NZLS CLE Ltd
CONTINUING LEGAL EDUCATION
NEW ZEALAND LAW SOCIETY
NZLS EST 1869

EasyReference PDF Paper

NZLS CLE – EasyReference

CONTRACT CASE LAW UPDATE

– Fundamental principles and common terms

DATE

November 2019

PRESENTERS

Victoria Heine
Yoon Jung Lee

DELIVERED

Commercial Case Law Intensive 2019

PRESENTERS

Victoria Heine, Thorndon Chambers, Wellington

Victoria is a barrister at Thorndon Chambers. She specialises in commercial litigation with particular expertise in contract law disputes, infrastructure litigation, and complex disputes arising from large scale development projects. Victoria was previously a partner at Chapman Tripp for over a decade.

Yoony Lee, MinterEllisonRuddWatts, Auckland

Yoonjung (Yoony) is a senior solicitor in the dispute resolution and litigation team. She specialises in large-scale commercial litigation and regularly acts for directors, major banks, receivers and liquidators in contractual interpretation, professional negligence and companies law litigation.

CONTENTS

CONTRACT CASE LAW UPDATE: FUNDAMENTAL PRINCIPLES AND COMMON TERMS

Victoria Heine
Thorndon Chambers
Wellington

Yoon Jung Lee
MinterEllisonRuddWatts
Auckland

This chapter begins with a refresher on contract interpretation principles.

It then proceeds in two parts. The first addresses implied terms, some emerging "new frontiers", and remedies including licence fee damages and penalty clauses. The second considers key boilerplate clauses. In each case, the discussion occurs by reference to key recent authorities both in New Zealand and overseas.

A refresher on contract interpretation[1]

The key areas of debate have historically been how do we interpret contracts and what evidence can be taken into account in doing so. The former encapsulates the debate between textualism (to what extent should the courts be guided by the ordinary or plain meaning) and contextualism (to what extent are contextual factors such as commercial common sense relevant).

While the legal principles are tolerably clear, the words of well-known commentator David McLauchlan are worth bearing in mind:

> Contract interpretation disputes are the most frequently litigated contract cases, both in New Zealand and in other Commonwealth countries. They also tend to be the most intractable and as a result their outcome is notoriously difficult to predict.[2]

There are a number of threads running through the recent cases which contribute to that uncertainty. First a clear signal that the courts will not save a commercial party from a bad bargain. Secondly, and apparently inconsistently, a sense in which the courts will not permit mere plain text to run counter to the broad sense of the justice of the bargain.

The leading New Zealand Supreme Court case remains *Firm PI 1 Limited v Zurich Australian Insurance Ltd*,[3] in which the Court:

- Made clear that the approach is objective, being the meaning which would be conveyed to a reasonable person having all the background which "would reasonably have been available to the parties" at the time the agreement was entered into.
- Emphasised that while context is relevant to the process of assessing meaning, the text remains "centrally important". If the language used has an ordinary and natural meaning, this will be "a powerful, albeit not conclusive, indicator of what the parties meant".

---

1 For a useful discussion, see Tim Smith, *NZLawyer- Contract Law MasterClass*; and the McLauchlan article referred to below.
2 David McLauchlan "Contacts don't always "mean" what they say" NZLJ, August 2019 at 227.
3 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

In practice this means that the focus of argument should be on the nature, quality, and formality of the drafting together with the internal context of the contract. Extra-contractual commercial context should, at a practical level, receive less prominence. To what extent that material is relevant may be a matter of debate in some cases, but what is clear is that it would be unusual for context to *displace* plain meaning. As the Court said in *Firm PI*, if the contract has a plain meaning, "a conclusion that it produces a commercially absurd result should be reached only in the most obvious and extreme of cases".

Evidence of pre-contractual negotiations remains admissible as an aid in interpretation, but recent cases do suggest (consistent with the relevant legal test) that recourse to such material is likely to be the exception rather than the rule. In particular it might suggest that broad discovery applications brought in the hope of recreating the parties' negotiations will meet considerable resistance.[4] That said, the Court of Appeal has just recently declined strike out in an interpretation case because it was inappropriate there to reach a conclusion on meaning without recourse to such material.[5] So even if the material ultimately proves of limited relevance, attempts to sidestep the burden of discovery of a lengthy trial may prove fruitless – not an easy position for a practitioner to navigate.

Implied terms

The current debate

The traditional starting point for implying a term into a contract is the five requirements set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (the *BP Refinery* requirements). The Privy Council held that for a term to be implied, it must:

- be reasonable and equitable;
- be necessary to give business efficacy to the contract;
- be so obvious that "it goes without saying";
- be capable of clear expression; and
- not contradict any express term of the contract.[6]

This test was considered relatively uncontroversial until the Privy Council set off a storm of debate on it in 2009.

In *Attorney-General of Belize v Belize Telecom*,[7] the Privy Council sought to put the *BP Refinery* requirements in context. It held that implying a term into a contract does not add to the contract, but is simply part of the process of construing what a reasonable person would understand the contract to mean (the *objective meaning*). In doing so, the court has no power to improve upon the contract; that is, it cannot introduce terms to make the contract fairer or more reasonable.[8]

4 Above at fn 1.
5 *Local Government Mutual Funds Trustee Ltd v Napier City Council* [2019] NZCA 444.
6 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 283 per Lord Simon.
7 *Attorney-General of Belize v Belize Telecom* [2009] UKPC 10, [2009] 1 WLR 1988.
8 At [16]–[20] per Lord Hoffman.

Delivering the judgment for the Board, Lord Hoffman explained:

> 17. The question of implications arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> 18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term, as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

However, the Privy Council did not disregard the *BP Refinery* requirements. It held that they were not "an independent series of tests which must each be surmounted". Instead, they simply express the idea that the implied term must reflect the contract's objective meaning.[9]

This became known as the "interpretational" approach to implied terms and generated fierce debate among academics. It was seen by many as a retrenchment away from the *BP Refinery* requirements, and potentially a relaxation of the applicable standard.

That interpretation was rejected by the UK Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*.[10] It held that while implying a term involves determining the objective meaning of the contract as a whole, implication is a different process from interpreting the express terms of a contract, governed by different rules.[11] The Court stated:[12]

> … it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or phrase, one is not construing words, as the words to be implied are *ex hypothesi* not there to be construed; and to speak of construing the contract as a whole, including the implied term, is not helpful, not least because it begs the question as to what construction actually means in this context.

Against these comments, the Supreme Court concluded that *Belize Telecom* was not changing the circumstances in which a term will be implied into a contract nor otherwise diluting the requirements for necessity.[13]

---

9 At [26]–[27] per Lord Hoffman.

10 *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [24].

11 At [25]–[27] per Lord Neuberger.

12 At [27] per Lord Neuberger.

13 At [22]–[23] per Lord Neuberger and [77] Lord Clarke.

The approach of the New Zealand Courts

So, what have the New Zealand Courts made of this debate?

While our appellate Courts have acknowledged the debate in the UK Courts on the different approaches to the *BP Refinery* requirements, they have generally been reluctant to wade into the debate given that it has not yet been determinative of the issue before it.

The appellate courts deliberately sidestepped the debate in three recent cases: *Mobil Oil New Zealand Ltd v Development Auckland Ltd*; *Ward Equipment Ltd v Preston*; and *The Malthouse Ltd v Rangatira Ltd*.[14]

In *Mobil Oil* the Supreme Court acknowledged that the interpretational approach under *Belize Telecom* had been previously approved by that Court, in the case of *Nielsen v Dysart Timbers Ltd*.[15]

However, the Court went on to say that in light of that approach being significantly qualified by the decision of *Marks & Spencer*, there was scope for argument as to whether adoption of the undiluted version of Lord Hoffman's interpretational approach was appropriate.[16] The Court considered that it was not necessary for it to resolve that debate in that case, as the issue before it was one properly of interpretation. After finding that the terms of the contract could not be read in a manner to impose an obligation on Mobil Oil to remediate contamination of the land, the Court went onto say that even if the *BP Refinery* requirements were applied, three of the preconditions were not satisfied in any event.[17]

A similar approach was taken by the Court of Appeal in the 2017 decision of *Ward Equipment*. The issue in that case was whether a contract could be terminated on reasonable notice, where the only express contractual right to terminate was in the event of breach. The majority (Winklemann and French JJ) again acknowledged the debate, noting that the law in New Zealand was unresolved on this point, but stated that whether the implication of terms called for the *BP Refinery* requirements was "an issue best left for another day".[18] The Court considered that whatever test was applied would reach the same conclusion in that case. As they formed the view that on the proper construction of the licence agreement, it was not terminable on reasonable notice, the Court considered that the "traditional and stricter test for implication of terms" would inevitably lead to the same outcome.[19]

In contrast, Kós P decided to step fully into the debate in *Ward* with his obiter remarks, stating that the position in New Zealand was not uncertain and seeking to reconcile the *Belize Telecom* approach with the *BP Refinery* requirements. Kós P emphasised that construction is the process of identifying the meaning of the contract, and that there were three techniques to do that: interpretation, implication and rectification. The meaning of the contract was not limited to the meaning of the express words. Rather, where major modification was required to the express words of the contract, whether because of incompleteness or error, interpretation must give way to implication or rectification. However, as the court was resistant to altering express words by implication or rectification, a more articulated set of rules needed to be met. On this basis, while *Belize Telecom* remains

---

14 *Mobil Oil New Zealand Limited v Development Auckland Limited* [2016] NZSC 89, [2017] 1 NZLR 48; *Ward Equipment v Preston* [2017] NZCA 444, [2018] NZCCLR 15; and *The Malthouse Limited v Rangatira Limited* [2018] NZCA 621.

15 *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43, [2009] 3 NZLR 160 at [64].

16 *Mobil Oil*, above n 14, at [81].

17 At [81] and [82].

18 *Ward*, above n 14, at [47].

19 *Ward*, above n 14, at [46] and [47].

authoritative in New Zealand, the *BP Refinery* requirements (or as his Honour considered best described as "guidelines") would continue to be a prominent part of the analysis.[20]

Finally, the debate was sidestepped entirely by the Court of Appeal in the 2018 decision of *The Malthouse Limited v Rangatira Limited*. (None of the members of this bench sat in *Ward*.) In that case, the Court acknowledged that *Mobil Oil* had left open whether the Court should follow the UK approach but subsequently applied the *BP Refinery* requirements anyway. On that basis, the Court proceeded to apply the *BP Refinery* requirements without further discussion.

What should practitioners take from this debate?

As at the date of publication of this booklet, the New Zealand appellate courts had not yet determined which of the approaches to implied terms would take precedence. However, it is apparent that the *BP Refinery* requirements are far from retired.

Pending such clarification from the Courts, the question then is what a practitioner should do in the face of this. And does it really matter? Is this debate purely of academic interest?

Out of fairness to the appellate courts, it is difficult to conceive of a case in which this argument will be determinative. In the vast majority of implied term cases it will not make a difference. However, there are potentially three differences in matters of application.

The first relates to the question of timing. Logically, interpretation of an agreement in order to ascertain its meaning (*Belize*) occurs after the relevant terms have been identified. That might suggest that the *BP Refinery* requirements are the logical starting point. And indeed, the prospects of a case in which the *BP Refinery* requirements are not met but a term is nevertheless to be implied on the basis of objective meaning appears remote.

Secondly, arguably an objective meaning or interpretational approach (*Belize*), may imply a more relaxed standard to the implication of terms. Although this consequence of the interpretational approach has been commented on at length by academics, the Court in *Marks & Spencer* held that the interpretational approach does not reflect a relaxing of the standard to the implication of terms.[21] However, the contrary comments from the Court of Appeal in *Ward* that the traditional test is stricter provides some support for this.

Finally, there is the question of whether *Belize* implies a more generous approach to what evidence it is permissible to take into account. In the context of interpretation cases, the New Zealand courts have permitted the following evidence to be considered, in support of what the reasonable person having knowledge of the background would consider the contract to mean:

- objective background facts reasonably known to the parties at the time the contract was made;
- any evidence of trade practice or custom within which the contract was drafted;
- the subsequent conduct of the parties after the contract was agreed; and
- the pre-contractual negotiating positions adopted by each party if they are admissible as objective evidence of the parties' intentions.

---

20 At [86]–[94].
21 See for example *Marks & Spencer*, above n 10, at [24].

If the approach is therefore that implied terms is a question of construction, there should be no objection with the same evidence that is currently permissible for interpretation being available to support an argument for an implied term.

In the absence of any appellate guidance, and from a practical point of view, the prudent approach is for a practitioner to advance arguments both on construction and based on the *BP Refinery* requirements, arguing that both approaches lead to the same result.

New frontiers?[22]

Good faith

The concept of "good faith" and its relevance to contractual obligations remains a live issue, although the courts are not any closer to a definitive statement of principle.

Most recently, the English Court of Appeal in *Times Travel (UK) Ltd v Pakistan International Airlines Corp*[23] has used good faith to distinguish between permissible and non-permissible lawful economic duress. The question squarely confronting that Court was whether duress can provide a basis for setting a contract aside, when the contract resulted from a lawful threat. This depends on determining whether such conduct is "illegitimate" – notwithstanding that it is lawful.

The Court turned to good faith as a basis to make that assessment. It concluded that the doctrine of economic duress does not extend to the use of lawful pressure to achieve a result to which the person exercising the pressure believes in good faith it is entitled. Conversely if the person did not bona fide believe itself to be so entitled, any agreement would be voidable.

There is some suggestion from the New Zealand commentaries that good faith could be a relevant test for assessing a threat of lawful conduct, but there is little by way of case law.[24]

Good faith two

The concept of good faith was referred to again in the recent decision of that same Court in *FSCH Group Holdings Ltd v GLAS Trust Corp Ltd*,[25] this time in the context of rectification. This judgement confronted squarely the earlier decision of Lord Hoffmann in *Chartbrook*,[26] who had held that where what is sought to rectify is a written contract, the test of intention was objective.

The Court articulated the underlying moral principle of rectification as being that persons who make a contract have to observe certain standards of good faith.[27] It is contrary to good faith for a person to take advantage of a mistake in a contract whether that mistake had been made by both parties or simply one. The test was accordingly a subjective one.

---

22 Gerard McMeel *McMeel on the Construction of Contracts: Interpretation, Implication and Rectification* (3rd ed, Oxford University Press, Oxford, 2017) at ch 11.

23 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWCA Civ 828.

24 Jeremy Finn, Stephen Todd and Matthew Barber *Burrows Finn and Todd: the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at 422.

25 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361.

26 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101.

27 *FSCH*, above n 25, at [146].

For any practitioner advising on a potential contractual dispute, the use of good faith as a yardstick by which to measure the conduct of contractual counterparties is elusive.

"Obvious contracts"

A paradigm example of the way in which courts will be influenced by the overall equities, is the recent decision of the United Kingdom Supreme Court in *Devani v Wells*.[28] Mr Wells had developed a block of flats for sale. He contacted Mr Devani, a real estate agent and they discussed the flats by telephone. They gave very differing accounts of that conversation. Mr Devani claimed that he had told Mr Wells that he was an estate agent and would charge a commission. Mr Wells maintained that Mr Devani had not mentioned a commission but had given the impression that he was an investor buying on his own account. Mr Devani subsequently arranged for a potential buyer to meet Mr Wells and a sale was concluded. On Mr Devani being told of the sale, he sent Mr Wells his standard terms which included a commission of 2%.

Mr Wells claimed that in addition to breaches of the relevant legislation applicable to real estate agents, there was no binding contract to engage Mr Devani as his agent because the agreement was too uncertain.

The trial court had found that the parties did intend to create legal relations: the question was whether that included a commission for Mr Devani. The Supreme Court found that the "the parties meant by their words and actions that the agent was engaged on the usual term" that is to say – commission payable on completion of the sale and from its proceeds. Having concluded that the express terms of the agreement included an allowance for the payment of commission it was strictly unnecessary to consider an implied term. But nevertheless, a term as to payment of commission was required to give the agreement business efficacy "and would not go beyond what was necessary for that purpose".

The Supreme Court also saw fit to analyse how Lewison LJ (a well-known expert on contract law), had come to a contrary conclusion. Lewison LJ had concluded that it is not possible to turn an incomplete bargain into a legally binding contract by adding expressly agreed terms and implied terms together.

This approach was considered wrong with the Supreme Court concluding that provided the test of an implied term was met (ie it was so obvious it went without saying), it was possible to imply into anything, including an offer.

It is possible that subsequent cases may not treat *Devani* as going quite this far given the Supreme Court's acceptance that the parties intended to create legal relations (and so there was a contract to which the implied term could attach).

[28] *Devani v Wells* [2019] UKSC 4, [2019] 2 WLR 617.

Remedies for breach

Licence fee damages

Two recent cases have considered so called "licence fee" or "negotiating damages". This head of damage arises from the *Wrotham Park*[29] line of authority, and most commonly arises in relation to non-compete, non-solicit and non-disclosure agreements.

It is an historically unusual head of damages but is becoming more commonly advanced in circumstances where plaintiffs struggle to establish economic loss.

The United Kingdom Supreme Court has now clarified in *Morris-Garner*[30] the theoretical basis for such awards of damages, and the circumstances in which they are available.

The underlying facts of this case were simple enough. One Step alleged that the Morris-Garners had breached certain non-compete covenants in a sale and purchase agreement between them and One Step. The trial judge found the Morris-Garners to be liable and the case proceeded through the appellate courts on the question of how damages should be quantified.

With few exceptions, damages for breach of contract are assessed on a compensatory basis. In the case of breach of non-compete covenants, the ordinary measure is the value of the business profits which the claimant would otherwise have made but which it has lost as a result of the defendant's unlawful behaviour.

Wrotham Park damages are damages calculated as an amount which would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendant from its obligation. They are also known as "negotiating damages" or "release damages". The term arose from the decision of Brightman J in *Wrotham Park*. Since then, the concept of damages assessed on the basis of a notional release fee, has been applied in a variety of quite disparate contexts. Those cases have generally been:

- cases in which the claimant's rights have been infringed, but the claimant has not suffered any apparent pecuniary loss (for example, trespass, wrongful use of property, disclosure of confidential government information);
- cases in which the claimant would ordinarily be entitled to the enforcement of its rights, but the notional release fee is the price of non-enforcement (for example, as a substitute for an injunction when an injunction is not appropriate for some reason); and
- cases where the claimant has suffered pecuniary loss, and the notional release fee is used as evidence of that loss ie as a surrogate for calculation of loss of profits from breach (eg patent infringement).

The Supreme Court held that negotiating damages are available in cases of breach of contract when they can be assessed by reference to the economic value of the right which has been breached, considered as an asset. They are therefore consistent with the compensatory purpose of contractual damages because the claimant has in substance been deprived of a valuable asset. For example, cases involving a confidentiality agreement, intellectual property agreement, or restrictive covenant over land.

[29] Pronounced "Rootham" – *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (HC).
[30] *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649.

They were not available simply because damages were difficult to quantify in a given case or no loss had occurred (in which case, damages may be no more than nominal).

Shortly after the release of this decision, the Singapore Court of Appeal issued a judgment with an equally comprehensive analysis of *Wrotham Park* damages.

Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua[31] concerned the appropriate remedy for breach of a contract arising from settlement of a dispute between joint venturers.

The parties were in a joint venture to develop land. They each held shares in certain JV Companies. The land in question was leased by one of the parties (SAA) who in turn granted sub-tenancies to the JV Companies. A dispute developed but this was ultimately settled, and the terms of the settlement were set out in a Consent Order.

The Consent Order required valuations to be conducted and for each party to bid for remaining shares in the JV Companies. The valuation process was delayed, and in the meantime, SAA renewed the head lease but did not grant sub-tenancies to the JV Companies. The Court found that SAA had breached the terms of the Consent Order, and then turned to consider the question of damages.

After an extensive review of the authorities, the Court held that *Wrotham Park* damages should, as a matter of principle, be recognised as a head of contractual damages under Singapore law. The Court also concluded that *Wrotham Park* damages are compensatory, rather than restitutionary, in nature. However, they play a limited role and apply only in a specific type of case. *Wrotham Park* damages can be awarded when three requirements are satisfied:

- First, as a threshold requirement, the court must be satisfied that orthodox compensatory damages (measured by reference to the plaintiff's expectation or reliance loss) and specific relief are unavailable.
- Second, it must, as a general rule, be established that there has been (in substance, and not merely in form) a breach of a negative covenant.
- Third, the case must not be one where it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis. In other words, it must be possible for the court to construct a hypothetical bargain between the parties in a rational and sensible manner.

Wrotham Park damages are to be measured by such a sum of money as might reasonably have been demanded as a quid pro quo for relaxing the negative covenant. The assessment is objective and by reference to a hypothetical bargain rather than the actual conduct and position of the parties. It is assessed by reference to the information available at the time, and the commercial context. The relevant date is the date of breach: post-breach events are generally irrelevant. Tentatively, in the Court's view, causation and remoteness of damage are not relevant. Given the hypothetical nature of the assessment, a "rough and ready" approach as opposed to a precise one is acceptable.

The UK Supreme Court decision in *Morris-Garner* was handed down after the hearing in *Turf Club* but before the Singapore Court had handed down its own judgment. The Singapore Court saw many similarities between its own decision and that in *Morris-Garner*. However, to the extent that *Morris-Garner* must be read as limiting the

[31] *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44.

availability of *Wrotham Park* damages (termed by the UK court, "negotiating damages") to cases involving the infringement of property rights or analogous interests, the Singapore Court did not agree. It considered that such a limitation would unduly narrow the scope of the *Wrotham Park* doctrine and should be rejected as a matter of principle. But it left open the possibility of further argument.

Plainly, cases which meet the criteria for an award of damages of this kind are rare – and we in New Zealand may need to wait for some time before such a case comes in front of the courts. Morrs-Garner was cited without comment in *New Zealand National Party v Eight Mile Style LLC*,[32] which was a copyright case.

Penalty clauses

Leave had been granted by the Supreme Court from the Court of Appeal decision in *Honey Bees*,[33] with a hearing scheduled for October 2019. But for now, it remains the most recent appellate authority on the enforceability of contractual penalty clauses.

The Court's overall approach remained that expressed in its earlier decision in *Wilaci*.[34] That is, the question of whether a contractual clause is an unenforceable penalty is primarily a question of construction. However, following this judgement it will be harder to argue that a particular clause is an unforceable penalty, a least where the parties are commercial actors.

Wilaci was a decision of our Court of Appeal, applying New South Wales law as this was the parties' choice of law. In *Honey Bees* the Court has now confirmed the approach in that case and signalled what was termed a "redirection" in the law in New Zealand on contractual penalties.

This important decision signals a move by the Court of Appeal in favour of freedom of contract, recognising that outside impaired consent, unconscionability, or consumer law infringement, there is less for the law to do. Except in cases of gross overreach, commercial parties should generally be left to the certainty of the bargains they have made.

The relevant test is one of disproportionality: the test is whether the disputed clause imposes a detriment (not limited to financial loss) out *of all proportion* to any legitimate interest which the other party has in enforcement. At a practical level this requires evidence to be led on the nature of the commercial interests and relevant transactional risks. It is purposefully a difficult test to satisfy and more demanding and sophisticated than the old *Dunlop* test.

Boilerplate clauses

Most contracts include a sweep of "common terms" or "boilerplate" clauses. Such clauses are often included as a matter of procedure when drafting contracts. However, they serve an important purpose of covering the balance of the parties' agreement on matters, such as the means by which the contract can be varied at a later date. They can become a focal point when parties to the contract are engaged in a dispute and issues of entire

[32] *New Zealand National Party v Eight Mile Style LLC* [2018] NZCA 596.
[33] *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2019] NZCA 122, [2019] 2 NZLR 790.
[34] *Wilaci Pty Ltd v Torchlight Fund No 1 LP (in rec)* [2017] NZCA 152, [2017] 3 NZLR 293.

agreement clauses or indemnities arise. This paper does not attempt to cover all cases on a particular boilerplate clause. Rather, a selection of recent and notable cases across New Zealand, Australia and the United Kingdom is provided with respect to the following clauses: no oral modification, indemnity, entire agreement and dispute resolution.

No Oral Modification "NOM" clauses

The position regarding NOM clauses has developed most significantly in the United Kingdom, where they have been held to be enforceable. Variations to the contract are required to be effected in compliance with the NOM clause (though it is important for New Zealand practitioners to note Lord Briggs' dissent in *Rock Advertising*).[35] In Australia, these clauses are not seen to be enforceable so as to invalidate an oral variation. However, they are of strong evidential value when considering whether the oral variation was, in fact, agreed. In New Zealand, there have been few reasoned cases on the subject though the cases that do address NOM clauses would suggest the position in New Zealand aligns with the Australian approach and the minority view in *Rock Advertising*.

New Zealand

Beneficial Finance Ltd v Brown[36] concerned a summary judgment application for repayment of debt under an invoice financing agreement. The Court ultimately found that the factual matrix necessary to determine whether there was a variation was not available on the summary judgment application, but the Court's discussion of the NOM clause is notable.

The NOM clause read: "All amendments to this Agreement must in (sic) in writing. This Agreement is the entire agreement about this subject matter and supersedes prior negotiations or agreements".[37]

The Court referred to a passage from *Treitel on the Law of Contract* stating that a contract may contain a term stipulating that it cannot be varied unless in writing and that such terms cannot entirely prevent an oral variation as there is no reason why the contract, including a NOM clause, could not be varied orally. It is, ultimately, a question of the intention of the parties.[38] Associate Judge Osborne then went on to state that there has been significant consideration in the English Courts of NOM clauses and that, whilst counsel had not referred his Honour to a similar body of discussion in New Zealand, he regarded the developing English approach as likely to be applied also in New Zealand.

Reference was made to *Virulite LLC v Virulite Distribution Ltd*,[39] where Stewart-Smith J held that a subsequent variation may have effect notwithstanding a NOM clause. In *Virulite* authorities were referred to which suggested that there is an evidential presumption against a variation being effective, or that parties seeking to displace the effect of such a clause faced a very high evidential burden. Associate Judge Osborne stated that *Virulite* was authority for the proposition that whether an oral variation becomes operative turns on the intention of the parties. The burden of proof rests on the party alleging the variation and the

35 [2018] UKSC 24, [2019] AC 119.
36 [2017] NZHC 964.
37 At [11].
38 *Edwin Peel Treitel on The Law of Contract* (14th ed, Sweet & Maxwell, London, 2015) at [5-036].
39 [2014] EWHC 366 (QB), [2015] 1 All ER (Comm) 204.

standard of proof is the balance of probabilities. The Court will need to assess all relevant evidence relating to the parties' contractual dealings.[40]

In a more recent decision, *Conqueror International Ltd v Mach's Gladiator Ltd*,[41] the defendant argued that an oral agreement varied the parties' sale and purchase agreement and allowed the defendant to retain the benefit of uncompleted sale contracts. The Court set out the principles to be applied when considering oral variations to a written contract:[42]

1. In New Zealand a contract, once made, can be varied by agreement between the parties by way of adding, omitting or altering specific terms.
2. A variation of a written contract only becomes operative when it contains all the elements necessary in the particular circumstances for formation of an enforceable contract.
3. The key enquiry in determining enforceability of an oral variation is the parties' intention.
4. To establish an oral variation, the evidence of it in the factual matrix of the contract and all other surrounding circumstances must be clear and unambiguous.

The NOM clause stated:[43] "no amendment to the agreement will be effective unless it is in writing and signed by all parties".

The Court noted that there are cases in the UK that establish, in principle, that a contract containing a NOM clause can be varied by oral agreement or conduct.[44] It was recognised that there were few reasoned cases on the subject in New Zealand. The Court stated that Osborne AJ had considered the matter at length in *Beneficial Finance* and noted the English approach was likely to be applicable, emphasising the key enquiry turns on the parties' intention in light of all relevant evidence relating to their contractual dealings.

The Court considered that the fundamental issue was whether, on the balance of probabilities, subsequent to entering into the agreement, the parties intended to bind themselves by the alleged oral agreement, notwithstanding the contractual requirement that variations be in writing. The clear intention of the parties was expressed in the no oral variation clause, such that strong compelling evidence will be required to displace this. It was ultimately held that the burden of proof required to establish an alleged oral variation was not established on the evidence.

Australia

In *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*,[45] the Department of Foreign Affairs and Trade entered into a head contract with BHP Information Technology (BHP-IT) for the development of communication software. BHP-IT entered into a back-to-back contract with a party subsequently acquired by GEC Marconi Systems (GEC) under which the sub-contractor assumed responsibility for the performance of the

40 The Court noted, by reference to *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm), [2013] All ER (D) 347 (Jul), that there may be formal relationships (such as banking relationships) where the factual matrix of a contract and other circumstances would preclude raising an alleged oral variation to defeat an entire agreement clause.

41 [2018] NZHC 265.

42 At [39] – [47].

43 At [42].

44 Interestingly, the Court cited *Rock Advertising*, above n 35, as one such case.

45 [2003] FCA 50.

bulk of BHP-IT's contractual obligations to GEC. Clause 45 of the subcontract required any contractual variation to be in writing. On the issue of NOM clauses, the question to be determined was whether the legal effect of cl 45 was to render ineffective any subsequent oral or implied contract which had the effect of varying the sub-contract.

Justice Finn noted that most Australian decisions concerning NOM clauses arise in the context of claims for payment of extra work or services rendered under contracts requiring written orders or agreements. The principles arising from those cases was that notwithstanding a NOM clause it was open to the parties by express oral agreement or by contract implied from conduct to impose additional or different rights from those in the original contract. Alternatively, that one party may induce or encourage the other party's assumption on which it relies that the relevant formal requirements do not need to be complied with. In that scenario, the party inducing the other would be estopped from relying on the NOM clause.

The Court followed *Commonwealth v Crothall Hospital Services (Aust) Ltd*[46] in holding that parties to a written contract may vary it in writing or (other than where the contract is required by law to be evidenced in writing) by oral agreement. The agreement to vary may be express or implied from conduct. To be an effective variation, notwithstanding non-compliance with the NOM clause, the requirements of a contract must be satisfied. Those requirements would be certainty of terms and real consideration for the agreement.[47] In response to the oft raised objection (as was the case in *GEC Marconi*) that depriving a NOM clause of legal effect would involve a failure to give effect to what the parties have agreed, Justice Finn said "[t]he vice in it, though, is that a later oral or implied contract is itself an agreement".[48]

Whilst the NOM clause would lack legal effect in the face of a later oral or implied agreement, it can have significant evidentiary effect as a fact to be taken into account in interpreting the later conduct of the parties.[49]

United Kingdom

The leading UK decision is *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*.[50] The case concerned a license agreement to occupy premises managed by MWB Business Exchange Centres (MWB). When Rock Advertising fell into arrears of the license payments, its sole director proposed to MWB's employee during a telephone conversation a revised payment schedule so that the early payments were reduced and the difference would be loaded onto the later payments. Having understood the MWB employee to have agreed to the variation, Rock Advertising made the first payment under the purported revised agreement. Rock Advertising's manager did not agree with the revised payment schedule and proceeded to lock Rock Advertising out of the premises. MWB issued proceedings for payment of the arrears and Rock Advertising counter-claimed for damages for wrongful exclusion, in reliance on the oral variation.

---

46 (1981) 54 FLR 439.

47 *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50, at [218], following *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

48 At [220].

49 At [221], applying *Bartlett v Stanchfield* (1889) 19 North Eastern Reporter 549.

50 Above, n 34.

The NOM clause read:[51] "All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

The trial judge found that the variation was invalid as whilst the employee had ostensible authority and the variation was not want for consideration, the amendment was not in writing as required. The Court of Appeal allowed the appeal, holding that the principle of freedom of contract was such that the parties could agree to depart from a previously agreed NOM clause and therefore the clause did not preclude the variation.

In the Supreme Court, Lord Sumption noted that the recent English cases on this point are equivocal. In *United Bank Ltd v Asif*,[52] Sedley LJ refused leave to appeal from a summary judgment on the ground that it was "uncontestably right" that in the face of a NOM clause "no oral variation of the written terms could have any legal effect". In *World Online Telecom Ltd v I-Way Ltd*,[53] Sedley LJ softened his view, finding that it was a sufficient reason for refusing summary judgment that the law was not settled.[54] In *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*,[55] Gloster LJ declined to decide the point but inclined to the view that NOM clauses were ineffective.[56]

The majority of the Supreme Court held (Lord Briggs JCS dissenting) that there was no reason why parties could not agree to bind themselves to a NOM clause. Lord Sumption commented that the effect of the rule applied by the Court of Appeal was such that the parties' intention was overridden. They could not validly bind themselves as to the manner in which future changes in their legal relations were to be achieved, even if they clearly expressed their intention to do so. The suggestion that parties could not bind themselves to the agreed form of any variation was described as the real offence against party autonomy.

Three reasons were recognised for parties' common use of NOM clauses:[57]

1. It prevents attempts to undermine written agreements by informal means. Thereby removing the possibility of abuse such as raising defences to summary judgment.
2. It avoids disputes about whether a variation is intended or its exact terms in circumstances where oral discussion can easily give rise to misunderstandings or crossed purposes.
3. It introduces formality in recording variations, making it easier for commercial parties to police internal rules restricting authority to agree variations.

NOM clauses were said to serve a legitimate business purpose and were intended to achieve contractual certainty of the agreed terms. They did not conflict with public policy and the law of contract did not normally obstruct the legitimate purposes of businessmen in such circumstances. Further, there was no conceptual inconsistency between the general rule that contracts could be made informally and a specific rule giving effect to a contract requiring variations to be in writing. The law would give effect to a contractual provision requiring specified formalities to be observed for variations, including a NOM clause.

---

51 *Rock Advertising*, at 119.
52 (Unreported) 11 February 2000 (CA).
53 [2002] EWCA Civ 413 (CA).
54 At [12].
55 [2013] EWHC 2118 (Comm).
56 At [273].
57 *Rock Advertising*, above n 35, at 119.

Lord Briggs, in dissent, considered it conceptually impossible for the parties to a contract to impose upon themselves such a scheme but not be free by unanimous further agreement, to vary or abandon it by any method, whether in writing, by spoken words or conduct, permitted by general law. A more cautious recognition of a NOM clause (that it would continue to bind until the parties agreed to do away with it either expressly or by strictly necessary implication) would provide the parties with most of the commercial benefits of certainty and the avoidance of abusive litigation about alleged oral variations.

Indemnity clauses

In New Zealand, a reference to "costs" within an indemnity could be insufficient to indemnify the party for its solicitor/client costs. The indemnity must be plain and unambiguous. Reference to "legal" costs or similar (such as "against all actions and damages") have been held to be sufficient. A costs claim pursuant to a plain and unambiguous indemnity may nevertheless be refused if public policy grounds dictate otherwise. Whilst each case turns on its particular facts, there appears to be a consistent approach across New Zealand, Australia and UK that to displace the general rule that a party is entitled to scale (or party/party) costs, the clause in the relevant contract must be unequivocal that solicitor/client costs are recoverable. If they are, they will be subject to a reasonableness requirement.

New Zealand

In *Newfoundworld Site 2 (Hotel) Ltd v Air New Zealand Ltd*,[58] Air New Zealand entered into a contract for accommodation with Newfoundworld (Novotel) during 2011 to 2013 (2011 Agreement). In 2013, the parties entered into a further agreement (2013 Agreement). From 2012, Novotel charged for early check-ins and continued to do so under the 2013 Agreement. The High Court found that the parties had agreed that Novotel could charge for early check-ins under the 2011 Agreement. However, that right did not continue under the 2013 Agreement. These findings were upheld on appeal, leading to the issue of whether Air New Zealand could recover indemnity costs from Novotel under the 2013 Agreement.

Clause 11.2 of the 2013 Agreement read:[59]

> [Novotel] shall indemnify [Air New Zealand] from and against all losses, damage and costs incurred by [Air New Zealand] (excluding any consequential or indirect losses, damages or costs) arising out of or related to a breach by [Novotel] of any of the warranties or any undertaking given by [Novotel] or breach by [Novotel] of any term or condition of this Agreement.

The issue was whether the cost to Air New Zealand of the legal proceedings was a "loss, damage or cost" arising out of Novotel's breach and if it was, whether it was consequential or indirect.

In the High Court, Wylie J cited *Boswell v Millar*[60] in support of the principle that costs are not damages and do not arise out of the breach of contract. Rather, they are losses flowing from steps taken to enforce contractual rights rather than flowing from the breach itself. Justice Wylie was satisfied that there was a clear connection between the cost of the legal proceedings and the breach and noted the scope of the indemnity extended to costs related

58 [2018] NZCA 261.
59 At [73].
60 [2014] NZCA 314, [2014] 3 NZLR 332.

to the breach, not just those arising out of the breach.[61] Accordingly, but for the proviso, the hotel would have been obliged to indemnify Air New Zealand. Justice Wylie noted that it was ambiguous that in cl 11.2 the indemnity extended to costs that do not arise from the breach but which are related to it, while excluding consequential or indirect costs.[62] By definition, consequential or indirect costs are costs that do not arise from the breach but are related to it. The contra preferentum rule was regarded as the tie-breaker and the clause was construed against the party that drafted it, Air New Zealand. His Honour concluded that the costs sought were consequential or indirect costs and not recoverable.[63]

On appeal, Air New Zealand argued there was no ambiguity and therefore the contra preferentum rule was not engaged. In any event, the contract provided that nothing in the agreement was to be interpreted against a party solely on the ground that it put forward the contract or any part of it. Air New Zealand also argued that Wylie J had incorrectly based his decision that legal costs were consequential or indirect on *Boswell* as that case was dealing with a claim for costs as damages flowing from a breach of contract and had no application for a claim to costs under an indemnity clause.

The Court of Appeal found that costs of legal proceedings to enforce a breach of contract are properly understood as indirect or consequential. They do not flow directly out of the breach. Instead, they are the result of actions of a party to seek redress for that breach. The observations in *Boswell* as to causative distance are therefore useful. Being costs that are consequential or indirect, they would fall within the proviso. The clause was not seen to be ambiguous and there was therefore no need to resort to the contra preferentum principle. Even if the general indemnity was broad enough to extend to legal costs, the fact the proviso would take that entitlement away did not create ambiguity. As with the nature of a proviso, it was taking away or qualifying in some way a rule which would otherwise apply.

Importantly, the Court was not persuaded that a general right to be indemnified for "costs" associated with a breach of contract extended to solicitor/client costs even if they could be categorised as a related cost. The Court noted that the clause "refers to costs, not legal costs. And it does not extend the indemnity to solicitor/client costs".[64] The latter point was relevant due to r 14.6(4)(e) of the High Court Rules 2016 where a court may order a party to pay indemnity costs if there is a clear entitlement under a contract or deed that is plainly and unambiguously expressed. It was held "cl 11.2 makes no reference to legal costs, nor is there anything in the words that suggest such an indemnity was contemplated."[65] Clause 11.2 therefore did not entitle Air New Zealand to recover indemnity costs.

As recognised in *Newfoundworld*, in other New Zealand cases an indemnity has been held to extend to solicitor/client costs. In *ANZ Banking Group (NZ) Ltd v Gibson*.[66] The three defendants were directors of two associated companies who had guaranteed debentures given by the companies to ANZ.

61 At [14].
62 At [16].
63 At [20].
64 At [84].
65 At [87].
66 [1986] 1 NZLR 556 (CA).

The guarantee included a provision that the guarantors were liable for:[67]

> All costs and expenses in or for which the Bank is or may become liable or may charge against the Customer including all costs and expenses (computed as between solicitor and own client) of or incidental to or obtaining or enforcing or attempting to obtain or enforce payment of all or any of such moneys as aforesaid under or by virtue of this Guarantee or otherwise.

The companies were insolvent and the bank appointed receivers and called upon the guarantees for the shortfall. The defendants claimed that demand was not validly served on the companies. The High Court held that the bank had validly served the demand and entered judgment against the guarantors for the shortfall, interest and costs on a solicitor-client basis. The guarantors appealed including on the grounds that the High Court erred in awarding costs on a solicitor/client basis. On appeal, Richardson and Casey JJ found that the undertaking in the guarantee for payment of costs of enforcement on a solicitor/client basis was an extending provision intended to entitle the bank to an indemnity with respect to its legal expenses properly incurred by it in relation to recovery under the guarantee.[68] That was clearly enforceable subject to public policy considerations. The Court saw no reason why the bank should be out of pocket as a result of a failure to pay when the parties had expressly provided that the bank should be indemnified in the event of default by the other.

In *Suttie v Bridgecorp Ltd* the indemnity was for "all costs and expenses (including but not limited to legal fees) incurred by the Lender."[69] The Court placed significance on the language of "legal fees" rather than "costs".[70]

In *Watson & Sons Ltd v Active Manuka Honey Association*, the indemnity was against all "actions and damages that may result from the licensees' operations".[71] There, the Court of Appeal held that the use of the term "actions or damages" plainly contemplated the possibility of court proceedings which might result in the Association incurring legal costs and therefore, as a matter of construction, recovery of solicitor/client costs was necessarily implied. The Court agreed with Pankhurst J's approach in the High Court that an indemnity provision is to be interpreted upon ordinary principles of construction which require consideration of the language used in the context of the agreement as a whole in its factual matrix. It is enforceable in accordance with its terms unless policy considerations require a different result and the amount of costs must be objectively reasonable. Reliance was made on the decision of *Beecher v Mills*[72] which involved a claim for legal costs under an indemnity given to the vendor in a sale and purchase agreement. The clause in *Beecher* referred specifically to the possibility of a claim by a named party but made no specific reference to legal costs. The Court was satisfied in that case that it was a necessary implication of the clause that solicitor/client costs did fall within the indemnity.

67 At 556.
68 At 566.
69 HC Auckland CIV-2006-404-3667, 8 December 2006, at [3].
70 At [17].
71 [2009] NZCA 595, at [10].
72 [1993] MCLR 19 (CA).

Australia

In *Chen v Kevin McNamara & Son Pty Ltd & Anor (No 2)*,[73] the owner of a residential property and a builder were party to a construction dispute. The owner sought declarations that an arbitration initiated by the builder was void and that the appointment of the arbitrator was also void. The orders sought were declined and a subsequent appeal was also unsuccessful. The builder sought an order that the owner pay his costs for the appeal on an indemnity basis. He submitted he was contractually entitled to such costs by virtue of the following clause: "The Owner shall pay to the Contractor: Any costs and fees incurred by the Contractor in enforcing or further securing its rights under this Agreement."[74]

The Court found that the clause did not specify that the owner should indemnify the builder. It did not refer to indemnity costs, solicitor client costs, or special costs. It contained no language which might signify that the costs contemplated were solicitor client or indemnity costs therefore:

> … [n]o conduct, well recognised principle or plain and unequivocal contractual term has been identified which would justify the displacement of the general rule that costs should be awarded on a party and party basis.[75]

In *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 3)*,[76] the central dispute concerned Area Health's termination of the construction deed, car park lease, hospital lease and car park sub-lease with its tenant, Macquarie. The Court found that Area Health terminated the agreements lawfully and that Area Health lawfully re-entered the premises. Area Health sought a discretionary costs order for indemnity costs pursuant to the following provision of the construction deed (and similarly in the carpark lease and hospital lease):[77]

> 7.8 If this deed is terminated under this clause 7:
>
> (a) the Tenant indemnifies the Landlord against any liability or loss arising and any reasonable cost incurred (whether before or after termination of this deed) in connection with the Tenant's breach of this deed and the termination of this deed including the Landlord's loss of the benefit of the Tenant performing its obligations under this deed from the date of that termination until the Terminating Date…

The Court found the language to be plain and unambiguous. The term "indemnifies" implies making payment for the whole loss or costs. In this case, the extent of the amount payable was expressly limited to "any reasonable costs" incurred in connection with the breach and/or termination.[78] So quantification of liability was to be undertaken with regard to the reasonableness of the costs claimed and bearing in mind that a court is not bound to give effect to any extra curial contract as to costs when exercising its discretion to award costs. This was in response to Area Health's reliance on *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171 as authority for the proposition that the court's discretion as to costs should be exercised so as to reflect the party's contractual right. In making the point that costs are at the discretion of the court, reference was made to *Abigroup Limited v Sandtara Pty Limited* [2002] NSWCA 45, at [9]. In *Abigroup*, the landlord was able to recover costs on a solicitor/client basis from the guarantor. The clause required the guarantor to "unconditionally indemnify" the landlord from

[73] [2012] VSCA 229.
[74] At 3.
[75] At 8.
[76] [2010] NSWSC 1139.
[77] At 6.
[78] At 21.

damage, costs and expenses the landlord may suffer or incur upon or arising directly or indirectly out of any breach by the tenant of any terms in the lease. Given the language of the indemnity, in particular a reference to "all costs and expenses", it was regarded as reflecting an intention that costs meant solicitor/client costs and the court held that a non-specific provision for "all costs and expenses" did not indicate payment of party/party costs or that a specific reference to some other basis for assessment was necessary.

The Court found that as the 96 agreements were interrelated and interdependent, the provisions should be given a commercially sensible and realistic interpretation, which supplies a congruent operation to the various components of each agreement taken as a whole. In the circumstances of the case, each provided a contractual entitlement to Area Health for all its reasonable litigation costs consequential upon, or in connection with, Macquarie's defaults which led to termination. The Court noted that it remained open to Macquarie to dispute that the costs were reasonably incurred and are not payable.

United Kingdom

In *Euro-Asian Oil SA v Credit Suisse AG* Euro-Asian sought costs against Credit Suisse on an indemnity basis pursuant to a letter of indemnity stating:[79]

> To protect, indemnify and to hold you [Euro-Asian] harmless from and against any and all damages, costs and expenses (including reasonable attorney fees) which you [Euro-Asian] may suffer by reason of the shipping documents, including the original clean and negotiable bills of lading remaining outstanding or by reason of a breach of the warranties given.

In support of its claim, Euro-Asian had relied in particular on *Macleish v Littlestone*.[80] The Court commented that the difference in language was significant. In *Littlestone* the indemnity read "[a]ll costs and expenses, including legal costs, which may be incurred".[81] That was to be compared with the present indemnity which included the crucial words "reasonable attorney fees".[82] A limitation existed in the present case as to the type of attorney fees that could be awarded. It was held that the phrase "reasonable attorney's fees" meant the contract did not provide for indemnity costs as they would not be reasonable.[83]

In *AstraZeneca UK Ltd v International Business Machines Corporation*,[84] (TCC) the main dispute was in relation to the parties' obligations following termination of a Master Services Agreement (MSA). The MSA contained the following provision:[85]

> [IBM] shall indemnify AstraZeneca ... on demand from and against all Defence Costs incurred by AstraZeneca in connection with any Dispute in which judgment is given in AstraZeneca's favour.

79 [2017] EWHC B7 (Comm), at [2].
80 [2016] EWCA Civ 127, [2016] 1 WLR 3289.
81 At [40].
82 At [5].
83 The Court referred to Costs Practice Direction to CPR Part 48 which provides as follows: "Where the court is assessing costs payable under a contract, it may make an order that all or part of the costs payable under the contract shall be disallowed if it is satisfied by the paying party that costs have been unreasonably incurred or are unreasonable in amount."
84 [2011] EWHC 3373 (TCC).
85 At [4].

"Defence Costs" was defined in the MSA as:[86]

> reasonable attorney's fees and disbursements (calculated on a solicitor-own client basis) including fees and disbursements charged by counsel and other legal advisers (including solicitors and counsel from other jurisdictions), fees levied by any court, arbitrator or mediator and the fees and disbursements charged by expert witnesses.

The Court held that the MSA applied so that each party indemnified the other against all reasonable attorney's fees and disbursements incurred by the other party in connection with any question or difference concerning the construction, meaning or effect of the MSA in which judgment is given in the other party's favour. The basis upon which to calculate the assessment of those fees and disbursements was stated as "solicitor-own client basis" which equated to an indemnity basis except where unreasonably incurred or of an unreasonable amount (in which case the receiving party would be given the benefit of any doubt). The Court confirmed that a party has two bases on which it could seek indemnity costs, either pursuant to a contractual entitlement or pursuant to the court's discretion (under s 51 of the Senior Courts Act 2016). The Court will likely exercise the discretion in accordance with the contractual right.

Entire Agreement clauses

It is evident from the cases that New Zealand courts (as in the UK) will enforce an entire agreement clause unless there is evidence of inequality in the parties' positions and there is a reluctance to go behind entire agreement clauses in commercial transactions without a finding of fraud. It cannot be said that entire agreement clauses are necessarily absolute, as a determination is made as to whether it is fair and reasonable that the provision should be conclusive. This is undertaken with regard to all the circumstances of the case, focusing on the relative positions of the parties and their access to independent legal advice (pursuant to what was s 4(1) of the Contractual Remedies Act 1979, now s 50 of the Contract and Commercial Law Act 2017).

New Zealand

In *Brownlie v Shotover Mining Ltd*,[87] Brownlie agreed to sell a gold mining licence to Shotover. Shotover, dissatisfied with the amount of gold it was able to recover from the licence, withheld the final instalment of the purchase price and issued proceedings alleging inter alia that it had been induced to enter the contract by fraudulent precontractual misrepresentations made by Brownlie. Specifically, Shotover alleged that Brownlie had represented that the depth of gravel at the mining site was 15 feet, when it was in fact much lower. The trial judge agreed, finding that Brownlie had made the alleged misrepresentation, the representation was false since the most reliable evidence indicated the gravel depth was only around nine feet and the misrepresentation had clearly induced entry into the contract since gravel depth was closely correlated to the expected amount of gold that could be extracted. The Court of Appeal declined to disturb any of these findings.[88]

---

86 At [6].
87 CA181-87, 21 February 1992.
88 At 28–29.

Brownlie sought to rely on the entire agreement clause to preclude Shotover from relying on precontractual representations:[89]

> The Purchaser acknowledges that it has purchased the Licence solely in reliance upon its own judgement and not upon any representation or warranty by the Vendor or any agent of the Vendor and the Vendor does not warrant the accuracy of any matter or fact herein or any document or paper or any statement by the Vendor or any other person.

Arguably, cl 8(e) would preclude the court from finding a misrepresentation by the operation of s 4(1) of the Contractual Remedies Act 1979 (now largely translated to s 50 of the Contract and Commercial Law Act 2017). Thus, the question was whether it was "fair and reasonable" that cl 8(e) be conclusive between Brownlie and Shotover.

As a starting point, McKay J observed that there can be nothing inherently unfair in such a clause.[90] It is highly desirable that written contracts should be drafted to state all the terms of the intended contract and so avoid uncertainties with can arise from verbal representations or collateral warranties. If parties have not agreed to include express warranties in their written contract, it is reasonable for them to expressly state verbal warranties are excluded.

Further, since this was a high-value commercial transaction where both parties obtained separate legal advice, "[t]he respective bargaining strengths of the parties would not justify any special indulgence to either".[91] Crucially, though, the Court found that Brownlie's misrepresentations were fraudulently made, including because Brownlie's circumstances motivated him to "oversell", the expert evidence indicated that Brownlie must have known that gravel was shallower than 15 feet and the trial judge's interpretation of Brownlie's demeanour.[92] While the existence of fraud will not always render it not "fair and reasonable" that an exclusion clause be determinative between parties, the Court found that it was in this case. Therefore, s 4(1) did not prevent the Court finding Brownlie liable for misrepresentation.

In a more recent decision, *PAE (New Zealand) Ltd v Brosnahan*,[93] PAE entered into a written agreement to purchase 100 shares in Central Property Services Ltd (CPS) from its directors (Brosnahan). During negotiations, the directors made representations about CPS's turnover and profitability, and provided copies of financial statements. PAE claimed Brosnahan had made misrepresentations and that the true value of CPS's shares were $286,000 ($964,000 less than the purchase price).

The entire agreement clause read as follows:[94]

> This agreement (and any Schedules to it) constitutes the entire agreement between the parties and supersedes all prior agreements, understandings, negotiations, representations, and discussions, whether oral or written, of the parties. The vendors make the representations and warranties set forth in clause 7 and no others. The obligations of the vendors under this agreement are joint and several. Any and all implied warranties are expressly excluded. No supplement, modification, or waiver of this agreement is binding unless in writing and signed by the parties. The vendors and/or the purchaser may, at its or their option, waive, in writing, any or all of the conditions in this agreement to which its or their obligations are subject. No waiver of any of the provisions of this agreement is to constitute a waiver of any other provisions

89 At 30.
90 At 31–32.
91 At 32.
92 At 34–35.
93 [2009] NZCA 611, (2009) 12 TCLR 626.
94 At [10].

> (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.

The High Court held that Brosnahan had provided false financial statements in breach of warranty but dismissed PAE's claims of fraud, misrepresentation and breach of Fair Trading Act on the basis of the entire agreement clause.

In dismissing PAE's appeal, the Court of Appeal held that as the agreement (including the entire agreement clause) was prepared by PAE, they were not able to claim that they were unaware of the clause or unfamiliar with it. It was found that there was no inconsistency between the entire agreement clause and the parties' conduct during negotiation. PAE was well aware that all previous representations were superseded by the express terms of the agreement.[95] PAE had ample opportunity to require warranties relating to accounts receivable if it regarded it sufficiently important. To deny the entire agreement clause its natural meaning would reinstate a representation that the parties had agreed was inoperative and would convert the alleged representations to an implied warranty when expressly excluded.[96]

In *Harris v GTV Holdings Ltd*,[97] Greenstone TV Ltd was owned 99% by the Harris Family Trust with the other 1% owned by Mr Harris (the Harris interests). In 2011, the Harris interests decided to sell Greenstone to GTV Holdings. The sale and purchase agreement was signed in 2013. Initial payment was made on 9 December 2013, and the shares were transferred. There had previously been an adjustment of the purchase price to reflect overseas licensing agreements (Adjustment). Harris claimed that the Adjustment required the deferred portion of the payment price to be paid in full and relied on an entire agreement clause to argue that GTV was prevented from pleading the existence of an implied term to the contrary.

The entire agreement clause read:[98]

> This agreement together with the other Transaction Documents constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter. The Confidentiality Deed terminates and ceases to be of force or effect on the date of this agreement.

Regarding the entire agreement clause, the Court found that s 4(1) of the Contractual Remedies Act (now s 50 CCLA) did not apply in the current case and the Court was not required to go behind the clause. Its ambit was consistent with the degree of predictability expected by commercial parties entering into such complex transactions. The clause was designed to ensure that a Court is limited to the written terms of the contract for interpretation purposes.

In *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd*,[99] Bushline had borrowed money from ANZ for many years to operate the farms and fund the purchase of new farms. In 2008, Bushline borrowed a further sum from ANZ to finance the purchase of another farm. The parties consolidated all of Bushline's facilities with ANZ into one loan with a

---

95 In relation to the claim under the Fair Trading Act, PAE claimed that, supposing the representation was misleading and deceptive, it also caused their loss. The Court found that PAE's reliance on the representations made in the financial statements was unreasonable as they had the ability and opportunity to make further enquiries, especially considering their experience in commercial purchases.

96 *Brosnahan*, at [22].

97 [2016] NZHC 3123.

98 At [25].

99 [2019] NZCA 245.

floating interest rate but hedged with a number of fixed rate swaps. The loan went sour as a result of the global financial crisis and issues in the dairy industry, causing Bushline to sell a number of its properties and eventually refinance with another bank. Bushline issued proceedings against ANZ based on alleged misrepresentations made by ANZ.

ANZ raised a number of affirmative defences, including relying on an entire agreement clause in the swap terms it had sent to Bushline. That clause read:[100]

> The Agreement contains all of the terms, representations and warranties made between the parties with respect to its subject matter and supersedes all prior discussions and agreements relating thereto.

The Court of Appeal found ANZ had made the representations alleged and turned to consider whether it was fair and reasonable for the "disclaimer clauses" (of which the entire agreement was one) to prevent the court from looking behind the agreements pursuant to s 4 of the Contractual Remedies Act 1979. Justice Clifford, writing for the Court, observed that the question is heavily fact-dependent and involves balancing freedom of contract and unfair/unreasonable commercial conduct.[101] It involves a consideration of all the circumstances of the case, including the subject matter and value of the contract, the respective bargaining strength of the parties (including whether legally represented) the circumstances in which the representation was made and whether the disclaimer was standard form or tailored.[102]

Justice Clifford considered that the existence and terms of the disclaimer clauses were factors that were minimally relevant in assessing whether it is fair and reasonable for the clauses to be conclusive.[103] On a broader view, the Court concluded that it was not fair and reasonable for the disclaimer clauses to have the effect asserted by ANZ. In particular, Clifford J relied on a number of factors:[104]

1. ANZ had undertaken to manage interest rate risks for Bushline.
2. There was a lack of understanding within ANZ of the implications of the swaps.
3. ANZ acknowledged that it promised Bushline it would have a fixed 70 basis point margin.
4. There was an imbalance of bargaining power. The terms of the swap were not specially drafted.[105] They were treated by ANZ as non-negotiable and intended for less sophisticated parties with limited ability to negotiate.
5. The subject matter was entirely within ANZ's knowledge and all other parties' knowledge came from presentations made by ANZ.

---

100 At [99].
101 At [244], citing *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, at [15].
102 At [245], referring to Contractual Remedies Act 1979, s 4(1), *Ellmers v Brown* (1990) 1 NZConvC 190,568 (CA) at 190,571 and 190,577–578, and *Collings v McKenzie* (1988) 2 NZBLC 102,997 (HC).
103 At [250].
104 The Court stated at [266] that it was not fair and reasonable for ANZ to be able in effect to say to the Coomeys: "Notwithstanding what we promised we would do and what we represented to be true, you have no claim against us even though we did not do what we said we would and what we represented to you was false."
105 At [258]–[265].

Australia

In *MacDonald v Shinko Australia Pty Ltd*,[106] MacDonald bought a unit off the plans in an apartment complex being built by the Shinko. When completed, it became apparent that the wrong unit had been designated in the floor plan forming part of the contract. MacDonald applied for summary judgment to recover the deposit. Shinko opposed. It further sought to rectify the contract to reflect what it claimed was a common intention that the unit be the one actually delivered to MacDonald, notwithstanding that it was incorrectly identified in the floor plan. Summary judgment was denied at first instance. MacDonald appealed.

On appeal, MacDonald's primary line of argument rested on an entire agreement clause in the contract (cl 28.1), which read as follows:

> ENTIRE AGREEMENT. This Agreement constitutes the entire agreement of the parties as to its subject matter and supersedes and cancels all prior arrangements, understandings and negotiations in connection with it.

The Supreme Court of Queensland dismissed the appeal. The purpose of the clause was to exclude evidence proving terms additional to or different from the written instrument or collateral contracts or to construe the contract in a way different from the meaning to be inferred solely from its terms. The entire agreement clause did not preclude a claim for rectification because rectification does not undermine an understanding that a written document contains the entire agreement between parties. Rather, it prevents a party from relying on a written agreement to the extent that it would be unconscionable to do so, for example where the written agreement was executed by the parties under a mistaken belief that it recorded a common intention contrary to the text.

United Kingdom

In *Inntrepreneur Pub Co (GL) v East Crown Ltd*,[107] East Crown leased a pub from Inntrepreneur. The lease included a sales tie, under which East Crown was required to purchase beer from a supplier nominated by Inntrepreneur. East Crown began to buy beer from a different supplier, prompting Inntrepreneur to apply for an injunction to enforce the sales tie. East Crown opposed on the basis that Inntrepreneur had given an oral warranty releasing East Crown from the sales tie (following undertakings given by Inntrepreneur to a regulator) around two years after the lease was executed.

Inntrepreneur denied that such a warranty was given but that, even if it had, it was ineffective because the lease contained an entire agreement clause at cl 14.1, which read as follows:[108]

> Any variations of this Agreement which are agreed in correspondence shall be incorporated in this Agreement where that correspondence makes express reference to this Clause and the parties acknowledge that this Agreement (with the incorporation of any such variations) constitutes the entire Agreement between the parties.

Lord Justice Lightman identified the issues as being whether the entire agreement clause precluded East Crown from relying on the alleged collateral warranty to release the sales tie and, if so, whether the alleged collateral warranty was in fact made.

---

106 [1992] 2 Qd R 152.
107 [2000] 2 Lloyd's Rep 611 (Ch).
108 At [7].

His Honour described the purpose and effect of entire agreement clauses as obviating the occasion for a search through negotiations for some chance remark to found a claim for the existence of a collateral warranty and the peril to the contracting parties posed by the need to conduct such a search.[109] An entire agreement clause constituted a binding agreement between the parties that the full contractual terms were in the document containing the clause and not elsewhere. Accordingly, promises or assurance made in the course of negotiations (which may have effect as a collateral warranty otherwise) would have no contractual force, save to the extent they are reflected and given effect in that document.

It was held that the entire agreement clause was sufficient to exclude Inntrepreneur from liability for collateral warranties.[110] It clearly set out an agreement that the full contractual terms between the parties were contained in the written agreement and nowhere else, including any collateral statements.[111] This finding alone was sufficient to justify the injunction sought by Inntrepreneur and dispose of East Crown's counterclaim. In obiter, Lightman J affirmed that an entire agreement clause will not preclude a claim in misrepresentation, since the denial of contractual force to a statement does not affect that it is, or might be, a misrepresentation.[112]

In *Exxonmobil Sales and Supply Corpn v Texaco Ltd*,[113] Exxonmobil agreed to supply Texaco with diesel. The contract nominated a third party to test samples of the diesel to ensure it complied with standard specified in the contract.

The contract contained an entire agreement clause (cl 18) which read:[114]

> This instrument contains the entire agreement of the parties with respect to the subject matter hereof and there is no other promise, representation, warranty, usage or course of dealing affecting it.

Texaco refused to accept a shipment of diesel, claiming it was off specification based on inspections conducted at the port of unloading. Exxonmobil considered this a repudiation of the contract because the third party that inspected the diesel as set out in the contract had approved the diesel's quality. It accepted the repudiation, sold the diesel elsewhere and initiated summary judgment proceedings to recover damages from Texaco. Texaco raised as one of its defences that there was an implied term in the contract, based on custom, that the third party inspector would retain samples of diesel for a reasonable period of time. Because it failed to do so, Texaco claimed, its determination was not binding. In response, Exxonmobil argued that any such term was barred by the operation of the entire agreement clause.

The Court held that, although entire agreement clauses come in different forms (referring to *Inntrepreneur*) they generally constitute a binding agreement that the contract terms are to be found in the document(s) evidencing the contract.[115] Usage or course of dealing are two methods by which a term may be implied. Thus, the agreement that "there is no usage" was a clear indication by the parties that they intended the terms based upon usage or custom were not to be implied into the agreement.[116]

---

109 At [7].
110 At [8].
111 At [8].
112 At [8].
113 [2003] EWHC 1964 (Comm), [2003] 2 Lloyd's Rep 686.
114 *Texaco*, at [6].
115 At [24].
116 At [24].

In *AXA Sun Life Services Plc v Campbell Martin Ltd*,[117] AXA had entered into a number of contracts with sales representatives. AXA terminated some of those agreements and issued proceedings to recover various sums from the proceedings. The defendants sought to rely on implied terms in the contracts and misrepresentations/warranties made by AXA that induced entry into the contracts.

AXA's position was that all those claims (except for fraudulent misrepresentation) were excluded by an entire agreement clause common to all contracts (cl 24), which read as follows:[118]

> This Agreement and the Schedules and documents referred to herein constitute the entire agreement and understanding between you and us in relation to the subject matter thereof. Without prejudice to any variation as provided in clause 1.1, this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement but this will not affect any obligations in any such prior agreement which are expressed to continue after termination.

The court ordered that the proceeding be heard on four preliminary questions, before going to trial, including whether cl 24 precluded the defendants from relying on misrepresentations and/or breaches of collateral warranties and/or implied terms. At first instance, Judge Graham Jones held that the answer was "no". On appeal, all parties accepted that the entire agreement clause was sufficient to exclude collateral warranties. However, they disputed whether it also excluded liability for misrepresentation and the finding of implied terms.

The Court of Appeal unanimously found that neither misrepresentation nor implied terms were excluded. On misrepresentation, Rix LJ, in a concurring judgment (though the leading judgment on the misrepresentation issue), considered that the entire agreement clause affected only "matters of agreement" (ie the contents of the contract).[119] Since misrepresentation is concerned with inaccurate precontractual statements but not with what the parties have agreed, it was outside the scope of the entire agreement clause.

Though the scope of each entire agreement clause turns on its wording, Rix LJ observed that the exclusion of liability for misrepresentation has to be clearly stated.[120] This can be done by clauses stating the parties' agreement that there have been no representations made, that there has been no reliance on any representations or express exclusions of liability for misrepresentation.

> However, save in such contexts, and particularly where the word 'representations' takes its place alongside other words expressive of contractual obligation, talk of the parties' contract superseding such prior agreement will not by itself absolve a party of misrepresentation where its ingredients can be proved.[121]

On implied terms, Stanley Burton LJ, in the leading judgment at [41], identified a dichotomy between implied terms that are "intrinsic" to written agreements and those that are "extrinsic". The former would resist the operation of an entire agreement clause; the latter would not. Since Campbell Martin pleaded the implied terms in order to give business efficacy to the agreement, the implied terms pleaded were intrinsic to the contracts and so not excluded by the entire agreement clause.

---

117 [2011] EWCA Civ 133, [2011] 1 CLC 312.
118 At [13].
119 At [81].
120 At [94].
121 At [94].

Dispute Resolution clauses

The cases demonstrate a willingness by the courts to give full effect to dispute resolution clauses, especially if they are entered into by commercial parties at the time of entering into the agreement. Where the clause provides for the dispute to be determined by arbitration, there appears to be a consistency in the New Zealand, Australian and UK cases of courts striving to give effect to the parties' intention of engaging in a private resolution of their dispute.

New Zealand

In *Attorney-General v Barker Bros Ltd*,[122] the Crown entered into a five-year lease for an airstrip in the Chatham Islands with Barker Bros Ltd (Barker). The lease provided in cl 2 that Crown had the option of renewing the lease for a further five years on terms to be agreed between the parties at the time but with rent not less than "the amount payable hereunder".[123]

The lease also provided that any dispute regarding the contract would be resolved by arbitration (cl 18):[124]

> In the case of any difference or dispute arising as to any clause, matter or thing herein contained or implied, or arising in any way in respect of this deed such difference or dispute shall be decided by a single arbitrator if the parties can agree upon the appointment of one person and if otherwise then by arbitration of two independent persons one to be appointed by each party to this deed and by an umpire …

At the end of the initial five-year term, the Crown purported to exercise its right to renew. The parties were unable to agree on terms, with Barker insisting on almost twice the rent due under the initial term of the lease. The Crown sought Barker's agreement to submit to arbitration to resolve the dispute. At trial, Mahon J considered that the parties could not have agreed that the potentially wide gap between the parties as to the terms on which the lease would be renewed be bridged by an independent third party.

The Court of Appeal allowed the Crown's appeal. The key issue was whether Mahon J was correct in finding that the arbitration clause was not intended as a means of resolving any disagreement which might arise between the parties after a notice of renewal had been given.[125] On the question of the effectiveness of the arbitration clause, Richmond P concluded that the parties objectively intended that the arbitration clause be a means of resolving any differences between the parties as to the terms of the renewal for a number of reasons. It was clear as a matter of law that an appropriately worded arbitration clause could fill the gaps left where the parties had left some important terms to be decided at a later date.[126] The use of arbitration to settle the rental figure payable in a renewal was common and accepted. The lease contained other terms requiring further negotiation by the parties, the resolution of disputes as to which the arbitration clause seemed to apply.[127] Clause 2 set a minimum rent on a renewal (the price paid in the initial term), which would be pointless if the parties intended that mutual agreement be the only means of settling the terms of the new lease.[128]

---

122 [1976] 2 NZLR 495 (CA).
123 At 495.
124 At 495.
125 At 498.
126 At 500.
127 At 502.
128 At 503.

The absence of a detailed formula by which an arbitrator could set the new rental figure was not fatal to the enforcement of the arbitration clause. The Court recognised that once it is satisfied that the parties have provided, by means of an arbitration clause, a machinery to settle terms and conditions of a new lease, effect should be given to that intention unless the lack of some stated formula or standard will render the arbitrator's task impossible in practice.

In *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 (HC), Sensation had agreed to build a yacht for Marnell. Marnell would pay instalments and receive a proportionate amount of title to the yacht as each instalment was paid. Relations between the parties broke down. Sensation issued default notices to Marnell and then purported to terminate the contract. Marnell responded that the default notices were defective such that Sensation's notice of termination constituted a repudiation of the contract for which Marnell was entitled to terminate.

Marnell filed proceedings seeking a range of orders, broadly aimed at ensuring that Marnell could take custody of the yacht. Sensation applied for a stay of proceeding, relying on a detailed dispute resolution clause (cl 18) in the contract that provided for a staged resolution consisting of negotiation, referral to the architect and, ultimately, arbitration. Marnell opposed Sensation's application on the basis that cl 18 either was unenforceable, did not apply to this dispute or had not been complied with by Sensation.

Justice Wild rejected all three grounds in finding that cl 18 bound the parties in this dispute such that a stay was justified. Marnell argued that the section of the dispute resolution clause dealing with arbitration, on its proper construction, did not apply in the circumstances mainly because another clause (cl 17) provided the correct procedure to apply in disputes following the expiry of default notices.[129] Justice Wild disagreed as cl 18 was expressed to apply to "[e]very dispute or difference concerning the Contract".[130] Clause 17 addressed the remedies available in respect of default notices, but not the forum in which those remedies were to be pursued. The use of the verb "sue" meant only "to bring a civil legal claim" and was "as apt to an arbitration, as it is to a Court proceeding".[131] The arbitration clause did not limit referral to arbitration to circumstances in which termination had succeeded the issue of a Completion Certificate.

Marnell also argued that Sensation had not complied with cl 18.5(h), which required a dispute to be referred to the respective chief executives before proceeding to arbitration. Wild J considered that there was enough evidence of Sensation making a good faith effort to resolve the dispute by negotiation to find that it had complied with cl 18.5(h).[132] His Honour also drew support from the general principle that courts should strive to give effect to the intention of parties to submit disputes to arbitration and not allow any inconsistencies or uncertainties in the wording or operation of arbitration clauses that might thwart that intention.[133]

---

[129] At [56].
[130] At [57].
[131] At [57].
[132] At [60].
[133] At [61], referring to *Redfern & Hunters Law and Practice of International Commercial Arbitration* (3rd ed, 1999) at 172–173; *Russell on Arbitration* (21st ed, 1997) at [2-006]; and *Queensland Electricity Generating Board v New Hope Colleries Pty Ltd* [1989] 1 Lloyd's Reports 205 at 210 per Lord Cooke.

In *Carr v Gallaway Cook Allan*,[134] the parties had agreed to submit to arbitration a dispute regarding whether Gallaway Cook Allan (GCA) had negligently failed to settle a commercial transaction in respect of which they had been instructed by Carr. The arbitrator dismissed Carr's claim. Carr then applied to the High Court for an order setting aside the award on the basis that the arbitration agreement was invalid. In the High Court, Ellis J decided the words "and fact" could not be severed, the arbitration agreement as a whole was not valid under New Zealand law and the award was set aside. On appeal, the Court of Appeal held the arbitration agreement was valid, finding that severance would not alter the fundamental character of the arbitration agreement and that there were strong policy reasons in favour of giving effect to the arbitration agreement especially where it had been substantially performed.

The dispute resolution clause read as follows (cl 1.2):

> The parties undertake to carry out any award without delay subject only to such rights as they may possess under Articles 33 and 34 of the First Schedule to the Arbitration Act 1996 (judicial review), and clause 5 of the Second Schedule (appeals subject to leave) but amended so as to apply to 'questions of law and fact' (emphasis added).

GCA accepted that the inclusion of a right of appeal on issues of fact was defective, but argued that this right could be severed from the arbitration agreement and the remainder enforced.

The Supreme Court held that the term "arbitration agreement" within the scheme of the Arbitration Act 1996 had a broad meaning going beyond the formal submission of the dispute to an arbitral tribunal and encompassing procedural matters on which the parties had agreed.[135]

This was the first issue identified by the Supreme Court, whether the arbitration agreement even included cl 1.2, or if it was limited to cl 1.1, which simply set out: "This dispute is submitted to the award and decision of the [arbitrator] as Arbitrator whose award shall be final and binding on the parties (subject to clause 1.2)."[136]

As to severability of the words "and fact" from cl 1.2, McGrath J reviewed the leading authorities on severance from the United Kingdom, Australia and the United States of America and concluded that a term could be severed only if it was "subsidiary to the main purpose of the contract".[137] Not if severance would destroy the main purpose and the substance of what had been agreed.[138] Objectively, italicisation of the words "questions of law and fact" followed by the notation "(emphasis added)" made clear that the scope of the appeal right went to the heart of the arbitration agreement.[139] Additionally, the factual matrix at the time the parties entered into the arbitration agreement reinforced the importance attached to the right to bring a factual appeal.[140] The words at issue ("and fact") constituting "the condition to which the agreement to arbitrate was subject" was held to be

[134] [2014] NZSC 75, [2014] 1 NZLR 792.
[135] At [39]–[41].
[136] Note, at [44] the Court said further that the policy reasons motivating the doctrine of separability are not engaged where an arbitration clause is contained in an agreement specifically tailored for resolution of a dispute by arbitration (cf. where the clause sits within the agreement the subject of the dispute).
[137] At [62].
[138] At [66], the exercise was said to be objective, though a court is entitled to ask whether the parties would have entered the arbitration agreement "but for" the terms sought to be severed as a means of ascertaining whether severance would leave the subject matter of the contract and the primary obligations of the parties unchanged.
[139] At [70].
[140] At [71].

so material and important a promise so as to not be severable. The agreement to arbitrate therefore failed and the arbitration agreement was not valid.[141]

On the issue of whether the Court should exercise discretion to set aside the award, McGrath J considered that the invalidity of an arbitration agreement was one of the more serious grounds for setting aside listed in art 34 such that, where made out, the court should only exercise its discretion to refuse to set aside an award in exceptional circumstances.[142] No such circumstances existed here, and so the Court allowed Carr's appeal and reinstated Ellis J's decision to set aside the award.[143]

United Kingdom

In *Harbour Assurance Co (U.K.) Limited v Kansa General International Insurance Co Ltd* [1993] QB 701 (CA), Harbour agreed to reinsure Kansa in respect of risks for the years 1980–1982. The reinsurance contract included the following arbitration clause:[144]

> All disputes or differences arising out of this agreement shall be submitted to the decision of two arbitrators one to be chosen by each party and in the event of the arbitrators failing to agree, to the decision of an umpire to be chosen by the arbitrators before entering upon the reference.

Harbour issued proceedings against Kansa seeking a declaration that the reinsurance contracts were void for illegality because Kansa was not registered to carry on business as an insurer in the United Kingdom. Kansa applied for the proceedings to be stayed because the arbitration clause required the dispute to be referred to arbitration, relying on s 1 of the Arbitration Act 1975 (UK). Harbour opposed on the basis that, since the arbitration clause was part of the allegedly illegal contracts (and so implicated in the dispute), it could not be relied on to resolve the dispute.

At first instance, Steyn J (as he then was) dismissed Kansa's application. Findings were made that, as a matter of law, the illegality of a contract can be referred to arbitration provided the alleged initial illegality does not directly impeach the arbitration clause. It was held that the alleged illegality of the reinsurance contracts did not impeach the arbitration clause, and that the arbitration clause in this case was wide enough to cover a dispute as to initial illegality. Despite these findings, his Honour felt bound by *David Taylor & Son Ltd v Barnett Trading Co*,[145] to find that the separability principle of arbitration clauses, that arbitration clauses are special and may be treated as separable from the terms of an agreement in which they are contained, did not extend to initial illegality. Kansa appealed.

The Court disagreed that Steyn J was bound by *David Taylor* to conclude as his Honour did.[146] Per Ralph Gibson LJ, that case is better understood as being decided on the basis of misconduct by the arbitrator in making an award for damages under an illegal contract, rather than that the arbitrator was not entitled to make a finding on illegality. Note that the Court similarly rejected an argument made for Harbour that it was bound by *Heyman v Darwins Ltd* [1942] AC 356 (HL) because Viscount Simon LC's statement that an arbitration clause cannot operate if one party is contending that the contract is void

141 At [72].
142 At [80].
143 At [86].
144 At 707.
145 [1953] 1 WLR 562 (CA).
146 At 713.

(because the arbitration clause itself would also be void) was obiter dicta, at 709 per Ralph Gibson LJ.[147]

It was noted that an arbitration clause has been held to be a self-contained contract collateral to the containing contract. As with any other contract, it must therefore be construed according to its terms in and with regard to the relevant factual situation.[148] Whether an arbitration clause is unenforceable in respect of a dispute as to the legality of the contract turns on whether the dispute goes to the validity of the arbitration clause and not just the contract in a general sense.[149] This will depend on the nature of the rule allegedly rendering the contract illegal and, specifically, whether its purpose would be liable to be defeated by submitting determination of the agreement's legality to arbitration.[150] Moreover, there is no public policy interest in the courts retaining a monopoly over the determination of the initial legality of agreements.[151]

On the facts, the arbitration clause was wide enough to include resolution of disputes as to illegality.[152] Nor were there any public policy reasons specific to the legality of insurance contracts that justified the finding sought by Harbour.[153] Lord Justice Ralph Gibson stated that in agreeing that "all disputes or differences arising out of this agreement shall be submitted to the decision of two arbitrators" the parties had presupposed that "the agreement" had some relevant existence.[154] The issue of whether all the promises in the agreement were rendered invalid and void when the parties signed the agreement by the illegality of the agreement was a dispute arising out of the agreement.[155]

In *Premium Nafta Products Ltd v Fili Shipping Company*,[156] Premium Nafta chartered eight ships from Fili. All charterparties were in Shelltime 4 form, which included the following arbitration clause (cl 41):[157]

> (a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.
>
> (b) Any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree.
>
> (c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred... to arbitration in London…

Fili purported to rescind the charters on the basis that they were procured by the bribery of certain senior officers of Fili by an individual associated with Premium Nafta. Fili initiated proceedings seeking declarations that the charters were validly rescinded. Premium Nafta applied to stay the proceeding in reliance of the arbitration clause and s 9 of the Arbitration Act 1996 (UK). By the time the case reached the House of Lords, there were two key issues. The first issue was whether the arbitration clause covered the dispute as to whether the contract was procured by bribery. The House of Lords affirmed the Court of Appeal's

147 At 716 per Leggatt LJ. Having found that such a sweeping principle was not part of English law, the Court declined to recognise one, at 723 per Hoffmann LJ.
148 At 711E per Ralph Gibson LJ.
149 At 724 per Hoffmann LJ.
150 At 724 per Hoffmann LJ.
151 At 719 per Leggatt LJ.
152 At 714 per Ralph Gibson LJ and 726 per Hoffman LJ.
153 At 724–725 per Hoffmann LJ.
154 At 714 per Ralph Gibson LJ.
155 At 714.
156 [2007] UKHL 40.
157 At [3].

rejection in *Harbour Assurance* of the rule that arbitrators could never have jurisdiction to decide whether a contract was valid because if the contract is invalid so too was the arbitration clause.[158] The issue was simply one of construction.

Lord Hoffman found that any exercise in interpreting arbitration clauses should start with a presumption that the parties, as rational businessmen, are likely to have intended that any dispute arising out of the agreement be decided by the same tribunal.[159] That presumption would be displaced only where the language of the arbitration clause makes it clear that the parties intended certain issues to be excluded from the arbitrator's jurisdiction.[160] On the facts, there was no such language in the charterparties. The arbitration clause was therefore wide enough to capture the dispute.[161] Lord Hope supported Lord Hoffmann's liberal approach to the construction of arbitration clauses as a means of upholding the parties' objective intention, noting that the nature of arbitration clauses is that businessmen tend not to rigorously scrutinise wording as they might terms that lie at the heart of the transaction such as price.[162]

The second issue was whether the arbitration clause was even binding at all, given Fili's allegation that the charterparties (and so arguably the arbitrations clauses therein) were invalid. Lord Hoffman stated that in a case involving corporate agents such as this one, the party seeking to void the agreement must show that the agent had no authority to enter into an arbitration agreement irrespective of the content of the main agreement or reasons for which the agent concluded it.[163] The House of Lords found it would have been "remarkable" for Fili to enter into any charter without an arbitration agreement. Therefore, the arbitration clauses remained effective notwithstanding any claims by Fili as to the validity of the charterparties. The House of Lords upheld the stay.

Australia

In *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*,[164] Francis agreed to act as Virgin Atlantic's sales agent in Australia. The agency agreement included the following arbitration clause (art 19):[165]

> Any dispute or difference arising out of this Agreement shall be referred to the arbitration in London of a single Arbitrator to be agreed upon by the parties hereto or in default of such agreement appointed by the President for the time being of the Royal Aeronautical Society. The and the provisions of the Arbitration Act 1950 and any statutory modifications or re-enactments therefore for the time being in force shall apply. [sic]

A number of disputes relating to the agreement arose, which were referred to arbitration. Virgin gave notice of termination under art 16 which gave each party a right to terminate at any time with three months' notice. Francis filed proceedings and contended that Virgin was not entitled to terminate because, notwithstanding cl 16, Virgin had represented that it would not terminate until the end of the next year. Virgin applied for a stay on the basis that the termination dispute should be referred to arbitration under art 19. The key issue

158 At [9] per Lord Hoffmann.
159 At [13] per Lord Hoffmann.
160 At [13] per Lord Hoffmann.
161 At [15] per Lord Hoffmann.
162 At [25]–[26] per Lord Hope of Craighead.
163 At [18] per Lord Hoffmann. Fili alleged that the circumstances gave rise to an inference that an agent acting for it was bribed to consent to the main agreement, but not that he was bribed to enter into the arbitration agreement.
164 (1996) 131 FLR 422.
165 At 424.

was whether the claims made by Francis relating to Virgin's purported termination was a dispute "arising out of" the agency agreement.

Chief Justice Gleeson observed that the expression "arising out of" in arbitration clauses has usually been given a wide meaning and that when parties to a commercial contract agree at the time of making the contract and before disputes have arisen to refer disputes to arbitration, that agreement should not be construed narrowly.[166] They are unlikely to have intended different disputes to be resolved before different tribunals or that the appropriate tribunal "should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument."[167]

Francis argued, by reference to a subsidiary claim in the proceedings under the Trade Practices Act 1974 (Cth), that the parties could not have intended to confer upon an arbitrator (especially a foreign arbitrator) the power to deal with a claim in respect of which the legislation confers such a wide discretionary jurisdiction upon the court.[168] Chief Justice Gleeson disagreed and said that, putting to one side the fact the place of arbitration provided for is England, there is no reason in principle why parties to a commercial contract cannot agree to submit to arbitration disputes arising between them under that statute.[169] Rather, it is consistent with modern policy of encouragement of various forms of alternative dispute resolution that courts should facilitate rather than impede agreements for private resolution of disputes.[170] On the subsidiary issue of whether and to what extent the English arbitrator would be able to decide Francis's claim under the Trade Practices Act, Gleeson CJ found that it was for the arbitrator to decide based on relevant principles of conflict of laws and that the Court should not pre-empt that decision.[171]

In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,[172] Pan Australia agreed to charter a ship (Comandate) from Comandate Marine. The charterparty was in the form of the New York Produce Exchange Form 1993 Revision, which included an arbitration clause at 45(b):[173]

> All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London … Any dispute arising hereunder shall be governed by English Law.

A dispute arose between the parties after *Comandate* was detained by the Australian Maritime Safety Authority. Pan Australia alleged various breaches of the charterparty by Comandate Marine and that it had engaged in deceptive and misleading conduct in contravention of the Trade Practices Act 1974 (Cth). It issued proceedings in rem against *Comandate* and obtained an arrest warrant for the ship. Comandate Marine applied to stay the proceedings, relying on s 7 of the International Arbitration Act 1974 (Cth), which would require the court to stay proceedings brought in respect of matters governed by an arbitration agreement. At the same time, Comandate Marine commenced proceedings in

166 At 427.
167 At 426–427, citing *Ethiopian Oilseeds & Pulses Export Corporation v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep 86 per Hirst J.
168 At 427.
169 At 428.
170 At 428.
171 At 428–429, referring to *Government Insurance Office (NSW) v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 246 and *Mitsubishi Motors Corporation v Soler-Chrysler Plymouth Inc* 472 US 614 (1985).
172 (2006) 157 FCR 45.
173 At [15].

rem against another ship chartered by Pan Australia in respect of alleged breaches of the charterparty by Pan Australia.[174]

The trial judge had held the charterparty, having been finalised when Pan Australia provided a bank guarantee, was not an "agreement in writing". The Federal Court disagreed, finding that the requirement under art II of the New York Convention that the contract be contained in an exchange of letters or telegrams was not a requirement that the contract be *formed* by the act of signing or the exchange of letters or telegrams.

The trial judge also found that Comandate Marine had elected not to pursue arbitration by filing its own set of proceedings without suitable reference to the arbitration. The Federal Court disagreed and held that the proceedings issued by Comandate Marine, being in rem, were not subsumed by the in personam proceeding commenced as soon as Pan Australia entered an appearance. Consequently, Comandate Marine had not commenced a proceeding against Pan Australia that might amount to a repudiation of the arbitration clause capable of acceptance by Pan Australia.

The Court defined the scope of the phrase "arising out of a contract" broadly, on which view it was clear that claims under the Trade Practices Act arose out of the charterparty.[175] The width of the phrase and its synonymity with the expression "in connection with" was said to reflect the practical, rather than theoretical meaning to be given to the word "contract" out of which the disputes may arise.[176] It would be necessary in each case to assess the connection of the dispute with the contract's formation, terms or performance to determine whether a dispute fell within the clause. Additionally, the terms of the arbitration clause should be considered in the context in which they appear.[177]

Pan Australia argued that the claim under the Trade Practices Act potentially gave rise to a right to set aside the charterparty ab initio such that the court would be asked to find that the agreement was null and void and a stay would be denied by s 7(5) of the International Arbitration Act 1974 (Cth).[178] However, the Court found that the doctrine of separability was part of the law of Australia and that, under that doctrine, the arbitration agreement was separable from the charterparty and therefore not rendered null and void by reason of the claims under the Trade Practices Act.[179]

174 At [131].
175 At [175].
176 At [175].
177 At [175].
178 At [207].
179 At [229]–[230].