorfer, for KTL, submitted that the Judge erred in his conclusion as a result of failing to consider all of the evidence and reaching a conclusion that was against the weight of the evidence. In particular, he complained that there was inadequate attention given to the contextual evidence and error in recognising the rationale for the LOI.

Relevant principles

[47] The approach to determining the existence of a partly written, partly oral agreement is well settled and there is no challenge to the Judge's summary of it. Whether such a contract has been entered into and, if so, on what terms, are questions of fact.[30] The usual approach to contractual interpretation applies — the facts are to be objectively assessed to ascertain whether sufficient agreement was reached.[31] The

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30 *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd*, above n 12, at [65] citing *Carmichael v National Power plc* [1999] 1 WLR 2042 (HL) at 2049 per Lord Hoffmann.

31 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43]; citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL); and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1

question is whether the parties intended to be bound at the point when the bargain is said to have been agreed, and whether there was express or implied agreement on essential terms.[32] Evidence of context, parties' subjective intentions and subsequent conduct are all admissible to assist in that inquiry.[33]

[48] The principles which govern the implication of terms were confirmed by the Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd*.[34] The Court noted that prior to the decision in *Attorney-General of Belize v Belize Telecom Ltd*,[35] the following passage from Lord Simon's judgment in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* was the most commonly cited authority in New Zealand in relation to the implication of terms:[36]

> … for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[49] In *Belize*, Lord Hoffman considered that the five conditions in *BP Refinery* are:[37]

> … best regarded, not as [a] series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means…

[50] The Supreme Court in *Bathurst* concluded that:[38]

> The *BP Refinery* conditions are a useful tool to test whether the proposed implied term is strictly necessary to spell out what the contract, read against the relevant background, must be understood to mean. Whilst conditions (4) and (5) must always be met before a term will be implied, conditions (1)–(3) can be viewed as analytical tools which overlap and are not cumulative. The business efficacy and the "so obvious that 'it goes without saying'" conditions

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NZLR 432 at [60]–[61] and [63].

32 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [53].

33 *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd*, above n 12, at [65].

34 *Bathurst*, above n 34.

35 *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.

36 *Bathurst*, above n 34, at [94] citing *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266, (1977) 16 ALR 363 (PC) at 283.

37 *Belize*, above n 38, at [27].

38 At [116(f)]. Footnotes omitted.

> are both ways, useful in their own right, of testing whether the implication of a term is strictly necessary to give effect to what the contract, objectively interpreted by the court, must be understood to mean.

The evidence at trial

The existing relationship between MBNZ and KTL

[51] When KTL began runs from MBNZ's Auckland depot to McDonalds restaurants in Gisborne and Whakatāne in December 2011, it did so at short notice, following an urgent request from MBNZ. It did not have a written contract in place, but MBNZ assured it that a written contract would be provided within a few weeks, which it was.

[52] The subsequent 2016 ICA covered the Gisborne and Whakatāne runs for a period of three years, expiring on 31 January 2019.[39] It specified the services that KTL was to perform and provided that if the parties agreed in writing KTL could provide "Additional Services" — being those not within the specified services — in accordance with and subject to the terms and conditions of the ICA. However, changes to the contract beyond the Additional Services would require a fresh contract to be executed because the ICA could "only be amended or replaced by another written agreement or deed executed by the parties".

MBNZ proposes the Additional BOP Runs

[53] In an email of 10 October 2017, Mr Millin invited KTL to outline a plan for how it would manage the Additional BOP Runs, if it was interested. KTL would have to commit to a start-date of 29 January 2018. Mr Millin understood that this would not be straight-forward, as he explained in his evidence, when it was put to him that this was a reasonable amount of time for KTL to do the necessary planning and preparation:

> … unless you worked in the transport industry, you cannot move multi-ton vehicles around the countryside at your free will. You have to get permissions, you have to get grants, you have to get the right equipment, you have to make sure they're roadworthy; you need the right equipment for the right job. It's

[39] Although there is no dispute over the fact that MBNZ was committed to the 2016 ICA, the evidence was unclear as to whether it had ever actually signed the agreement since no signed copy was disclosed.

> not something you can do in a [matter] of weeks, it really isn't. So three months is a very tight time period.

[54] KTL was very interested — it was keen to increase its share of MBNZ work, which it viewed as providing a solid work stream for a reputable company. It began work to assess the viability of taking on the new runs, which would require KTL to expand its delivery routes from two McDonalds restaurants to 12. Mr Kingsbeer described the necessary preparation:

> Between October 2017 and early January 2018, I liaised with tyre companies, fuel companies and insurance companies to put the necessary steps in place for KTL to commence the Additional Runs in January. We talked to KTL's finance company, truck sales reps, … forklift companies and the TR Group regarding specs associated with this equipment … We hired extra staff, ordered specific logbooks, set up our yard, hired a forklift trailer, and arranged a site in [Taupō] to keep an extra forklift … It was difficult organising something that had to remain confidential.

[55] The main consideration was that KTL would require a new truck and two new trailers. These could either be purchased (KTL's preference) or leased. But in either case, to be economic, KTL would need to borrow or lease for a term of five years. As noted, any financier or lessor would require certainty that KTL had a contract of similar length with MBNZ, to ensure that their own position would be secure.

[56] MBNZ usually required its contractors to use vehicles fitted with tail-lifts, which had to be custom-fitted. But KTL preferred to use forklifts. It owned two forklifts and MBNZ had accepted it using them for the Gisborne and Whakatāne runs. The forklifts were left on-site at Gisborne and Whakatāne. KTL's initial plan was to use the forklifts for the Additional BOP Runs by carrying them behind the truck, using newly built truck and trailers. However, that plan would depend on securing an order "slot" which it could not do without having its contract with MBNZ in place.

[57] The alternative was to lease the new equipment from TR Group, which would require modifying the trailers to fit tail-lifts. TR Group was not prepared to proceed without KTL having a contract in place. David Carpenter, TR Group's Managing Director, gave evidence that the expense involved in installing tail-lifts on trailers meant that it was not economical to do so for short-term leases. TR Group quoted on leases for both three- and five-year periods for cost comparison purposes,

but intended that the lease would be for five years in order to make the arrangement economical for both parties, and TR Group required KTL to provide the underlying contract in order to proceed.[40]

[58] KTL's accountant, James McGregor, helped to work out budgets to see how the Additional BOP Runs could be operated cost effectively. Mr McGregor gave evidence that:

> We were always operating on the basis that there would be a long-term contract of at least five years. The equipment required and costs that KTL would incur to set up the new delivery runs would only be profitable over that period.

[59] On 24 October 2017 KTL emailed its plan to Mr Millin. It set out a schedule for deliveries and a proposed rate of $3.35 plus GST per kilometre. It noted that the build time for the new vehicles required were February and March 2018, based on orders being placed within two weeks. The plan also included a proposal for additional Hawkes Bay/Napier runs even though they were not part of the immediate negotiation.

The parties negotiate and KTL starts the Additional BOP Runs

[60] There was a meeting at the Kingsbeers' home on 16 November 2017. Mrs Kingsbeer's evidence was that:

> At the meeting, we told MBNZ that KTL would need a written contract in place within a reasonable time. Without a contract, KTL would not be able to secure finance and order the necessary equipment and machinery to carry out the Additional Runs… We told [Mr Millin] and [Mr Gordon] that, if there was no written contract in place by MBNZ's required start date, KTL would have to incur costs of leasing equipment on a short term basis. There would also be costs of setting everything up at such short notice… KTL could not maintain those ongoing costs indefinitely. [Mr Millin] told us that if KTL incurred extra costs, that MBNZ would cover those expenses.

[61] Mr Millin said in evidence that:

> As our negotiations progressed in late-2017, KTL requested that they take on the Hawkes Bay/Napier delivery runs… MBNZ agreed , although they would commence slightly later.

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[40] Ultimately, TR Group agreed to credit the difference between the rental rates and the long-term lease rates once the long-term lease was confirmed but this did not happen until May 2018 — well after KTL had started the Additional BOP Runs.

> The offer that MBNZ made for the Additional BOP Runs was for a five-year term… We discussed this with KTL, as it was their preferred contract term. I recall that KTL needed a long-term contract of at least five year[s] to generate enough income to cover the introduction of the new vehicles and drivers required for the Additional BOP Runs.
>
> …
>
> The Additional BOP Runs were outside the normal services that KTL provided to MBNZ under its existing Contractor Agreement. A new contract was required which would include the agreed rates and routes that KTL would undertake.
>
> Between October 2017 and January 2018, I corresponded with Tony and Nicky Kingsbeer to work out the details of the Additional BOP Runs… Due to the short time frame until MBNZ needed KTL to commence the Additional BOP Runs, KTL advised me that they would have to hire short-term equipment. This meant hiring forklifts to help with the loading and unloading. I understand KTL needed a written contract to secure finance and to order or lease the trucks and plant they required… I agreed that MBNZ would cover KTL's reasonable costs to commence the Additional BOP Runs. …
>
> I recall speaking to [Mr Sutherland] about KTL's start-up costs. We agreed to help KTL during this period. It was expected the costs would be paid back over time, but due to KTL's service and high standards we were willing to step outside normal practice to assist.

[62] Mr and Mrs Kingsbeer and Mr Millin were strongly challenged on their evidence in relation to whether agreement had been reached on a five-year term and on whether Mr Millin had agreed that MBNZ would meet the short-term costs. All maintained their positions. Mr Millin's evidence included the following exchange in cross-examination in relation to the five-year term:

> Q. So [Mr Sutherland] did not agree to a five year contract, did he?
>
> A. He didn't disagree with it either.
>
> Q. Because in fact you never said to KTL or to Kingsbeer that [MBNZ] agrees to a five year term, did you?
>
> A. Yes, I did.
>
> Q. And Mr Sutherland's evidence that he will give, that MBNZ was never prepared to commit to a five year term is in fact the correct position isn't it?
>
> A. Doesn't matter how many times you say it, I agreed to a five year contract with [KTL].

[63] In relation to the short-term costs, Mr Kingsbeer said that he had given Mr Millin a "ballpark figure" of $20,000 to 50,000, which he was able to do from his experience renting similar equipment. Under cross-examination, Mr Millin estimated that he had given his agreement to meet the short-term costs at the "end of the year, beginning of January because we were running out of time to get the contract in place." He said that the Kingsbeers had given him a "ballpark figure" of $50,000, which would be discussed as they arose. He was cross-examined on the fact that the costs were unknown and did not resile from his position:

> Q. So if the costs had come in and you thought actually they were too high, on your understanding you could have said: "No we're not going to pay them"?
>
> A. No, we would have negotiated. I would never have said no because I agreed to support them through the early stages.
>
> …
>
> Q. … you say: "We agreed to help KTL during this period". And by using that word "help" here, were you indicating to KTL that we'd help you out subject to seeing what all these costs were about?
>
> A. No. What I was referring to there was I would help them through the start-up 'cos we basically left them short notice to, to, to get the contract going.
>
> Q. Yet [MBNZ] was not in the business of paying for start-up or short-term costs for its contractors, is it?
>
> A. No, but [MBNZ] are in the business of ensuring their restaurants are serviced twice a week, on time, every single day.
>
> Q. But [KTL] wasn't the only transport company that you could have used for these runs, was it?
>
> A. I was very limited for that region, yes. The only other one was … Halls. …

[64] On 24 November 2017 Mrs Kingsbeer asked Mr Millin if MBNZ would provide an LOI from MBNZ recording the agreement and MBNZ's commitment to the five-year contract. Mrs Kingsbeer wanted a LOI to order the new equipment KTL would need. In a text on 28 November 2017, she followed up her request, referring to the need to "get this gear .. booked" and adding that "a very brief letter of intent is all that is needed to get balls rolling". In evidence, Mr Millin confirmed the purpose of

the LOI as being "for [KTL] to access the short term equipment so they can do the job I've asked them to do. With the end goal being a five year contract."

[65] Mr Millin consulted Mr Sutherland, who agreed that MBNZ would provide a LOI. On 29 November 2017 he sent a LOI addressed to Mr Kingsbeer to Mr Millin for forwarding on to KTL. This is a convenient point to address MBNZ's argument that the contractual arrangement that existed between the parties was reduced to writing in the form of the LOI. The evidence is strongly against this assertion. It is clear from both the oral and contemporaneous written evidence (including Mrs Kingsbeer's text) that the LOI was to be used as a basis for arranging rental equipment. The LOI was not intended to form the basis of a contract between MBNZ and KTL. Therefore, its failure to specify a five-year term or any obligation to meet short-term expenses is not significant in determining whether a contract existed in the terms asserted by KTL.

[66] The LOI provided by MBNZ stated that:

> [MBNZ] intends to progress in assessing the ability of [KTL] to comply with all safety and service requirements for undertaking work on behalf of [MBNZ] in the Bay of Plenty & Rotorua regions. We would like to establish the next steps towards ensuring compliance.
>
> 1) [KTL] is required to review and meet the contractor capability requirements as set out within competency response document. This document is attached to this letter and will assess and confirm:
>
>   a. [KTL] has, or can obtain within the required timeframe compliant assets as set out in the competency document
>
>   b. [KTL] has adequate process and controls to ensure that all employees engaged in [MBNZ] work meet the requirements set out in the competency document.
>
>   c. [KTL] meets all other requirements set out in the competency document.
>
> 2) Upon successful completion of the competency document to the satisfaction of [MBNZ] the intent is to implement a contractor agreement which will establish service levels and all other terms and conditions between [MBNZ] and [KTL].
>
> To ensure and facilitate prompt progress, Andrew Millin will continue to be the main point of contact for [MBNZ] and can clarify any questions. Thank you for working with [MBNZ] in this process.

[67] Mr Millin forwarded the LOI to KTL without comment and without the competency document referred to. That was provided later and comprised more than 30 pages of policies and codes of conduct. We come to those later.

[68] The LOI did not meet KTL's needs. Mrs Kingsbeer sought Mr McGregor's advice. He responded:

> I am aware that you will be asked to sign an agreement to lease plant on a five year basis today.
>
> You need confirmation that the Napier/Hastings run will be offered to you and that the contracts will include the following;
>
> 1 Km rate of $3.35
>
> 2 Annual CPI adjustment.
>
> 3 Maximum pallet numbers per run (must fit on your truck/trailer)

[69] Later on 29 November 2017, Mrs Kingsbeer forwarded Mr McGregor's email to Mr Millin saying:

> See below from my accountant …. This is what needs to be in place to proceed
>
> I know you are busy with everything, but for us to start signing up gear to be built to meet the timeframes of 28th January 2018 and potentially 25th February 2018, this is what needs to be done.
>
> No one will sign me up unless I've got all my "T's" crossed and "I's" dotted.
>
> Also I want to order 3 trailers (Gisborne, BOP, Hawkes Bay) I need to order them all at the same time, as well as ordering two trucks.

[70] Mr Millin responded:

> I can confirm the below, I just need to do some work before I change over the Napier route to [KTL].

[71] Without a suitable LOI or contract, KTL could not place the order and missed the available December 2017 slot. As a result, by January 2018, the plan to order new equipment was superseded by the leasing option. However, TR Group required the certainty of knowing that KTL had a secured long-term contract with MBNZ, and a start date, before it would action any order.

[72] Over this period there were emails between Mr Millin and Mr Sutherland about finalising the arrangements with KTL. On 8 January 2018 Mr Millin requested that Mr Sutherland provide a LOI detailing the runs to be undertaken, that "[the] contract we'll be looking at is a 5 year contract" and that MBNZ would like to discuss the Napier/Hastings route "further down the line." Two days later Mr Millin emailed Mr Sutherland again saying "I really need this letter otherwise we can't go live in BOP on the 27th" to which Mr Sutherland responded "Agreed. Must close this today". However, later that day, Mr Sutherland asked about the contractor transition plan, noting that "[to] gain approval for the [LOI] we must be able to demonstrate the plan." The latter was a reference to the internal requirement of MBNZ that its Managing Director, Yves-Marie Brillant, approve the change in contractor. Mr Millin provided the necessary information. Mr Sutherland obtained Mr Brillant's approval of the change and of the terms of an updated LOI that Mr Sutherland proposed.

[73] On 10 January 2018 Mr Millin emailed the Kingsbeers asking for trip routes for the deliveries "so I can send them to Chicago to put in the contract". It then emerged that MBNZ was working from a rate of $3.25 plus GST per kilometre, rather than the $3.35 plus GST per kilometre that KTL had referred to in its original plan, and to which Mr Millin had agreed in his email of 29 November 2017. This put the viability of KTL's plan in doubt. Mrs Kingsbeer immediately emailed Mr Millin reminding him that he had agreed to the $3.35 plus GST per kilometre rate. He acknowledged that — describing it as "a miss on my part" — but said that he would not go higher than $3.25 and "if that's not possible I'll just agree to continue with [Hall's] at [their] increased rate."

[74] Mrs Kingsbeer consulted Mr McGregor. He advised that the Additional BOP Runs could still be viable at the lower rate but it was essential that, among other things, KTL was offered the Hawkes Bay/Napier runs, and that it was given a five-year contract with the written contract provided soon so that KTL could lease the necessary equipment — the lower rate would only be economical if KTL leased the purpose-built trailers in the long term. Mrs Kingsbeer emailed Mr Millin with new "trip rates" based on the $3.25 plus GST per kilometre rate. Mr Millin responded that "I'm happy to go with the $3.25 km rate… if [KTL] can't manage that rate please let me know so

I can have the necessary conversation to ensure continuity of service to the restaurants."

[75] The Judge placed significance on this last email. The first of his five reasons for finding that no contract had been formed was that the email showed that as late as 11 January 2018, whether KTL was to undertake the Additional BOP Runs was still in issue because of Mr Millin's "unsubtle reference" to continuing to use Hall's for the runs.[41] While we agree that the lack of agreement on the dollar per kilometre rates, which was obviously an important factor for MBNZ, indicated that no final agreement had been reached as at that date, we do not consider it especially significant. It must be viewed against Mr Millin's evidence that a seamless transition between one contractor and another was vital because McDonalds was "ruthless". He was asked what would have happened had the Kingsbeers said at that point they could not do the runs. Mr Millin responded that it "[d]idn't even bear thinking about, to be fair. I would have had to go back to [Hall's] … cap in hand and apologise. Say: "Listen guys," and I know what he would have done." Under cross-examination Mr Millin was asked:

> Q. So if KTL hadn't agreed to the rate of $3.25, did you have another option?
>
> A. The only other option I had for the Kingsbeers' area was to carry on with Halls and pay the higher rate.

[76] In our view, both KTL and MBNZ were committed to reaching an agreed position on the dollar per kilometre rate. From MBNZ's perspective, reverting to Hall's was not a realistic alternative because MBNZ had already decided not renew Hall's contract and, evidently, ongoing service by Hall's would come at a cost. In any event, this exchange occurred approximately two weeks before the scheduled start date and it is clear from the exchanges that followed that the dollar per kilometre rate was settled satisfactorily and therefore had no ongoing significance in terms of determining whether the parties had reached a firm agreement before the start date.

[77] On 12 January 2018 two things happened. First, Mr Millin emailed the updated LOI and texted Mrs Kingsbeer to alert her. This LOI, dated 10 January 2018 and

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[41] Decision under appeal, above n 2, at [69].

received by KTL on 12 January 2018, contained the same introductory paragraph and paragraph one. However, the latter part of the LOI now said:

> 2) Upon successful completion of the competency document to the satisfaction of [MBNZ] the intent is to implement a multi-year contractor agreement which will establish service levels and all other terms and conditions between [MBNZ] and [KTL].
>
> Subject to the above the intended commencement date for [KTL] on these additional deliveries (attached) is Monday 29th January 2018. With further consideration acknowledged for the Hawkes Bay region within the next 6 months. Andrew Millin will continue to be the main point of contact for [MBNZ] and can clarify any questions. Thank you for engaging with [MBNZ] in this process.

[78] Mrs Kingsbeer texted Mr Millin about the "competency document" referred to in paragraph two to which Mr Millin replied "Don't worry about the "Competency" document, you already provide a service for us so that's a given." We come back to the issue of the competency requirements later.

[79] The second thing was a telephone call between Mr and Mrs Kingsbeer and Mr Millin. It is unclear who called who. Mr Kingsbeer said that Mr Millin had called him and Mrs Kingsbeer about the updated LOI:

> During that call, [Mr Millin] gave KTL the green light to start the [Additional BOP runs] on the new rate of $3.25/km. He assured us that the Hawkes Bay deliveries would commence in a few months. We reiterated that, until the formal, written contract came through, KTL would incur the costs of hiring short-term rentals. [Mr Milllin] assured us that a formal, five-year contract was three to six weeks away.

Mrs Kingsbeer said that:

> On 12 January 2018, I called [Mr Millin] and told him the terms [Mr McGregor] had said KTL needed. [Mr Millin] verbally accepted the terms during our phone call. I reiterated to [Mr Millin] that KTL would not be able to enter into long-term leases until it had a written five-year contract in place. I told him again that KTL would need to hire equipment on a short-term basis in the meantime, and that this would be an extra cost for KTL. Again, [Mr Millin] confirmed that MBNZ would cover the costs incurred…

[80] At this point, therefore the evidence from Mr Millin and the Kingsbeers was to the effect that: (1) Mr Millin had offered and KTL had accepted a five-year contract for the Additional BOP Runs, with a written agreement expected within a matter of weeks (2) once the written contract was available, KTL would be able to lease the

necessary equipment (3) Mr Millin had agreed to meet the short-term costs within a ballpark of $50,000 (4) agreement had been reached on the dollar per kilometre rate and (5) Mr Millin had given the "green light" for KTL to start.

[81] However, the updated LOI still did not meet KTL's needs, as Mr McGregor made clear in his email of 15 January 2018, in which he commented that:

> Just a few points to get sorted in the letter of intent.
>
> The contract must be for five years as this is the commitment you are making with your financing.

[82] But Mr and Mrs Kingsbeer could not raise this — or anything else — with Mr Millin because Mr Millin was placed on leave on 12 January 2018 as a result of a pending restructure of the senior management team at MBNZ. By 15 January 2018 his position had been disestablished and his employment terminated. No one told KTL this. Mr and Mrs Kingsbeer thought Mr Millin was simply on leave. They directed their questions about the LOI to Mr Gordon, who told them to contact Mr Sutherland.

[83] Mr and Mrs Kingsbeer forwarded Mr McGregor's email of 15 January 2018 to Mr Gordon, who forwarded it to Mr Sutherland, who was managing the process pending Mark Bavister assuming his role. On 17 January 2018 Mr Sutherland responded:

> I have made a couple of changes to the letter of intent, clarifying that these additional routes are already covered under the existing Contractor Agreement until a new one is signed. *It is noted 5 years is your preferred length of the new agreement.*
>
> (emphasis added)

[84] Paragraph two of the updated LOI sent on 17 January 2018 now read:

> 2) *Upon successful completion of the competency document to the satisfaction of [MBNZ] the intent is to implement a multi-year (maximum 5 years) contractor agreement which will establish service levels and all other terms and conditions between [MBNZ] and [KTL].* Note the additional routes are to fall under the current Contractor Agreement expiring 31 January 2019 in the interim and significant diversions due to road closure will be compensated as required and agreed.
>
> (emphasis added)

[85] The LOI confirmed 29 January 2018 as the start date. It also confirmed that Mr Millin would remain the main point of contact, even though Mr Millin's employment with MBNZ was about to cease.

[86] The idea that the Additional BOP Runs would be accommodated under the existing ICA was new to the Kingsbeers. There is no evidence that Mr Millin had conveyed it to them. To the contrary, his evidence was that the Additional BOP Runs were outside the existing ICA and a new contract would be required that included the agreed rates and routes for the new runs. We note too that, under the terms of the ICA, written agreement by the parties was required for "Additional Services" to be undertaken pursuant to the existing contract. MBNZ appears not to have sought that agreement from KTL. Nevertheless, Mr and Mrs Kingsbeer "did not think too much about it as [they] had been assured that a new written contract would be provided soon". Mr Sutherland's email did not suggest otherwise.

[87] However, the revised LOI still did not meet KTL's needs because it did not confirm a five-year term. The Judge's second reason for finding that there was no contract was that a five-year term was not consistent with either the 2016 ICA or the progressive iterations of the LOI.[42] We respectfully disagree.

[88] We do not see the three-year term of the 2016 ICA as relevant, given the significantly different circumstances in which the agreement to undertake the Additional BOP Runs had arisen, namely the quadrupling of the volume of work being undertaken by KTL, at quite short notice, which required a substantial investment in new equipment and the letting go of existing work.

[89] Nor do we see the iterative terms of the LOI as determinative. The Judge viewed as particularly significant the email Mrs Kingsbeer sent to Mr McGregor on 15 January 2018 forwarding him the updated LOI, with a number of comments and questions, including:

> In the letter of intent, it says to implement a "multi-year" contractor agreement. As we are wanting to sign up to TR Group for 5 years, should the letter of intent say 5 years, I would hate to get a contract that says 2 or 3.

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[42] Decision under appeal, above n 2, at [70].

[90] It was put to Mrs Kingsbeer in cross-examination that the email showed she wasn't sure at that point whether MBNZ was going to agree to five years. She rejected that, explaining that:

> … what I was saying is that the letter of intent needed to say five years because we were going to align an agreement with TR Group for five years. If we aligned in agreement with TR Group for five years and all of a sudden it turned out to be a contract for two or three years and then they cancel … we would be liable to TR Group for the balance of the term of that long-term lease and we would have to pay it out. So the letter of intent and the contract and the agreement with TR Group all had to align the same.

[91] This explanation does not address the obvious implication that, as at 15 January, Mrs Kingsbeer harboured some concern that MBNZ might produce a contract for two or three years. However, this email is the single piece of evidence inconsistent with an understanding that there existed a five-year contract. It needs to be viewed against the following: for the Additional BOP Runs to be viable, KTL needed to lease new equipment but could not do so until it could satisfy TR Group as to the underlying contract with MBNZ. Mr Millin had said firmly that he had offered and KTL had agreed to a five-year term; after Mr Sutherland "noted that 5 years is [KTL's] preferred length of the new agreement", there was no further negotiation, or even communication, about the term of the contract until MBNZ produced the draft contract in June 2018 for a term of five years, which suggests that Mr Sutherland's "noting" of KTL's preferred term is properly viewed as an acknowledgement that there was a contract and that it would reflect KTL's preferred term. So, although we accept the basis for the Judge's concern about Mrs Kingsbeer's email, the weight of the evidence is against ascribing much, if any, significance to it. In our view, the Judge did not give sufficient weight to the parties' explanation for the LOI and wrongly treated it as indicative of the agreement regarding the term of the contract, which it was not.

[92] After that updated LOI there were further exchanges between Mrs Kingsbeer and Mr Sutherland regarding the Routes Schedule, which was to be attached to the LOI. There was, however, no further request for changes to the substance of the LOI. On 18 January 2018, Mrs Kingsbeer emailed Mr Sutherland, requesting a final sign off on the attached Route Schedules and LOI, adding that:

> I will be forwarding your reply email directly to TR Group, as well [as] a copy of our current contract, which as you explain in [the] letter of intent has been extended to include the new runs.
>
> No pressure but we require this ASAP, in order to finalise rental equipment required to commence runs next week.

[93] Mr Sutherland circulated the email to Mr Brillant and to Mr Millin's successor, Mr Bavister (who did not see it until he started his new role in late January 2018). The next day he sent the final version of the LOI with the agreed Routes Schedule to KTL. The substance of the LOI was unchanged from that sent on 17 January 2018.

[94] At this point MBNZ began to address the issue of compliance with its competency requirements. MBNZ argued that if there was an agreement as to a five-year contract, it was conditional on KTL satisfying the competency requirements, which it had not done.[43] This argument was based on the assertion that KTL had not returned the "EOI Response Schedule" to MBNZ and, in any event, one of the requirements in that schedule, the "Contract Schedule 11 – DQMP Elements", was not supplied to KTL until 14 June 2018 (with the draft contract) so that it could not have been satisfied until that point.

[95] On 17 January 2018 MBNZ's Compliance Officer, Shaun Galway, emailed Mrs Kingsbeer documents relating to the competency requirements. The following day MBNZ's Field Service Consultant, Emily Thomas, sent more documents. A few days later Ms Thomas came to the Kingsbeers' house to explain the policies and get KTL drivers' sheets, health and safety forms and policies signed. Mrs Kingsbeer said that she gave Ms Thomas the completed "EOI Response Schedule". Ms Thomas denied receiving it. Mrs Kingsbeer said that she never heard anything further from MBNZ regarding the competency requirements. There was no conclusive evidence on whether Mrs Kingsbeer had given the signed schedule to Ms Thomas. Mrs Kingsbeer acknowledged that when she signed the EOI Response Schedule she could not have not seen the "Contract Schedule 11 – DQMP Elements" because the 2016 ICA only contained schedule 9.

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[43] At trial, KTL argued that this requirement had been waived by Mr Millin's text of 12 January 2018. The Judge rejected this and we respectfully agree with that conclusion. However, the argument was not advanced on appeal and we do not need to address it.

[96] By the start date on 29 January 2018, there was no new written contract in place. KTL started the Additional BOP Runs using short-term rental equipment.

Subsequent events

[97] KTL's case was that it had a binding contract with MBNZ for the Additional BOP Runs by 29 January 2018. However, because the parties' subsequent conduct may be taken into account in that determination, we review the relevant events that followed that date. Before doing so, we make some general observations about the context in which these events occurred.

[98] First, Mr Sutherland and Mr Bavister, clearly, had many other calls on their time and attention around the start date. The circumstances in which Mr Bavister assumed his new position can be gleaned from his comment in cross-examination that "there was a massive change at [MBNZ] at that time. There was a lot of things going on." It appears that he did not meet with Mr and Mrs Kingsbeer until some time in mid-March 2018.

[99] Secondly, Mr Bavister and Mr Sutherland could not be sure about what Mr Millin had said to the Kingsbeers. There was no personal hand-over. Mr Millin did not leave any handover notes. Mr Bavister did not have access to Mr Millin's emails. There appears not to have been any attempt made to check KTL's claims with Mr Millin — for example, regarding the short-term costs — though this may have been attributable to the circumstances in which Mr Millin's employment was terminated.

[100] Thirdly, Mr Bavister appears to have received limited written information by way of introduction to the KTL situation, with an email dated 18 January 2018 from Mr Sutherland to others in the MBNZ management team summarising the transition from Hall's to KTL, together with the LOI and the routes schedules. The email referred to KTL's history with MBNZ — that it had "provided good service and established strong relationships with the restaurants", and confirmed that KTL would be taking over Hall's Rotorua/BOP runs. It detailed the restaurants and the schedules. It did not mention the contractual basis for the new arrangements, which was

mentioned only in the LOI. Mr Bavister first saw these documents after he assumed his new position.

[101] Mr Bavister was cross-examined about the extent to which he familiarised himself with the KTL's assumption of the Additional BOP Runs. He took from the LOI that the new runs were being treated as falling under KTL's existing ICA. This suggests a misunderstanding of the purpose of the LOI (as discussed, it was only requested to provide a basis for securing the rental agreement so that KTL could start the runs). In addition, Mr Bavister was not sure when he familiarised himself with the 2016 ICA.

[102] Nor was Mr Bavister able to say what the position was regarding the competency requirements. He had a meeting with Mr Galway and discussed various things, including KTL's completion of the competency requirements. They were said to be "a work in progress" but Mr Bavister did not follow this up because he was not directly responsible for this issue and Mr Galway did not report to him. In these circumstances the evidence falls short of showing that, if a contract had been formed, it was conditional on completion of the "EOI Response Schedule". KTL points out that the "Schedule 11 DQMP Elements" document did not require execution, merely that KTL had to read and understand it. We agree with KTL that if any competency matters were outstanding, completion was a formality.

[103] Mr Bavister's initial discussions with the Kingsbeers were mainly about operational matters. However, by March 2018 KTL was under financial pressure as a result of the short-term costs and was concerned that there was no indication from MBNZ as to when the contract would be provided. On 21 March 2018, Mr and Mrs Kingsbeer emailed Mr Bavister raising concerns over the lack of a new contract and seeking reimbursement of the short-term costs. They explained the impact of the change of dollar per kilometre rate on the KTL budget and the need to start the new runs with rental equipment. They went on to say:

> We advised [Mr Millin] at the time that although the letter of intent assisted us in being able to short term lease equipment, it wasn't a long term fix and we would need to have a contract [i]n place within 6 weeks of commencement. We advised [Mr Millin] that we needed a long term contract in place before we could order the equipment. …

> … [Mr Millin] had indicated on his part that he acknowledged the short timeframe and in lieu [of] remuneration for this extra contract expense would … be reimbursed.
>
> We feel we are stuck, we can't order the right equipment, because we don't have a long term contract, but in the meantime, we have all these extra expenses, that weren't part of the original deal, that we do, in order to get the job done… The original plan was by now to have contracts in place, equipment on order (build times for trucks and trailer will take at least 4 to 6 months). In the meantime be reimbursed, and by now the gear would have been arriving next month or may …. But none of that has happened, and we are now at the tail end of March, without a resolution.

[104] There was no reply to this email. Mr Bavister said that he did not see it until 28 March 2018 when Mrs Kingsbeer followed it up with a phone call and then resent the email. Our impression is that, whether as a result of pressure of work and/or lack of information, Mr Sutherland and Mr Bavister did not grasp why a fresh written contract and the short-term costs seemed so important to KTL.

[105] On 31 March 2018, KTL sent two invoices for "above contract expenses" — dated 28 February and 31 March 2018 for $17,310.03 and $17,316.64 respectively. Mr Bavister described receipt of the invoices as "quite a shock", noting that January and February 2018 had proceeded without any invoices rendered for these additional costs. His view was that without any specific written agreement regarding reimbursement for these costs, it would be difficult to get the invoices approved for payment.

[106] Mr Bavister's evidence was that he was confused by the Kingsbeers' suggestion that the short-term costs were caused by the lack of a written contract. The 2016 ICA was in place and he therefore could not understand why the lack of a fresh contract should be a problem. Mrs Kingsbeer explained that the 2016 ICA did not allow KTL to arrange its financing and leasing requirements but Mr Bavister still did not understand — he considered that the 2016 ICA should have been sufficient. This evidence is important. The Kingsbeers had made it clear that KTL's plan was only viable if it could take a long-term lease on the new equipment — the costs of a short-term rental could not be sustained. But a long-term lease required KTL to satisfy TR Group that it had a long-term contract. By the start date of the Additional BOP Runs, the 2016 ICA had less than a year to run and was insufficient to secure a long-term lease. Mr Millin understood this. Mr Bavister appears not to have understood.

[107] On 6 April 2018 Mr Bavister emailed KTL to say that he was working on a draft of the written contract and expected to have something the following week. No draft was provided.

[108] On 9 April 2018, Mrs Kingsbeer emailed Mr Bavister. She raised four matters. First, the short-term expenses, which would continue to accumulate until the right equipment was in place. Secondly, the written contract, explaining again the need for a contract matching the term of the equipment lease. Thirdly, the fact that, despite a Consumer Price Index (CPI) clause in the 2016 ICA, no compensation for CPI increases had been paid over the entire period of the contract. Finally, she provided the email exchange regarding the dollar per kilometre rate.

[109] Mr Bavister's evidence about this email is telling. He reiterated the fact that there was no written agreement regarding the short-term costs or a written contract and, in relation to the CPI increases, commented that "[i]t seemed as though every time we tried to get clarification from KTL about what they were claiming, and on what basis, KTL tried to claim for more and more costs (this is seen later in the relationship too)". In cross-examination, however, Mr Bavister accepted the KTL was entitled to CPI adjustments. On 20 April Mr Bavister wrote formally to KTL advising that the new runs were intended to fall under the 2016 ICA and MBNZ did not accept any obligation to meet the short-term costs. It agreed to review the dollar per kilometre rate. In relation to the CPI adjustment, MBNZ would commit to reviewing CPI on an annual basis but would not conduct any prior year reviews.

[110] At this stage, Mr Bavister's position in relation to the various issues being raised by KTL, as it appears from his evidence, can be summarised as: (1) he did not see why not having a fresh contract for five years was a problem because he had "been dealing with contractors for many years and they had been able to sign up with equipment et cetera without … the need for a contract to be in front of them" (2) he did not know when the contract would be available (3) without any written record of agreement to pay the short-term costs, he saw no obligation to do so and (4) he knew nothing about KTL's financial position and was not aware that there was any stress on the business.

[111] KTL's very different perspective is captured in Mrs Kingsbeer's emails to Mr McGregor at the end of April 2018. Following a telephone discussion between Mrs Kingsbeer and Mr Bavister two days prior, Mrs Kingsbeer emailed Mr McGregor on 26 April 2018, saying:

> [I've] tried and tried to explain to them that the letter of intent was what got the ball rolling just so we could get equipment from TR Group, it had no substance or longevity to it, and we have been making that clear since the day we started. Its so short TR Group won't even put tail lifts on the trailers!!!! I didn't discuss the TR Group deal, only to say if we had a draft contract in place by 1st May, long term lease rates kick in.
>
> He then said, how can this all be fixed, as a new contract could take 1, 3, 4 weeks, or 4 months. I said I would be continuing to email monthly invoices for the short fall, as the deal we are doing is not the deal we signed up for and we are not meeting the budgets that we set and [our operation is] unviable at those rates.

And in another email a few minutes later:

> Our Cashflow has dried up.
>
> Today we have been doing the run for 13 weeks. We are in a far worse place that what we were 13 weeks ago. We had money in the bank and our mental health was ok. Both have deteriorated.

[112] At this point, Mr McGregor became directly involved. He emailed Mr Sutherland on 27 April 2018 to express his concern. Mr Sutherland responded by email the same day:

> In terms of the contract, the incremental work was included as additional services under the existing contractor agreement expiring 2019 (which I confirmed via email). [MBNZ] are in the final stages of an updated agreement template which when reviewed and mutually signed would override the existing one.
>
> In terms of additional costs, we are not aware of any commitment by [MBNZ] to pay additional costs nor do we understand the breakdown of these claims. Should you be able to clarify these points please forward to Mark Bavister and myself.

[113] Mrs Kingsbeer appears to have acted on that email, contacting TR Group on 2 May 2018 to advise:

> According to [MBNZ] they are in their final stages of providing a contract to us. …

> I'm not sure what it will look like, whether it be 5 years or 2, 3x3.
>
> We had the conversation last week regarding back dating the short term leases, into the long term 5 year plan. Can you or Andrew send me a email confirming this.

[114] TR Group responded immediately: the group's Sales and Account Manager, Peter Sowman, emailed "sounds like progress is [being] made on the contract so that's great as that is fundamentally key to the new leases [being] signed off." This is a convenient point to record the Judge's third reason for finding that no contractual agreement had been reached. The Judge considered that:[44]

> … other than that five-year term, there was no evidence at all whatever TR Group or any other financier may have required as "suitable" for long-term leasing or other financing was communicated to MBNZ, still less that MBNZ accepted the contract would be provided in those terms. …

[115] The Judge noted that TR Group's correspondence with KTL went no further than TR Group waiting on "some paper information" which it later explained as meaning that KTL's financial information was sufficient for it to be confident to make its $500,000 or more investment in the new equipment.[45] The Judge went on to observe that whether TR Group's requirement to be satisfied either as to the financial strength of the client or the basis on which the vehicle would be used would have been satisfied by this contract was conjecture.[46] However, there was evidence that provision of the contract from MBNZ would have been sufficient for TR Group to have leased the new equipment. Mr Carpenter said in evidence that TR Group "required KTL to provide their underlying five year contract to proceed with the lease agreement, along with their financials to approve finance and secure the leases". He confirmed in cross-examination that if KTL provided the contract between it and MBNZ, TR Group would have signed up a five-year lease agreement, and that TR Group did not regard the Kingsbeers as financially strong enough to enter into a long-term lease with TR Group without evidence of the contract. And later said "what we were looking for was the proper contract… signed for the long-term lease we were looking for the contract, not just the [LOI]."

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44 Decision under appeal, above n 2, at [71].
45 At [71].
46 At [72].

[116] As we have already noted, Mr Millin clearly understood that KTL could not finance or lease the necessary equipment without satisfying the financier or lessor as to the underlying contract between it and MBNZ. Given Mr Millin's position and the fact that no adverse credibility finding was made against him, Mr Millin's knowledge of this must be treated as imputed to MBNZ. It seems clear to us that TR Group did require the contract between KTL and MBNZ in order to provide a lease for the new equipment and that, had it received the contract, the lease would have been forthcoming and that MBNZ is taken to have known that.

[117] It is also convenient at this point to address the Judge's fourth reason for finding there was no contract reached — that there was no contemporaneous evidence that MBNZ had indicated that a draft contract would be provided within any particular time period.[47] Mr Millin had agreed in cross-examination that he did not give a binding commitment to the Kingsbeers that the contract would be provided within a certain period because he did not know when it would be provided. But he also said that he had expected it to be provided before the start date:

> A. … I was expecting the contract to be issued before [KTL] actually starting their work because how can you commit to doing the work without a contract? I mean, you can't cover cost that way, it's ridiculous so it's, yeah, that's what I would've expected. In other roles I've been in, the contract would have been issued before the work was started so yeah, I would have expected that to be pretty, pretty fast. But it didn't.
>
> Q. And within the ongoing conversations that you were having with the Kingsbeers about the contract and when it would be delivered, was that a topic that was coming up?
>
> A. Yeah, they were continually asking which I'd expect them to. It's a huge commitment to agree to do the … I asked them to do and to really, but they put, they would have put a lot on a line if that contract hadn't come out because, and I was just as nervous because at the end of the day if for any reason something went wrong and they pulled out or anything, it would have been in my lap. I would never have put, I never wanted to put myself in that sort of position because McDonalds are ruthless.

[118] It is apparent that Mr Millin fully grasped that KTL needed to have the contract within a time frame that would enable it to secure the new equipment as quickly as possible because renting equipment on a long-term basis was not viable for it. Further,

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[47] At [73].

on the information Mr Millin had in January 2018, he could have agreed to provide the contract within a reasonable time. He had no reason to believe that could not be done. Unbeknownst to Mr Millin, the template was being revised and this would take much longer than anyone expected. That fact does not, however, mean he did not agree with KTL that the contract would be provided within a reasonable time.

[119] Even after Mr Millin left MBNZ, its staff continued to act consistently with the expectation that a contract could be provided within a reasonable time. Mr Bavister acknowledged that:

> I probably did say that a written contract could be provided relatively quickly, but that would be because I did not know that the contract was being reviewed by our legal counsel in the USA. I learned that subsequently.

[120] While we agree with the Judge's assessment that there is no basis on which to conclude that there was a definite commitment to provide the contract within a three to six week period, we think the correct inference to draw from the evidence is that the parties agreed that a contract would be provided within a reasonable time. We come to the question of what a reasonable time was in this context later.

[121] As Mrs Kingsbeer had repeatedly tried to explain, the provision of the written contract was linked to the issue of the short-term costs; putting an end to the short-term costs depended on them being able to enter into the lease with TR Group and that depended on provision of the contract. This brings us to the Judge's final reason for rejecting the assertion that MBNZ had agreed to meet the short-term costs.[48] This conclusion was based on Mr Millin's evidence that, with the benefit of the ballpark figure provided by the Kingsbeers that the costs would be under $50,000, the Kingsbeers would "be discussing them as they come in" and that it was "expected that the costs would be paid back over time, but due to KTL's service and high standards we were willing to step outside normal practice to assist". He clarified this in cross-examination, agreeing that in the long run, there would "ultimately be no cost to [MBNZ]" because the cost would be "worked out in the rates" — in other words, it would all come out in the wash. The Judge said:[49]

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48 At [74].
49 At [74] (footnote omitted).

> It is unclear … if Mr Millin contemplated some form of bridging finance. The illogic of Mr Millin's indiscriminate consideration of KTL's additional expenses incurred by short-term rentals for payment, and inevitable start-up expenses for recovery, indicates his further confusion. There is no evidence he was aware of TR Group's preparedness to credit KTL, which may have made sense of MBNZ's 'recovery'; that preparedness was not in any event indicated by TR Group until well after Mr Millin says he discussed short-term expenses with the Kingsbeers.

[122] Respectfully, we find this reasoning difficult to follow. There was never a suggestion of any formal repayment that might involve some form of bridging finance. Mr Millin was clearly conveying that the short-term costs could be met by MBNZ to ensure that KTL would sustain its delivery services (which was essential to MBNZ) and that future rates could be settled in a way that allowed MBNZ to effectively recover its up front support for KTL. When Mr Millin was negotiating with KTL in late 2017 and early 2018, it was not yet known that TR Group would ultimately offer to credit the short-term rental costs against the cost of the long-term lease — that offer was not made until May 2018, after Mr Millin had left the company.

[123] On 4 June 2018 Mr Bavister emailed KTL requesting a meeting to discuss "a couple of items, including the status of the contract." Infuriated, KTL declined to meet until the issue of the contract and the short-term costs were resolved. The next day, however, Mr Kingsbeer spoke to Mr Sutherland and Mr Bavister by telephone (prompted by an accident Mr Kingsbeer had during a run). On 6 June 2018 Mrs Kingsbeer emailed Mr Bavister, with a copy to Mr Sutherland, as follows:

> [Mr Kingsbeer] has talked to [Mr Sutherland] regarding the extra expenses we are incurring. I think its been established with all parties now that these extra expenses incurred are solely because of the way the runs are currently set up, and this set up is due to the delay in receiving the contract.
>
> Once everything is in place …… i.e. the forklifts are mounted to the actual trucks, these extra expenses will cease.
>
> As [Mr Sutherland] has indicated to [Mr Kingsbeer] in their conversation yesterday, he now fully understands what these expenses are for and that they will not be an ongoing expense once correct gear is set up with Forklifts mounted to the trucks, he indicated that there shouldn't be any problem in you signing off on those invoices 108 Feb, 109 Mar, 116 Apr, and paying us. I will email you May Invoices expenses later in the week.
>
> Now that everyone is on the same page, and you can clearly see from the invoices what every expense is for, can you please confirm what date they will be paid.

> Thank you and we look forward to hearing from you tomorrow (Thursday) as we should be receiving a copy of the contract.

[124] Mr Sutherland took no issue with Mrs Kingsbeer's summary at the time, though at trial he said it was a "step too far" to suggest that he had agreed that there would be no problem signing off on the invoices.

[125] On 10 May Mr McGregor called Mr Bavister and was told that the contract was with MBNZ's lawyers and that Mr Bavister would get back to him with an update. Mr Bavister did not recall the specifics of this call but accepted Mr McGregor's account. Mr McGregor emailed Mr Bavister on 22 May 2018 enquiring about progress. He was told that the contract was still being reviewed by MBNZ's lawyers and Mr Bavister would update him on 28 May 2018, which he did not do.

[126] Mr Bavister replied that Mr Sutherland would be responding in relation to the contract and the extra expenses. On 10 June 2018 Mr Bavister emailed the Kingsbeers to say that a contract should be available on 12 June. Nothing was received.

[127] Finally, on 14 June 2018 MBNZ send a draft contract. It was in substantially the same terms to the 2016 ICA, but for a five-year term. It was, however incomplete in that the schedules referring to the agreed rates were missing — Mr Bavister advised that MBNZ and KTL would "still need to work together to complete schedule 2 and 3". In a separate email Mr Bavister set out a number of questions about the short-term costs.

[128] KTL replied, providing the information, its exasperation evident from the comments (presumably by Mrs Kingsbeer) that:

> This is disappointing and frustrating, as we have explained [in] so many emails and conversations to both you and [Mr Sutherland], the breakdown of these costs. This is not something we [are] profiteering from, these are actual expenses we are incurring, that we never budgeted for.

[129] Following this exchange, on 15 June 2018, Mr Bavister emailed KTL that "[MBNZ] is committed to finalising these discussions as quickly as possible" and suggesting a face to face meeting the following week. He confirmed that MBNZ had reviewed the information provided and "agree[d] with covering the majority [of]

expenses" to the tune of approximately $34,000. MBNZ ultimately agreed to pay $39,772.62.

[130] KTL responded positively on 18 June 2018 and asked if money could be paid that day. MBNZ requested a revised invoice for the agreed amount ($39,722.62), which Mrs Kingsbeer provided in the evening of 18 June 2018, asking that it be paid as soon as possible. The following afternoon Mr Bavister asked for a change to one of the items such that it stated the amounts as NZD and included the details of KTL's bank account. Payment was not made. On the morning of 20 June 2018, Mrs Kingsbeer emailed Mr Bavister asking when payment would be made "as I had to report to my bank before COB" adding that she could "…not stress the importance of this [enough]". Mr Bavister replied that he understood the importance and would let her know. By the afternoon, nothing had been heard. Mrs Kingsbeer emailed again. Mr Bavister responded that Ian Thomas (the Finance Director) was back in Australia the next day and a further update would be provided then.

[131] On 21 June Mr Bavister confirmed that "payment [had] been completed this morning by the Australian team." Mrs Kingsbeer was cautious. She decided that the planned meeting ought to wait until the payment had been received. But payment was not received. On 22 June 2018 KTL's lawyers wrote to MBNZ requiring payment of the short-term costs reflected in invoices 131, 134, 135 and 136 by 27 June 2018 and giving notice that KTL would cease the Additional BOP Runs on 30 June 2018. It confirmed that it would continue the Gisborne and Whakatāne runs.

[132] The agreed payment for the short-term costs was finally made on 3 July 2018. MBNZ asserts that the delay was the fault of its bank.

[133] On 3 September 2018, KTL gave three months' notice, as required by the 2016 ICA, of its intention to cease the existing runs. It could no longer manage these runs economically because it was using the larger trailer leased for the Additional BOP Runs, which was too expensive to use on the Gisborne and Whakatāne runs.

[134] Mr Kingsbeer gave evidence that after ending its relationship with MBNZ, KTL made efforts to find other work. It found that very difficult. It had been operating

in a specialist area and its equipment was set up to transport refrigerated goods to MBNZ requirements. There was no opportunity to find other work of that type. The other main contractor for that kind of work was Hall's, the contractor from which KTL had taken over. It had surplus capacity and would have handled any extra work itself. Mr Kingsbeer made enquiries as to other kinds of work. However, there was little work available, and moving away from refrigerated transport would have meant modifying the existing equipment, which KTL could not afford to do. It returned the leased equipment to TR Group and sold off the equipment that it already owned, using the proceeds to repay debt.

Was there a contract and if so, what were its terms?

KTL and MBNZ intended to be bound

[135] We consider that the weight of the evidence is to the effect that when KTL and MBNZ negotiated the terms on which KTL would assume the Additional BOP Runs, they both intended to be bound from 29 January 2018 and they reached an agreement on that basis.

[136] KTL was certainly keen for the increased business from MBNZ. But it was also sufficiently cautious to seek advice from Mr McGregor about the viability of the new runs and to follow that advice. The evidence does not suggest that Mr and Mrs Kingsbeer took what would be a significant financial risk (including stopping work for its other clients) without knowing that MBNZ was committed to a five-year term on terms that would ensure the contract was viable for KTL.

[137] MBNZ was equally keen. On Mr Millin's evidence, KTL was really the only available contractor in the region — the only other being Hall's, which was ceasing work on 28 January 2018. There was pressure on Mr Millin to ensure a seamless transfer — it was evident that McDonalds was a demanding client and lapses in service would not be tolerated. MBNZ itself needed the certainty of having KTL committed to avoid risk in terms of its own contractual obligations to McDonalds. These considerations were exacerbated by the difficult time of the year for starting the Additional BOP Runs. Both MBNZ and KTL needed the certainty of the other being committed.

[138] So, Mr Millin and the Kingsbeers both understood that: (1) the runs would only be viable for KTL if it had a five-year lease of new equipment (2) that could not happen until TR Group saw that KTL had a five-year contract with MBNZ (3) although it was not known exactly when a written contract would be available, it was reasonable given the parties' history and the state of knowledge at the time, to expect that this would only be a matter of weeks and (4) if MBNZ covered short-term costs arising from having to hire equipment on a short-term basis pending the written contract becoming available, KTL could confidently undertake the new runs.

[139] The interconnectedness of the short-term costs and the provision of a written contract within a reasonable period, which was known to Mr Millen, was not subsequently understood by MBNZ's Australian management and not adequately recognised by the Judge.

Express terms

[140] Mr Millin, who had the ostensible authority to conclude an agreement with KTL, was certain he had agreed to a five-year term. For the reasons discussed above, we do not accept MBNZ's argument that any long-term agreement was subject to the written contract being provided or to the competency requirements being completed. We find that there was an express term of the contract that KTL would perform the Additional BOP Runs for a five-year term.

[141] For completeness, we address the Judge's comment that "[the] pleaded essential terms also omit any obligation on KTL to perform work for MBNZ".[50] This comment was made in relation to the argument that the parties had agreed that the pleaded terms that MBNZ would provide a written contract within a reasonable time and meet the short-term costs were essential to them — suggesting that the lack of any obligation on KTL to actually undertake the runs "might be thought fatal to the pleaded terms' contended essentiality."[51] MBNZ adopted the Judge's view. Respectfully, we disagree.

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50 At [80].
51 At [80]

[142] KTL's assumption of the Additional BOP Runs was the raison d' être of the arrangement, for both KTL and MBNZ. The Amended Statement of Claim pleaded an essential term that MBNZ would provide a "Written Contract" within a reasonable period. The "Written Contract" was defined as "a written contract documenting the BOP Additional Runs". The meaning of "BOP Additional Runs" was drawn from the pleading at paragraph nine that "[KTL] would undertake additional delivery runs to: Bay of Plenty and Rotorua ('the BOP Additional Runs')".

[143] We also find that there was an express term that, pending the written contract being provided, MBNZ would meet KTL's short-term costs up to a maximum of $50,000. The fact that the precise short-term costs were unknown does not preclude an agreement because the parties had agreed the upper limit. Nor does the fact that there was no express agreement regarding when the costs would be reimbursed — the parties can be taken to have agreed that the usual commercial practice of invoiced costs being paid the following month would apply. We note that the invoices KTL rendered on 31 March 2018 were endorsed "Terms: 20th of following month".

Implied term

[144] MBNZ submits that there are no grounds on which to imply a term that a written contract would be provided within a "reasonable time". It argues that such a term is not capable of clear expression.[52] It give two broad reasons for this submission. First, it is unclear what form of written contract would be "suitable to enter into long-term leases and/or obtain finance on". We do not accept this submission because there was clear evidence from TR Group that a written contract between KTL and MBNZ for a five-year term would allow TR Group to provide a long-term lease to KTL.

[145] The second reason given is that it is not obvious what would constitute a reasonable timeframe. We do not accept this submission either. We emphasise again that the viability of the Additional BOP Runs depended on KTL being able to secure a long-term lease of equipment and have its short term costs met by MBNZ in the meantime. We have found that there was an express term that MBNZ would do so up to a maximum of $50,000, which was intended to assist KTL for the period pending

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52 Referencing *Bathurst*, above n 34, at [116].

the written contract being provided. A reasonable time for a written contract to be provided is necessarily within the period for which KTL would have its short-term costs met — beyond that the Additional BOP Runs would not be viable for it.

[146] The invoices for "above-contract" expenses, and additional costs breakdown attached to them, show that $54,865.42 of short-term costs had been incurred by the end of May 2018. The costs incurred were reasonably foreseeable and consistent on a month-to-month basis — with the average monthly short-term costs being $12,837.75. KTL would therefore accrue the recoverable limit of $50,000 of short-term costs in just under four months. A reasonable time for MBNZ to provide the contract within would have been, at the very latest, by 29 May 2018.

[147] We therefore find there was a binding contract between KTL and MBNZ, the terms of which were that:

(a) KTL would undertake the Additional BOP Runs from 29 January 2018 for a term of five years;

(b) MBNZ would provide a written contract to that effect within a reasonable time of the start date (where a reasonable term was no more than four months from the start date); and

(c) pending the written contract being provided, MBNZ would meet KTL's short-term costs up to a maximum of $50,000.

Was there a breach of contract by MBNZ?

[148] KTL pleaded both repudiation and breach of the contract by MBNZ, though its case, both in the High Court and on appeal, rested primarily on the allegation of breach. The alleged breaches were the failures to provide a written contract within a reasonable period and to pay the short-term costs.[53] It is said that these failures gave rise to a right of cancellation under s 37(2)(a) and (b) of the CCLA — being breaches

[53] We only consider the issue of breach in relation to the implied term that MBNZ would provide a written contract within a reasonable period, which we have found. This is instead of the alternative term asserted, that a written contract be provided within three to six weeks.

of terms that were essential to KTL and which substantially reduced the benefit of the contract to it.

[149] The Judge, having found that no contract existed, did not make a determination on the issue of breach:[54]

> … I need not to, and do not, contemplate if MBNZ nonetheless may be said in breach of KTL's pleaded essential terms for contract provision and short-term expenses' payment, or any resultant quantification of lost profits. Such is to pile conjecture on conjecture. But it should not go without mention MBNZ provided a draft five-year contract, and paid short-term expenses, to KTL. Whether that was provision at a reasonable time, or payment of all payable, is not now for determination under this first cause. …
>
> (footnotes omitted)

[150] MBNZ does not accept that either of the terms was essential. It says that KTL knowingly entered into the arrangement on the basis that it would incur short-term expenses and that a written contract would follow at some point in the future. There was no reason the arrangement could not have continued on that basis but for KTL's cancellation of it.

[151] We do not accept that submission, for the reasons explained earlier — both KTL and MBNZ needed the Additional BOP Runs to be viable for KTL, and that depended on KTL being able to secure long-term leases of new equipment, which, in turn, required a written contract from MBNZ and support from MBNZ in relation to the short-term costs in the meantime. For the same reason, we find that the term regarding payment of the short-term costs was agreed to have been essential. We have previously commented on MBNZ's apparent failure to appreciate the interconnectedness of these aspects of the arrangement, which Mr Millin appreciated and which was the reason he reached the agreement he did with KTL.

[152] Finally, MBNZ denies that there was any breach of the terms. In relation to the obligation to provide a written contract within a reasonable period, it relies on the fact that the contract template was under review by MBNZ's overseas lawyers and neither Mr Sutherland, nor Mr Bavister could reasonably have been aware of how long

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[54] At [80].

that would take. It asserts that if there was a breach, it was cured by MBNZ's provision of the draft contract on 14 June 2018 and a full copy on 19 June 2018. We have held that a reasonable time for providing a written contract was on or before 29 May 2018 — at the outside. The contract, in its final form, was not provided until three weeks after that date. MBNZ was unquestionably in breach of this obligation.

[153] As to the asserted breach of the obligation to pay the short-term costs, MBNZ maintains that it discharged its obligation by engaging in constructive negotiations for payment and that it "did pay them, subject to the bank error". KTL's communications in June 2018 about the pressing need for payment could not have made it clearer that the time for payment had passed and KTL could not wait any longer. Whatever the reason for MBNZ's failure to make the payment when it had promised to do so, it is an error that MBNZ must bear.

[154] For the same reasons as we found that performance of these terms was agreed to be essential, we also find that the failure to provide the written contract within a reasonable time and to reimburse the short-term costs substantially reduced the benefit of the contract for KTL. By mid-June 2018, KTL could not expect any further reimbursement of short-term costs beyond what had been agreed. These were accruing at approximately $12,000 per month. There were serious difficulties with cash-flow. Even with the final contract, there would be a lead time of some weeks while new leased equipment was modified. Essentially, the Additional BOP Runs were no longer viable. KTL was entitled to cancel the contract on that ground.

Affirmation

[155] It will be recalled that KTL's solicitors wrote to MBNZ on 22 June 2018 advising that it was no longer viable for KTL to continue the Additional BOP Runs and that it would cease doing so on 30 June 2018. MBNZ pleaded that KTL's action in continuing the runs until 30 June 2018 amounted to an affirmation of the contract, disentitling it to cancel. The Judge did not address this issue. MBNZ raised it in its notice supporting the judgment on other grounds.

[156] A contracting party may lose their right to cancel a contract for breach by choosing to affirm the contract. Affirmation, now provided for by s 38 of the CCLA,

has its origins in equity and "rests on the underlying notion that an aggrieved person must elect between fundamentally inconsistent rights."[55] Whether a party has made that election and affirmation the contract is very much a question of fact. The evidence must show that the party has made a firm choice to which they are irrevocably committed.[56] In this case, the evidence is perfectly clear that KTL had elected to cancel. Its preparedness to continue servicing the Additional BOP Runs for a further eight days — conveyed in the same paragraph as the notice to cancel — cannot be viewed as indicating any uncertainty about that election. What it did was allow MBNZ time to make alternative arrangements, something that was very much to MBNZ's advantage.

Failure to mitigate

[157] MBNZ had asserted that, if there was a binding agreement between the parties, then KTL had failed to take reasonable steps to mitigate its losses upon termination of the Additional BOP Runs by ceasing business. It contended that KTL should have continued to trade and to find new customers. The Judge did not consider it necessary to deal with this issue, but added that if he had done so, he would have found that disposing of the means of conducting its business was reasonable in the circumstances.[57] MBNZ challenges that finding.

[158] In our view the Judge's indicative conclusion was correct. The onus of proving that KTL failed to mitigate its loss was on MBNZ, but Mr Kingsbeer's evidence, as recorded earlier, makes it clear that KTL took reasonable steps to try and continue the business before ceasing to trade.

[159] Also in the context of KTL's obligation to mitigate, MBNZ complained that, in calculating its claim, KTL failed to account for the value of the equipment that would have been used to carry out the Additional BOP Runs. Mr Cook made a further submission that did not reflect the pleadings relating to failure to mitigate that the

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55 *Crump v Wala* [1994] 2 NZLR 331 (HC) at 336.

56 See for example *Hughes v Huppert* [1991] 1 NZLR 474 (HC) at 478; and *Jansen v Whangamata Homes Ltd* HC Hamilton CIV 2003-419-1511, 29 November 2004.

57 Decision under appeal, above n 2, at [89].

value of the business should have been deducted from any loss sustained. These arguments go to quantum, rather than the question of mitigation.

Relief: quantum, failure to mitigate and the quantum meruit claim

[160] In the event of its appeal succeeding, KTL seeks to have this Court enter judgment for the amount sought in its Amended Statement of Claim for damages for loss of profits ($679,475) and short-term costs ($91,261.44). MBNZ, however, seeks to have the question of quantum remitted to the High Court.

[161] There was extensive evidence in the High Court on the question of quantum but the Judge did not make any findings. We consider it preferable for the question of quantum in relation to both the loss of profits claim and the short-term costs to be determined by the trial Judge so that the parties have the benefit of a first instance decision on this aspect.

[162] The issue of relief is complicated slightly by the outcome on the quantum meruit cause of action. In the event of its contractual claim failing, KTL had sought $91,261.44 in respect of the short-term costs on the basis of quantum meruit. The Judge held that KTL's claim in quantum meruit failed except to the extent of to $7,876 — but that finding in relation to invoice 136 was made in his supplementary judgment. Given our finding that a contract did exist, quantum meruit was not the appropriate basis for determining KTL's entitlement and that aspect of the main judgment should be set aside. However, there is no appeal against the supplementary judgment and that judgment must stand. The modest amount recoverable under that judgment can be taken into account in assessing quantum overall.

Remaining grounds of appeal: estoppel/FTA/quantum meruit

[163] Given our conclusions on the issue of whether a contract existed between the parties, it is unnecessary to consider the remaining grounds of appeal.

Result

[164] The appeal is allowed. The judgment in the High Court is set aside.

[165] The case is remitted to the High Court for determination of quantum in accordance with the findings in this judgment.

[166] MBNZ must pay KTL costs for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel.

Solicitors
Holland Beckett Law, Tauranga for Appellant
Buddle Findlay, Auckland for Respondent