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IN THE COURT OF APPEAL OF NEW ZEALAND

CA373/2015
[2015] NZCA 605

BETWEEN	NEW ZEALAND CARBON FARMING LIMITED First Appellant
	NZCF LAIDMORE LIMITED Second Appellant
AND	MIGHTY RIVER POWER LIMITED Respondent

Hearing:	24 September, 16 and 17 November 2015
Court:	Wild, French and Cooper JJ
Counsel:	D J Goddard QC, C P Browne and E F Armstrong for Appellants J E Hodder QC, D T Street and H K Wham for Respondent
Judgment:	16 December 2015 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is dismissed.

C The appellants are to pay the respondent's costs calculated as for a standard appeal on a band A basis, deducting 10 per cent from that amount, and usual disbursements.

D Order limiting distribution of the unredacted version the judgment to the parties and their legal representatives.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] The appellants, New Zealand Carbon Farming Ltd and NZCF Laidmore Ltd and the respondent, Mighty River Power Ltd (MRP) are in dispute about the meaning and application of provisions of an agreement they executed on 12 January 2012 (the Agreement).

[2] The Agreement related to the sale by the appellants to the respondent of carbon credits called New Zealand Units (described in this judgment as "Units") transferred to the appellants under the New Zealand Emissions Trading Scheme (ETS) established under the Climate Change Response Act 2002 (the Act). The Units to which the Agreement relates are derived from the appellants' forest at Hawarden in North Canterbury. The forest is a "post-1989 forest" under the Act.[1] The appellants are related companies, owning different parts of the forest referred to in some of the evidence as "Hawarden" or "Laidmore". The appellants' interests in the present litigation are indistinguishable, and except where it is appropriate to

[1] Climate Change Response Act 2002, pt 5, subpart 1.

differentiate, we refer to them together as "NZCF" and to the forest as the "Hawarden forest" or simply "the forest".

[3] Under the ETS, emitters of carbon dioxide must surrender Units equivalent to their emissions, and foresters are granted Units equivalent to the amount of emissions absorbed by their forests. The respondent is an electricity generator, wholesaler and retailer. As a "stationary energy company" it has been required since early 2011 to surrender Units to the Crown under the ETS equal to the carbon dioxide-equivalent of emissions emitted by its activities in the previous year. It was interested in acquiring Units from NZCF to assist it to meet those obligations, and entered into the Agreement for that purpose.

[4] Both NZCF and MRP (by way of counterclaim) sought declarations in the High Court at Auckland about the meaning and application of provisions of the Agreement. They now appeal and cross-appeal from aspects of the judgment of Toogood J determining their claims.[2]

[5] The principal issue arises under NZCF's appeal, which focuses on cl 2.1(d) of the Agreement.[3] That clause contemplates that NZCF would be obliged to sell (and MRP to purchase) a different number of Units than that stated in the Agreement, in the event of a change in Units allocated to NZCF resulting from any change (subsequent to the signing of the Agreement) in the accounting mechanism provided for under the Act. This issue turns on the proper interpretation of the phrase "[change in] approach in operation under the Act at the signing of this Agreement". NZCF claims there was such a change and that it substantially increased the number of Units it was obliged to provide and MRP was obliged to purchase under the Agreement. The arguments presented on both sides require consideration of the process by which the ETS was applied to the forestry sector, a process forming part of the background against which the parties negotiated the Agreement. Both NZCF and MRP have addressed the discussions that took place between them on the basis they are relevant to the interpretation of cl 2.1(d).

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2 *NZ Carbon Farming Ltd v Mighty River Power Ltd* [2015] NZHC 1274 [High Court judgment].

3 Clause 2.1(d) is set out in full below at [91].

[6] MRP's cross-appeal concerns two issues resolved against it in the High Court. The first concerns the proper interpretation of cl 2.1(a) of the Agreement, in particular the phrase "the Units transferred to the Sellers under the NZ ETS for the Converted Area for each calendar year," and the corresponding delivery obligations in cl 2.1(b).[4] The second issue on the cross-appeal relates to the scope of documents and information that NZCF was obliged to provide MRP in relation to every delivery under cl 2.1(b)(ii) of the Agreement.

The regulatory regime

[7] The Act was enacted on 18 November 2002. Apart from provisions not relevant here, it was brought into force on 1 August 2003 by the Climate Change Response Act Commencement Order 2003. The purpose of the legislation was to enable New Zealand to meet its international obligations under the United Nations Framework Convention on Climate Change, adopted at New York on 9 May 1992, and the Protocol to the United Nations Framework Convention on Climate Change adopted at Kyoto on 11 December 1997.

[8] Since its original enactment, the Act has been substantially amended. Relevantly for present purposes, the Climate Change Response (Emissions Trading) Amendment Act 2008 added a new pt 4 to provide for a New Zealand greenhouse gas emissions trading scheme, the ETS. The purpose of the Act was altered so as to state specifically the purpose of providing:[5]

> … for the implementation, operation, and administration of a greenhouse gas emissions trading scheme in New Zealand that supports and encourages global efforts to reduce greenhouse gas emissions by assisting New Zealand to meet its international obligations under the Convention and the Protocol, and by reducing New Zealand's net emissions below business-as-usual levels.

[9] In October 2008, the Ministry of Agriculture and Fisheries (MAF) published a guide seeking to explain the operation of the ETS insofar as it related to the forestry sector. The guide, "Forestry in the Emissions Trading Scheme", explained that the ETS worked by putting a price on the emission of greenhouse gases, and providing incentives that would encourage sectors to search for the most efficient

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4 Clause 2.1(a) is set out in full below at [88]. Clause 2.1(b) is described in greater detail at [89].

5 Climate Change Response (Emissions Trading) Amendment Act 2008, s 5.

means of lowering net emissions. The guide stated that New Zealand's forests would play a critical role in meeting the country's climate change objectives, noting that forests were already a significant store of carbon with potential for that to increase. It was for this reason that forestry had become the first sector to enter the ETS, with effect from 1 January 2008.

[10] The guide also explained that forest land was to be included in the ETS in two ways. The scheme would compulsorily apply when pre-1990 forest land was deforested (unless it was exempt). Alternatively, owners of "post-1989 forest land" could choose to bring it into the ETS. In doing so, the owners would become "Participants", entitled to receive Units for the increase in carbon stored in their forests as they grow. Units could be sold in New Zealand or converted and sold internationally.

[11] The scheme required participants:

(a) To report at least once every five years on the carbon stocks in their registered forest area using methods, and in accordance with a timeline, specified in regulations.

(b) To surrender Units if the carbon stocks in their registered forest land fell below a previously reported level (for example, due to harvesting or fire).

(c) To notify the government if any part of the forest area registered in the scheme were sold or withdrawn, and if required to do so, surrender any emissions Units transferred for that area of forest.

[12] It was explained that landowners would have until the end of 2012 (referred to as the "first commitment period") to decide whether to register for that period. If they did, then all carbon sequestered since 1 January 2008 would earn Units. After 2012, whilst landowners could still register, only carbon sequestered from 1 January 2013 would earn Units. It was also stipulated that no Units could be earned for carbon sequestered before 2008, and if landowners did not register, then gains or losses in carbon stocks in their forests would be retained by the government.

[13] The guide explained that under the ETS, it was proposed that there be two methods for determining forest carbon stocks, the default look-up table approach (also referred to in this judgment as "the look-up table" approach) and the field measurement approach (FMA), both of which are discussed in the next section. It was noted the FMA approach was proposed to be introduced through an amendment to the Climate Change (Forestry Sector) Regulations 2008 (the Regulations) "towards the end of 2009." Those amended regulations would provide the detailed rules governing when and how each method for determining carbon stocks might or must be used.

[14] The Regulations were in fact amended in 2011.[6] The 2011 amendment was made on 16 May 2011, but relevantly came into force on 1 September 2011. As will emerge, those dates are significant for the arguments in the present case. The effect of the amendment was to insert new provisions dealing with the FMA and establishing the process by which it would be implemented. Key features of the FMA regime included the following:

(a) There was a definition of "FMA participant". So far as is relevant, the definition applied to a "post-1989 forest land participant who has 100 or more hectares of registered post-1989 forest land at any time during a mandatory emissions return period".[7]

(b) The expression "mandatory emissions return period" was defined by reference to the definition in s 189(9) of the Act. In broad terms, that definition states the term means the "first commitment period" (the period from 1 January 2008 to 31 December 2012) and any subsequent commitment period or, if there is no subsequent commitment period, the five-year period commencing on 1 January 2013.

(c) In order to participate in the FMA, a participant was required to give notice to the Chief Executive assigning a forest class (of exotic or

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6 Climate Change (Forestry Sector) Amendment Regulations 2011.
7 Climate Change (Forestry Sector) Amendment Regulations, reg 4(1)(a).

indigenous) in any area of the participant's registered post-1989 forest land.[8]

(d) Next, the participant had to apply to the Chief Executive ("in accordance with any relevant standard issued by the Chief Executive") for the allocation of at least the minimum number of plots required under reg 22C.[9] The participant was then required to establish a permanent sample plot at each location allocated for a plot by the Chief Executive under reg 22C.[10]

(e) Regulation 22C required the Chief Executive to allocate permanent sample plots on receipt of an application under reg 22B. That allocation was to be made in accordance with a standard issued by the Chief Executive and in accordance with certain rules set out in the regulations. The relevant standard was not issued until 1 September 2011. It prescribed "the manner in which permanent sample plots allocated by the Chief Executive must be located and established", as well as specifying the detail of the "FMA information" required to be collected at and recorded for those plots.

(f) On receipt of the FMA information, the Chief Executive was required to use the information to model forest growth and carbon yield for the participant's registered forest land.[11] The Chief Executive was also to "produce and provide to the relevant FMA participant" tables showing a "participant-specific forest carbon stock table expressed as tonnes of carbon dioxide per hectare" and "a participant-specific residual carbon stock table expressed as tonnes of carbon dioxide per hectare".[12]

(g) A "field measurement approach information standard" was prescribed pursuant to s 90 of the Act on 22 December 2011. This standard

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8 Climate Change (Forestry Sector) Regulations 2008, reg 22A.
9 Regulation 22B(1)(a).
10 Regulation 22B(1)(b).
11 Regulation 22D(1)(a).
12 Regulation 22D(1)(b).

defined the form of information FMA participants would receive when allocated plots. There were also detailed instructions as to the actions required to be taken by the FMA participant in the course of collecting and recording the information and submitting it to the Environmental Protection Authority.

(h) Regulation 22E(1) then required the FMA participant to use the FMA tables to calculate carbon stock for the purposes of the emissions return required to be filed in respect of the "first commitment period".

[15] It is necessary also to note reg 22O of the Regulations. Headed "transitional provision", this regulation provided:

> Despite anything in regulations 22A to 22N, an FMA participant may not submit any FMA information to the chief executive before 1 September 2012 without consent of the chief executive.

[16] In June 2012, the Ministry for Primary Industries (MPI) (now the responsible Ministry) published a "Guide to the Field Measurement Approach for Forestry in the Emissions Trading Scheme". Part of this document was headed "The FMA Process: A Detailed Guide to Implementation". It described the process detailing the various steps required, which included the requirement to establish sample plots in accordance with the FMA standard and to collect and submit FMA information. The document also described the process in which MPI would generate the FMA tables. It explained:

> This step is carried out by MPI on behalf of an FMA participant, by using the MPI Carbon Calculator to generate participant-specific tables of forest carbon stocks …. Each set of tables is unique to an FMA participant's registered forest land, having been derived from the FMA information from the sample plots on that land.

[17] It was further stated that the MPI carbon calculator would use the participant's FMA information, and data derived from the information, to model forest growth and carbon yield over time. The Guide also explained that once the FMA tables of carbon stocks had been produced for an FMA participant, and the emissions return for the first Mandatory Emissions Return (MER) period completed,

the participant must use the tables when calculating forest carbon stocks for all future emissions returns.

[18] On 21 June 2012 MPI prescribed a further version of the information standard. As with its predecessor, the document prescribed the form and electronic format of information to be provided by the FMA participant under the regulations.

[19] On either 9 or 10 January 2013 MPI published the "Mandatory Emissions Return" to be used by post-1989 participants registered in the ETS. The form was required to be submitted no later than 30 June 2013. A note on the form read as follows:

> The mandatory emissions return process reconciles units issued or surrendered in previous voluntary emissions returns, with a participant's entitlement to units over the five year commitment period … In some cases the units issued in previous returns may be more than or less than the units now entitled to. This may be due to discrepancies in previous voluntary returns, amendments in the default tables or if a participant is now using participant-specific tables for the first time under the Field Measuring Approach.

[20] An accompanying "Guide to Calculation" explained that participants with 100 hectares or more of post-1989 forest land registered in the ETS were required to use FMA tables.

The assessment of carbon sequestration

[21] Toogood J heard evidence as to the methods available to calculate a forest's entitlement to Units under the ETS. Witnesses with relevant expertise on the methodologies included:

(a) Dr Murray McClintock. He is a consultant in the area of carbon accounting who advised NZCF at relevant times and gave expert evidence on its behalf.

(b) Professor Bruce Manley, a professor and the head of the New Zealand School of Forestry at the University of Canterbury, where he leads the

> School's carbon forestry research work. Professor Manley was called by MRP.

[22] Mr Bruce Miller of NZCF (previously employed by MRP) and Mr Aaron Smith (of MRP), who were involved in the discussions prior to execution of the Agreement, were also familiar to some extent with the methodologies involved.

[23] Professor Manley explained that there are two methods for calculating a forest's entitlement to Units under the ETS: these are the look-up table method and the FMA. As explained in the previous section, the latter is now compulsory for forests over 100 hectares. The FMA could not be used for filing returns prior to February 2013.

[24] Both calculation methods rest on the same forest growth and carbon sequestration models, referred to as the 300 Index growth model and the C_Change carbon model. Professor Manley explained that industry participants use modelling systems, such as PRAD Calculator and Forecaster, which incorporate those two models in order to calculate a forest's unit entitlement.

[25] Professor Manley's evidence about the three most relevant carbon modelling systems (PRAD Calculator, Forecaster and Forecaster-Carbon) was summarised by Toogood J as follows:

> [23] PRAD Calculator is a relatively simple Microsoft Excel-based growth and yield modelling system. The 300-Index growth model is included, on a stand-level basis, with C_Change. This modelling system is the most popular with smaller companies, infrequent and less-experienced users.
>
> [24] Forecaster is a modelling system in which the 300-Index growth model is an option, on an individual stem or tree basis, together with C_Change. Forecaster is a very detailed system which has numerous options allowing it to be used for many different forestry tasks. For example, in Forecaster there are at least 40 different growth models for a variety of different species and purposes. It is important that users of the Forecaster system select the appropriate growth model and other functions for the analysis they wish to conduct.
>
> [25] Forecaster-Carbon is a slimmed-down version of Forecaster, developed by MPI for managing the FMA and is based on the forest carbon predictor (FCP) system used by the Ministry for the Environment. In the opinion of Professor Bruce Manley, head of the New Zealand School of

> Forestry at the University of Canterbury, the Forecaster-Carbon is closer in nature to the PRAD Calculator than to the more wide-ranging Forecaster system. Those two systems are based on a stand-level 300-Index growth model, while Forecaster has a more detailed individual stem-level version of the same model. In Professor Manley's opinion, however, if the same inputs and parameters are chosen, the three systems will produce results within five percent of each other.

[26] The method of calculation when the ETS was first introduced was based on look-up tables. Professor Manley described that method as simple, but less accurate. The look-up tables essentially provided pre-calculated values of carbon stocks by forest type, age and, in the case of Pinus Radiata only, by region. The look-up tables were set out in the Regulations. Professor Manley said that the values were intended to be generic estimates only of the weight of carbon dioxide removed from the atmosphere and stored in the forest during its growth. ETS participants were able to claim Units for the change in carbon stocks over time based on the look-up tables but with the introduction of the FMA, the tables were no longer able to be used for forests over 100 hectares in area.

[27] Professor Manley explained that in effect the FMA results in personalised or participant-specific look-up tables for forests over 100 hectares. The FMA tables are more accurate than the default look-up tables previously used (which remain in use for forests under 100 hectares) but the process is significantly more expensive because of the costs involved in gathering the necessary site-specific measurements.

[28] In general terms, as Professor Manley explained it, the FMA tables were generated by a process in which:

(a) the forester submitted initial information regarding the size and type of its forest to MPI;

(b) MPI generated a set of plots within the forest;

(c) the forester measured its forests at those plot points and in accordance with guidelines issued by MPI, before submitting that data to MPI; and

(d) MPI ran its forecaster-carbon model for each of the plots and then averaged the results to produce an FMA table.

[29] Once the FMA table had been obtained, it was mandatory to use it in respect of the first commitment period in filing the MER. As Mr Goddard QC emphasised for NZCF, prior to that, the forester was obliged to use the default look-up table method, and that was the only method able to be used for filing returns when the Agreement was signed.

[30] Dr McClintock explained in his evidence that it was only with the publication on 22 December 2011 of the FMA Information Standard that forest data could be collected in a manner complying with the regulations, and the data could not be submitted to MPI for processing until 1 September 2012. He also said that MPI would not reveal the basic characteristics of its carbon modelling tool to the forestry sector. The Ministry decided to develop its own unique proprietary carbon model ("Forecaster-Carbon"), rather than using one of the two industry standard modelling tools, "PRAD" and "Forecaster".[13] The Forecaster-Carbon model was developed during 2012 and was not fully functional until early 2013. This meant, in Dr McClintock's view, that no ETS participant could accurately model or forecast their entitlements under the FMA; even if the model input data were the same (for example, the same tree measurements used, from the same sample plots) participants would not be able to accurately predict the carbon yields.

[31] However, Professor Manley had a different view. He had been engaged by MAF to lead projects designed to educate forestry professionals about the difference between the default look-up table and FMA approaches. He gave detailed evidence about the educative programme undertaken to explain how the models could be used to predict the amount of carbon that could be claimed under the FMA.

[32] Professor Manley therefore disagreed with Dr McClintock that the forest's unit entitlement could not be accurately predicted. Having reviewed the modelling carried out by Dr McClintock, Professor Manley said that during 2011 Dr McClintock had adopted an industry-standard approach to estimating a forest's

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[13] Described above at [25].

unit entitlement under the FMA. His modelling with the PRAD Calculator became increasingly refined and more accurate in its attempts to estimate the forest's entitlement under the FMA as a result of:

(a) use of measurement plots;

(b) removal of gaps in mapping to reduce variability; and

(c) increasing the number of plots to estimate key inputs of site index, 300-Index and stocking.

[33] Professor Manley said that, based on the post-contract material, Dr McClintock's modelling before 12 January 2012 predicted the forest's actual unit entitlement to within seven per cent of that later determined by MPI using the FMA data.

Steps taken by NZCF under the regulatory regime

[34] On 9 January 2012 MAF wrote to NZCF noting that changes to the Regulations "came into effect" on 1 September 2011. This meant all participants with 100 hectares or more of post-1989 forest land registered in the ETS were now required to use the FMA to determine forest carbon stocks for the MER period of 1 January 2008 to 31 December 2012. That return was due in the first quarter of 2013. The letter pointed out, however, that any other returns made before the end of 2012 must use the "default tables" specified in the Regulations.

[35] Consistently with that requirement, voluntary emissions returns were filed for the Hawarden and Laidmore forests respectively on 4 and 10 January 2012, using the default look-up tables. Then, on 11 January 2012, Dr McClintock signed on NZCF's behalf an "Assigned Forest Class" form stating that the company was assigning all its stands as exotic. He ticked the box to indicate he understood that the forest class information would be used by MAF to determine the minimum number of permanent sample plots and their locations, and acknowledging that, "The Regulations and Field Measurement Approach Standard have specific requirements for the minimum plot numbers by Forest Class, if assigned".

[36] Dr McClintock filled in the form on the basis that the species in the various stands referred to were either Pinus Radiata, Douglas Fir or, in the case of two stands, other indigenous species. A similar form was completed by Dr McClintock for NZCF Laidmore Ltd on 16 January 2012 in respect of the Laidmore Forest.

[37] In the meantime, on 13 January 2012, a day after the Agreement had been executed, Dr McClintock requested on behalf of NZCF that permanent sample plot locations be allocated for the Hawarden forest. Once again, an MAF form was used and it sought the allocation of 85 permanent sample plots. The plots were allocated as requested on that day.

[38] A request to allocate permanent sample plot locations in respect of the Laidmore forest was made on 18 January 2012. The requested permanent sample plot locations were allocated on 20 January 2012.

[39] Dr McClintock explained in his evidence that NZCF began the collection of the FMA data in the forest in January 2012. The exercise was completed in February, having been carried out in two parts for Hawarden and Laidmore respectively. The measurement data was submitted to MPI in September 2012.[14] As has been seen, it was not possible under reg 22O for such data to be submitted prior to 1 September 2012.

[40] Various problems were apparently encountered by MPI in transferring the data submitted into its system. However, those difficulties were eventually overcome. On 25 February 2013 MPI issued the FMA tables for the forest.

[41] On the same day, Dr McClintock filed two MERs for the forest, in the names of NZ Carbon Farming Ltd and NZCF Laidmore Ltd. The MERs were for the first commitment period, from 1 January 2008 to 31 December 2012 and so referred to Units previously claimed in voluntary emissions returns under the default look-up tables, as well as the increased numbers of Units consequent on use of the FMA

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[14] See above at [15]. The Regulations referred to the information being submitted to the Environmental Protection Authority. On a basis which has not been explained to us, the information was actually submitted to the Ministry for Primary Industries, and that in fact is what was envisaged would occur by the "Guide to the Field Measurement Approach" published in June 2012.

tables. In the case of the NZCF MER, an entitlement to receive [omitted] Units was identified in addition to [omitted] Units already claimed. As a consequence, the total Units relating to the first commitment period were [omitted]. The NZCF Laidmore Ltd MER calculated an entitlement to receive [omitted] Units, in addition to [omitted] Units previously claimed giving a total of [omitted] for the whole period.

[42] On 1 March 2013, NZCF transferred [omitted] Units to MRP as the first delivery under the Agreement and issued an invoice in the sum of $2,520,000 calculated at the rate of [omitted] per Unit as set out in the Agreement. Mr Smith acknowledged receipt on that day. MRP paid NZCF's invoice on 20 March 2013.

Discussions prior to execution of the Agreement

[43] Both parties referred to negotiations between NZCF and MRP beginning in August 2011 and continuing up to 12 January 2012 when the Agreement was executed. NZCF referred to the negotiations to support a submission that the number of Units to be delivered pursuant to the Agreement was arrived at after a negotiation driven simply by commercial considerations and was not intended to reflect the Units able to be produced by the forest once the FMA came fully into effect and a MER was filed under the Regulations. From MRP's point of view, however, the purpose of referring to the negotiations between the parties was to demonstrate that the numbers of Units provided for in the Agreement reflected the parties' best estimate of the number of Units the forest would produce under the FMA tables when they were available and able to be used in submitting the MER.

[44] Those involved in the negotiations included Mr Miller for NZCF, and Mr Phillip Gibson and Mr Smith for MRP. Mr Miller kept Mr Matthew Walsh, an NZCF director, advised about developments. Mr Miller had previously worked for MRP as its Head of Wholesale Markets. In June 2011 Mr Gibson replaced him in that role, his duties including management of MRP's portfolio of emissions Units for the purpose of meeting its surrender obligations under the ETS. Mr Gibson gave evidence that when he took over from Mr Miller, MRP's Market Credit Risk Management Policy required there to be sufficient Units to cover between 50 and 100 per cent of its surrender obligations. He explained:

> These limits were set due to the regulatory uncertainty regarding surrender obligations at the time we negotiated our long-term unit purchase agreements. We needed at least sufficient units to cover half of our obligations on a 1 for 1 basis but did not want to acquire too many units should the 2 for 1 transitional provisions be extended.

[45] Mr Gibson further explained that MRP required Units to enable it to comply with its obligations under the ETS, and it did not need more Units than it was required to surrender to the Crown. By September 2011, MRP had signed six agreements and was negotiating a further four including the subject Agreement. If agreements were able to be concluded on those outstanding, MRP would be close to having sufficient Units to cover its surrender obligations on a one for one basis until 2026.

[46] In August 2011, Mr Miller (now employed by NZCF) was contacted by a German fund manager with whom he had had some contact while working for MRP. The fund manager was seeking an investment opportunity for his clients and wished to purchase a "green" asset that would produce a return. Mr Miller saw an opportunity to offer the Hawarden forest for that purpose. He thought a long-term carbon off-take contract able to provide a steady future income stream from an annual sale of Units would make the forest an attractive investment. Aware of MRP's potential interest in the acquisition of Units, he contacted Mr Gibson, and explained about the investor potentially interested. According to Mr Miller, the negotiations between NZCF and MRP that followed quickly resulted in agreement being reached over the term (15 years) of an agreement with the price and volume of Units being settled by the end of September 2011. It was his evidence that the investment model dictated the volumes that he advanced during the discussions.

[47] According to Mr Gibson however, when he first raised the matter Mr Miller described the forest as one that would deliver approximately [omitted] Units per year. Mr Gibson discussed the position with Mr Smith, and arranged for him to send an initial draft agreement to Mr Miller. It was common ground this was based on MRP's agreement with Paraheka Holdings Ltd, executed on 14 October 2011 (the Paraheka agreement).

[48] The draft agreement sent by Mr Miller to Mr Smith on 18 August 2011 provided, at cl 2.1(a), for the sale and purchase of Units transferred to NZCF under the ETS for the "Converted Area" for each calendar year.[15] The draft contained a schedule (sch three) consisting of a table in four columns, part of which we now set out: [the figures in the table have been omitted]

Vintage of Units from Converted Area	Delivery Date	Minimum Delivery Volume	Maximum MRP Agreed Volume
2012	1 April 2013		
2013	1 April 2014		
2014	1 April 2015		
2015	1 April 2016		
2016	1 April 2017		
2017	1 April 2018		

The table continued in the same format for the years 2018–2026, with the figure of [omitted] Units in both of the volume columns.

[49] The terms "Minimum Delivery Volume" and "Maximum MRP Agreed Volume" were used in cl 2.1(b) and (c) of this and subsequent drafts, as well as the Agreement, for the purpose of defining minimum delivery obligations of NZCF and maximum purchase entitlements of MRP. These obligations turned on the numbers of Units specified in the third schedule.

[50] Following a further discussion between Mr Gibson and Mr Miller, Mr Gibson told Mr Smith that the volume of Units might be more like [omitted] and that Mr Miller had suggested that "overs" be "managed through mutual options".

[51] On 22 August 2011, Mr Miller responded to Mr Gibson (copying his response to Mr Smith). His email attached a marked up version of the draft. The changes included raising the minimum delivery volumes stated in sch three to

[15] It is common ground that the expression "Converted Area", which was retained in each draft and appeared in the Agreement itself was a hangover from the Paraheka agreement which was used as a precedent (in that case, the land had been converted from farmland, hence "Converted Area"). It is to be understood simply as a reference to the Hawarden forest in the present Agreement.

[omitted], and adjusting the maximum MRP agreed volume to [omitted], for each year. There was an amendment also to the purchase price for the Units which in the initial draft had been stipulated in a range from [omitted] per unit initially to [omitted] toward the end of the period of the contract. The amendment increased these figures to [omitted] and [omitted] respectively. In his email, Mr Miller spoke of the desirability of "flattening this curve" although his amended draft left stepped increases in place.

[52] Mr Smith sent Mr Miller another draft agreement on 29 August 2011. That version of the agreement contained the changed minimum delivery volumes that had been inserted by Mr Miller, but altered the maximum MRP agreed volumes to [omitted]. The result was that both columns of sch three now referred to the same amounts as minimum and maximum volumes. In response the same day, Mr Miller wrote:

> thanks for quick turnaround guys,
>
> volume ca. [omitted]
>
> pricing close, if we can apply [omitted] last 3 years I'm pretty much there – need to check whether other SH's but I would be recommending yes on that basis! (still keen to apply higher front end, lower back)

[53] There was a flurry of emails back and forth on 30 August 2011. Relevantly for present purposes, Mr Miller wrote to Mr Smith on that day seeking improvement as far as the price was concerned. He also wrote:

> Vol [omitted] happy to have 2 way option on surplus, security over property, suggest 2 way option on 5 yr rollovers?

[54] Mr Gibson responded a few minutes later asking:

> Is that [omitted] minimum?
>
> What are you feeding these trees, they seem to be getting stronger each day?

[55] In another email sent shortly afterward Mr Gibson wrote: "Option on surplus at contract rates and option on roll over at rates to be agreed?" Next in the sequence, Mr Miller wrote: "[omitted] guaranteed"; and Mr Smith responded, "Bruce, how does [omitted] in 5 year blocks work? With first delivery in 2013."

[56] Mr Miller's response about an hour and a quarter later was:

> just to confirm mate the below curve averages [omitted];
>
> an average price of [omitted] gets us over the line; I need a consistent revenue line so…
>
> I can either deliver [omitted] pa at [omitted]
>
> or have the curve profiled and deliver more units in first 5 years and less in the last 5 e.g. [omitted] for 5 years [omitted] then [omitted]

[57] About 10 minutes after that, Mr Smith wrote to Mr Miller: "Can you send me the details of the forest we are talking about. Just the usual; location, area, age class, species, silvicultural regime." About half an hour later, at 3.04 pm, Mr Miller responded by sending to Mr Smith an email attaching NZCF's projected carbon yield from the Hawarden Forest. The email was simply headed, "Attachments: Harwarden C_Change model outcomes …" Attached was a table headed, "New Zealand Carbon Farming Ltd – Hawarden (Hawarden & Laidmore Forests)". Below that was a table showing the carbon yield per annum for the years from 2008 to 2026, which we now set out: [the figures in the table have been omitted]

CARBON YIELD (CALCULATED BY FOREST)

Deliverable carbon

Vintage	**Model**
2008	
2009	
2010	
2011	
2012	
2013	
2014	
2015	
2016	
2017	
2018	
2019	
2020	
2021	

2022 2023 2024 2025 2026	

[58] These figures represented the latest results of modelling work carried out by Dr McClintock to estimate the unit yield from the forest. Next, about two minutes later, Mr Miller sent Mr Smith further material that he had obtained from Dr McClintock giving a general description of the forest, its area, the species in it, its altitude, co-ordinates and ETS map. This material also confirmed the forest's ETS registration.

[59] At 4.53 pm that day, Mr Smith responded to Mr Miller. He said he had sent the draft agreement to Bell Gully to incorporate changes and continued:

> I have scaled the volume back slightly to better fit our book but kept the same pricing and curve, can't tweak too much more – see below.
>
> Also, after looking at the growth profile of the forest I am more comfortable with these volumes

[60] Mr Smith included in his email a table in the following form: [the figures in the table have been omitted]

Year	Vol	Price
2012		
2013		
2014		
2015		
2016		
2017		
2018		
2019		
2020		
2021		
2022		
2023		

2024		
2025		
2026		

[61] Mr Smith explained in evidence that at the outset of the discussions MRP had been content to rely on Mr Miller assessing what the forest was likely to produce, while knowing that NZCF was working with Dr McClintock who would be carrying out modelling work to estimate unit yields. However, once Mr Miller suggested raising volumes to [omitted] Units per year (a figure significantly higher than MRP's own initial modelling would predict), MRP needed to reassess the position to ensure it had "sufficient protection". It was Mr Smith's evidence that once he had received this information, including the results of Dr McClintock's modelling, he entered the data in MRP's PRAD Calculator and estimated the forest's average annual unit entitlement as [omitted]. It was on this basis that he had responded to Mr Miller suggesting lower unit yields.

[62] Mr Miller sent a further email at 5.47 pm that day. The email read:

> Aaron, pricing works, however as discussed I need to deliver a fixed revenue hurdle to the investor. Hence the need to enhance Vols. As you have modelled the forest will generate avg [omitted] pa. The other credits will be made up from the catch up credits '08-'12 delivering us [omitted] units in 2013. These will be applied for first 10 years of contract, so vol requirement is
>
> - [omitted] 1st 5 yrs
> - [omitted] 2nd 5
> - [omitted] next 2
>
> And [omitted] final 3 yrs

[63] Mr Miller's reference to "catch up credits" for the period 2008–2012 reflects the common understanding that when the first MER was filed, it would show an entitlement to credits because for those years the voluntary emission returns previously filed using the default look-up tables would have greatly underestimated the Units able to be claimed once the FMA tables were available for use.

[64] Mr Miller sent a further email at 6.12 pm which read, "Aaron what about a separate or back to back deal with NAP on the same terms and therefore removing volume constraint?"

[65] It is common ground that this was a reference to the Nga Awa Purua joint venture which owns and operates the Nga Awa Purua geothermal power station, and manages its own ETS obligations. As Mr Miller would have known, MRP had a 65 per cent interest in that joint venture.

[66] The following day, 31 August, Mr Smith wrote to Mr Miller setting out a further table and saying that the volumes and prices in it would work for MRP "just". The table was as follows: [the figures in the table have been omitted]

Delivery	Min. Vol	Price
2013		
2014		
2015		
2016		
2017		
2018		
2019		
2020		
2021		
2022		
2023		
2024		
2025		
2026		
2027		

[67] Mr Smith explained in evidence that this proposal envisaged that "catch up" Units referable to the Hawarden forest would be available and could be used to cover the initial shortfall in MRP's portfolio caused by slow early forest growth rates. Mr Miller forwarded Mr Smith's email to Mr Walsh, with the comment, "This looks great!"

[68] On 1 September Dr McClintock updated NZCF's carbon model. He explained in evidence that by this time, NZCF had learned more about the proposed FMA process and carbon modelling approach. He said:

> We ran the carbon model again using PRAD modelling software. To determine carbon yield, we used estimated growth rates at four different parts of the forest and then modelled the forest in four sections before combining the results. This was more sophisticated than our earlier model. For that we had used regional growth estimates and modelled the whole forest as a single block; this time we used local growth estimates and subdivided the whole forest into smaller parts. …

[69] Dr McClintock wrote to Mr Walsh attaching a copy of his summary report on Hawarden on that day. In the executive summary, Dr McClintock wrote:

> This report summarises projected carbon sequestration for a mixed age, diverse species planted forest at Hawarden, North Canterbury using a range of forest modelling tools developed by Scion (formerly Forest Research Institute). The carbon model results account for projected site productivity, wood density, tree survival at establishment, subsequent tree mortality with age and biomass allocation between carbon pools within the forest system. The projections cover the period from 2008 to 2026.
>
> Subdividing the forest by age class, species, and stand location within the larger Hawarden Forest provides projected annual deliverable carbon that averages 121,000 tonnes (CO2-e /year) for the period 2008-2026 for these model conditions (127,000 tonnes/year for the 15 years from 2012-2026).

The report included a table in which the carbon yield figures were the same as those advised by Mr Miller to Mr Smith on 30 August 2011.

[70] The report concluded with a reference to planned work at Hawarden, which would aim to resolve outstanding uncertainties in the estimation of the "total deliverable carbon". There was reference to proposed on-site testing in two phases. First, a series of reconnaissance plots would be measured across the forest in September 2011, to "provide a snapshot of productivity and variation in that productivity". The results of the survey would be used to "fine-tune model outcomes". Second, there would be a comprehensive field inventory programme involving many plots across the forest, to be undertaken in October–November 2011. It was said that:

> The results of this comprehensive forest inventory will be used for reporting to New Zealand Government agencies for the purposes of calculation of the

> total deliverable carbon yield under the Emissions Trading Scheme. … The inventory survey will be designed to maximise the outcomes of that deliverable yield. …

[71] That report was subject to amendments to reflect further work by Dr McClintock carried out at Mr Walsh's request. It formed the basis of ongoing discussions between NZCF and the potential investor over the following days.

[72] On 7 September 2011 Mr Smith sent Mr Miller a further copy of the draft agreement. This version of the draft reflected the position reached on 31 August. The numbers of Units specified in sch three were as in the table included in Mr Smith's email of that day.

[73] Dr McClintock attended a workshop run by MAF in Wellington on 8 September 2011 about the FMA. On 15 September he wrote to Mr Walsh reporting on work being undertaken at Hawarden and what had been said at the workshop. He noted:

> We have been busy since the Field Measurement Approach (FMA) getting the Hawarden fieldwork organised as well as conducting a range of other work in the field. There is mixed news on the FMA assessment side that I will summarise below; the main change is a pullback on MAF's part [with] respect to a commitment to timelines for delivery of [FMA] tables.

[74] With respect to Hawarden, he advised that the crew was still in the forest, and expected to be finished the following day. He then summarised anticipated timelines for completion of the "workflow" for the FMA, noting that the proposed methodology was more or less "as expected" but also observing that MAF had drawn back on its delivery schedule for FMA tables, and now expected to be "on or before 1 September 2012". He continued:

> (b) **Forest carbon models should be close to those we already use** – After a degree of debate about the algorithms used to estimate forest carbon, MAF said that although they are not going to make those forest carbon models available, they will use established models developed for use in New Zealand based on the 300 Index. This essentially means PRAD and Forecaster combined with C_Change. A recent review suggests these models create differences of less than 5% between them so a choice of either will have limited impact if we have used the other to estimate carbon stocks.
>
> We use the PRAD + C_Change to produce the model results run to date. What this suggests [is] that we can get close to MAF's likely

> Participant-specific Look-Up values by using PRAD to calculate forest carbon using forest-specific measurements and applying a scaling factor to account for the confidence interval we are measuring to. **This should give us a result equivalent to a Participant-specific table**. This is clearly not as good as MAF providing the final numbers early but does remove some uncertainty about how close our models are expected to be to that final MAF table for each forest.
>
> (Original emphasis).

[75] At the end of his email, under the heading, "Summary", Dr McClintock wrote:

> The biggest issue is the delay in getting the forest-specific Look-Up tables. The upside is that we can create our own version of those tables now that we know what MAF will use as a carbon model. There is some remaining uncertainty about their scaling of results but this will be in proportion to the level of confidence in forest measurement, which [we] can control with the number of plots we put into the forest. The timeline for starting measurement work remains the same.
>
> For Hawarden, we will have the data required to fine-tune model results by early next week. The audit will be resolved in time to start measurement as planned in October.

[76] There was a telephone discussion between Mr Miller and Mr Smith on 19 September. The discussion was recorded, and there was a transcript in evidence. The context was a pending meeting of the MRP Board, for which Mr Smith had to prepare a report. There remained uncertainty as to whether NZCF would be able to reach agreement with the third party investor. In the circumstances, Mr Miller and Mr Smith discussed what could be said to the MRP Board about volumes. Mr Miller also raised an issue about the proposed encumbrance over the forest land, which had been included in the last version of the draft agreement. Mr Miller pointed out that although the evident intent was that the encumbrance should just "cover the Units in your contract", the way it had been structured embraced all of the Units, which he described as putting a "constraint on us which we don't want".

[77] The discussion about the volume of Units covered various possibilities but was inconclusive. It is clear from the terms of the discussion that the main uncertainty arose because NZCF did not know whether it would be able to conclude arrangements with the potential investor. As to that, Mr Miller said that he would

know the answer to volume "within the next month", commenting that it would be well ahead of any deliveries.

[78] Later that day, Mr Miller emailed Mr Smith a marked up copy of the draft agreement. Insofar as the third schedule was concerned, the column headed "Minimum Delivery Volume" had the same figures referred to in Mr Smith's email of 31 August. The column "Maximum MRP Agreed Volume" was left blank. In the covering email, Mr Miller said:

> NZCF will transact as discussed regardless of third party transaction, only change would be to moderate the volume down to ca. [omitted] per yr. i.e. we NZCF would be more comfortable with a larger proportion of spot risk.

Mr Miller indicated he would be in a position to confirm the final volume by the end of October.

[79] On 21 September an issue arose of concern to NZCF because of further modelling work carried out by Dr McClintock using plot data from the recently completed field measurements. Dr McClintock advised that on the basis of the results achieved, the forest was under-performing relative to previous predictions by about 20 per cent, with an average carbon yield over the period 2012–2026 of about 103,000 Units. Mr Walsh registered his concern about the impact this would have on "our deal" (we infer, with the third party investor). However, later that day, Dr McClintock suggested there was something not right about the results. Mr Walsh was concerned that what he described as a very important investor meeting had been scheduled for the following day, and he was now "scrambling to reposition" the investment proposition. As he put it, "The yield gap is so big that will have great difficulty explaining it by reference to the previous expectations we have set".

[80] In the event, Mr Walsh decided to write to the investor referring to the negotiations with MRP and stating:

> Given the time that has elapsed since we opened those negotiations and the changing market conditions over that period, [MRP] now feel more comfortable with a lower off take volume. After some discussions, that volume has settled at an average of [omitted] units per year. The other terms of the offtake, including price profile, are unchanged. This reduced offtake volume naturally has a flow through impact on the capital cost which, as a

> result, now reduces to NZ$25m. Otherwise, all other terms are as previously advised including yield.

He attached a one-page summary of the proposed deal. This included the following under a heading, "Earnings Quality":

> - 15 year fixed income stream delivering 8.5% every year
> - Fixed price offtake from BBB+ rated Mighty River Power Limited at average of [omitted] per credit for 15 years
> - 15 year credit stream projected to average [omitted] credits per annum. New Zealand Carbon Farming will provide an underwrite committing to top up any shortfall that materialises during the off take term

[81] At some stage in October, however, the potential investor indicated to Mr Miller that it was no longer interested in the possibility of purchasing the Hawarden forest.

[82] Following a meeting between Mr Miller, Mr Smith and Mr Gibson on the morning of Thursday 6 October, Mr Glenn Rockell, acting general counsel of MRP, wrote to Mr Miller with a revised draft of the Agreement. The new draft reflected the agreement reached that the quantities shown in the schedule should be [omitted] in the "Minimum Delivery Volume" column and [omitted] in the "Maximum MRP Agreed Volume" column for all years (2012–2016). Mr Smith said in evidence that he was comfortable NZCF could at least deliver the minimum delivery volume of [omitted] Units because he had modelled the forest as being entitled to approximately [omitted] Units under the FMA. He says he assumed NZCF were also modelling the forest at similar volumes, and that lay behind Mr Miller's observation that NZCF would be willing to take a "larger proportion of spot risk" for selling volume above the maximum delivery volume on the spot market.

[83] As is clear from the evidence discussed above, Dr McClintock made various estimates for NZCF of the forest's likely yield of Units once the FMA tables became available. In cross-examination Dr McClintock said that all of his estimates produced estimated volumes of Units at least double that which would be derived from application of the default look-up tables approach. He also confirmed that he

had confidence his work would produce a "ball park figure" for the Units resulting from application of the FMA approach.

The Agreement

[84] It is not necessary to deal with each clause of the Agreement and we restrict the discussion to its more important provisions.

[85] We note first that the third of the recitals in the "Introduction" section of the Agreement records that:[16]

> The Sellers have agreed to sell, and the Buyer has agreed to purchase, the Units transferred to the Sellers in respect of the Converted Area by the Crown, or Replacement Units, on the terms and conditions set out in this Agreement.

As has already been seen, the expression "Converted Area" was simply adopted from MRP's agreement with Paraheka Holdings Ltd. It is common ground that the term has no significance in its own right and must be taken as being simply a reference to the land of the forest registered for the purpose of the ETS. This indeed is plain from the definition of "Converted Area" in cl 1.1 of the agreement:

> "**Converted Area**" means the 2433 hectares of the Land that the Sellers have registered as carbon accounting areas, being the areas outlined in MAF registration ETSA reference 003231, dated 14 January 2011 and ETSA reference 017277 dated 18 December 2011, and that have been planted, or which the Sellers shall plant in accordance with clause 2.3, with forest that is eligible to be Post-1989 Forest Land.

[86] Other relevant definitions include:

> "**Maximum MRP Agreed Volume**" means the maximum amount of Units to be delivered to the Buyer, without the Buyer's further agreement, on a Delivery Date relating to the Units arising from the previous calendar year, being the amount specified as the Maximum MRP Agreed Volume for a particular calendar year and Delivery Date as set out in Schedule One;
>
> "**Minimum Delivery Volume**" means the minimum amount of Units to be delivered to the Buyer on a Delivery Date, being the amount specified as the Minimum Delivery Volume for a particular calendar year and Delivery Date as set out in Schedule One;
>
> …

[16] The Sellers under the agreement are the appellants and the Buyer is the respondent.

> "**Replacement Units**" means assigned amount units, or New Zealand units, from a forestry project, or such units of a type to which the Buyer agrees and which are capable of being surrendered for compliance purposes under the NZ ETS, provided that such Units would be of comparable benefit to the Buyer where any such Replacement Units are supplied to the Buyer to replace any Units not Delivered in accordance with this Agreement;
>
> …
>
> "**Unit**" means a New Zealand unit as defined in the Act, which is transferred to a Seller in respect of the Converted Area.

[87] Schedule one replaced what was sch three in earlier drafts. There is no need to set it out. It has four columns headed respectively "Vintage of Units from Converted Area", "Delivery Date", "Minimum Delivery Volume" and "Maximum MRP Agreed Volume". The vintage years are 2012–2026, and the delivery dates are 1 March for each following year, beginning with 1 March 2013, ending 1 March 2027. The two volume columns contained, in respect of every year, the figures [omitted] and [omitted] respectively.

[88] Clause 2.1 is headed "Agreement to Sell and Purchase Units". Clause 2.1(a) provides:

> (a) **Agreement to sell**: Subject to clause 2.12 and paragraphs (b) and (c) of this clause 2.1 below, during the Exclusive Term, the Sellers agree to sell exclusively to the Buyer, and the Buyer agrees to purchase, on the terms and conditions of this Agreement, the Units transferred to the Sellers under the NZ ETS for the Converted Area for each calendar year.

[89] Clause 2.1(b) deals with delivery. It sets out obligations of the Sellers to deliver to the Buyer "the Units arising from the Converted Area" (or Replacement Units) which are to apply on an annual basis starting on 1 March 2013 (in respect of Units transferred to the Sellers for the calendar year from 1 January to 31 December 2012) and on 1 March 2014 for each subsequent year.[17] If one or more of the Sellers had a net liability (to surrender or repay Units) then it would be obliged to deliver a report "specifying the number, origin and serial numbers of the Replacement Units provided in place of the Units that would otherwise have comprised the Minimum Delivery Volume".[18]

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17 Clause 2.1(b)(i)(A).
18 Clause 2.1(b)(i)(B).

[90] Clause 2.1(c) is headed "Additional Units, Replacement Units and Alternative Units Payment". It provides for what is to happen if the "Units arising in relation to the Converted Area" received by the Sellers for a particular calendar year are less than the Minimum Delivery Volume for that calendar year; between the Minimum Delivery Volume and Maximum MRP Agreed Volume; and greater than the Maximum MRP Agreed Volume.[19]

[91] Clause 2.1(d) is the provision that is the subject of the principal dispute between the parties. It provides as follows:

> **Change in accounting mechanism:** Subject to clause 2.3(b)(iii), in the event that the accounting mechanism provided for under the Act for determining the carbon stock in a post-1989 forest is amended thereby resulting in the Sellers being allocated a change in Units in respect of the Converted Area from what would have been allocated under the "Look-up Table" approach or any other approach in operation under the Act at the signing of this Agreement, then the parties agree that the Minimum Delivery Volume and Maximum MRP Agreed Volume for and from the calendar year in which such amendment takes effect shall be increased, or decreased, pro rata to the overall increase or decrease in Units which the Sellers would then be allocated.

[92] By cl 2.3(b) the Sellers agree to plant and maintain the forest in the "Converted Area", manage the Converted Area and monitor, calculate and report on the emissions and removals from the forest planted on the Converted Area, all in accordance with the Management Plan. The Management Plan is defined as "the Sellers' plan for managing the forests planted on the Converted Area in accordance with best carbon forestry practise [sic]".

[93] Clause 2.5 provides that without the prior written consent of the Buyer, the Sellers cannot sell or otherwise transfer their interest in the Converted Area. If they propose such a sale they are obliged to novate their rights and obligations to the proposed buyer as a condition of the sale.

[94] Clause 2.6(a) provides for the Sellers to execute and register a second ranking mortgage against the land in favour of the Buyer to secure performance of various specified clauses in the Agreement (including cls 2.1–2.3, 2.5, 2.7–2.11 and other provisions). There is also a provision obliging the Sellers to procure agreement by

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[19] It is discussed in greater detail below at [136].

the first mortgagee limiting its priority to the amount of $14,400,000. At no time can the amount of the indebtedness secured under the first mortgage be greater than that Priority Amount.[20] There are also provisions requiring the first mortgagee's agreement that:

(a) at no time will the first mortgage secure any indebtedness of any party other than the Sellers in respect of the Converted Area;[21] and

(b) the first mortgagee will give the Buyer notice of any default under the first mortgage, and give the Buyer a reasonable period to remedy any such default as well as the right to purchase the debt secured under the mortgage for the amount by which the Sellers remained indebted.[22]

[95] Under cl 2.7, the Converted Area and Units can be the subject of a charge ranking below the Buyer's second mortgage, but there are limitations on the amount of any further mortgage. Further, under cl 2.10 of the Agreement the Sellers granted the Buyer a security interest in the Units, and all proceeds of the Units, which were "transferred, assigned and set over" to the Buyer "by way of security only". The Buyer is authorised to register one or more financing statements on the Personal Property Securities Register under the Personal Property Securities Act 1999.

[96] Clause 4 deals with price and payment. It stipulates that the price for the Units or any Replacement Units would be [omitted] for the those to be delivered between 1 March 2013 and 1 March 2017; [omitted] for the years from 1 March 2018 to 1 March 2022; [omitted] for the years between 1 March 2023 and 1 March 2024 and [omitted] for the years 1 March 2025 to 1 March 2027 inclusive.

[97] Clause 5 provides for warranties by both parties and separately for particular warranties by the Sellers. One of the Sellers' warranties is that they have taken all practicable steps to create or procure the creation of, or otherwise obtain, the Units that are the subject of the Agreement. Another is they have operated and continued

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20 Clause 2.6(b).
21 Clause 2.6(b)(iii).
22 Clause 2.6(b)(v) and (vi).

to operate the Converted Area in the manner of a prudent and reasonable forest operator in accordance with the Management Plan.[23]

[98] Finally, we set out cl 5.3:

> **Buyer's Acknowledgements:** The Buyer acknowledges that:
>
> (a) other than the commitment to the Minimum Delivery Volume, neither the Sellers nor any of their advisers have given, or will give, any representation or warranty as to the future volume of Units to be transferred by the Crown to the Sellers in respect of the Converted Area and then from the Sellers to the Buyer; and
>
> (b) other than the commitment to the Minimum Delivery Volume, any information about potential future volume of Units to be transferred by the Crown to the Sellers in respect of the Converted Area is indicative only and has not been relied upon by the Buyer.
>
> For the avoidance of doubt these acknowledgements do not interfere with the Sellers' obligations to comply with clauses 2.1(b) and (c) where the number of Units transferred to the Sellers from the Crown in respect of the Converted Area is greater than the Minimum Delivery Volume.

Approach to interpretation

[99] Both parties referred to passages in the recent decision of the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[24] The Court summarised the general approach to be taken to contractual interpretation in the following passage:[25]

> … It is sufficient to say that the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[26] This objective meaning is taken to be that which the parties intended.[27] While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant.[28] Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

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23 Clause 5.2(d) and (f) respectively.

24 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

25 At [60] (one footnote omitted).

26 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann. See also *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14] per Lord Hoffmann.

27 *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [16] per Lord Hoffmann delivering the judgment of the Privy Council.

28 *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 at [39] per Lord Hoffmann.

[100] The Court's reference to "background" was subject to a reservation in relation to evidence of pre-contract negotiations. As to that, the Court simply referred to *Vector Gas Ltd v Bay of Plenty Energy Ltd,* in which a variety of views were expressed on the extent to which that was appropriate.[29] In this case, as noted earlier, both parties have relied on the communications between Mr Miller and Mr Smith prior to execution of the Agreement and so there is no suggestion they should not be taken into account. The purpose in doing so, however is not to assert that the contract should have a meaning derived from the negotiations rather than the words of the Agreement itself. Rather, the purpose is to consider the negotiations as part of the relevant background, to assist in ascertaining the meaning of the words the parties used in the agreement. Even on a strict approach, evidence of pre-contractual negotiations is admissible for establishing facts relevant as background that was known to the parties, or to establish their knowledge of the circumstances with reference to which they used the words in the contract.[30]

[101] The Court in *Firm PI 1 Ltd* also confirmed that a purposive or contextual interpretation does not depend on there being an ambiguity in the contractual language.[31] Further:

> [62] It should not be over-looked, however, that the language of many commercial contracts will have features that ordinary language (even a "serious utterance") is unlikely to have, namely that it will result from a process of negotiation, will attempt to record in a formal way the consensus reached and will have the important purpose of creating certainty, both for the parties and for third parties (such as financiers). …
>
> (Footnotes omitted).

[102] Mr Goddard also emphasised the following passages:

> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that

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29 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [4] per Blanchard J, at [23] per Tipping J, at [64] per McGrath J and at [151] per Gault J; *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 24, at [61], n 42, with the Court stating that the case did not raise any issue as to the admissibility of pre-contract negotiations, so it was unnecessary to discuss that aspect of the judgments in *Vector*.

30 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 29, at [13] per Blanchard J and [67] per McGrath J.

31 At [61].

> will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.
>
> …
>
> [93] All this means that where contractual language, viewed in the context of the whole contract, has an ordinary and natural meaning, a conclusion that it produces a commercially absurd result should be reached only in the most obvious and extreme of cases.
>
> (Footnotes omitted).

[103] Mr Goddard also relied on observations of Lord Neuberger in *Arnold v Britton*, which he submitted reflected an approach effectively the same as the approach to contractual interpretation in New Zealand, emphasising the care needed when evoking commercial common sense:[32]

> [17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* …) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision.
>
> …
>
> [19] The third point … is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. …
>
> [20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. …
>
> [21] The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made and which were known or reasonably available to both parties … it cannot be right,

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[32] *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.

> when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

[104] We accept these statements of the law.

The dispute about clause 2.1(d)

[105] NZCF claims that as at the date of the signing of the Agreement on 12 January 2012 the only approach "in operation under the Act" was the default look-up table approach. FMA tables were not able to be used until 2013. Although the Regulations had been made on 16 May 2011, and (relevantly) came into force on 1 September 2011, their terms were such that the FMA assessment process could not be implemented by a participant until all the steps required for production and use of the FMA tables had been completed. As has been seen, reg 22O provided that FMA participants could not submit any FMA information before 1 September 2012 without the consent of the Chief Executive.

[106] In the case of the Hawarden Forest, the FMA tables were not issued until 25 February 2013. As envisaged by the Agreement, the MERs which were then submitted for the first commitment period relied on the FMA tables. Until that point was reached, NZCF had submitted voluntary emissions returns using the default look-up tables as it was required to do. It followed, according to NZCF, that in terms of cl 2.1(d) there had been a relevant amendment to the accounting mechanism provided for under the Act triggering the application of cl 2.1(d).

[107] If cl 2.1(d) did apply, that would require calculating the numbers produced in each year covered by the Agreement under the default look-up tables, calculating the numbers produced under the FMA tables (the amended "accounting mechanism" for the purposes of the clause) for those years, deriving a pro rata increase between the annual figures and then applying the pro rata increase to the figures contained in sch one of the Agreement.

[108] The effect of this argument, if correct, is that MRP would be obliged to purchase Units from NZCF in numbers substantially exceeding the numbers specified in sch one of the Agreement as the "Maximum MRP Agreed volume". The

comparative figures were set out in a schedule attached to NZCF's statement of claim that contrasted the Units yielded under the default look-up tables with the yield under the FMA tables, derived percentage increases and applied those percentage increases to the figures given in the "Minimum Delivery" and "Maximum MRP Agreed Volume" columns of sch one of the Agreement. The percentage increases in the numbers of Units ranged between 171 per cent at the lowest and 256 per cent at the highest. Over the period of the Agreement, the total minimum delivery volumes would increase from [omitted] to [omitted], and the total purchase price payable in relation to the minimum volumes would lift from [omitted] to [omitted].

The High Court judgment

[109] Toogood J rejected NZCF's argument. Noting the issue turned on whether the FMA accounting mechanism was in operation under the Act when the Agreement was signed on 12 January 2012, the Judge referred to the definition of "operation", in *The New Shorter Oxford English Dictionary*, which defined the word as meaning "the condition of functioning or being active".[33] He said he was satisfied the FMA was in operation in mid-January 2012 "in that sense".[34] Although the FMA was not then in operation for the purposes of calculating carbon stocks in the preceding year, the Agreement did not relate to that period. The amending regulations put in place and began the operation of a regime for the calculation of carbon stocks in the 2012 calendar year, which was the first "vintage year" under the Agreement.[35] The default look-up tables approach had ceased to apply from 1 September 2011, and the FMA became operative. The initial stages of the operation of the new approach involved the release of relevant information by MPI, including the second version of the FMA Information Standard on 22 December 2011.[36] Consequently, the FMA was functioning and active, albeit at a preliminary stage and not "fully" operational when the Agreement was executed.[37]

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33 High Court judgment, above n 2, at [113]. The edition cited by the Judge was: *The New Shorter Oxford English Dictionary* (4th ed, Oxford University Press, Oxford, 1993) at 2005–2006.
34 At [114].
35 At [115].
36 At [115].
37 At [116].

[110] The Judge concluded that this interpretation of cl 2.1(d) was supported by the fact that, as the Judge found, the minimum and maximum delivery volumes contained in sch one of the Agreement were based on reasonably accurate estimates of the forest's annual unit entitlement under the FMA, and not under the default look-up tables.[38] He observed:

> [120] I reject Dr McClintock's attempt on behalf of the plaintiffs to persuade me that, because the Ministry for Primary Industry would not reveal the basic characteristics of its carbon modelling tools to the forestry sector, no ETS participant could accurately model or forecast their entitlements under the FMA. …

[111] The Judge noted that Mr Miller and Mr Smith had reached consensus on 30 August 2011 that the forest had the capacity to deliver between [omitted] and [omitted] Units calculated using the FMA. The Judge thought this "particularly telling".[39]

[112] He was also influenced by the fact that the minimum and maximum delivery volumes stated in sch one were not based on the default look-up tables approach. He noted both Mr Miller and Dr McClintock had acknowledged that under the default look-up tables approach, the forest would deliver, on average, between [omitted] and [omitted] Units only.[40] In the circumstances, he thought it would make no commercial sense for the parties to agree on a range of deliveries under the Agreement two and a half to three times the forest's capacity.[41]

[113] He also found there was no evidence either party had anticipated when negotiating and entering the Agreement that the minimum and maximum volumes stated in sch one would be doubled as a result of scaling when the FMA was utilised for the first delivery on 1 March 2013.[42]

[114] All of these considerations confirmed the Judge in the view at which he arrived as a consequence of applying what he considered to be the plain and ordinary meaning of the expression "in operation". Because of the view he had formed he did

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38 At [119].
39 At [121].
40 At [123].
41 At [123].
42 At [125].

not need to consider MRP's counterclaim seeking rectification of the contract, advanced as a fall-back argument in case its position on the interpretation of the contract did not succeed.

Appellants' argument on appeal

[115] Mr Goddard noted that cl 2.1(d) combined both triggering and operative parts in one clause. While the effect of the operative part of the clause was common ground, the dispute concerns the circumstances in which the clause is brought into operation. He submitted that occurred when:

(a) an accounting mechanism provided for under the Act for determining carbon stock is amended;

(b) the amendment has the effect of the Seller being allocated a change in Units;

(c) the change is between (i) what would have been allocated under the default look-up table approach or any other approach in operation under the Act at signing and (ii) what is allocated after the change; and

(d) the amendment alone would be insufficient to trigger the application of the clause; there must also be a change in unit allocation before the clause applies.

[116] Mr Goddard argued whatever produces the change must produce a change from what is "in operation under the Act", otherwise there would be no relevant change. Further, the status quo from which there is a change must be the mechanism in operation in the sense it is generating unit allocations when the contract is signed. He noted that when the Agreement was executed, a change from the default look-up tables was anticipated. By contrast, there is no documentary evidence of any anticipation in 2011 or subsequently that the FMA approach, to be used from 2013, would subsequently be replaced. Mr Goddard submitted it was clear the FMA mechanism was not "in operation" when the contract was made, and the High Court

had been wrong to find it was. He noted that sites in the forest to be measured to provide the necessary data for the production of FMA tables were not identified until December 2011. The necessary measurements were not completed until February 2012 and the measurement data could not be submitted to MPI before September 2012. Further, participants were not permitted to use the FMA table during the first commitment period; reg 22E provided for them to be used after the end of the first commitment period (of which 2012 was the final calendar year). All these events were after the signing of the Agreement.

[117] The High Court was wrong to find the default look-up tables ceased to apply from 1 September 2011 so that, by January 2012, no other accounting mechanism could apply to the forests. Default look-up tables continued to operate for the purpose of allocating Units and no other approach could be used for the returns filed before 1 January 2013. In January 2012 the appellants filed a voluntary emissions return using the only methodology then permitted, namely, calculations based on the default look-up table.

[118] Mr Goddard submitted that in order to be relevantly "in operation", cl 2.1(d) required a pre-contractual allocation of Units to which the post-contractual allocation could be compared. However, the first allocation of Units under the FMA did not occur until February 2013. It followed that on a natural and ordinary reading of "in operation", the FMA mechanism was not in operation on 12 January 2012.

[119] Mr Goddard also challenged the High Court's reliance on considerations of commerciality or common sense, claiming that Toogood J erred in his assessment of the commercial context in which the contract was negotiated. In this respect, Mr Goddard submitted the evidence before the Court demonstrated that the contract volumes were the result of negotiation between the parties based on their various commercial imperatives and were not intended to be estimates of the forest's annual unit entitlements under the FMA. He maintained there was no evidence of any discussion between the parties suggesting the common intention to agree volumes based on FMA modelling. Rather, the parties had simply pursued their own separate commercial objectives, which were to a large extent, although not entirely, known to the other party. In this respect, Mr Miller had proposed volumes and prices based on

NZCF's risk appetite and business objectives; Mr Smith had accepted or rejected them based on his assessment of net present value and fit to the demand profile created by MRP's carbon policy, after he had modelled the projected yield.

[120] Mr Goddard was critical of the High Court's finding that it would make no commercial sense for the parties to agree on a range of deliveries under the Agreement two and a half to three times the forest's capability under the default look-up tables. He submitted the finding was apparently based on the Judge's conclusion that there was a rule of thumb in the industry to double the outputs from default look-up tables to estimate the FMA outputs.[43] In fact, cl 2.1(d) was commercially sensible for MRP because at the time the contract was signed, MRP wanted more Units and there was evidence it was under its minimum targets. It was actively seeking other agreements and unit prices were expected to increase. It knew also that NZCF would be obliged to provide replacement Units or make an alternative payment for any shortfall in the Units available from the forest. It inserted standard contractual provisions in the Agreement, requiring NZCF to maximise the number of Units available.

[121] Further, insofar as NZCF was concerned, selling Units in excess of those referable to the forest was commercially sensible because it had access to a significant portfolio of such Units, it maintained it would have no problem meeting contractual delivery volumes at any level, and it made commercial sense to have a higher proportion of pre-sold Units.

[122] Mr Goddard noted that the Agreement made express provision for the possibility of a shortfall between Units received from the forest and the required delivery volume. The Agreement provided for the delivery of Replacement Units that were not the subject of a delivery obligation related to any particular source.

[123] Mr Goddard emphasised that the courts should be reluctant to find that an Agreement is not commercially sensible simply because, with the benefit of hindsight, it appears more favourable to one of the parties. As noted, he referred to the cautions sounded by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian*

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[43] High Court judgment, above n 2, at [123].

Insurance Ltd, as well as *Arnold v Britton* about the dangers of departing from the plain meaning of language used in a contract on the basis of perceived commercial absurdity.[44]

Respondent's argument

[124] Mr Hodder QC submitted it was clear the Agreement was founded on the forest and its expected capacity to produce Units that NZCF would sell. In this respect, he emphasised that the forest was:

(a) to be managed as a Units-producing forest;

(b) the effective source of the Units; and

(c) the primary source of security of delivery for MRP.

[125] Mr Hodder submitted it was also clear the volumes set out in sch one to the Agreement reflected expectations of both parties, based on modelling estimates of the approximate average volume of Units that the forest was expected to yield, applying the FMA tables. The estimates and the negotiation of the Agreement had nothing to do with the default look-up tables. NZCF's claim based on cl 2.1(d) had been invoked only after the first delivery had been made.

[126] Properly understood, the purpose of cl 2.1(d) was to deal with risk factors, regulating future change by ensuring that the volumes contained in the Agreement remained related to the forest's yield. The central flaw in NZCF's approach is evident when reference is made to the schedule attached to the statement of claim. In that respect, the minimum volume of Units to be acquired by the buyer would double, going from the [omitted] stipulated in the first year to [omitted] and, over the life of the Agreement, from [omitted] Units to [omitted]. That increase would occur by treating the minimum volumes stipulated in the Agreement as based on the default look-up tables when in fact they were not.

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[44] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 24 and *Arnold v Britton*, above n 32.

[127] Mr Hodder submitted the FMA was the relevant accounting mechanism in operation from September 2011; cl 2.1(d) would have no application unless or until the FMA was replaced by some other accounting mechanism. In support of that submission, he noted it was mandatory to use the FMA table for the MER for the first commitment period, due after the end of 2012, and any subsequent returns. Further, it was in fact, on the basis of estimates, the only mechanism to which the parties had regard in agreeing the volumes set out in sch one. The fact an FMA return could not be filed before 2013, including at the date of the Agreement, was irrelevant and did not mean the FMA was not "in operation". NZCF was at the time an FMA participant and it was required to adhere to the FMA processes (and did) as and when it was necessary to do so. It followed that the FMA could properly be regarded as having been "in force", and "in the condition of functioning" as the Judge had found.[45]

[128] Mr Hodder characterised NZCF's submissions about the natural and ordinary meaning of cl 2.1(d) as divorced from the plain purpose of the clause, and from the Agreement as a whole. The purpose of the clause should be seen as allowing for changes to the volumes set out in sch one, which he argued should remain related to the Units produced by the forest, given any future change in the regulatory mechanism during the 15-year term of the Agreement. Properly construed, cl 2.1(d) did not require any hypothetical calculation to be done as of January 2012, because prior to 2013 such a calculation would be irrelevant.

[129] Mr Hodder submitted that NZCF's approach failed properly to account for the exchanges between Mr Miller and Mr Smith in the negotiations leading to the Agreement. Whilst the parties did not directly exchange ongoing modelling results, they both used the PRAD Calculator and "C_Change" and there could be no doubt that the sch one volumes were reached on the basis of a common understanding of the likely yield from the forest based on the parties' estimates.

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[45] At [113]–[114].

Analysis

[130] Mr Goddard submitted cl 2.1(d) to a close textual analysis on the basis that it was not possible for there to be two accounting mechanisms "in operation" under the Act, and when the Agreement was executed the mechanism in operation was the default look-up table approach. He then argued there was no reason to depart from the ordinary meaning of cl 2.1(d) by reference to the commercial context.

[131] However, it is not possible or appropriate to construe cl 2.1(d) on its own. It must be considered in the context of the contract as a whole.[46]

[132] We consider that, viewed in the context of the Agreement as a whole, cl 2.1(d) has the clear purpose of enabling the numbers of Units specified in sch one to be altered if there is a legislative change, after execution of the Agreement, which results in the numbers of Units available being increased or decreased compared with what is set out in sch one. We say that for a number of reasons.

[133] First, it is clear the amendment to the accounting mechanism contemplated by cl 2.1(d) must be one that results in a change to the Units allocated to the Sellers. The nub of the Agreement is what is said in cl 2.1(a), whereby the parties agree respectively to sell and purchase the "Units transferred to the Sellers under the NZ ETS for the Converted Area for each calendar year". Clearly, this means the Units referable to the Hawarden forest, and not some other forest. Recital C is to the same effect and makes it plain that the Agreement is about the Units transferred to the sellers in respect of the "Converted Area".

[134] We think it follows that when cl 2.1(d) refers to an amendment that results in the Sellers being allocated a change in Units, the change is one that has effect in relation to the numbers of Units transferred to NZCF in respect of the Hawarden forest.

[135] Consistently with that, cl 2.1(b) sets out the Sellers' delivery obligations by reference to the Units transferred to the Sellers for the preceding calendar year.

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[46] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 24, at [61]–[63].

Clause 2.1(b)(i)(A) makes it plain these are Units arising from the Converted Area. Similarly and consistently, the obligation to deliver annually a copy of the emissions return provided by the Sellers to the Crown, relates to the Converted Area.[47] And this report must contain a record of each Seller's net entitlement to receive Units in respect of the Converted Area.

[136] The obligation to provide replacement Units in cl 2.1(c) is also instructive. It applies where the Sellers "receive an amount of Units arising in relation to the Converted Area … for a particular calendar year" that is:

(a) less than the Minimum Delivery Volume; or

(b) between the Minimum Delivery Volume and the Maximum MRP Agreed Volume; or

(c) greater than the Maximum MRP Agreed Volume.

[137] If (a) applies, the Sellers must deliver the number of Units that are available, and either deliver Replacement Units, or pay an amount called the Alternative Units Payment.

[138] If (b) applies, the Buyer must buy all the Units. This justifies an inference that the Agreement is treating the sch one amounts as an estimate of the numbers of Units likely to be transferred. The cl 2.1(a) obligation to sell and buy is effectively treated as requiring the sale and purchase of any number of Units between [omitted] and [omitted], being respectively the Minimum Delivery Volume and the Maximum MRP Agreed Volume set out in the schedule.

[139] If (c) applies, then again the Maximum figure must be sold and purchased. MRP must be given an option to buy more, but is not obliged to do so.

[140] Collectively, these provisions imply that when cl 2.1(d) refers to the Sellers being allocated a "change in Units in respect of the Converted Area from what would

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47 Clause 2.1(b)(ii).

have been allocated under the "Look-up Table" approach" it is intending to refer to the numbers set out in sch one.

[141] It was impossible, of course, when the Agreement was being drafted, to be precise about the numbers that would be allocated under the FMA approach. That explains why sch one contained minimum and maximum volumes. The expression "Maximum MRP Agreed Volume" was used in the schedule, because that column contained the total number of Units that MRP was agreeing to buy when executing the Agreement, although it was also contracting for an ability to take more if and when it was given an option to do so.

[142] We consider the wording of these provisions makes it most unlikely that the parties intended that there would be a potential liability on each side to deal in numbers of Units significantly in excess of those they knew from their modelling were likely to be produced once the FMA tables were applied.

[143] Other provisions of the Agreement support that conclusion. We have set them out earlier. Broadly, the provisions of cls 2.3(b), 2.5(a), 2.6, 2.7, 5 and 5.3 all turn in important respects on the Converted Area and Units to be derived from it. MRP's security was in relation to that area, and it was that area to be planted and maintained in accordance with the management plan. An interpretation of cl 2.1(d) that has the consequence that the Units in fact traded under the Agreement will be sourced very substantially, of necessity, from other land seems most unlikely, having regard to the comprehensive provisions made in respect of the Converted Area.

[144] Mr Goddard placed some emphasis on the fact cl 2.1(d) was in the same terms as MRP's Paraheka agreement, which was itself based on earlier versions in similar terms and became a template for agreements entered into by MRP after the current Agreement. The wording had been developed by MRP's solicitor and, as Mr Goddard pointed out, Mr Miller would have been aware of its previous use. Mr Goddard noted that cl 2.1(d) had been in the original draft MRP sent to NZCF, and the Agreement had been negotiated over about five months. In that period, while many changes had been made to the draft, including in relation to the contract volumes eventually set out in sch one, this clause had remained in its original form,

and a reference to the look-up tables had been retained. Mr Goddard asked rhetorically why the wording would not have been altered if the coming into force of the 2011 Amendment Regulations meant the default look-up tables were no longer in operation.

[145] While the point made is not without substance, in the end we have not found it compelling. As Mr Hodder pointed out, in the case of the Paraheka agreement, the relevant schedule setting out the "Minimum Delivery Volume" and the "Maximum MRP Agreed Volume" contained a note making it plain that the volumes referred to were sourced from the default look-up tables. The note read:

> Reference amounts are sourced from the MAF "A Guide to Look-up Tables for Forestry in the Emissions Trading Scheme" dated July 2011. The amounts shown are annual incremental amounts expressed as tonnes of carbon dioxide per hectare, calculated from Table Two for Exotic Softwood. These amounts, multiplied by 300ha and 383ha respectively, and 90% and 120% margins respectively, are how the Minimum Delivery Volumes and Maximum Delivery Volumes were derived.
>
> Any change in account mechanism (Clause 2.1(d)) calculation should refer to these Reference Amounts in the calculation of any pro-rata amendments.

[146] As Mr Hodder observed, the note shows that for the purposes of the Paraheka agreement, the look-up tables were thus directly adopted as the basis upon which the obligations of the parties were defined. That is consistent with the fact the agreement contained two starting dates for delivery, respectively in September 2011 and 1 April 2012, which pre-dated the first date on which an MER could be lodged using the FMA approach. The default look-up table approach was relevantly in operation under the Act, and it was actually used to calculate the entitlement to Units under the Paraheka agreement.

[147] In the present case however there was no note in sch one. On the view we take there did not need to be, because the default look-up tables were not being used for the purposes of calculating the rights and obligations of the parties and would not be the basis on which the first MERs were filed. We think the explanation for retention of cl 2.1(d) must simply be that the parties were focused on the fact the first delivery would occur under the FMA regime, and they failed to turn their minds to the fact the default look-up tables had effectively become redundant. Putting that

another way, the Agreement was negotiated and made at a time when the parties knew the default look-up tables would not apply to the performance of their obligations under the Agreement. Units would only be transferred under the FMA approach, but they omitted to alter the Agreement so as to reflect this.

[148] Apart from the provisions of the Agreement itself, there are aspects of the wider context that support MRP's argument. We mention first the fact the FMA process was in fact being implemented when the Agreement was executed. As we have seen, the Regulations providing for the FMA regime had been introduced with effect, so far as is relevant, from 1 September 2011. The necessary statutory processes to enable participants to file the first MER relying on the FMA tables were underway. Dr McClintock was engaged in modelling the predicted yield on application of the FMA approach, and busy "getting the Hawarden fieldwork organised" in preparation for the FMA process. Detail about how the measurement process was required to be carried out was published in December 2011. On both sides, the parties had endeavoured to estimate the likely yield of Units from the forest under the FMA by the time the Agreement was executed. They also knew from the very first delivery under the Agreement, the FMA tables would be used. In these circumstances, it seems most unlikely that the parties would have contracted on the basis full implementation of the FMA accounting mechanism in early 2013 would be treated as a relevant amendment for the purpose of cl 2.1(d), especially when they knew there would be a significant increase in the numbers of Units available under the FMA compared with the default look-up approach.

[149] The modelling work carried out by the parties in fact resulted in approximate estimates, which were similar. We think it clear from the evidence we have discussed that the Maximum MRP Agreed Volume of [omitted] Units was a genuine pre-estimate, with which both NZCF and MRP were comfortable, of the number of Units the forest would produce using the FMA tables.

[150] As to the ability to assess the number of Units that would be available under the FMA approach, the Judge preferred Professor Manley's evidence to that given by Dr McClintock. We can see no basis upon which we should reach a different conclusion, especially having regard to what Dr McClintock said in his report of

15 September 2011, which we quoted earlier in the judgment.[48] At that stage, he was suggesting the methodologies he was employing ought to give a result "equivalent to a participant-specific table".[49] We think it is more than an insignificant coincidence that the figures in sch one of the Agreement have a reasonable relationship with the Units available from the forest estimated on each side during negotiations for the Agreement.

[151] Mr Goddard emphasised Professor Manley's evidence that the three available models available for estimating numbers of Units would produce results within a range of five per cent depended on the models having the same inputs. He claimed this was significant because there could be no guarantee the inputs would be the same prior to publication of the FMA tables. However, we do not think the interpretation issue ought to depend on whether the parties were able to forecast precisely the outcome of relying on the FMA tables. It is more significant that they knew they would be able to make estimates that bore a reasonable relationship to the outcome that would be produced by the FMA approach. Having considered the evidence, we think that is what they considered they could do.

[152] Perhaps more importantly, the idea that the default look-up tables approach is to be treated as being the only approach "in operation" for the purposes of cl 2.1(d) does not seem to be sensible, having regard to the negotiations between the parties and the fact, as they well knew, the default look-up tables would produce a result far below the numbers of Units set out in the Minimum Volumes column in sch one. As we have already noted, Mr Goddard was critical of Toogood J's reference to a "rule of thumb in the industry" that Units calculated under the default look-up tables should be doubled to arrive at the likely tally under the FMA tables. Mr Hodder conceded that the "rule of thumb" statement was probably unjustified. But, as we have noted, Dr McClintock's evidence was his modelling work prior to execution of the Agreement had consistently produced predicted outcomes from the FMA tables that were at least double the yield under the default look-up tables.

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48 Above at [73].
49 Above at [74].

[153] NZCF's argument therefore assumes the parties were content to provide figures in sch one they knew at the time to be profoundly inaccurate. Those figures would then be adjusted to reflect the extent to which the outcome produced by application of the FMA approach greatly exceeded what would be produced, had the default look-up tables been used. That seems most unlikely, especially when it is remembered the first Units to be transferred would be *after* the default look-up tables had ceased to be relevant (because the first MER would have to be based on the FMA tables).

[154] In the end, we do not think Mr Goddard's point that there could not be two approaches in operation under the Act is persuasive. We accept the Judge erred in saying the default look-up tables ceased to apply from 1 September 2011. They remained the only means of claiming Units, and could be used for the purpose of voluntary emissions returns. The more important point, however, is that the FMA approach was in the course of being implemented and would be the only method by which the Units to be transferred to NZCF and sold to MRP under this Agreement could be calculated.

[155] There is another consideration, arising from the fact that at least down to October 2011, when the potential investor withdrew, NZCF was negotiating in the hope of selling the forest on the basis that MRP was contracted to purchase the Units transferred in respect of the forest under the ETS. It seems most unlikely they were doing so on the basis there might be significantly more Units available (more in fact, than the forest could yield), which the new owner would be obliged to provide under the terms of the Agreement. While we accept that for a period NZCF and MRP were discussing a draft under which [omitted] Units would be transferred, they stepped back from that and focused on figures in sch one that were roughly in accordance with their pre-estimates of yield.

[156] It seems the [omitted] figure was largely explicable on the basis that what Mr Miller called "catch-up" Units would be available for the first commitment period once the first MERs were filed: the implication of Mr Miller's email sent at 5.47 pm on 30 August, quoted at [62] above. Mr Goddard also noted NZCF's significant access to other forests from which Units could be sourced to meet

obligations under this Agreement, but we consider the obligations of the parties under Agreement in the end were firmly linked to the Units available in respect of the Hawarden forest.

[157] The figures produced by Dr McClintock on 21 September had caused concern because of the potential impact on the negotiations between NZCF and the third party. However, Mr Walsh dealt with that situation by writing to the third party setting the number of Units likely to be available at [omitted]. That is the mid-point of the figures in sch one ultimately agreed between NZCF and MRP. This is another indication of the number of Units that NZCF expected could realistically be available from the forest.

[158] It may be mentioned also in passing that if the parties had reached agreement on [omitted] Units, on the basis of the contractual interpretation now asserted by NZCF, there would have been an even more dramatic increase in the number of Units NZCF would have been required to provide and MRP to buy.

[159] These considerations, based on the context in which the Agreement was executed, confirm the view we reached having considered the wording of the contract as a whole, namely, NZCF's argument parts company with commercial common sense. Mr Goddard eloquently pointed out the pitfalls of an interpretive approach in which the Court seeks to substitute its own view about commerciality when construing contracts entered into by parties such as these. However, we do not read the authorities as proscribing reference to commercial common sense. The quotation above from *Arnold v Britton* is to the effect that commercial common sense is a "very important factor to take into account when interpreting a contract".[50] We are satisfied NZCF's interpretation does not accord with commercial common sense and in expressing that conclusion have no sense that we are imposing our own view of commerciality on the parties. On the contrary, we consider it cannot have been the common intention of the parties to contract on a basis that would almost double the numbers of Units set out in sch one and well beyond the expected capacity of the forest.

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[50] *Arnold v Britton*, above n 32, at [20]. Set out in full above at [103].

[160] Having regard to the previous considerations, we consider the meaning that cl 2.1(d) would convey to a reasonable person having all the background knowledge available to the parties, in the situation in which they were at the time of the Agreement, is the FMA accounting mechanism was treated as an approach in operation under the Act for the purposes of defining the rights and obligations of the parties under the Agreement. It had informed the numbers set out in sch one, which reflected the parties' estimates of entitlements under the FMA, and they had made detailed provision in cl 2.1(c) for what was to occur in the event those estimates needed to be adjusted when the Units were transferred in accordance with the FMA tables. In our view, the parties did not intend at the time of the Agreement that the provision and use of the FMA tables should be regarded as a relevant change in the accounting mechanism provided under the Act so as to trigger cl 2.1(d).

[161] That conclusion is reinforced by consideration of the fact the first delivery by NZCF to MRP under the Agreement, which occurred on 1 March 2013, was of [omitted] Units. This came after the first MERs were lodged, using the FMA approach. Those MERs related to the first commitment period, from 1 January 2008 to 31 December 2012. The calculated "entitlement to receive" was [omitted] Units in respect of the larger part of the forest (the New Zealand Carbon Farming Ltd MER) and [omitted] in respect of the smaller NZCF Laidmore Ltd part of the forest. Both of these figures were net of Units claimed under voluntary emissions returns previously filed using the default look-up tables. That meant the combined entitlement to be transferred by the Crown to NZCF was [omitted] Units.[51] It follows that when NZCF delivered [omitted] Units to MRP, it did so at a time when it would have had available substantially more Units than the [omitted] delivered to MRP. It did not then suggest any obligation on the part of MRP to purchase such Units because of cl 2.1(d). Nor were we referred to any evidence that NZCF even gave MRP the *option* to purchase further Units, as contemplated by cl 2.1(c)(iii)(B).

[162] In *Gibbons Holdings Ltd v Wholesale Distributors Ltd* the Supreme Court resolved earlier uncertainty by holding that subsequent conduct of the parties could

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[51] NZCF's Reply to MRP's Statement of Defence stated that NZCF received 211,838 Units in February 2013.

be looked at for the purposes of determining the proper construction of a contract.[52] Tipping J emphasised the focus must be on objective conduct and also expressed the view the subsequent conduct must be "mutual or shared" conduct.[53] Thomas J, however, held the conduct of one party alone could be relevant and said:[54]

> There is no reason, certainly in this case, why evidence of subsequent conduct should have to be common to establish a common intention. Conduct which is not, and has not been, "shared" or "mutual" may nevertheless point to a meaning contrary to the meaning later asserted by one of the parties. That party has acted inconsistently with the meaning it seeks to persuade the court to place upon the contract. The value of the evidence stems from the inconsistency. …

[163] Subsequently, in *Vector Gas Ltd v Bay of Plenty Energy Ltd*, Tipping J held that evidence of subsequent conduct would be admissible, if it is capable of demonstrating objectively what meaning the parties intended their words to bear.[55] It appears from [30] of his judgment that he was intending to depart from the requirement expressed in *Gibbons Holdings Ltd v Wholesale Distributors Ltd* that the relevant conduct must be shared or mutual.

[164] In the present case, the relevant conduct is not only the delivery by NZCF of [omitted] Units, but also receipt and payment for those Units by MRP. This happened without any controversy at the time, and without either party stating or suggesting there was anything incorrect in the process followed. It was only subsequently that NZCF raised an issue. We consider this was relevant conduct by both parties, and on the part of NZCF it was contrary to the interpretation of cl 2.1(d) it now asserts. Whether on Thomas J's approach, or on Tipping J's original or revised view, the conduct is relevant to the intent of the parties.

[165] It was not until 15 July 2013 at a meeting attended by Mr Fraser Whineray and Mr Gibson of MRP and Mr Miller of NZCF that the latter "raised the impact" of cl 2.1(d), stating that NZCF's models suggested the clause could have the effect of doubling the contractual volumes. Mr Miller was taxed about this in

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52 *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277. Blanchard J left the issue open but the other Judges all agreed that evidence of subsequent conduct could be admitted where relevant.

53 At [53].

54 At [135].

55 *Vector Gas v Bay of Plenty Energy*, above n 29, at [31].

cross-examination, and admitted he had not considered the possibility of the clause having that effect prior to the evening of 12 July. There were the following exchanges between Mr Hodder and Mr Miller:

> Q. Was this something that had been discussed with Mr Walsh prior to this date?
>
> A. I don't believe so, no.
>
> Q. It hadn't been discussed with anybody else before this date?
>
> A. No.
>
> Q. This was a Eureka moment for you on the evening of the 12th of July 2013?
>
> A. I didn't know what the impact was at that stage.
>
> Q. Well, this is the beginning of the idea that's led to the scale-up claim, isn't it?
>
> A. Yep.
>
> …
>
> Q. … just to be clear, this isn't mentioned in any of the early discovered document[s] is it?
>
> A. No.
>
> Q. This is a new idea.
>
> A. Well, it's not an idea. It's a clause in a contract.
>
> Q. Well, the idea that the clause would apply so that you could increase the volume supplied over this contract to twice what the forest could produce is a new idea, isn't it?
>
> A. The impact of the clause is started to be talked about here, yes.
>
> Q. And it's an impact that had never previously been discussed internally at NZCF?
>
> A. No.
>
> Q. And nor had it been discussed with investors.
>
> A. No.
>
> Q. Or banks.
>
> A. No. Not by me.
>
> Q. Or Mighty River Power.

A. Not by me.

Q. And so this is the germ of the idea that takes us to the point that the gross revenue under this agreement is actually not $36 million but $71 million.

A. Yep.

[166] This evidence is inconsistent with the stance NZCF now adopts on the meaning of cl 2.1(d). It is inconceivable that it was NZCF's intention (let alone MRP's) that cl 2.1(d) would be triggered by use of the FMA tables so as to effectively double the volume of Units the subject of the agreement. And it is inconceivable that NZCF would have that intention and make no mention of it when delivering Units in March 2013.

[167] The subsequent conduct confirms the view we have reached on the construction of the Agreement.

[168] For all these reasons NZCF's appeal must be dismissed.

Rectification

[169] MRP counterclaimed seeking rectification if, contrary to its submissions, the High Court held the Agreement was to be construed so that the FMA was not considered to be "any other approach in operation under the Act" when the Agreement was signed. Because of the view he came to on the interpretation of cl 2.1(d), Toogood J found it unnecessary to address the alternative claim for rectification. It is also strictly unnecessary for us to deal with the issue, but we do so for completeness.

[170] Mr Hodder handed up the wording that MRP submitted a rectified form of cl 2.1(d) would take. We now set that out, underlining the words that would be added:

> **Change in accounting mechanism**: Subject to clause 2.3(b)(iii), in the event that the account mechanism provided for under the Act for determining the carbon stock in a post-1989 forest <u>(and used to estimate the Minimum Delivery Volume and Maximum MRP Agreed Volume for any calendar year as set out in Schedule One)</u> is amended thereby resulting in the Sellers being allocated a change in Units in respect of the Converted Area from what

> would have been allocated under the "Look-up Table" approach or any other approach in operation under the Act at the signing of this Agreement (including, for the avoidance of doubt, the Field Measurement Approach from the commencement of the Climate Change (Forestry Sector) Amendment Regulations 2011), then the parties agree that the Minimum Delivery Volume and Maximum MRP Agreed Volume for and from the calendar year in which such amendment takes effect shall be increased, or decreased, pro rata to the overall increase or decrease in Units which the Sellers would then be allocated.

[171] While it is possible to imagine a more elegant way of drafting the provision, we think it satisfactorily establishes that application of the FMA approach would not result in cl 2.1(d) being triggered and so it does what is required from MRP's point of view.

[172] Mr Goddard noted that before rectifying the contract the Court would need to be confident there was a common and continuing intention, manifest in the conduct of the parties. He submitted there was a "complete dearth" of any evidence that NZCF had the intention to contract in the terms sought for the rectified clause.

[173] It will be apparent from the discussion above that we disagree. In short, we consider it plain the parties intended to contract on the basis that unless there was a subsequent change in accounting mechanism replacing the FMA approach, then cl 2.1(d) would not be triggered, and the provisions of sch one of the Agreement would bind the parties.

[174] Had we not come to the view we have about the interpretation of cl 2.1(d) we would have rectified the clause as sought by MRP, thereby reflecting our conclusion as to the true intention of the parties at the time of the Agreement's execution.

Cross-appeal issues

The "wash-up" issue

[175] Clause 2.1(a) has earlier been set out.[56] MRP submits on appeal, as it did in the High Court, that the obligation of the parties relates to the sale and purchase of "the Units transferred to the Sellers … **for** the Converted Area **for** each calendar

[56] Above at [88].

year" (respondent's emphasis). The argument is that the phrase plainly links the Units to both the forest and the calendar year. Consequently, the subject of the Agreement is Units of carbon sequestered in each calendar year. MRP claims this and the related provisions do not allow NZCF to claim "catch-up" or "wash-up" Units when an MER is filed for a five-year commitment period.

[176] The next stage of the argument turns on cl 2.1(b)(i). It has not previously been set out, and it is not necessary to set it out in full. It contains NZCF's obligation to deliver the Units arising from the Converted Area on an annual basis "starting on 1 March 2013 (in respect of Units transferred to the Sellers for the 1 January to 31 December 2012 calendar year) and on 1 March 2014 and each subsequent 1 March for the Units transferred to the Sellers for the preceding calendar year".

[177] Mr Hodder submits this language implies a causal connection with relevant performance (that is, the actual Units produced) for that year. He argues that under cl 2.1(b) there is a repeated sequence of events for each year of the Agreement requiring NZCF to file an emissions return to claim the Units arising in a particular year and then transfer of the Units to NZCF "for" that preceding year.

[178] Then, there is an equivalent annual obligation to provide a copy of the emissions return to MRP, under cl 2.1(b)(ii), on 10 February of the year of sale. By 1 March of that year, NZCF delivers these Units to MRP. Mr Hodder submitted this consistent annual sequence was reflected in sch one with its minimum and maximum delivery volumes expressed in accordance with delivery dates specified as 1 March 2013 down to 1 March 2027.

[179] Mr Hodder argued it was significant that sch one makes no allowance for any delivery to reflect the statutory regime's five yearly "catch-up" (or surrender) potential under MERs. In particular, there was no provision for the first "vintage" period to be the years "2008–2012". Although the parties knew before the Agreement was signed that there would be an entitlement to a significant number of "catch-up" Units when the first MER was filed in early 2013, neither the language of cl 2.1(a) and (b), nor sch one made allowance for this.

[180] MRP therefore contends that the catch-up Units cannot be used to bring the Units up to the Maximum Delivery Volume in any particular year.

[181] Toogood J rejected MRP's argument. He considered it was clear from the language of cl 2.1(a) that what is bought and sold under the Agreement are the "Units transferred to the Sellers … for the converted area".[57] During the first four years of each commitment period, the Units transferred would be based on voluntary emissions returns. In the fifth year of the commitment period, the Units transferred would be based on the MER. That might produce a number that exceeded or was less than the number of Units that would have been transferred if a voluntary emissions return had been filed for that year. He considered that the words "for each calendar year" at the end of cl 2.1(a) were used merely to reflect the fact the buying and selling of Units took place on an annual basis.

[182] This meant NZCF was obliged to sell, and MRP to purchase, the Units in fact transferred to NZCF by the Crown pursuant to the filing of the MER for the first commitment period and delivered to MRP on 1 March 2013.[58] The formal order was in the following terms:

> The plaintiffs were obliged to sell and the defendant was obliged to buy the units transferred to the plaintiffs by the Crown, pursuant to the filing of the mandatory emissions return for the first commitment period and delivered to the defendant on 1 March 2013, subject to the contractual volume provisions in clause 2.1(c).

[183] Mr Goddard submits Toogood J was correct, arguing cl 2.1(a) contains clear obligations on the parties to sell and buy the Units transferred to the sellers for the converted area for each calendar year. The transfer of Units which follows the end of each commitment period is the result of filing a MER required by the Act. The year in which the Units were sequestered in the forest within the five-year period is not relevant.

[184] Mr Goddard further submitted there was nothing in the wording of cl 2.1(b) suggesting a different outcome. The clause similarly focuses on the Units allocated to NZCF by the Crown, Mr Goddard also pointed out that the ETS requires forest

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57 High Court judgment, above n 2, at [90].
58 At [95].

measurement at least every five years, to produce new FMA tables for use in each MER. Unit allocation using an MER for the last year of each commitment period would require the use of the new FMA table so as to calculate the Units for the five-year commitment periods. Units the subject of voluntary emissions returns provided in other years are deducted to produce the allocation for the last year of each commitment period.

[185] The fact all this occurs against the background of minimum and maximum volumes, which are the subject of the obligations of the parties set out in sch one, ensures MRP would not be obliged to take Units above the maximum it has contracted for, and equally NZCF is obliged to provide at least the minimum volumes.

[186] We accept Mr Goddard's submissions. We consider the agreements set out in cl 2.1(a) and the delivery obligations in cl 2.1(b) are clear. When an MER is filed in each fifth year, it necessarily involves a reconciliation with the Units claimed in any preceding voluntary emissions returns. The legislative intent is to provide for an accurate statement of the Units sequestered over the commitment period. That accounting, however, will not add to or subtract from the obligations of the parties under the Agreement. Their obligations relate to the Units in fact transferred, subject to the limits set by sch one.

[187] We consider the High Court was correct and this aspect of MRP's cross-appeal must fail.

Verification

[188] Clause 2.1(b)(ii) obliges NZCF to deliver to MRP, on an annual basis:

> … a copy of the emissions return or similar such document provided to the Crown in respect of the Converted Area in the relevant calendar year, including a record of each of the Sellers' emissions and removals as calculated (and if necessary verified) for that return and an assessment of each of the Seller's:
>
> (A) net entitlement to receive Units;
>
> (B) net liability to surrender or repay Units,

in respect of the Converted Area.

[189] MRP argued NZCF was required under this provision not only to provide a copy of the emissions return provided to the Crown, but also any other information reasonably necessary to enable MRP to verify the Units delivered by NZCF are Units MRP is required to purchase under the Agreement. The argument was built on the phrase "and if necessary verified".

[190] It is a companion argument to the submissions made on the wash-up issue. Here MRP argues it should be able to access information showing which of the Units included in the MER are referable to years other than the year immediately preceding the provision of the MER. Such information is not apparent on the face of the MER itself. Hence the claim to be entitled to further information, to verify the numbers of Units transferred to it by NZCF are Units it is obliged to buy. The argument is diminished in significance by our decision on the wash-up issue.

[191] NZCF submits the clause requires it to provide only a copy of the emissions return, which will include a record of the emissions and removals as calculated and an assessment of each of the seller's net entitlements to receive or surrender Units in respect of the Converted Area. NZCF says the phrase "and if necessary verified" reflects the fact that under s 62 of the Act calculations of emissions and removals may be subject to a requirement for verification by the Environmental Protection Authority, or other authorised persons. NZCF argues that because it has not been required to verify its emissions return at any relevant time, it has satisfied its only obligation under cl 2.1(b)(ii) by providing MRP with a copy of the return provided to the Crown.

[192] Toogood J accepted NZCF's argument. He considered it clear that NZCF's obligation under the Agreement was to deliver to MRP the Units transferred to it by the Crown in respect of the forests. Once the Crown is satisfied NZCF has a particular entitlement in respect of any year, it is required under the ETS to transfer the appropriate number of Units to NZCF. At that point, NZCF is obliged to deliver them to MRP, and MRP to buy the Units.[59]

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[59] High Court judgment, above n 2, at [145].

[193] Mr Hodder submitted the Judge had confused the purpose and subject matter of the Agreement. The Agreement is not simply for NZCF to sell and MRP to buy the Units transferred from the Crown to NZCF; rather, he submitted, it is for NZCF to sell and MRP to buy those Units transferred from the Crown to NZCF that can be tied directly to those Units earned by the Hawarden forest in the preceding calendar year.

[194] Mr Hodder submitted the Judge had been inconsistent in his approach, rejecting a wider disclosure obligation on the basis the parties could have made express provision for it while rejecting MRP's argument that the parties could have made express provision for "wash-up" or "catch-up" Units.

[195] We are satisfied the Judge's decision was correct. We have already decided the relevant obligations of the parties relate to all of the Units transferred in respect of the five-year commitment period.

[196] We accept the phrase "and if necessary verified" is properly understood against the background of the legislative regime. Unless it is read in that context, it would be most unclear who would need to verify the return, or how and when that should occur. We accept Mr Goddard's submission that NZCF would only be obliged to provide to MRP information required to verify its emissions and removals if such information had been required for the purposes of verification under the Act.

[197] Mr Hodder's suggestion that the words should be applied so as to import an obligation to verify if MRP required such verification would be an unjustified gloss on the words used in the Agreement.

[198] There is nothing in Mr Hodder's point about inconsistency. The Judge has simply construed the relevant provisions in respect of both cross-appeal arguments in a straightforward way.

[199] This aspect of the cross-appeal must also fail.

Result and costs

[200] For the reasons we have given, NZCF's appeal is dismissed, and MRP's cross-appeal is also dismissed.

[201] The parties agreed that costs should follow the event and should be calculated as for a standard appeal on a band A basis. However, they also agreed that in the event the cross-appeal did not succeed there should be some deduction in the costs that would otherwise have been awarded to MRP if it were to succeed on NZCF's appeal.

[202] The issue concerning the proper interpretation of cl 2.1(d) occupied most of the time spent in the hearing of the appeal. In the circumstances, we consider it appropriate to order that the NZCF is to pay MRP's costs calculated as for a standard appeal on a band A basis deducting 10 per cent from that amount. NZCF must also pay the usual disbursements.

[203] For confidentiality reasons and by consent of the parties, there is an order limiting distribution of the unredacted version of the judgment to the parties and their legal representatives.

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