IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA663/2021
[2023] NZCA 266

BETWEEN	PHILIP JOHN WOOLLEY Appellant
AND	FONTERRA CO-OPERATIVE GROUP LIMITED Respondent

Hearing:	8 and 9 November 2022
Court:	Brown, Goddard and Clifford JJ
Counsel:	P A Morten and M A Robertson for Appellant J F Anderson KC, M D Branch and K F Shaw for Respondent
Judgment:	29 June 2023 at 10.30 am

JUDGMENT OF THE COURT

A The appellant's application for leave to adduce further evidence is granted.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis plus usual disbursements. We certify for two counsel.

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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The appellant, Mr Woolley, the owner and operator of a dairy farm known as Glenmae, entered into a milk supply agreement (MSA) with the respondent (Fonterra). An enforcement order issued by the Environment Court on 4 April 2014 on the application of the Marlborough District Council (MDC) ordered the cessation of the

milking operation at Glenmae (the Enforcement Order). It prohibited the recommencement of milking until certification was provided by a registered engineer that the effluent disposal system at Glenmae was functioning properly in accordance with a resource consent.[1] Fonterra then exercised the power in the MSA to suspend milk collection.

[2] Mr Woolley engaged Opus International Consultants Ltd (Opus) who provided a certification dated 5 September 2014 (the Certificate) by way of a response to the Enforcement Order. The MDC disputed the sufficiency of the Certificate. In those circumstances, and where there had not been a ruling of the Environment Court on the issue of compliance with the Enforcement Order, Fonterra decided that the suspension of milk collection should be maintained.

[3] Mr Woolley claimed that Fonterra's continuation of the suspension after 5 September 2014 was a breach of an implied term in the MSA that Fonterra would exercise any discretionary power reasonably. The High Court dismissed his claim.[2] The issues on Mr Woolley's appeal include: whether, following provision of the Certificate, the contractual preconditions to the exercise of the suspension power existed; if so, the nature of any constraint on Fonterra's discretionary power to suspend milk collection; and whether, in maintaining the suspension of milk collection after 5 September 2014, Fonterra acted contrary to any such constraint.

The milk supply agreement

[4] The MSA provided a broad framework for a six-year supply contract commencing on 1 June 2013 under which Mr Woolley committed to supply Fonterra exclusively with milk from Glenmae. It comprised three documents:

(a) the Supply Contract Schedule 13/14 (the Schedule);

(b) the Supply Contract Terms 13/14 (the Contract Terms); and

(c) the Suppliers' Handbook (the Handbook).

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1 *Marlborough District Council v Woolley* [2014] NZEnvC 79 [Enforcement order].

2 *Woolley v Fonterra Co-operative Group Ltd* [2021] NZHC 2690 [High Court judgment].

[5] The Handbook, which is updated annually by Fonterra and issued to its shareholding members and milk suppliers before the start of each milking season, contains the detail of the supply relationship.[3] Under cl 3.3 of the 2014/15 Handbook Fonterra retained the power to suspend milk collection in specified circumstances:

> Fonterra can give you notice that it will not collect your milk or has suspended collection of your milk, and as a result you will be considered to have not supplied that milk if:
>
> …
>
> - you have not complied with the Terms of Supply;
>
> …
>
> - you breach the Environmental Sustainability requirements set out in Section 8 of this Handbook;
>
> …
>
> If Fonterra does not collect your milk or suspends collection of your milk, you must dispose of the milk at your own cost and it must not be re-presented for collection (see Clauses 4.16 and 4.17).

[6] Environmental sustainability was addressed in Section 8 of the Handbook, cl 8.1 of which prescribed the grounds on which Fonterra could suspend milk collection:

> **8.1 ENVIRONMENTAL SUSTAINABILITY**
>
> **You must:**
>
> - meet the following minimum requirements:
>   - comply with all relevant environmental regulations that apply on your farm;
>   - comply with the requirements of this Section of the Handbook;
>   - take all reasonable and practical steps to minimise harm to the environment; and
>   - ensure that Fonterra's reputation is not compromised as a result of environmentally undesirable farming practices.

[3] It was accepted by the parties to have been incorporated into the milk supply agreement by reference: High Court judgment, above n 2, at [36]. Although there was disagreement as to whether Mr Woolley had received the 2014/15 Suppliers' Handbook before the start of the milking season, nothing turned on this, as there was no material difference between the 2013/14 and 2014/15 Suppliers' Handbooks: High Court judgment, above n 2, at [40].

Fonterra will:

- ensure that you are:
  - aware of the minimum requirements that you must achieve in order to supply milk to the Co-operative; and
  - well supported to continuously improve the environmental outcomes on your farm;
- undertake assessments to ensure that the Co-operative's minimum requirements are being achieved.

If the minimum requirements are not being achieved:

- where it is identified that the minimum requirements are not being achieved, the issue will be rated as a minor, major or critical hazard;
  - "minor" hazards pose a small risk of environmental damage, non-compliance with environmental regulations and/or damage to Fonterra's reputation. Your Farm Dairy Assessor will work with you to address these issues, but if you require further support you should call the Supplier Services Team in the first instance;
  - "major" hazards pose a significant risk of environmental damage, non-compliance with environmental regulations and/or damage to Fonterra's reputation. Major hazards must be remedied as soon as is practicably possible but no later than the start of the following season;
  - "critical" hazards cause environmental damage, and are likely to be non-compliant with environmental regulations and/or cause damage to Fonterra's reputation. The immediate issue must be remedied within 24 hours. Any further actions that are required to avoid a repeat occurrence must be completed as soon as is practicably possible but no later than the start of the following season;
- where a minor, major or critical hazard is identified, Fonterra may require an Environmental Improvement Plan to be developed that specifies the actions required and the agreed dates by which those actions will be completed;
- if you refuse to participate in the development of an Environmental Improvement Plan, or to implement that Plan, Fonterra will specify the timeframe within which the minimum standard must be met.

If you:

- do not meet the requirements of this Section of the Handbook; or

- do not undertake the actions required in an Environmental Improvement Plan or that your Farm Dairy Assessor requires you to undertake to meet the minimum standards within the specified timeframes; or
- have more than one major or critical hazard in the past three years on your farm; or
- provide incorrect information in relation to this section of the Handbook.

Fonterra may:

- charge a fee of $200 plus GST for a farm visit by a Fonterra representative;
- charge a fee of $250 plus GST for a farm visit by a Fonterra representative where the development of an Environmental Improvement Plan is required;
- require, at your cost, an independent consultant to develop an Environmental Improvement Plan that will achieve the minimum standard;
- suspend the collection of your milk and as a result you will be considered to have not supplied that milk.

If Fonterra suspends collection of your milk, you must dispose of the milk at your own cost and it must not be re-presented for collection (see Clauses 4.16 and 4.17).

[7] Clauses 8.2 to 8.5 then recited mutual obligations between Fonterra and milk suppliers on specific environment issues. Clause 8.2 is of particular relevance:

8.2 EFFLUENT MANAGEMENT

Effective effluent management ensures that this valuable resource is utilised to its fullest extent and that our ground and surface water bodies are protected from contamination. Adherence to the Co-operative's requirements will allow us to demonstrate a strong record of meeting regulatory requirements.

In accordance with the Sustainable Dairying Water Accord, we will work with suppliers to reduce their reliance on effluent systems that discharge to water.

You must:

- meet the following minimum requirement:
  - all sources of effluent collected on the farm are managed in a manner that complies with the relevant Regional Council resource consent or permitted activity rules, 365 days a year;

- in the event that the minimum requirement is not met:

  - work with a Sustainable Dairying Advisor or Farm Dairy Assessor to create an Environmental Improvement Plan that sets out the actions required to achieve the minimum standard and the timeframe within which this is to be achieved; and

  - implement the actions in that Environmental Improvement Plan within the timeframes specified.

Fonterra will:

- assess your effluent system during the annual Farm Dairy and Environmental Assessment;

- provide you with support, or refer you to an appropriate service provider, to develop an Environmental Improvement Plan in the event that a major or critical hazard is identified on your farm; and

- undertake follow up assessments to ensure that the actions specified in the Environmental Improvement Plan are completed and the minimum requirement is being achieved.

Factual overview

[8] The High Court judgment records in considerable detail the chronology of events giving rise to this litigation. For the purposes of this appeal a more succinct account will suffice but we gratefully adopt the summation by Isac J of various sequences of events.

Events culminating in the Enforcement Order

[9] In 2008–2009 Mr Woolley converted Glenmae from a bull and beef unit to a dairy farm. As part of that conversion he applied for a resource consent for the construction and operation of an effluent system designed by a chartered engineer, Mr Dimmendaal. That design contemplated five ponds: one anaerobic pond, two aerobic ponds and two holding ponds. Effluent would primarily be discharged to land by combining it with irrigation water and discharging it through a centre pivot irrigator. The application envisaged that 500 cows would be milked at Glenmae.

[10] A first resource consent granted by MDC in December 2008 (U081142) required that the installation of the effluent system be certified by the designing engineer. It specified that discharge was not to commence until such time as MDC

had received that certification. Because Mr Dimmendaal left private practice and was not replaced, the pond construction work was undertaken by Mr Woolley without supervision. Mr Woolley did not favour the five-pond design, instead constructing the anaerobic pond (pond 1) and a single aerobic "holding" pond (pond 2). This clear breach of the 2008 resource consent caused MDC to suggest that Mr Woolley should make an application for a variation of the resource consent.

[11] On 2 August 2010 Mr Woolley applied for a new resource consent reflecting his proposed two-pond system. However this application contained no information on cow numbers. The Judge noted that this was significant because the evidence in the subsequent Environment Court proceedings indicated that approximately 900 cows were milked in the 2013/14 season.[4] On 1 September 2010 MDC issued a replacement resource consent (U100478) for the installation of the effluent system at Glenmae. Condition 4 stated:[5]

> The installation of the effluent system shall be certified by the designing engineer upon completion of the installation, which is then to be provided to the Manager, Compliance, Marlborough District Council. The certification shall confirm the system has been installed and is functioning according to the approved design. The discharge shall not commence until such time as that certification has been received by the Manager, Compliance, Marlborough District Council.

[12] However Mr Woolley did not engage a replacement consulting engineer to provide the necessary certification. Consequently his continued use of the redesigned effluent system failed to comply with the second resource consent. Following an inspection of Glenmae on 10 October 2012, MDC prepared a report recording that the effluent system failed to comply with several conditions of the resource consent, including condition 4. On 11 February 2013 MDC wrote to Mr Woolley pointing out this and other areas of non-compliance, and drawing his attention to the minimum standards of compliance required by Section 8 of the Handbook. It concluded with a warning to Mr Woolley that due to the multiple areas of ongoing non-compliance and poor management practices, MDC might consider taking further enforcement action.

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4 High Court judgment, above n 2, at [106].

5 The first resource consent contained a similar condition.

[13] On 26 June 2013 MDC filed an application in the Environment Court for an enforcement order, followed by an amended application for expanded orders on 23 December 2013. In parallel with its enforcement proceedings, MDC liaised with Fonterra about the situation on Glenmae. In turn, Mr Woolley sought Fonterra's intervention on his behalf with MDC.

[14] The traditional dairy season runs from 1 June until 31 May in the following year. It is common for farms to begin "drying off" cows by early autumn and to winter the animals on a grazing block between June and July. Due to the length of the period between insemination and birth, there is a long decision-making lead time with farmers often having cows inseminated from late October in one season, intending calving and milking to start by August of the following season. It was Mr Woolley's contention that, as a result of decisions he made in relation to herd management in October 2013, he was committed to milking cows on Glenmae from August 2014.[6]

[15] On 2 December 2013 Fonterra, through the person of Ms Langford,[7] issued an Environmental Improvement Plan (EIP) for Glenmae under cl 8.1 of the Handbook. The EIP closely reflected the findings of MDC's October 2012 inspection report and identified four deficiencies in relation to effluent management, each of which was rated as "major" in terms of cl 8.1 of the Handbook. Mr Woolley was required to present to MDC by 31 March 2014 a certification of the effluent system by the designing engineer. If he was unable to do so, he was directed to apply to vary condition 4 of the resource consent. The EIP also warned Mr Woolley that a failure to meet the environmental standards required of milk suppliers could result in suspension of his milk collection.

[16] Following a hearing on 23 January 2014, the Environment Court delivered a decision on 4 April 2014 making an order in the following terms:[8]

> **<u>ENFORCEMENT ORDER</u>**
>
> A: The Environment Court orders under section 314(1)(b)(i) of the Resource Management Act 1991 that, to ensure compliance with Condition 4 of Marlborough District Council Consent U100478,

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6 High Court judgment, above n 2, at [14]–[15].

7 Ms Langford was a Sustainable Dairying Adviser: see cl 8.2 of the Handbook, at [7] above.

8 Enforcement order, above n 1.

P J and S M Woolley obtain, lodge and serve by Friday 6 June 2014 a certificate from a registered engineer (being a practitioner approved by the Marlborough District Council) stating that:

(1) the effluent disposal system on the dairy farm "Glenmae" on State Highway 63 in the Upper Wairau Valley has generally been installed and is functioning according to the design in MDC Permit U100478 and the accompanying documents; and

(2) in particular that the dimensions given on the plans are correct (and, if not, by how much they differ) and that the layout on the ground corresponds with the cross-section and sectional view on the second application for resource consent; and

(3) the two ponds are functioning as holding ponds, i.e. they are impermeable and are not discharging to the ground and/or groundwater around or beneath the ponds; and

(4) there are no holes in the ponds and walls; and

(5) past weed infestation has not affected the ponds' impermeability.

B: Under section 314(l)(a) of the Resource Management Act 1991 the Environment Court:

(1) orders that P J and S M Woolley cease operating the milking shed on the dairy farm "Glenmae" on State Highway 63 in the Upper Wairau Valley from 7 June 2014; and

(2) prohibits P J and S M Woolley from recommencing milking at Glemnae, unless and until order A has been complied with and the approved engineer's certificate records that the effluent system was installed and is functioning correctly in all respects.

C: The applications for other enforcement orders are adjourned.

D: Leave is reserved for any party to apply for:

(1) further timetabling directions, provided any application is made promptly (last minute applications are unlikely to be successful);

(2) approval by the Court of a certifying engineer if agreement cannot be reached.

…

[17] As Isac J observed,[9] the terms of the order accurately reflected the reasons of the Environment Court: Mr Woolley had a final opportunity to obtain the necessary

[9] High Court judgment, above n 2, at [115].

certification by 6 June 2014, failing which he could not undertake any milking on Glenmae. The Judge also noted that by April 2014 the cows from Glenmae would likely have been dried off and the milking shed and effluent system would not be required again until August 2014.[10]

Fonterra's decision to suspend milk collection

[18] Fonterra learned of the Enforcement Order affecting Glenmae from MDC on 2 May 2014.

[19] On 30 May 2014, one week before the unless order would take effect preventing any milking on Glenmae and use of the effluent system, Mr Woolley applied to vary the conditions of his resource consent. The MDC opposed that application. The Environment Court issued a procedural decision on 9 June 2014 declining to vary the Enforcement Order or extend time for compliance. Judge Jackson stated:[11]

> [8] I record that Mr and Mrs Woolley have now breached the orders and thus now need to [rely] on indulgences from the [MDC] (endorsed by the court) if they are to commence milking in the 2014/15 season. They should now start looking at alternative arrangements for their herd.

[20] The MDC sent a copy of the procedural decision to Fonterra. On the evening of 18 June 2014 Ms Langford sent a letter to Mr Woolley containing a notice of suspension of milk collection in the following terms:[12]

> **Suspension of Milk Collection – 39061 and 39094**
>
> Fonterra Co-operative Group Limited has been provided with copies of the Environment Court decisions for both Glenmae Farm (39094) and Tuamarina Farm (39061).
>
> …
>
> For Glenmae (39094), we note that the Enforcement Order:
>
> - contains a number of requirements
> - prohibits you from recommencing milking unless and until those requirements are complied with, and

---

[10] At [105], n 36.
[11] *Marlborough District Council v Woolley* [2014] NZEnvC 123 [Procedural decision].
[12] Milk collection was also suspended in respect of another of Mr Woolley's farms, Tuamarina.

> - requires an approved engineer's certificate that records that the effluent system has been installed and is functioning correctly in all respects.
>
> **Fonterra is therefore unable to start milk collection in the 2014/15 season from supply no. 39061 or supply no. 39094 until the requirements of the respective Enforcement Orders are met.**
>
> Please keep us advised of progress towards meeting the requirements of the Orders. We will in due course need confirmation from Marlborough District Council of compliance before either suspension can be lifted.
>
> If you require any further clarification on this matter please contact me on [cell phone number].

Opus is retained

[21] In the reasons for its 4 April 2014 decision, the Environment Court observed that certification could be obtained from another appropriately experienced engineer.[13] Opus was the only firm that had both chartered professional engineers and was accredited under the Farm Dairy Effluent System Design Accreditation programme. Consequently Mr Woolley retained Opus. That engagement was not confined to certification but also included the redesign and upgrade of the effluent system on Glenmae:[14]

> Opus … are pleased to provide the following Offer of Service for a Farm Dairy Effluent system evaluation, subsequent design to meet current code of practice, management of implementation of the Farm Dairy Effluent (FDE) system upgrade and the preparation of an Effluent Management Plan as outlined below for Glenmae Farm on State Highway 63 (Lot 1 and 2 DP 306447).

Mr Woolley's attempt at brinkmanship

[22] Despite the terms of the Enforcement Order, Mr Woolley decided to move cows back to Glenmae with the apparent intention of milking them. As the Judge explained:

> [142] On 12 July 2014 Ms Langford and her immediate supervisor, Mr Gahamadze, met with Mr and Mrs Woolley to discuss the suspension and Mr Woolley's options for the upcoming season. Fonterra's focus had shifted to animal welfare concerns given that there were large numbers of cows due to begin calving and be in need of milking by the start of August.

13 Enforcement order, above n 1, at [55].
14 High Court judgment, above n 2, at [140].

> Mr Gahamadze raised the possibility of "book-building" which involves sending parts of a herd out to farmers to be milked for a period of time.
>
> [143] Mr Woolley did not react well to this suggestion. Ms Langford's evidence, which Mr Woolley accepted was probably correct, was that when he heard the suggestion Mr Woolley sat back, crossed his arms, and said something along the lines of:
>
>> Here is what I am going to tell you … will happen. I will bring all my cows home and they will start calving on the farm. I will either milk them and put the milk into the non-compliant effluent pond. Fonterra will simply have to pick up my milk otherwise I will make it known that Fonterra has now contributed to making an environmental problem worse. Or I will simply not milk them after they calve. This will make their udder[s] blow up. I will make sure that I will get the media here and tell them that Fonterra has caused an animal welfare issue by refusing to pick up my milk.
>
> [144] Ms Langford and Mr Gahamadze then confirmed that it was the Court order which prohibited Mr Woolley from resuming milking in the 2014/15 season, at least until he complied with the terms of the order.

[23] It appears that Mr Woolley was confident that Glenmae would be ready to milk in the new season and could accommodate cows from his Tuamarina farm. He firmly rejected Fonterra's proposal of book-building because he wanted to use "the animal welfare possibility" to put pressure on both the Environment Court and MDC to permit him to commence milking more rapidly.[15]

[24] Mr Gahamadze's attempt to dissuade Mr Woolley from his planned brinkmanship was unsuccessful.[16] As the Judge explained:

> [146] Undeterred, Mr and Mrs Woolley began transporting in-calf dairy cows back to Glenmae from 11 July 2014. Given Mr Woolley's comments to Fonterra staff at this time, it seems inescapable that his intention was to milk those cows in breach of the Court's order. Mr Perrott, the contract milker engaged by Mr and Mrs Woolley on Glenmae, swore an affidavit for the Environment Court on 5 August 2014. He deposed that he got a call from Ms Woolley indicating that she was trucking some cows to Glenmae "and that they would be there to be milked." He had estimated that by about 12 August 2014 there would be 600 cows to be milked. During cross-examination, Mrs Woolley candidly accepted there could have been that number of cows.
>
> [147] Mr Perrot[t]'s evidence to the Environment Court was that, from an animal welfare perspective, he had little choice but to milk the cows in breach of the enforcement order. And with Fonterra having suspended milk collection, the milk collected had to be discharged into the anaerobic pond, which by this stage was seriously over its operating capacity.

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[15] At [145].
[16] At [145].

> [148] Mr and Mrs Woolley's decision to introduce milking cows back to Glenmae coincided with increasing pressure from their bank, ASB, to ensure that they were generating sufficient income to finance their significant liabilities. So, there was a very real financial pressure to ensure income from milk proceeds in the 2014/15 season.
>
> (Footnote omitted).

[25] The state of affairs by August 2014 is described in the judgment as follows:

> [167] By the end of August 2014, up to 20,000 litres of milk was being dumped every day into pond 1, which had become a putrescent problem of its own. Around this time the number of cows on Glenmae peaked at about 1,200.
>
> [168] Throughout this time, Mr and Mrs Woolley continued to lobby Fonterra to collect their milk. On 7 August 2014, Fonterra's in-house counsel, Mrs Alison Brewer, advised [Mr Woolley's solicitor] by email that in order for Fonterra to be able to collect milk from Glenmae it would require a clear direction from the Court that it could and should do so. The reason Mrs Brewer gave for this requirement was that Mr and Mrs Woolley remained in breach of their resource consent, which in turn amounted to a breach of the Suppliers' Handbook conditions of supply. The following day, Mrs Brewer confirmed that Fonterra would liaise with MDC about its lifting [of] the milking prohibition to ensure that Fonterra did not end up getting caught in the middle of any dispute as to what any future Court order might permit.
>
> …
>
> [173] So, the overall position by mid-August 2014 was this: Mr and Mrs Woolley had created an animal welfare crisis on Glenmae. They then used this crisis to justify seeking a variation of the enforcement order. Given Ms Langford's evidence that only a month earlier Mr Woolley had told her and Mr Gahamadze that was precisely what he intended to do, the implication is inescapable. Mr Woolley's (very general) claim in evidence that he and Mrs Woolley had made efforts to accommodate their cows elsewhere in Marlborough, but had been unable to do so, must similarly be rejected. The Environment Court had made it very clear to Mr Woolley months earlier that he needed to make contingency plans in the event he could not obtain certification of the effluent system by 31 May 2014. He chose not to do so. He also dismissed Fonterra's efforts — with the support of Federated Farmers and Dairy NZ — to book-build. I therefore find the situation that arose on Glenmae was precisely one that Mr and Mrs Woolley sought to create.
>
> (Footnote omitted.)

The Opus Certificate

[26] Following a period of negotiation between Opus and Mr Woolley's solicitor, Mr Clark, about the terms of the proposed certificate, Opus issued the Certificate on 5 September 2014. We address the sufficiency of the Certificate below in our

discussion of the grounds of appeal.[17] However the Judge's preliminary observations are worthy of note:

> [212] First, the certificate began by noting that it was provided "solely in response to" the enforcement order, and addressed the orders numbered A(1) to (5).
>
> [213] Second, the certification "and related comments are interconnected and must be read together and in its entirety". Put another way, the general statement of response provided by Opus to each of the Environment Court's orders 1 to 5 were subject to important qualifications listed under a "comments" section for each order. Opus was careful then to note that the terms of the certification were circumscribed not only by the brief general statement but also by reference to any limitations noted in the comments.
>
> …
>
> [215] Finally, the certificate noted that the word "generally" used "within this certification means broad or overall conformance with the approved installation as stated, not necessarily meeting *all specified* engineering design requirements" (emphasis added). And as outlined at [114] above, while the Environment Court used the expression "generally" in its first order, the intent and scope of the certification orders must be considered by reference not only to the orders themselves, but also to the reasons the Court gave for making them as contained in the 4 April decision.

The suspension of milk collection is maintained

[27] On the morning of 5 September 2014 Mr Woolley telephoned Mrs Brewer, Fonterra's in-house counsel, to advise that the Opus Certificate was imminent and that Mr Woolley considered that milking could recommence once the Certificate had been served and Fonterra could resume collection of milk from Glenmae. In an email to Mr Clark following that call, Mrs Brewer explained that Fonterra would not be collecting milk until Mr Woolley had obtained an order from the Environment Court "lifting" the Enforcement Order:

> I have advised Mr Woolley that it is Fonterra's understanding that milking cannot recommence under order B(2) because order A can no longer be complied with, due to the 6 June 2014 deadline having passed and no extension having been granted.
>
> I also note that Council's lawyers have advised me that Council does not share Mr Woolley's view and that the Court order prohibiting milking overrides the resource consent.

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17 High Court judgment, above n 2, at [69]–[84].

> We understand that there will need to be another Court process initiated by Mr Woolley to get the order prohibiting milking lifted.
>
> Could you please urgently advise (in writing) your legal opinion of the position. We will then consider further, and liaise with Council and our own external advisers as necessary. We also ask for a copy of the Certificate and accompanying documents lodged/served.
>
> In the meantime Fonterra's position is that we cannot collect milk until the Court Order prohibiting milking has been lifted by the Court.

[28] The Judge summarised Mr Woolley's response via Mr Clark in this way:

> [219] Thus Mr Woolley's position was this: while he had not obtained the certificate by 6 June 2014 as required under order B(1), Fonterra was wrong to consider that meant he could no longer comply with the order. That was because the effect of non-compliance was not to prevent the ability to obtain certification; it merely prevented the commencement of milking. Order B(2) was an unless order prohibiting milking. It made no reference to a drop-dead date for certification. So now that a certificate meeting the requirements of the order had been obtained, there was no requirement to return to the Court. Fonterra was obliged to collect milk from Glenmae and a refusal to do so would constitute a breach of contract.

[29] It was MDC's view that the consequence of the procedural decision of 9 June 2014[18] was that Mr Woolley needed approval from both MDC and the Environment Court before milking could commence at Glenmae.

[30] On 8 September 2014 Mr Clark wrote to Mrs Brewer stating:[19]

> 11. If [the] Council genuinely believes there is now a problem at Glenmae it is incumbent on it to take urgent action with the Court. It has not done so. And given the dismissal of its most recent attempt it is unlikely to do so. Simply because it now has no basis for any enforcement action whatsoever.
>
> 12. Which then brings us to Fonterra. It cannot play judge and jury on this. The Suppliers Handbook which casts obligations on Fonterra is clear. Nowhere does it say that Fonterra is unilaterally allowed to refuse to take milk because there is a dispute between the farmer and Council.
>
> 13. Absent some evidential foundation of environmental harm or breach of consent Fonterra must take the milk.

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18 Procedural decision, above n 11. See [19] above.

19 The reference in paragraph 11 to MDC's most recent attempt was to MDC's application of 21 August 2014 for an order cancelling the resource consent and requiring Mr Woolley to destock Glenmae. In the course of an urgent telephone conference before Judge Hassan, MDC accepted that its application was beyond the scope of s 321 of the Resource Management Act 1991 and sought leave to withdraw that part of the application.

> 14. And Fonterra is also required to observe due process.
>
> 15. So Fonterra is now plainly in breach. That occurred on Saturday. As well as loss of milk the Woolley's hold Fonterra liable for all consequential losses and cost.

[31] Later that day Mrs Brewer sent an email to Mr Clark which relevantly stated:

> I note that, amongst other things, clause 8.1 of the Suppliers Handbook requires Mr & Mrs Woolley to comply with:
>
> - all relevant environmental regulations that apply on their farm
> - the effluent management minimum requirement set out in clause 8.2.
>
> Fonterra remains of the view that Mr & Mrs Woolley are not meeting those minimum requirements. For so long as Council disputes Mr & Mrs Woolley's entitlement to recommence milking, and absent a Court order directing otherwise, this position is unlikely to alter. On this basis, Fonterra suspends, and is entitled to suspend, milk collection.
>
> I also note para [8] of the Procedural Decision dated 9 June 2014 which, as well as declining the application for extension of time, records the orders have been breached and requires Mr & Mrs Woolley to "rely on indulgences from the Council (endorsed by the Court) if they are to commence milking in the 2014/2015 season".
>
> In refusing to recommence collection, Fonterra denies it is [in] breach of the terms and conditions of supply, and also denies any liability for losses and costs.

[32] Some time prior to 9 September 2014 Mr Woolley commissioned a plan to introduce a new "weeping wall" system as a means of separating effluent solids and liquids, a modification which would enable pond 1 to be abandoned. The effluent system could then operate from a newly constructed pond containing the weeping wall separator in conjunction with pond 2. The weeping wall plans arrived only two working days after the Certificate had issued.

[33] Mr Woolley did not return to the Environment Court to resolve the dispute about the ongoing effect of the Enforcement Order, despite MDC's stance on the terms of the Certificate and Fonterra's maintaining the suspension of milk collection. The Judge observed that was despite Mr Woolley filing an application with the Court on 12 September 2014 to vary the Tuamarina enforcement order (in order to permit milking), the reservation of leave in the 4 April Enforcement Order for Glenmae, and

the indication in the procedural order of 9 June that Mr Woolley's ability to milk during that season was reliant on "indulgences from the Council (endorsed by the Court)".[20] The failure to return to the Environment Court together with the rapid decision to abandon pond 1 as part of an effluent system caused the Judge to draw an inference that Mr Woolley was not confident that the Certificate met the requirements of the Enforcement Order.[21]

[34] On 11 September 2014 the contract milker who was responsible for the day-to-day running of Glenmae refused to continue milking Mr Woolley's cows and advised that he would have no further involvement in the running of the farm until such time as Mr Woolley could demonstrate it was fully compliant and operational. Receivers were appointed under the ASB's securities on 24 November 2014. Three days later the criminal proceedings next discussed were commenced.

The Environment Court's ruling of 10 July 2015 (Ruling 3)

[35] The Judge prefaced his discussion of the criminal proceedings (the context for Ruling 3) with the following description of the Certificate:[22]

> [266] In essence, the certificate was a half-way house; it neither met the requirements of the order, as Opus, and most likely Mr Woolley, appear to have appreciated at the time, but neither did it say that the system did not meet the requirements of the order. The passive drafting created ambiguity. …

In the Judge's view that ambiguity was in large part to blame for the events of the criminal proceedings in the Environment Court in 2015.[23]

[36] The MDC charged Mr and Mrs Woolley with a number of offences under the Resource Management Act 1991 (RMA) relating to the activities on Glenmae in 2014, including a charge that between 10 July 2014 and 7 November 2014 they permitted a breach of the Enforcement Order by permitting the operation of the milking shed to milk cows.[24] In Ruling 3 Judge Smith amended the charges to reduce

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20 High Court judgment, above n 2, at [239]. The Judge italicised the words in parentheses.
21 At [247].
22 High Court judgment, above n 2.
23 At [266].
24 Which the Judge noted was a date not long before the appointment of receivers and would broadly coincide with the removal and drying off of the herd: High Court judgment, above n 2, at [268].

the period of offending.[25] It is convenient to refer to Isac J's description of what transpired:

> [269] The prosecution took place over three days in July 2015. It seems after the prosecution case Judge Smith, who heard the evidence, took the view that the Opus certificate met the requirements of the enforcement order, and that MDC's prosecution for breach of the order could not be sustained after 5 September 2014. On 10 July he issued a ruling in which he amended the date range of the relevant charges so that the alleged offending ceased on 5 September 2014 rather than 7 November. It is this ruling — referred to as Ruling 3 — which is the genesis of Mr Woolley's claim.
>
> [270] The Judge took this approach because Fonterra and the Council considered that the enforcement order remained in force preventing milking and use of the effluent system.
>
> [271] Turning to the certification, the Court noted that the Opus certificate "on its face … purports to be an engineer's certificate and it purports to address the orders of the Court …". The Judge went on to note two arguments had been advanced by the prosecution to support the conclusion that the terms of the certificate did not meet the requirements of the order. First, the use by Mr Whyte as certifying engineer of the words "reasonable grounds to believe" rendered the certificate inadequate. Second, the qualifications noted in the document had the same effect.
>
> [272] Judge Smith concluded that the use of the words "reasonable grounds to believe" followed a formula that was ubiquitous amongst professional engineers and other professionals. Accordingly, the use of that qualifying expression did not undermine the value of the certificate.
>
> [273] The Court then went on to conclude:
>
> > When I look at the requirements of the Court requiring a certificate from a registered engineer, I am satisfied as to the following:
> >
> > (a) That the Court intended that the certificate be in accordance with the IPENZ or engineer's normal certification process. The use of the word is a term of art and recognises that the certificates are routinely given to councils by engineers and others in respect of a range of issues.
> >
> > (b) The Court explicitly discussed issues relating to the certification in this case[.] It cites in particular from a letter to another engineer, Mr Born, whereby the council foresaw there would be difficulties in anyone certifying the ponds, particularly as to the clay content. The Court noted at para [55] of the decision, a little earlier but still relevant:
> >
> > > However, that does not automatically mean the condition is impossible to comply with. Impossibility, in relation to a condition, usually means that a consent holder finds that it is physically

[25] *Marlborough District Council v Woolley* [2015] NZDC 13239 [Ruling 3].

> or legally impossible to comply with the condition. But that is not the situation here because an engineer could have been found to satisfy the condition … Another appropriately experienced engineer could be found.
>
> (c) Certification in this case is from an appropriately qualified engineer approved by the Council.
>
> For the reasons given I am satisfied that the certification provided on 5 September satisfied the terms of the enforcement order.
>
> [274] Later in the ruling Judge Smith concluded that he was satisfied "beyond any doubt" that the certification required by the order was received on 5 September. The order ceased to have effect on that date accordingly.
>
> (Footnotes omitted.)

The MDC's application for leave to appeal to the High Court from Ruling 3 was declined.[26]

[37] Within days of Judge Smith's ruling MDC granted a new resource consent for a materially different effluent system designed by Opus and On-Farm Agri Centre Ltd. That consent rendered the status of the Enforcement Order largely moot, except insofar as Mr Woolley's claim against Fonterra was concerned.[27]

The High Court judgment

[38] The Judge analysed Mr Woolley's claim, that there was an implied term that Fonterra would exercise any discretionary power within the MSA reasonably, as captured in three points:[28]

> (a) First, the suspension notice of 18 June 2014, and Mrs Brewer's decision to continue the suspension after 5 September, were invalid because the individuals who purported to make those decisions on Fonterra's behalf lacked authority to do so (or because the formalities required of a suspension notice were missing);
>
> (b) Second, the 5 September certificate met the requirements of the enforcement order, and from that date the order was discharged. It follows that the essential precursor to Fonterra's discretion to suspend milk collection did not exist after that date. Accordingly, there was no power to suspend milk collection, and doing so was a breach of contract; and

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26 *Marlborough District Council v Woolley* [2016] NZHC 1172.

27 High Court judgment, above n 2, at [276].

28 At [286] (footnote omitted and emphasis in original). The first point is not in issue on appeal.

(c) Finally, the *decision* to suspend milk collection, and the *process* followed by Fonterra when exercising its discretion, was unreasonable in a public law sense, consistent with the approach of the Supreme Court of the United Kingdom in *Braganza v BP Shipping Ltd*. In that case, a majority of the Court confirmed the use of *Wednesbury* unreasonableness as a control on contractual discretions.

[39] The Judge viewed the claim as turning on the answer to the question whether the Certificate met the terms of the Enforcement Order, explaining:

> [317] If the Opus certificate met the terms of the order, such that the order was discharged on 5 September 2014, the contractual condition sustaining the suspension — non-compliance with environmental requirements — ceased to exist. So, whether Fonterra's decision was rational or procedurally reasonable is irrelevant. It had no proper basis, or one grounded in the terms of the contract, to suspend milk collection from Mr Woolley's farm.
>
> [318] Conversely, if the enforcement order remained in effect despite the Environment Court's finding in Ruling 3, Fonterra is not liable, whatever arguments are advanced on the validity of the notice, or the exercise of the discretion. That is because Fonterra cannot be liable for the consequences of not collecting milk that Mr Woolley was unable to produce lawfully. Mr Woolley has not been deprived of any contractual benefit as a result of the suspension. It is the enforcement order that is the reason for his lost income.

[40] The Judge rejected the proposition that Ruling 3 prevented the High Court from considering whether Mr Woolley remained in breach of the Enforcement Order after 5 September 2014.[29] After a detailed comparison of the Certificate and the Enforcement Order the Judge concluded that following 5 September 2014 Mr Woolley remained in breach of both the Enforcement Order and the resource consent. He was also in breach of cl 8.1 of the MSA. It followed that none of Mr Woolley's claimed losses were caused by any breach of contract by Fonterra.[30]

[41] While viewing that conclusion as sufficient to dispose of Mr Woolley's claim,[31] the Judge proceeded to consider the further question whether the suspension decision was unreasonable. As a preliminary point, the Judge determined that Mr Woolley's failure to meet the "minimum requirements" in cl 8.2 meant Fonterra was contractually empowered to suspend milk collection.[32] Then, following a careful review of the case law, the Judge concluded there was no doubt that *Braganza v BP*

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29 At [320].
30 At [380].
31 At [381].
32 At [409].

Shipping Ltd[33] had charted a new approach to the review of contractual discretions but considered that, in the light of some post-*Braganza* decisions, it remained questionable whether the new approach can be applied in more commercial contexts.[34] The old approach (the so-called default rule) and the new approach adopted in *Braganza* will be outlined below when discussing the issues on appeal.[35]

[42] The Judge would have confined the approach in *Braganza* to "other-regarding" powers, namely those which involve some positive duty or obligation of the decision-maker to have regard to the interests of the counterparty. He suggested that in commercial cases, where the object of the discretion will more generally be self-regarding and in conflict with the interests of the counterparty, the requirements of autonomy and certainty suggest added scope for judicial intervention beyond the traditional default rule is undesirable.[36]

[43] The Judge concluded:

> [441] In the context of this case, Fonterra's power of suspension is already subject to contractual limitations controlling its exercise. In particular, the power may not be exercised unless a supplier is in breach of one of the minimum requirements identified in cl 8.1. I decline to accept the plaintiff's invitation to apply *Braganza*, especially its extension of the *Wednesbury* review of contractual decision-making. The traditional elements of the default rule are sufficient, I find, to balance the risk of abuse of power with freedom of contract.

[44] Having determined that Mr Woolley's case, to the extent it was based on a challenge to Fonterra's consideration of relevant or irrelevant considerations, was legally unsustainable, the Judge then determined that even on the basis of the expanded default rule in *Braganza* Mr Woolley's claim must also fail.[37]

[45] The Judge then dealt only briefly with the issue of causation, explaining that all Mr Woolley's claims against Fonterra flowed from his own unlawful conduct.[38] He had previously made the point that the milking which occurred at Glenmae both

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33 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.
34 High Court judgment, above n 2, at [432].
35 At [86]–[102] below.
36 At [440].
37 At [461].
38 At [482].

before and after 5 September 2014 was a breach of the Enforcement Order, which explained why the receivers were obliged to destock Glenmae from November 2014, from which it followed that none of Mr Woolley's claimed losses were caused by a breach of contract by Fonterra.[39]

Issues on appeal

[46] The various strands to Mr Woolley's appeal are conveniently summarised in an introductory paragraph of the submissions of his counsel, Mr Morten:

> Mr Woolley submits that Ruling 3 was a judgment *in rem*. Even if it was not, Isac J was not sitting as an appellate judge: he had no jurisdiction to reconsider whether the certificate satisfied the enforcement order. If he had jurisdiction, Isac J misconstrued the meaning of the enforcement order. The facts establish that the certificate met the terms of the enforcement order. Fonterra's refusal to pick up Mr Woolley's milk was a breach of the terms of its supply contract with him. That breach caused Mr Woolley to suffer loss. The losses were not a result of his unlawful acts.

Fonterra filed a memorandum supporting the judgment on other grounds, namely that absence of causation was either a complete or partial defence to Mr Woolley's claim.

[47] The parties filed an agreed list of issues in the following terms:

> 1. Did Isac J have jurisdiction in this proceeding to determine factual matters *de novo* in relation to compliance with the Resource Management Act …
>
> 2. Is [Ruling 3] in respect of which leave to appeal was declined by [the High Court] a judgment *in rem* that binds Fonterra or otherwise prevents Fonterra from challenging Ruling 3? …
>
> 3. If the Court determines [Isac J] had jurisdiction to find that Ruling 3 was not binding on [Fonterra], did the certificate meet the terms of the Enforcement Order? …
>
> 4. Did [Mr Woolley] breach the "four minimum requirements" in clause 8.2, and/or the minimum requirement in clause 8.1 of the Supply Contract after 5 September 2014? …
>
> 5. Was [Fonterra's] decision to refuse to collect milk for the balance of the 2014/2015 dairy season a breach of the Supply Contract? …
>
> 6. Did the losses Mr Woolley suffered flow from his own unlawful conduct, and disentitle him to an award of damages? …

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39 At [380].

7. Has Mr Woolley established that any breach by Fonterra was causative of loss?

[48] That list follows the sequence in which Mr Woolley's claims were considered in the judgment. We adopt a similar structure as follows:

(a) Did the contractual preconditions to the exercise of Fonterra's power to suspend milk collection exist as at and following 5 September 2014?

(i) Was the Judge precluded from determining the sufficiency of the Certificate?

(i) Was the sufficiency of the Certificate within the exclusive jurisdiction of the Environment Court?

(ii) Was Ruling 3 a judgment in rem?

(ii) Did the Certificate satisfy the requirements of the Enforcement Order?

(b) Should a term be implied in the MSA that Fonterra would exercise the power to suspend milk collection "reasonably"?

(c) Was the maintenance of the suspension of milk collection a breach of such an implied term?

Mr Woolley's application to adduce further evidence

[49] Mr Woolley applied under r 45 of the Court of Appeal (Civil) Rules 2005 for leave to admit further evidence, namely a Fonterra document concerning the permeability of linings of effluent ponds and an email from Ms Langford to MDC enclosing that document. While initially opposing the application, ultimately Fonterra withdrew its opposition. Consequently the application to adduce the evidence is granted.

Contractual preconditions to the exercise of Fonterra's power to suspend milk collection

[50] In the High Court Mr Woolley contended that cl 8.1 of the Handbook provided for specific "triggers" or "minimum requirements" which had to be satisfied before Fonterra's power to suspend milk collection arose. They included an obligation owed by Fonterra to ensure that Mr Woolley was aware of the minimum environmental requirements he had to achieve and a requirement that he was "well supported to continuously improve the environmental outcomes on [his] farm".[40] Apart from the EIP issued by Ms Langford on 2 December 2013,[41] it was Mr Woolley's case that there had been a failure by Fonterra to discharge its obligations before the suspension was implemented on 18 June 2014 and continued on 5 September 2014.[42]

[51] The Judge accepted that the minimum requirements in cl 8.1 constituted a contractual trigger before the power to suspend crystallised.[43] However he did not consider that that trigger required Fonterra to take any specific steps. As he explained:

> [406] As noted, the purpose of section 8 of the Suppliers' Handbook is to ensure Fonterra's suppliers undertake steps to achieve the four identified aims of the Sustainable Dairying Water Accord. It provides that Fonterra will offer — in an unspecified way — support to its members to do so. But beyond these rather abstract aims, it has a clear contractual bottom-line: suppliers are required to comply with all environmental regulations. If they do not, Fonterra is empowered to suspend milk collection.
>
> [407] I do not read anything in clause 8.1, or indeed section 8 of the Handbook, as requiring any action by Fonterra as a pre-condition of its ability to suspend. In particular, the statements in cl 8.1 and 8.2 which indicate "Fonterra will" take particular steps are not a contractual precursor or trigger for the exercise of the power in issue here. Were that the case, Fonterra would be obliged to lend its support to conduct that is illegal and, most likely, criminal. As [counsel for Fonterra] submitted in closing, there is an obvious need to interpret cl 8.1 to ensure Fonterra's ability to suspend milk collection is not encumbered by any prior obligation to develop an EIP with the farm owner, or meet those steps expected of it in cl 8.2.

[52] On appeal Mr Woolley did not challenge the Judge's conclusion that the precursors for suspension existed from 18 June to 4 September 2014, a period during

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40 See [6] above, setting out cl 8.1.

41 See [15] above.

42 High Court judgment, above n 2, at [385].

43 At [409]. Fonterra had accepted the exercise of the power to suspend required a trigger before it arose: at [393].

which Mr Woolley accepted that the Enforcement Order was in force. Rather, as the fourth agreed issue made clear,[44] his contention was that the precursors ceased to exist following provision of the Certificate. Compliance with the literal terms of the Enforcement Order was all that was required of the certification so as to discharge the order.[45] That issue had been determined by Judge Smith in Ruling 3 and the High Court was precluded from revisiting it.

Was the sufficiency of the Certificate within the exclusive jurisdiction of the Environment Court?

[53] The Judge addressed the question of the status of the Environment Court's decision succinctly. After noting that the effect of s 47 of the Evidence Act 2006 was to render the correctness of Mr Woolley's conviction, for breaching the Enforcement Order in the 2014 season up to 5 September, unassailable in the High Court proceeding,[46] the Judge stated:

> [322] But the converse position does not apply. That is, Fonterra is not bound in this proceeding by Judge Smith's 2015 determination that the Opus certificate discharged the enforcement order. Fonterra was not a party to that proceeding, so no question of res judicata or estoppel arises. The application of the res judicata doctrine only to parties and privies involved in previous litigation serves an important function: a judicial determination in one proceeding is a product of the evidence adduced at *that* hearing by the parties present. But the same events and factual substratum may arise for consideration in later proceedings involving different parties and different evidence. In these circumstances, a latter court seized of the issue has a duty to determine the facts afresh based on the evidence before it.

[54] On appeal Mr Woolley renewed the exclusivity of jurisdiction argument, submitting that fact-finding and policy evaluation under the RMA is confined to consent authorities and, on appeal, to the specialist Environment Court.[47] Unless directed otherwise by the Chief District Court Judge, proceedings under s 338 of the RMA (including prosecutions for breach of enforcement orders) must be heard by a District Court Judge who is also an Environment Judge.[48] The courts of

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44 At [47] above.
45 High Court judgment, above n 2, at [329].
46 At [321].
47 Citing *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, [2008] NZRMA 200 at [37].
48 Resource Management Act, s 309; and *Conway v Auckland Regional Council* [2007] NZRMA 252 (HC) at [51]–[53] and [59].

general jurisdiction (namely the High Court and this Court) have jurisdiction only in respect of questions of law.[49]

[55] The point was emphasised that an appellate court with limited jurisdiction is not authorised to make factual findings under that guise.[50] Isac J was not sitting as an appellate judge and he had no statutory power to determine whether the Enforcement Order had been complied with or discharged. The MDC's application for leave to appeal was rejected because the issues sought to be raised were not questions of law. Consequently Judge Smith's ruling was final.

[56] We agree with Fonterra's rejoinder that Mr Woolley's contention overlooks the fundamental fact that his proceeding was not under the RMA for breach of an enforcement order but rather a civil proceeding seeking a remedy for breach of contract. In the exercise of the High Court's civil jurisdiction Isac J was required to consider whether there had been a breach of the applicable environmental regulations and compliance with the Enforcement Order.

[57] Isac J was determining the issue in different proceedings involving different parties and, we would add, with the benefit of evidence not before Judge Smith.[51] The specialist jurisdiction of the Environment Court under the RMA did not preclude the High Court from doing so and Isac J was under no obligation to defer to the assessment of Judge Smith.

Was Ruling 3 a judgment in rem?

[58] The "in rem" argument was not advanced in the High Court. In its submissions for the appeal hearing, Fonterra contended that in seeking to raise the issue in this Court Mr Woolley was reneging on a concession made at trial. That concession was said to be reflected in the Judge's observation that Mr Morten had responsibly

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49 Pursuant to ss 299 and 308 of the Resource Management Act or, in the case of appeals from prosecution proceedings for breach of s 338, pursuant to s 296 of the Criminal Procedure Act 2011.

50 Citing *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].

51 High Court judgment, above n 2, at [11], where Isac J recorded that he had been greatly assisted by documents discovered in the proceeding which were not available in the Environment Court, expressing the view that had they been, it was likely that the result of that decision would have been different.

accepted in closing that the Environment Court judgments did not affect the High Court's ability to consider the merits of their conclusions afresh.[52]

[59] Mr Morten explained that the particular statement[53] was directed to the issue of the application of s 50(1) of the Evidence Act, but was not intended to preclude the proposed in rem argument. Counsel for Fonterra then indicated that it was not its intention to maintain that there was a formal bar to Mr Woolley advancing the in rem argument. We consider that was an appropriate stance. Consequently it is unnecessary for us to address the concession issue further.

[60] Mr Woolley's submissions invoked the description of the nature of a judgment in rem in *The Doctrine of Res Judicata*:[54]

> A judicial decision *in rem* is one which declares, defines, or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person, or thing, to the world generally, and therefore is conclusive for, or against, everybody, as distinct from those decisions which purport to determine the jural relation of the parties only to one another, and their personal rights and equities *inter se*, and which, therefore, are commonly termed decisions *in personam*.

[61] Mr Woolley submitted that Ruling 3 was a declaration by Judge Smith that Mr Woolley had done what in the Environment Court's opinion was necessary to ensure compliance with the matters set out in s 314(1)(b)(i) of the RMA. The status of Mr Woolley's compliance or non-compliance with those statutory requirements and the terms of the Enforcement Order was a "thing" in the relevant sense.

[62] Mr Woolley contended that in Ruling 3 Judge Smith determined "the status of a thing" — that is, the jural relation of the Certificate, and its compliance with the Enforcement Order, to the world generally. The decision was therefore conclusive for, or against, everybody. Hence Ruling 3 was a judgment in rem binding on Fonterra*,* whether or not it was a party to the prosecution proceedings. Consequently Isac J had no jurisdiction to revisit the issue.

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52 At [324].

53 "While the decision of the District Court that compliance had been achieved is not a decision in this litigation or binding on this Court, it is evidence of a high probative value."

54 George Spencer Bower and Alexander Turner *The Doctrine of Res Judicata* (2nd ed, Butterworths, London, 1969) at 213, this being the version quoted in *P E Bakers Pty Ltd v Yehuda* (1988) 15 NSWLR 437 (CA) at 442.

[63] Support for that contention was said to be found in the decision of the New South Wales Court of Appeal in *P E Bakers Pty Ltd v Yehuda*.[55] In that case, a municipal council granted a development consent for the premises of a bakery business which incorporated a number of conditions. In proceedings instituted by the council in the Land and Environment Court of New South Wales alleging breaches of the conditions, certain of the conditions were held to be valid.[56] In later proceedings against the same respondents brought by a neighbour alleging contravention of the same development consent, the respondents renewed their challenge to the validity of the conditions which had been previously ruled valid. In holding that the earlier decision was a judgment in rem, the Court of Appeal stated:[57]

> In the present case, the res, whether it be the land or the consent, has a status which is not derived from any private arrangement but from the decision of a public authority exercising the statutory powers conferred upon it. … The granting of the consent was a public act affecting the status of the land. The consent was also a thing in itself, deriving its status from the statute and instruments made pursuant to the statute. The status of the land and of the consent is a matter in which the public generally are interested …

[64] The submission for Mr Woolley was that the same was true of an enforcement order and a resource consent under the RMA. Ruling 3 determined the "status of a thing", namely that the Certificate was a valid certificate, that Mr Woolley had done what the Environment Court considered was necessary in order to comply with his resource consent, and that the Enforcement Order ceased to exist after 5 September 2014.

[65] Contending that that argument was fundamentally misconceived, Fonterra submitted that Ruling 3 was in substance a conclusion that it was in the interests of justice to amend the charges to reduce the offending period to be between 10 July 2014 and 5 September 2014, in light of Judge Smith's view that Mr Woolley was in compliance with the Enforcement Order after the latter date. It was submitted that, while expressed in somewhat emphatic terms by the Judge, that decision was in substance a decision that Mr Woolley would be acquitted on those charges if pursued. That was fundamentally a finding in personam as between Mr Woolley and MDC.

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55 *P E Bakers Pty Ltd v Yehuda*, above n 54.
56 *Waverley Municipal Council v P E Bakers Pty Ltd* (1985) 54 LGRA 309 (NSWLEC).
57 *P E Bakers Pty Ltd v Yehuda*, above n 54, at 445.

[66] Fonterra's submission made the following points:

(i) The sufficiency of the Certificate does not concern the status of people or property.

(ii) While by operation of s 47 of the Evidence Act a person's conviction for non-compliance with an enforcement order will be conclusive proof of their guilt for the purpose of separate civil proceedings, the converse does not apply. An acquittal (or here, the amendment of charges in the interests of justice) merely embodies the conclusion that the elements of a criminal offence have not been established to the required standard.[58] It does not prevent a subsequent finding in civil proceedings that the person acquitted committed the act or omission on the balance of probabilities.

(iii) Incidental findings of fact that could loosely be described as going to the "status" of something are not judgments in rem.[59] The Environment Court's finding regarding the Certificate in the context of amending the criminal charges against Mr Woolley was such an incidental finding.

[67] In our view Fonterra's arguments are a complete answer to the contention that Ruling 3 was a judgment in rem so far as the sufficiency of the Certificate was concerned. We also agree with Fonterra's submissions that the *P E Bakers* case is distinguishable on the grounds that the Land and Environment Court's decision concerned the validity (and hence the status) of consent conditions. By contrast, Ruling 3 concerned compliance with conditions of consent. The status of the consent was not in issue, only Mr and Mrs Woolley's personal criminal liability for non-compliance with it.

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58 *Daniels v Thompson* [1998] 3 NZLR 22 (CA) at 50–51.

59 *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin), [2011] PTSR 269 at [52]; and *Ward v Savill* [2021] EWCA Civ 1378 at [75].

[68] Of greater relevance to the present case is the judgment of the Supreme Court of Victoria in *El Alam v Council of the City of Northcote* where, although Mr El Alam was acquitted on charges concerning the use of land in contravention of the planning scheme, the Supreme Court accepted that the Council was not precluded from seeking an enforcement order to stop alleged contravention of the planning scheme.[60] Distinguishing a number of cases, including the *P E Bakers* case, Mandie J explained:[61]

> The cases cited all turned upon the construction of the particular statutes involved. There was not the slightest support in principle or authority advanced for a conclusion that the dismissal of charges of contravening a planning scheme is or is capable of constituting a judgment in rem as to the lawful prior user of the land in question binding the world at large, even if a finding as to such user was fundamental to the dismissal.

[69] For the reasons advanced by Fonterra we reject the contention that Ruling 3 was a judgment in rem concerning the sufficiency of the Certificate.

Did the Certificate satisfy the requirements of the Enforcement Order?

[70] Whether a contractual precursor to the exercise of a contractual power or discretion exists is a question of fact. The party asserting the entitlement to exercise the power or discretion has the onus of proof of that fact. However in some circumstances the evidential onus may shift to the other party to the contract.

[71] Mr Woolley initially challenged, but ultimately conceded, the existence of the contractual precursors to Fonterra's initial exercise of the suspension power. Hence the suspension of milk collection was lawful while the Enforcement Order, which prohibited him from milking, remained in force. Mr Woolley pleaded that the Enforcement Order was satisfied by the provision of the Certificate.

[72] In the High Court Mr Woolley argued that, as Fonterra's initial suspension decision of 18 June 2014 merely adopted the terms of the Enforcement Order, the suspension would be self-terminating when the Order was complied with.[62] It would then be for Fonterra to demonstrate afresh the existence of a contractual precursor by

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60 *El Alam v Council of the City of Northcote* [1996] 2 VR 672 (SC) at 679–681.
61 At 680.
62 High Court judgment, above n 2, at [327].

identifying any breaches of the minimum requirements in the Handbook and categorising them as minor, major or critical hazards.

[73] The notice of appeal elaborated on that issue in this way:

> 40. His Honour failed to specifically identify any conduct after 5 September 2014 that breached any of the four minimum requirements in the Glenmae contract (except for non-compliance with the Enforcement Order) that entitled Fonterra to continue its suspension of milk collection after 5 September 2014 for the entire 2014/2015 milking season.

[74] That argument may have gained traction if it had been demonstrated that the Enforcement Order had in fact been satisfied by the Certificate. Fonterra would then have both the legal and evidential burden of establishing that it was entitled to maintain the suspension under the contract until such time as MDC or the Environment Court confirmed that the Enforcement Order was discharged, and milk collection could resume.

[75] However the key point of contest in the litigation was whether the Certificate was sufficient to satisfy the Enforcement Order. Fonterra described this as the primary issue before the High Court and the core issue on appeal. Indeed, given Fonterra's explicit reliance on the Order's requirements in the original suspension notice, the sufficiency of the Certificate assumed the status of a proxy for proof of the contractual test for suspension of milk collection.

[76] Isac J concluded by a clear margin that the Certificate was not sufficient to meet the requirements of the Enforcement Order,[63] identifying five aspects of the evidence which led to that conclusion:[64]

> (a) A comparison of the certificate against the requirements of the enforcement order reveals that the certificate is deficient.
>
> (b) Beyond the terms of the certificate and enforcement order, the contemporaneous documentary evidence indicates that the authors of the certificate believed it might not be accepted by the Environment Court as a full and frank certification in keeping with the terms of the enforcement order.

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[63] At [337].
[64] At [338]

> (c) The doubts revealed by the documentary evidence were then confirmed in the oral evidence Mr Woolley's engineers gave before me.
>
> (d) Mr Woolley's own conduct at the material time gives rise to an inference that he also considered it unlikely the certificate met the requirements of the enforcement order (or at least that the Environment Court would accept the certificate discharged the order).
>
> (e) Finally, Mr Woolley in evidence appeared to accept the certificate may not meet the terms of the order, and his case as it was presented to me implicitly accepted that.

He proceeded to elaborate on each of those aspects in the forty paragraphs which followed.

[77] We agree with the Judge's conclusion that the Certificate did not sufficiently or unequivocally certify that the effluent disposal system on Glenmae had generally been installed and was functioning according to the design in MDC Permit U100478. We do not find it necessary to descend into the degree of detail in which this issue was explored in the High Court. It suffices to refer to the commencement of the Judge's reasoning in respect of order A(1):

> [345] Opus' certificate responded to this by stating:
>
> > Based on the available information, we have reasonable grounds to believe that:
> >
> > (i) The effluent disposal system has generally been installed and is functioning according to MDC permit U100478 (but with some limitations as explained below).
>
> [346] Then, under a heading "Comments", the certificate went on to note 10 important qualifications that run for a page and a half. A number of them clearly indicate that Opus was not providing a certification consistent with the requirements of the enforcement order.

[78] The Judge's latter observation can be illustrated by two of the ten "comments" in relation to the Certificate's response to order A(1):

> 5) We have not assessed the structural stability of the Pond 1 structure in its present form, nor can we make any comment on construction methodology. The primary reason for this is that Pond 1 is not sufficiently empty to undertake a reasonable geotechnical investigation or structural assessment. An Abatement Notice has now

> been issued to Mr Woolley preventing any further pumping of material from Pond 1.[65]
>
> …
>
> 8) The contingency system to apply [farm dairy effluent] by injecting effluent at a rate of 20% into the centre pivot irrigator(s) had not been installed at the time of this certification.

[79] The Judge's view was reached solely by reference to the requirements of order A and not by reference to order B. He explained:

> [340] The first part of the enforcement order — Part A — contains five conditions that the engineer's certificate was required to address. Those five conditions will be our focus shortly. But Part B of the order also stipulated that in addition to the five conditions in Part A, the engineer also needed to certify that the effluent system was "installed and is functioning correctly *in all respects*" (emphasis added).
>
> [341] Part B's additional stipulation is broader and more exacting than order A(1). At first glance, the two conditions are at odds with each other given order A(1) required certification that the effluent system was "generally" installed and functioning according to the design in the permit, while order B(2) is completely unqualified.
>
> [342] The better view, however, is that the certification requirement in order B(2) should be read as a sixth condition under Part A. Rather than an inconsistency with B(2), it seems to me to fill a gap that might otherwise exist: a system that had been installed and was functioning generally in accordance with the original design in the application might not be "installed and functioning correctly in all respects". That could be so if, say, the original design failed to include an important element of the system.
>
> [343] However, nothing turns on this point. Although the Opus certificate entirely fails to address the additional certification requirement in order B(2), I have approached my analysis on the basis most favourable to Mr Woolley. My conclusion on the inadequacy of the certificate has been reached based on a consideration of the more generous requirements of order A.

[80] Mr Morten challenged the conclusion that order B(2) created a sixth condition, primarily by reference to the reasoning of Judge Smith in Ruling 3, who observed:[66]

> [18] It is difficult to understand the distinction between order A being complied with and the requirement in B that the effluent system be installed and functioning correctly in all respects. What it seems to indicate, in my view, is that all the elements of A must be complied with, and the engineer

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65 The handicap which Opus faced was emphasised in Comment 1, which noted that Opus was not the original design engineer and was providing its assessment of the effluent disposal system despite not having been involved in the design or construction of Pond 1.

66 Ruling 3, above n 25.

> must certify that as a whole the system is operating. Nevertheless, item A1 seems to have the same requirement.

[81] We do not accept that order B(2) was in effect otiose. On the contrary, we consider that the reasons provided by the Environment Court for the orders it made manifest a concern to ensure that there was a fully functioning effluent system in place at Glenmae before milking could recommence. For example, having stated that the certificate must confirm the system was functioning according to the approved design, the Court said: "[a]ll aspects of the system from cowshed to paddock should of course be examined and certified."[67]

[82] The emphasis on the need for a "full" certificate was evident in the stark warning conveyed by the final paragraph of the Environment Court's enforcement order decision:

> [80] Finally we consider the court should warn Mr and Mrs Woolley that the operation of this dairy farm is at risk. Their operation of the dairy effluent system at Glenmae has been haphazard at best. If an engineer's certificate showing there is full compliance with the terms and conditions of the second permit is not obtained by 31 May 2014, then Mr and Mrs Woolley face the very real prospect that they may not be able to start milking on Glenmae in the 2014/15 season. They should consider making alternative arrangements for their milking cows if they have any indication they may not obtain a full certificate.

[83] We agree with Fonterra's submission that the use of the conjunction in order B(2) conveyed that this was a requirement separate from and additional to compliance with order A, an intention emphasised by the fact that the word "and" was underlined. While we endorse the findings of Isac J concerning the want of compliance with order A, we consider that the omission from the Certificate of any reference to order B(2) was a further sound basis for concluding that the Certificate did not satisfy the requirements of the Enforcement Order.

[84] Fonterra had an understandable interest in its milk suppliers' effluent systems functioning correctly in all respects. Given the Certificate's silence so far as order B(2) was concerned, Fonterra was justified in concluding that the prohibition on milking remained in force and that the contractual pre-conditions to the exercise of the

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67 Enforcement order, above n 1, at [53].

discretion to suspend milk collection continued to exist, notwithstanding the provision of the Certificate.

[85] We also consider that in circumstances where Fonterra had properly suspended the collection of milk because a court order prohibited milking at Glenmae, and MDC was maintaining that resumption of milk collection would be unlawful because it would breach that court order, Fonterra was justified in proceeding on the basis that it would not lift the suspension until Mr Woolley obtained confirmation from the Environment Court that his stance was correct and he was entitled to resume milking. Fonterra was not required to risk participating in a breach of the court order, in circumstances where it was at the least reasonably arguable that the order continued to prohibit milking.

An implied term to act "reasonably" in the exercise of a contractual discretion

Absolute contractual rights/contractual discretions

[86] In recent times courts in other common law jurisdictions have frequently used the implication of a term to restrict the ambit of a unilateral discretionary power conferred on one of the parties to a contract. However it is sometimes difficult to distinguish between the kind of contractual powers which should be qualified in that way and powers which are "absolute" and should not be so restricted.

[87] The distinction was recently acknowledged by the majority of the Supreme Court in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*:[68]

> [278] In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)*,[69] Jackson LJ reviewed the authorities on contractual discretions and contrasted contractual discretions with absolute contractual rights. He observed that the former involves "making an assessment or choosing from a range of options, taking into account the interests of both parties".[70]

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[68] *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

[69] *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200, [2013] BLR 265.

[70] At [83].

The majority did not consider that the contractual right there in issue could be classified as a contractual discretion and hence that subject was not considered further.[71]

[88] By contrast, in the present case it was common ground that Fonterra's power to suspend collection of milk was a contractual discretion, not an absolute contractual right. It was also common ground that the exercise of that discretion was not untrammelled. As the pleadings revealed, the point of contest was the degree to which the exercise of that power could be supervised.

The pleadings

[89] The amended statement of claim asserted that the MSA contained an implied term as follows:

> [7] It was an implied term of the Supply Contract that [Fonterra] would exercise any discretionary power provided to it:
>
> a) reasonably;
>
> b) honestly and in good faith;
>
> c) for a proper purpose;
>
> d) in a manner that would give effect to the expectations of the parties;
>
> e) in a manner that was not perverse, capricious or arbitrary; and
>
> f) otherwise in accordance with the principles articulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[90] Mr Woolley claimed that, in breach of the pleaded implied term, Fonterra's actions in purporting to exercise its discretion to suspend milk collection from 5 September 2014 and throughout the 2014/2015 season were not "reasonable" in 19 respects.

[91] The response by Fonterra in its statement of defence was in these terms:

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71 *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 68, at [279] per Glazebrook, O'Regan and Williams JJ. The minority did not address this aspect of the claim: see [225] per Winkelmann CJ and Ellen France J.

> 7 It admits that in exercising the discretionary power as to whether to suspend milk collection or to lift the suspension, there was an implied term that it act reasonably and in accordance with the principles that apply to the unilateral exercise of a contractual discretion which, in the circumstances, may include some or all of the matters set out in paragraphs 7(b)-(f) of the [amended statement of claim].

[92] While that response's implicit carve out of "reasonably" in 7(a) foreshadowed Fonterra's different perspective concerning the outer boundaries of the implied term, it was common ground that in exercising the discretionary power to suspend milk collection Fonterra was obliged at a minimum to comply with what is known as "the default rule" described below.

[93] The issue which divided the parties was whether, and if so in what circumstances, the development of that rule recognised in *Braganza* (the expanded default rule) applies in New Zealand.[72] That issue has not previously been addressed by the New Zealand senior courts. Nor, like the traditional default rule, does it appear to have been the subject of academic discourse here. More specifically, the question is whether the contractual power to suspend milk collection must be exercised by Fonterra "reasonably" by reference to both the first and second limbs in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, that is by reference to both process and outcome.[73]

The default rule

[94] As Isac J observed,[74] the common law, at least in other Commonwealth jurisdictions, has developed a default rule controlling the exercise of contractual discretions in various circumstances. The locus classicus statement of the default rule is said[75] to be the judgment of Leggatt LJ in *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (No 2)*:[76]

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72 *Braganza v BP Shipping Ltd*, above n 33.

73 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

74 High Court judgment, above n 2, at [411].

75 See Stephen Kós "Constraints on the Exercise of Contractual Powers" (2011) 42 VUWLR 17 at 22–21.

76 *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (No 2)* [1993] 1 Lloyd's Rep 397 (CA) at 404.

> For purposes of judicial review the Court is concerned to judge whether a decision-making body has exceeded its powers, and in this context whether a particular decision is so perverse that no reasonable body, properly directing itself to the applicable law, could have reached such a decision. But the exercise of judicial control of administrative action is an analogy which must be applied with caution to the assessment of whether a contractual discretion has been properly exercised. The essential question always is whether the relevant power has been abused. Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously, or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application.

[95] While it was implicit that Leggatt LJ's reference to "unreasonably" was intended to mean "irrationally", in the sense that no reasonable decision-maker could have reached the impugned decision, that was made explicit in subsequent decisions such as that of Rix LJ in *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd*:[77]

> It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria … Lord Justice Laws in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the *Wednesbury* rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision maker becomes the court itself.

[96] Save for an article by Stephen Kós,[78] the New Zealand literature is noticeably silent on the default rule, although it has been referred to in a number of High Court decisions, including *C & S Kelly Properties Ltd v Earthquake Commission*, where Mander J explained:[79]

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77 *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep 558 at [66].

78 Stephen Kós, above n 75.

79 *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690. Argument in that case concluded a fortnight prior to delivery of *Braganza*. There was passing reference to *Braganza* in *Wellington City Council v Local Government Mutual Funds Trustee Ltd* [2017] NZHC 2901, (2017) 19 ANZ Insurance Cases 62-161 at [167].

> [73] To summarise, Commonwealth Courts are willing to intervene in the exercise of a prima facie unfettered discretion. Such intervention will ordinarily be premised on an implied term to constrain the exercise of the discretion so as to give effect to the reasonable expectations of the parties. The exercise of contractual discretion will be open to challenge where it can be established that it was not exercised honestly in good faith; or not exercised for the purpose(s) for which it was conferred; or when exercised in a capricious or arbitrary manner; or otherwise falls into the category of what would be considered *Wednesbury* unreasonableness.

An expanded default rule?

[97] In the context of an employment contract, the United Kingdom Supreme Court in *Braganza* adopted an expanded default rule.[80] BP Shipping, the employer, was empowered to determine the facts surrounding the death of an employee while serving on its vessel at sea. The cause of Mr Braganza's disappearance while at sea was unknown but the two plausible explanations were either accident or suicide. BP Shipping concluded that the employee had committed suicide. The consequence of that conclusion was that the employee's widow was not entitled to a death-in-service payment under the contract. The issue of principle concerned the limitations to be applied to the formation of the employer's opinion.

[98] In the leading judgment Lady Hale DP observed that there is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute assigns a decision-making function to a public authority, noting that in neither case is the court the primary decision-maker. She identified the question as being whether the standard of review for decisions of a contracting party should be any less demanding than the standard adopted in the judicial review of administrative action.[81] Lady Hale DP recognised that the decided cases revealed an understandable reluctance to adopt the fully developed rigor of the principles of judicial review of administrative action in a contractual context but also that, at the same time, they had struggled to articulate precisely what the difference might be,[82] citing both the observations of Leggatt LJ[83] and Rix LJ.[84]

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80 *Braganza v BP Shipping Ltd*, above n 33.
81 At [19].
82 At [20].
83 At [20], citing *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (No 2)*, above n 76, at 404 and as quoted at [94] above.
84 At [22], citing *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd*, above n 77, at [66] and as quoted at [95] above.

[99] Lady Hale DP referred to the test of reasonableness of an administrative decision adopted by Lord Greene MR in *Wednesbury Corporation*,[85] drawing attention to its two limbs: the first limb focuses on the decision-making process — whether the right matters have been taken into account in reaching the decision; the second focuses upon its outcome — whether, even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. She pointed out that the latter is often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the former.[86]

[100] Noting dicta to the effect that contractual discretions should not be exercised with reference to considerations wholly extraneous to the subject matter of the decision,[87] Lady Hale DP reasoned that, if it is part of a rational decision-making process to exclude extraneous considerations, it is also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question.[88] She stated that it is of the essence of "*Wednesbury* reasonableness" (or "*GCHQ* rationality")[89] review to consider the rationality of the decision-making process rather than to concentrate on the outcome, pointing out that concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.[90]

[101] However Lady Hale DP then voiced this qualification:

> 32 However, it is unnecessary to reach a final conclusion on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action. Given that the question may arise in so many different contractual contexts, it may well be that no precise answer can be given. The particular context of this case is an employment contract, which, as Lord Hodge JSC explains, is of a different character from an ordinary commercial contract. Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence. This must be borne in mind in considering how the contractual decision-maker should approach the question of whether a person has committed suicide.

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85 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, above n 73.

86 *Braganza v BP Shipping Ltd*, above n 33, at [24].

87 At [28], referring to *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299 at [67] per Mance LJ.

88 At [28]–[29].

89 A reference to how "irrationality", as a ground of judicial review, was defined in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

90 *Braganza v BP Shipping Ltd*, above n 33, at [29].

[102] The reservation as to the scope of application of the dual limbs of the *Wednesbury* test was echoed in the concurring judgment of Lord Hodge SCJ:

> 53 Like Baroness Hale DPSC, with whom Lord Neuberger PSC agrees on this matter, at para 103 below, I think that it is difficult to treat as rational the product of a process of reasoning if that process is flawed by the taking into consideration of an irrelevant matter or the failure to consider a relevant matter. While the courts have not as yet spoken with one voice, I agree that, in reviewing at least some contractual discretionary decisions, the court should address both limbs of Lord Greene MR's test in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 233–234.
>
> 54 In my view it is clearly appropriate to do so in contracts of employment which have specialties that do not normally exist in commercial contracts. In *Johnson v Unisys Ltd* [2003] 1 AC 518, para 20 Lord Steyn stated:
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>> "It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract."

Was the maintenance of the suspension of milk collection after 5 September 2014 a breach of an implied term?

Was the default rule applicable here?

[103] Because we did not receive argument challenging the application of the default rule, our judgment assumes (without expressly deciding) that the default rule applies in New Zealand. We proceed on the basis that Fonterra's concession in this case, that it must not exercise the discretion to suspend milk collection arbitrarily, capriciously, in bad faith or unreasonably, albeit only in the sense that no contracting party could have rationally so acted,[91] was properly made.

[104] It suffices to recall the asymmetry of power in the parties' relationship. Fonterra is a dairy co-operative which must act in the interests of its many farmer shareholders. Mr Woolley is an individual shareholder. He is contracted to supply milk to the co-operative under the MSA. The MSA has a statutory underlay in s 74 of the Dairy Industry Restructuring Act 2001, which requires Fonterra to accept a supplier's milk unless they fail to satisfy the applicable terms of supply. Mr Morten

[91] Fonterra's submissions on appeal stated that it supported the more restrictive approach preferred by Isac J.

emphasised the point that, because Fonterra was the sole purchaser of bulk milk in the Marlborough region, a suspension of milk collection would leave Mr Woolley exposed. In these circumstances Fonterra's position as recorded in its pleading was unsurprising.

Was Fonterra in breach of the default rule?

[105] The Judge's findings on whether there was a breach of an implied term did not draw a bright line between a breach of the default rule and a breach of an expanded default rule. That is because, although declining to adopt the expanded default rule from *Braganza*,[92] the Judge proceeded to consider whether Mr Woolley's claim would succeed under the expanded default rule.[93] While supporting the judgment's ultimate conclusion, Fonterra's stance was that the *Braganza* test should not have been applied and that its conduct should be scrutinised by reference to the default rule.

[106] The passage of events culminating in the provision of the Certificate presented Fonterra with a binary decision. Mr Woolley asserted that the milking prohibition in the Enforcement Order had evaporated with the consequence that Fonterra was obliged to collect the Glenmae milk. He threatened court proceedings. However MDC asserted that, because the Certificate was insufficient, the prohibition remained in force. It threatened to prosecute Fonterra if it resumed milk collection, contending that would be aiding a breach by Mr Woolley of the Enforcement Order.

[107] It was necessary for Fonterra to consider the implications of its actions for itself and for all its co-operative members. In that respect Mr Woolley was not in some special category. No doubt the uncomfortable episode concerning the Environment Court's consideration of resource consent breaches by Mr Woolley in respect of Tuamarina would still have been fresh in Fonterra's corporate mind.[94]

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92 High Court judgment, above n 2, at [460].

93 At [461].

94 On 30 August 2013 the Environment Court determined that Mr Woolley was in breach of resource consent conditions relating to effluent storage and discharge on Tuamarina: *Marlborough District Council v Awarua Farm Marlborough Ltd* [2013] NZEnvC 206. The Court was critical not only of MDC but also Fonterra. Of its own initiative the Court summonsed Mr Murphy, the Director of Milk Supply for Fonterra, to attend the hearing and give evidence. Isac J observed that the unfolding public story of dirty dairying, and the summonsing of a senior executive to provide an explanation of Fonterra's efforts to ensure environment compliance on Mr Woolley's farms, unsurprisingly sparked internal communications within Fonterra: High Court judgment,

[108] Of course, as Mr Morten emphasised, the implications for Mr Woolley of a continuation of the suspension were grave. He had no other viable productive output for his milk and the implications for him of the loss of revenue from sales were serious. But Fonterra was also in a difficult position, with MDC asserting that it would be unlawful for it to resume collection. And as Mr Branch for Fonterra submitted, any continuation of the suspension need only have been for a short period. It was within Mr Woolley's power to make an urgent application to the Environment Court seeking confirmation of his view that the Certificate was effective to discharge the Enforcement Order, or seeking a discharge on the basis that he had substantially complied with the order and could not reasonably be expected to do more. Leave for further applications was expressly reserved to the parties in the 9 June 2014 procedural decision.[95]

[109] Mr Morten submitted that Fonterra could not escape its contractual obligations by saying it was unsure whether the Certificate was sufficient to meet the terms of the Enforcement Order, observing that it was a global company well able to fund an application for a declaration from the Environment Court. However, Fonterra was not a party to the proceedings in the Environment Court. It had no obligation to instigate the judicial process. It was not unreasonable for Fonterra to maintain the (properly imposed) suspension until Mr Woolley had taken appropriate steps to confirm that it was lawful for him to resume milking.

[110] Nor could it realistically be said that the cost of an urgent application, pursuant to leave reserved, for confirmation by the Court that the Certificate had the effect which Mr Woolley contended, was a burdensome cost. As earlier noted,[96] on 12 September 2014 Mr Woolley filed an application with the Court for variation of the Tuamarina enforcement order to permit milking there. There was no practical impediment to his seeking to secure clarification that his interpretation of the Certificate was correct and MDC's erroneous.

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above n 2, at [87].

95 Procedural decision, above n 11, at [11].

96 At [33] above.

[111] In these circumstances we consider that Fonterra's decision to maintain the suspension of milk collection from Glenmae for the time being was not only rational but unsurprising. It was the course calculated to secure certainty in the shortest possible time about the status of the prohibition on milking. Its decision did not offend against the default rule.

Should the expanded default rule apply in this case?

[112] We do not view this appeal as an appropriate vehicle for either general endorsement or rejection of the *Braganza* approach. We would first note that this case is not an employment case which, as the Supreme Court's judgments recognised, involves a relational contract of a different character from an ordinary commercial contract.[97]

[113] Secondly, and perhaps inevitably given the heavy focus in argument on the issue of the sufficiency of the Certificate, the submissions directed to the appropriateness of the *Braganza* extension were comparatively confined. *Braganza* was not mentioned at all in the appellant's written submissions. It was mentioned only once in Fonterra's written submissions, albeit in a paragraph observing that neither the points on appeal nor the appellant's submissions took issue with the Judge's findings on the law that applied to this particular contractual discretion. While in the course of oral argument and exchanges with the bench the issue was amplified somewhat, the extent of analysis fell well short of what such a significant development in contract law would require.

[114] This would not in any event be a suitable case for development of the law on constraints on the exercise of contractual discretions as, whatever the test might be, we agree with the Judge that it was satisfied in this case. As already mentioned, the decision by Fonterra to maintain the suspension was not only rational but unsurprising. Fonterra could not be expected to make a decision to resume collection of milk before Mr Woolley had taken steps to confirm that milking could lawfully resume despite the qualified terms of the Certificate and the firmly asserted view of MDC (the relevant regulator) to the contrary.

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[97] See [101]–[102] above.

[115] Hence, we express no views on the conceptual underpinnings of the *Braganza* approach which must await another day.

Result

[116] The appellant's application for leave to adduce further evidence is granted.

[117] The appeal is dismissed.

[118] The appellant must pay the respondent costs for a standard appeal on a band A basis plus usual disbursements. We certify for two counsel.

Solicitors:
Wisheart MacNab & Partners, Blenheim for Appellant
Harkness Henry, Hamilton for Respondent