IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL PANEL

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-000492
[2019] NZHC 1187

BETWEEN	AIR NEW ZEALAND LIMITED Plaintiff
AND	BP OIL NEW ZEALAND LIMITED First Defendant
	Z ENERGY LIMITED Second Defendant
	Z ENERGY 2015 LIMITED Third Defendant

Hearing:	11-13 March 2019
Appearances:	N S Gedye QC and J A MacGillivray for Plaintiff V L Heine, T Smith and R Goss for Defendants
Judgment:	28 May 2019

JUDGMENT OF VENNING J

This judgment was delivered by me on 28 May 2019 at 3.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:	Tompkins Wake, Hamilton Chapman Tripp, Wellington
Counsel:	N S Gedye QC, Auckland

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Introduction

[1] Between 16 and 30 September 2017, damage to the fuel pipeline from Marsden Point Refinery to Wiri in Auckland caused a severe disruption to the supply of aviation fuel (Jet A1) to Auckland Airport and affected Air New Zealand Limited's (Air NZ) operations.

[2] Air NZ purchases Jet A1 from four fuel companies: Exxon Mobil Aviation International Asia Pacific, a division of Exxon Mobil Asia Pacific Pte Limited (Exxon); Air BP, a division of BP Oil New Zealand Limited (BP); Z Energy Limited (ZEL); and Z Energy 2015 Ltd (Z 2015). ZEL was formerly Shell New Zealand Limited. Z 2015 is wholly owned by ZEL and operates the fuel business formerly operated under the Caltex brand. Since 2015, the two Z companies have been managed together as Z Energy.

[3] During the period of the disruption the fuel companies supplied Air NZ with substantially less fuel than it required to operate its scheduled air services. At times during the outage Z was only able to supply 30 per cent of the required volumes. Air NZ was forced to cancel some scheduled services and incurred considerable additional cost in maintaining other scheduled services. It brings this proceeding to seek compensation for the losses sustained.

[4] Air NZ has resolved its claim against BP. It maintains its claim against ZEL and Z 2015 Limited (collectively Z). Air NZ's case is that it was dependent upon Z supplying its fuel requirements, and it was an implied term of the contracts that Z would supply the full volume of fuel required by Air NZ each day, on a continuous basis, (an "unqualified supply obligation") to enable it to operate its scheduled services.

[5] Z does not accept there was any such implied term to supply fuel on that basis. It says the parties' relationship worked perfectly well without any obligation to supply, but if any obligation to supply is to be implied, it was a reasonable endeavours obligation.

[6] Paul Kelway, the Treasurer of Air NZ, gave evidence in support of Air NZ's claim. For Z, Nicolas Williams, the General Manager, Commercial Division at ZEL and Hamish Dyer, the Commercial Optimisation Manager at ZEL, gave evidence.

Air NZ's fuel usage

[7] Air NZ uses Jet A1 to fuel both its jets and turbo-prop aircraft. In September 2017 the fleet size was approximately 100 aircraft. Air NZ's annual fuel requirement at that time was approximately 209 million US gallons, of which 174 million US gallons were used at Auckland international and domestic airports.

[8] In September 2017 Air NZ's expected average monthly fuel requirement at Auckland Airport was approximately 14.5 million US gallons made up of:

(a) international fleet – 11.5 million US gallons. This was supplied by Exxon 26.9 per cent; BP 23.5 per cent; ZEL 32.7 per cent; and Z 2015 16.9 per cent;

(b) domestic jet fleet – 2 million US gallons. This was supplied entirely by Z 2015;

(c) domestic turbo-prop fleet – 1 million US gallons. This was supplied by BP.

The fuel supply chain

[9] Jet A1 fuel for Auckland Airport originates at the Marsden Point Oil Refinery. The delivery of Jet A1 to Auckland Airport is dependent on the 160 km pipeline Refinery to Auckland Pipeline (RAP) that runs between the Refinery and the Wiri fuel storage facility in Auckland. The RAP is owned and operated by The New Zealand Refining Company Limited (Refining NZ). The fuel companies that supply fuel to Air NZ hold 40 per cent of the shares in Refining NZ.

[10] The Wiri fuel storage facility is owned and operated by a joint venture between the fuel companies, Wiri Oil Services Limited (WOSL). The WOSL facility has storage capacity for approximately 36 million litres of Jet A1 fuel. Once fuel leaves the RAP Pipeline and enters the WOSL facility a holding and settling period of 24 hours is needed before the fuel can be further despatched to the airport. WOSL's practice is to hold approximately 24 million litres of available fuel at the Wiri facility, although the volume fluctuates.

[11] A further pipeline runs between the WOSL facility at Wiri and Auckland Airport. This is known as the Wiri to Airport Pipeline (WAP). At the airport a number of tanks provide a further storage facility of some 12 million litres approximately.

[12] The WAP and the tanks at the airport storage facility are owned by the fuel companies. The management and operation of the fuel facilities at the airport is carried out on behalf of the fuel companies by an entity known as the Joint User Hydrant

Installation (JUHI) which is a joint venture between the fuel companies and acts as their agent in fuel operations.

[13] The actual fuelling of aircraft on the ground is carried out by two joint venture companies at Auckland Airport. Joint Into-plane Fuelling Services (JIFS) is operated by BP and is a joint venture between BP and ZEL. Joint Into-plane Fuelling (JIF) is operated by Exxon and is a joint venture between Exxon and Z 2015.

The "contracts" in issue

[14] Air NZ says that an exchange of emails concluding on 20 April 2016 led to a contract with ZEL for the supply of Jet A1 fuel for international jet aircraft at Auckland Airport. The series of emails between the parties contain the following terms:

(a) the pricing basis: price per gallon was fixed based on MOPS,[1] plus a margin, plus a charge for freight;

(b) location: Auckland International Airport;[2] and

(c) term: 1 May 2016 to 31 October 2017.

[15] Again, by exchange of emails concluding on or about 3 October 2016, Air NZ says it entered a contract with Z 2015 for the supply of Jet A1 fuel for both domestic and international jet aircraft at Auckland Airport. The series of emails between the parties contain the following terms:

(a) pricing basis: price per gallon was fixed based on MOPS, plus a margin, plus a charge for freight;

(b) location: Auckland International Airport and Auckland Domestic Airport; and

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1 MOPS is the weekly median of Platts Singapore. Platts is an international market for jet fuel.

2 The emails also referred to Christchurch Domestic Airport, but nothing turns on that for present purposes.

(c) term 1 October 2016 to 30 June 2018.[3]

[16] Both ZEL and Z 2015, in their respective statements of defence, deny that the parties made a contract for supply, and instead plead that on or about the dates specified above agreement was reached between the parties as to the price at which any jet fuel supplied by Z at Auckland Airport would be provided, and the term (as in length of time) for which that price would apply. They also accept that the agreement contained implied terms to the effect that the fuel to be supplied was Jet A1, and that the delivery point was into the wing, though no terms to that effect appear in the emails.

[17] In neither exchange of emails was there any agreement on the volume of Jet A1 fuel to be supplied to Air NZ, or any reference to either party having any obligation to supply or purchase Jet A1 fuel from the other, although Z accepts the terms of the agreement were based on a percentage allocation of Air NZ's uplift and indicative volumes of Jet A1 provided by Air NZ.

[18] In practice, Air NZ's treasury department issued forecasts of required fuel volumes at Auckland Airport to the fuel companies two to three times a year. Those forecasts set out, on a month by month basis, the forecast volumes expected to be required by Air NZ at Auckland Airport. From time to time Air NZ also responded to direct queries from the fuel companies about the expected forecasts. Air NZ then supplied a schedule of its expected daily fuel requirements to JUHI the day before. That enabled JUHI to arrange with JIFS and JIF the necessary fuelling on the following day.

[19] The fuel volumes supplied were measured at the hydrant truck which pumped the fuel into the wing. Delivery occurred at the wing attachment point. While the amount supplied by Z was based on the percentage Z had of the allocation of Air NZ's uplift at Auckland Airport the actual quantities supplied were ultimately determined by the pilot and were recorded and subsequently invoiced.

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[3] There is a dispute between the parties as to whether the term for domestic supply ended on 30 June 2018 or 31 October 2018, but nothing turns on that for present purposes.

The pipeline failure

[20] On 15 September 2017 the RAP suffered an outage because of damage to the pipeline. Subsequent investigations by Refining NZ and the Northland District Council suggest the outage was most probably caused by a mechanical digger operating illegally without Refining NZ's knowledge or consent. Because of the damage the RAP was unable to be used to transport fuel, including Jet A1, to Auckland for a period of 11 days while the damage was investigated and repaired. It then took a further three days before the RAP could be pressurised to provide 100 per cent fuel supply levels.

[21] The Jet A1 fuel then in storage at the Wiri Terminal and the JUHI storage facility at Auckland Airport was not sufficient to meet the normal daily uptakes of all the airlines for the period it was anticipated the RAP would be out of service, while repairs were carried out. The JUHI Operating Committee determined to impose "allocations" on fuel uplift from Auckland Airport to manage the supply shortage. In this context an "allocation" is a reduction in supply against an airline's actual need. Fuel is allocated proportionately based on the calculated historic use amongst all airlines.

[22] On Friday 15 September 2017 Mr Kelway, the treasurer of Air NZ, was advised by the fuel companies that allocations at 90 per cent would be put in place from noon on Saturday, 16 September.

[23] Late Saturday morning, 16 September 2017, Mr Kelway was advised that the situation was much worse than initially thought and that more severe allocations were likely. Mr Kelway was asked to join the JUHI Operating Committee's meeting that afternoon by phone. At that meeting the Operating Committee had not determined what additional allocations would be needed. The discussion involved how much stock was on hand at Wiri and the airport, how long the disruption was likely to be, and therefore the likely volume available for the duration of the disruption. Initial estimates were that stock would last between 10 to 14 days. The Operating Committee agreed to allow the airlines five days to get down to a 30 per cent allocation (i.e. to operate on supply of 70 per cent less than normal). The airlines could choose how

much to take over each of those five days, provided they had used no more than 30 per cent of a daily usage over the total period. It was left to the airlines to smooth the reduction downwards.

[24] After determining the source of the issue and what was required to repair the RAP, Refining NZ commenced repairs on 21 September. From 21 September the allocations were relaxed, moving to 50 per cent on that day. The repair was completed at about 10.00 am on Sunday, 24 September. The RAP was then able to be pressurised and product moved from the Refinery to Wiri again. The allocations were increased to 80 per cent on 26 September and to 100 per cent on 30 September, reflecting a return to normal operations.

Air NZ's response to the allocations

[25] While the allocations were in place, Air NZ was unable to maintain all its scheduled services. It was also forced to make technical stops and to tanker in extra fuel. A technical stop is an additional stop at an intermediary airport for the sole purpose of refuelling. Tankering in involves fuelling the aircraft outside of Auckland with as much as could be loaded in its tanks subject to weight limits determined by cargo and passenger load. By making technical stops and tankering in, Air NZ was able to self-supply about a million litres a day, but it incurred substantial costs associated with both the technical stops and tankering in.

Issues

[26] The following issues arise:

(a) Is there any obligation on Z to supply at all?

(b) If there is, what type of supply obligation is to be implied? Is it, as Air NZ argues, an unqualified supply obligation or is it, as Z argues, a reasonable endeavours obligation.

(c) If it is a reasonable endeavours obligation, has Z satisfied it?

(d) If it is an unqualified supply obligation were the contracts frustrated?

The parties agree that damages can be dealt with later, if necessary.[4]

Is there a supply obligation at all?

[27] Although the focus of the hearing was on whether the term to be implied was an unqualified supply obligation or a reasonable endeavours obligation to supply, the pleadings raise a more fundamental issue which Mr Gedye acknowledged in his closing submissions. As noted, Z denies that a contract had been concluded between the parties. It says agreement was reached as to price and term only. The emails Air NZ relies on as constituting the contract say nothing about an obligation to supply.

[28] The first and fundamental issue therefore is whether there is a contract for the supply of Jet A1 fuel into which a term relating to the basis upon which the supply was to be made can be implied?

[29] Mr Gedye QC submitted that objectively the parties intended to enter binding contracts under which Z was obliged to supply Jet A1 fuel and Air NZ was obliged to purchase it each day during the contractual term. It would be unreal to suggest that the arrangement was effectively a series of daily contracts to supply. The logical outcome of Z's pleading denying a contract was that Z could refuse to supply or Air NZ could refuse to buy fuel at any stage during the two year period agreed on. That could not be right.

[30] Mr Gedye accepted that the contracts concluded by the exchange of emails were brief. They only dealt with price and the length of the agreement. But neither did they deal with the type of fuel, or how it was to be delivered. Despite that, Z accepted those matters were implied into the agreement.

[31] Mr Gedye noted that the Z companies also admitted in their pleaded defences that the terms of the agreements were based on a percentage allocation of Air NZ's uplift. That was the long-term settled practice of the parties. The previous contract

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[4] Mr Gedye also confirmed that Air NZ does not pursue its second cause of action against the Z companies.

concluded with ZEL in 2013 stipulated percentages and indicative annual volumes, the type of fuel, weekly invoicing and the supply point. If the agreed percentages applied to the contracts then, in Mr Gedye's submission, it followed the volumes required were also agreed or understood. Air NZ supplied Z with periodic forecasts of the expected monthly returns. Z simply needed to apply the known percentages to those numbers to arrive at the volumes it needed to source and supply. Adjustments could then be made daily according to the schedule. The actual quantity needed to be confirmed on a practical basis each day but the parties could operate in terms of the estimates and forecasts. There was no evidence Z had any difficulty in dealing with the supply of fuel to Air NZ on that basis in the past.

[32] Ms Heine submitted the answer was that there was a commercial imperative operating. Air NZ needed fuel and Z was willing to supply it. They agreed price and continued to operate on the same basis they had operated on for a number of years. There was, however no contract to supply. Air NZ had declined to sign the standard International Air Transport Association (IATA) contract.

[33] In *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* a full Court of the Court of Appeal confirmed the prerequisites to formation of a contract:[5]

> [53] The prerequisites to formation of a contract are therefore:
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> (a) An intention to be immediately bound (at the point when the bargain is said to have been agreed); and
>
> (b) An agreement, express or found by implication, or the means of achieving an agreement (eg an arbitration clause), on every term which:
>
> (i) was legally essential to the formation of such a bargain; or
>
> (ii) was regarded by the parties themselves as essential to their particular bargain.
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> A term is to be regarded by the parties as essential if one party maintains the position that there must be agreement upon it and manifests accordingly to the other party.

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

[34] Even where the parties may have intended to conclude an agreement they may fail to do so. In the *Fletcher Challenge* case itself, the Court accepted the parties had intended to conclude an agreement but the heads of agreement they had entered was incomplete. In particular, a number of items which related to essential terms were expressly recorded as "not agreed".

[35] The present case is not so much about terms that were not agreed, rather there was no express reference to the obligation to supply at all. At first sight it might seem it has some similarities with the case of *Aotearoa International Ltd v Scancarriers*.[6] Aotearoa purchased and exported waste paper. Its principal shareholder had a number of discussions and meetings with a representative of Scancarriers, a shipping company, regarding that company shipping its product. Scancarriers' agent sent a telex to record the rate of freight, the length of time the freight rate would be held and the goods it related to. Aotearoa delivered waste paper for shipping which Scancarriers accepted. Issues arose between the parties. Aotearoa sued alleging breach of the contract. Ultimately the Privy Council concluded there was no contract. The only express terms in the telex related to the freight rate, the period the rate would apply, and manner of stowage. The telex contained no references to any quantity of cargo nor any reference as to any number of shipments nor to dates of suggested shipments, or intervals between such shipments.

[36] In the *Scancarriers'* case the Privy Council noted that the first question must always be whether any legally binding contract has been made for, until that issue is decided, a Court cannot properly decide what extra terms, if any, must be implied into what is, ex hypothesi, a legally binding bargain as being both necessary and reasonable to make that legally binding bargain work. The Privy Council noted:[7]

> It is not correct in principle, in order to determine whether there is a legally binding bargain, to add to those terms which alone the parties have expressed, further implied terms upon which they have not expressly agreed and then by adding the express terms and the implied terms together thereby create what would not otherwise be a legally binding bargain.

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6 *Aotearoa International Ltd v Scancarriers* [1985] 1 NZLR 513.
7 At 556.

[37] The Court in *Fletcher Challenge* discussed the *Scancarriers'* decision. The Court considered it relevant the observations were made on the particular facts of the case and there did not seem to have been a mutual intention to contract. It is also relevant that there was no past history of dealing between the parties to the *Scancarriers'* decision.

[38] The Court also agreed with Mustill LJ's conclusion in *Malcolm v The Chancellor, Masters and Scholars of the University of Oxford* that it was helpful to consider whether there was a sufficient skeleton of express terms to be fleshed out by implication.[8]

[39] While Air NZ had, through Mr Kelway, resisted entering contracts with detailed provisions as to supply, Air NZ and Z had agreed the main points upon which the Jet A1 would be supplied. Air NZ and Z both accept a number of terms were agreed or can be implied. The fuel was Jet A1; price was agreed; the delivery point was to the wing; and the term (as in length of time) were all agreed. In addition, the agreed price and term were based on a known and accepted percentage allocation of Air NZ's uplift at Auckland Airport and Air NZ's indicative volumes of its Jet A1 fuel requirements.

[40] Further, the parties had proceeded on this basis for a number of years. On 15 October 2013 the parties had concluded a previous negotiation regarding pricing for the supply of Jet A1 on similar terms and expressly referred to the relevant uplift percentage and the annual indicative volume. The conduct of both parties in practice and leading to the exchange of emails would suggest to an objective observer that Z had an obligation to supply Jet A1 fuel and Air NZ had a corresponding obligation to purchase the fuel supplied.

[41] The supply of Jet A1 fuel was at the heart of the terms the parties agreed to. The terms have no meaning or purpose unless there was an obligation on Z to supply Jet A1 fuel (and on Air NZ to purchase it). It is implicit in the matters agreed upon,

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8 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand* [2002] 2 NZLR 433 (CA) citing *Malcolm v The Chancellor, Masters and Scholars of the University of Oxford* [1994] EMLR 17.

that the parties intended that for the term of the contract Jet A1 fuel would be supplied by Z and bought by Air NZ at the agreed price and on the basis of Air NZ's indicative volumes.

[42] I conclude that the parties intended to commit to a contract for the supply of Jet A1 fuel, and did so based on express and implied terms and past practice. What they did not address was how an interruption to supply was to be dealt with and particularly, whether the supply obligation that underpinned the contract was an unqualified supply obligation or a reasonable endeavours one.

What type of supply obligation is to be implied?

[43] The next issue is what term should be implied into the contract to clarify the supply obligation. But first I consider the appropriate approach to implied terms and the particular context of this case.

[44] The case of *The Moorcock* provides a useful starting point to consideration of how the courts have approached implied terms.[9] The defendant wharfingers agreed to allow the plaintiff to discharge and reload its vessel at their jetty. The parties knew that the vessel would take the ground at low tide. The plaintiff's vessel was damaged when it settled on a hard ridge of ground under the mud at low tide. The contract was silent about the risk of damage. The Court of Appeal confirmed a term will be implied into a contract where it was necessary to do so to give such business efficacy as both parties must have intended it should have. The question posed by Bowen LJ was how much of the peril was it necessary to assume that the shipowner and jetty owner intended respectively to bear. The jetty owner had no control over the bed of the river but were in a position to ascertain the state of the bed of the river with relative ease. The Court implied a term that the jetty owner would be taken as representing that it had taken reasonable care to ensure the river bottom was in such a condition as not to cause damage to the plaintiff's vessel.[10]

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9 *Moorcock, The* (1889) 14 PD 64, [1886]-[90] All ER Rep 530 (CA).
10 At 67 and 70.

[45] In *Shirlaw v Southern Foundries (1926) Ltd* the Court introduced the officious bystander test.[11] An implied term will be so obvious that:[12]

> [I]f, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: "Oh, of course."

[46] In *BP Refinery* the Privy Council declined to read a term into a concessionary rating agreement to the effect that the agreement should continue only so long as the named appellant should be the occupier of the rating site. The Board summarised the conditions (which may overlap) to be satisfied before a term will be implied:[13]

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

[47] Since the late 1970s the five factors identified by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* have been adopted by New Zealand Courts as elements required to be established for the implication of a term into a contract.[14]

[48] More recently, following the later Privy Council case of *Attorney-General of Belize v Belize Telecom Ltd*[15] and the United Kingdom Supreme Court case of *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd,*[16] the conceptual basis for the implication of terms has been the subject of some discussion in both the United Kingdom and New Zealand.

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11 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206; [1939] 2 All ER 113 (CA).

12 At 124.

13 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC), 16 ARL 363 at 376.

14 *Devonport Borough Council v Robbins* [1979] 1 NZLR 1 (CA) at 23; *Prudential Assurance Co Ltd v Rodrigues* [1982] 2 NZLR 54 (CA) at 61.

15 *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 1 WLR 1988.

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

[49] In *Attorney-General of Belize v Belize Telecom Ltd* Lord Hoffman, delivering the opinion of the Board, commented on the *BP Refinery* criteria:[17]

> The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express *the central idea that the proposed implied term must spell out what the contract actually means*, or in which they have explained why they did not think that it did so. …

[50] Lord Hoffman's focus was on the construction of the contract. Although the comments of Lord Hoffman in *Belize Telecom* were referred to with apparent approval by the Supreme Court in *Dysart Timbers Ltd v Nielsen*[18] and applied, the Court still also applied the *BP Refinery* test.

[51] The Supreme Court of England and Wales revisited the issue in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*.[19] With reference to Lord Hoffman's approach that consideration of whether a term should be implied was an aspect of the construction of interpretation of a contract, Lord Neuberger said:

> [26] I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in the *Belize Telecom* case could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.
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> [27] Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.
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> …

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17 *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 1 WLR 1988 at [27].

18 *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43, [2009] 3 NZLR 160 at [25] and [62].

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

> [31] …In those circumstances, the right course for us to take is to say that those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms.

[52] In *Mobil Oil New Zealand Ltd v Development Auckland Ltd* William Young J delivered the decision of the Court.[20] He noted Lord Hoffman's approach in *Belize Telecom* had been referred to with approval by the Supreme Court in *Dysart Timbers* but had been significantly qualified by the United Kingdom Supreme Court in *Marks and Spencer*. Without resolving the issue, William Young J considered Lord Hoffman's interpretation approach as appropriate in the case before him.[21] But for the sake of completeness the Court also tested the result by application of the *BP Refinery* conditions.[22]

[53] In *Ward Equipment Ltd v Preston,* Winkelmann and French JJ noted that whether the task before them was one of interpretation or implication was notionally significant, because it remained an unresolved issue in New Zealand as to whether implication of terms "…is to be dealt with by applying the same test, and perhaps, addressed as part of the same process as for the interpretation of existing contractual terms."[23] They referred to the *Marks and Spencer* decision as settling the position, at least for the United Kingdom, before observing:

> [47] We acknowledge that, at least in those cases where there is a written contract which provides for termination, the courts have been involved in considering whether or not to imply additional terms. But whether this calls for the use of the *BP Refinery* test for implication of terms is an issue best left for another day. We say this for the following two reasons. First, as noted above, we consider that the correct approach to the issue of implication is currently uncertain. Secondly, this legal issue is not dispositive in this case. Whichever test we apply, we would reach the same conclusion. As we come to, we consider that on a proper construction of the licence agreement, it was not terminable on reasonable notice. Applying the traditional and stricter test for implication of terms would inevitably lead to the same outcome.

[54] In a separate judgment, while agreeing with the ultimate conclusion, Kós P suggested that the correct approach in New Zealand should not be viewed as uncertain.[24] He stated that the task of the Court, in any dispute concerning the content

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20 *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48.
21 At [81].
22 At [82].
23 *Ward Equipment Ltd v Preston* [2017] NZCA 444, [2018] NZCCLR 15 at [46].
24 At [84]

of the contract, is to ascertain its meaning. That task is called construction, and while that term and interpretation are often used interchangeably, the better view may be that interpretation, alongside implication and rectification, are techniques of construction. He suggested that Lord Hoffman's analysis was concerned with the relationship between implication and construction, not implication and interpretation. Kós P noted that *Belize Telecom* had been applied by the Court of Appeal in *Hickman v Turn & Wave Ltd* and, albeit with some reservation, by the Supreme Court in both *Dysart Timbers* and *Mobil Oil,* and therefore remains good authority in New Zealand.[25] He considered *Belize Telecom* had not altered the fundamental point that implication is not to be deployed to improve a contract but simply to ascertain the meaning all parties intended the contract to bear. The officious bystander may be called on where a gap has been identified to inform what the parties would have said they meant. The five conditions in *BP Refinery*, best viewed as guidelines, remain applicable as a collection of methods to assess contractual meaning.

[55] Importantly, and relevantly, in all this discussion, it is accepted that when considering whether to imply words into a contract the words used, the surrounding circumstances known to both parties at the time of the contract, commercial common sense and the reasonable reader or reasonable parties are all factors to be considered.

[56] The words used by Air NZ and Z in the series of emails were, as noted, brief and focused on price and term. I turn to the issue of the context known to the parties at the time those emails were exchanged.

The context to the fuel supply agreements

[57] Both parties rely on the knowledge common to the fuel companies and Air NZ (and others) as to the vulnerability of the supply of Jet A1 fuel to Auckland Airport.

[58] The vulnerability of the supply to Auckland Airport has been known since at least late 2003. Following a major issue which led to a reduction of fuel at Sydney

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[25] *Ward Equipment Ltd v Preston* [2017] NZCA 444, [2018] NZCCLR 15 at [93]–[94], citing *Attorney-General of Belize v Belize Telecom Ltd*,; *Hickman v Turn & Wave Ltd* [2011] NZCA 100; [2011] 3 NZLR 318; *Dysart Timbers Ltd v Neilsen* [2009] NZSC 43; [2009] 3 NZLR 160; and *Mobil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89; [2017] 1 NZLR 48.

Airport in September and October 2003, Air NZ's CEO wrote to the Minister of Energy to express concern about the similar vulnerability of the Auckland region to supply disruption. The concern was also communicated to the fuel companies. Since that time there have been several studies and reports primarily commissioned by the Government but also by WOSL that have addressed the potential vulnerability of fuel supply from Marsden Point.

[59] It is sufficient to summarise the reports that Mr Kelway referred to in his evidence. In October 2004, Hale & Twomey, an energy consultancy, produced a report for WOSL on the demand for fuel in the Auckland region. In February 2005 Hale & Twomey produced a further report on oil security for the Ministry of Economic Development. The report noted, amongst other things, that if the RAP was unavailable for a significant period (more than one week) full supply of jet fuel to Auckland Airport would not be able to be maintained. Mr Kelway had some input to the Hale & Twomey report. The report recorded that the Board of Airline Representatives of New Zealand (BARNZ) did not have confidence that a major disruption event was unlikely.

[60] On 20 September 2005, Air NZ's then CFO and acting CEO wrote to Shell and BP describing capacity of the RAP as an issue.

[61] On 10 February 2006, Air NZ's CEO wrote to the Ministry of Economic Development expressing Air NZ's concern about supply security.

[62] In October 2011, Hale & Twomey prepared another report on RAP contingency options.

[63] In May 2012, Hale & Twomey produced a further report for the Ministry of Economic Development. The report considered, in extensive detail, possible disruptions in the supply chain to Auckland Airport and identified certain contingency responses such as trucking, increased storage and other measures.

[64] On 12 June 2012, NZIER reported to Ministry of Economic Development on New Zealand's oil security.

[65] In September 2012 Hale & Twomey prepared a report for WOSL entitled "Economic Strategic and Capacity Assessment" which examined the issues which would arise in the case of a major disruption to the RAP Wiri supply chain.

[66] In October 2012, the Government through the Ministry of Business, Innovation and Employment (MBIE) issued a discussion paper entitled "Review of New Zealand's oil security". It raised issues for discussion and invited submissions. Air NZ made a submission pointing out the limited storage capacity for jet fuel at Wiri and the airport. Z Energy made a submission in which it discussed alternative means of supply in the event of disruption. It concluded that alternative solutions such as trucks in storage and additional gantries at Refining NZ and/or Jet tanks at Mt Maunganui coupled with additional discharge points at the Airport would provide a level of insurance and be more cost effective than a RAP bypass.

[67] In October 2014, Mr Kelway gave a presentation to the NZ Transport Fuels Summit conference held in Auckland. The thrust of Mr Kelway's paper was to indicate Air NZ was comfortable with the level of storage at the time but he emphasised that there was a need for fuel suppliers to move fast when supply issues arose. At that time two new three million litre tanks, which doubled the airport storage capacity at the Airport to 12 million litres, had just been commissioned.[26]

[68] In his presentation Mr Kelway acknowledged the balance to be struck between the cost of further resourcing and the risk of disruption. The bullet points Mr Kelway made were as follows:

- The supply chain is a just in time production and delivery system delivering 3m litres per day of jet fuel
- Low stock levels, in general, by international standards
- Low capital intensity means international competitive pricing
- Air New Zealand understands that carries risk of disruption
- Cost of disruption less than standing cost of more storage
- Comfortable with the balance

[26] Air NZ's total consumption increased significantly over the 2015/2016 summer period. There was no further expansion of storage capacity before the outage in September 2017.

- We don't want too much capital invested
- But need to move fast when supply issues arise

[69] In February 2017, Hale & Twomey produced a report for WOSL which addressed the supply chain resilience at Auckland Airport.

[70] In May 2017, Refining NZ produced a report on Wiri storage capacity, and in July 2017, Hale & Twomey produced yet a further update on NZ Petroleum Supply Security for MBIE.

[71] In summary, both Z and Air NZ were aware of the limited storage at WOSL and the airport, and of the vulnerability of the reliance on the RAP. Neither considered that an additional pipeline could be justified. Z considered the possibility of putting in place alternative means of supply in the event of a major RAP outage. Air NZ acknowledged that to further increase capacity or security of the RAP would require capital investment, with an attendant increase in the price of fuel to it. Air NZ was, at least as at 2014, comfortable with the balance but was anxious to ensure there was a quick response in the event of a disruption.

The practice of allocation

[72] In addition to the known risks to the RAP supply pipeline, the fuel companies and Air NZ were also familiar with the practice of allocation. There have been several past instances of disruption when the airlines, including Air NZ, have accepted the imposition of allocations on a proportionate pro rata basis. Christchurch Airport went to 70 per cent allocations with effect from midnight, on 17 March 2011, following the earthquakes. The allocations were lifted 12 days later. At the time Air NZ advised Z they were able to manage their own requirements by tankering in fuel from Wellington and Auckland. Mr Kelway wrote to Z during the disruption. He asked if Z had an Excel spreadsheet they used to monitor Air NZ's usage. He then noted:

> One of the things we should put it on our list of things to setup properly is design a standard template for use maybe by everybody.
>
> When we have an issue we will all know what to do and how we are going on meeting the allocations.

[73] There was no suggestion in that correspondence that Air NZ took issue with the allocation system and the consequent temporary reduction in Air NZ's supply.

[74] Then, some months later, in July 2011, Christchurch Airport went to 30 per cent allocation because of a product quality issue. Z advised Air NZ on 5 July that allocations would continue until 13 July. Again, Air NZ did not take issue with the allocation and temporary reduction in supply.

[75] Next, in April 2014 there was a Jet A1 shortage in Auckland arising from unexpected complications that arose during a planned refinery shut-down for maintenance work. To cope with the reduced allocations Air NZ increased its domestic uplift at Christchurch and tankered in fuel from Australia. While at the time Mr Kelway made the point that measures should have been (and should be) taken to conserve stocks so airport and airline operations could proceed with resilience, Air NZ did not object to the imposition of allocations. Indeed, in an email of 9 April 2014, in response to a communication from Z that they were waiting to hear from Refining NZ as to whether they were on track to start up based on a 90 per cent confidence assurance, Mr Kelway argued for the imposition of allocations:

> … We are past p90 probabilities. The consequences of being wrong impose substantial disruption on airlines, P100 is only acceptable.
>
> The allocations need to proceed ASAP.
>
> It takes time to get organised and not doing ASAP gives the wrong signal to airline ops. …

[76] Mr Kelway later asked to be consulted over further measures needed to enable the services to be maintained because:

> The airlines bear the consequences of the decisions taken and the risk and the damage.

Mr Kelway made the point in his communication that as Air NZ was 60 per cent of Auckland lift it bore most of that risk and damage.

[77] Mr Kelway said in his evidence that while Air NZ had accepted allocations in the past, it had never accepted that Z had no responsibility for the cost of shortages to Air NZ. He said Air NZ was pursuing its claim in this case because the financial

impact of the 2017 outage was considerably more significant than the previous examples.

[78] Allocations are also used worldwide when there is a shortage of fuel to airports. The standard IATA aviation fuel supply model agreement (Version 4) provides for the supply of fuel. Clause 6.1.A provides:

> Seller shall ensure prompt refuelling of Buyer's scheduled Aircraft and take all reasonable measures not to delay Buyer's Aircraft's departure. If Buyer's scheduled Aircraft arrives ahead of its scheduled time of arrival, or late, or is operating a regular non-scheduled flight, Seller shall endeavour to promptly refuel the Buyer's Aircraft.

[79] But the force majeure clause in the same document provides for allocations:

> If there is such shortage of Fuel at any location specified in the Agreement that Seller is unable to meet its own requirements and those of its Affiliated Companies for sales to customers then under agreement at that given location, due to Force Majeure, Seller shall, in consultation with said customers, make a fair allocation of Fuel among these customers.

[80] Mr Kelway accepted that the IATA agreement was a standard form agreement but made the point that Air NZ had not signed off on such an agreement with Z.

Prior dealings

[81] The last relevant contextual matter is the prior contractual dealing between the relevant parties. In 2009, Air NZ agreed a mid-contract price review offer with Z's predecessor Shell. The Shell offer stated all sales were subject to the terms and conditions of the then standard Shell IATA agreement. Mr Kelway confirmed in evidence that he would be amenable to that proposal given it was based on the standard IATA agreement and did not indicate any objection to the terms proposed. But ultimately no signed agreement was concluded.

[82] In 2010, Air NZ reached agreement with Greenstone Ltd for the supply of fuel. The offer Greenstone Ltd made stated:

> … all Sales will be made subject to the terms & conditions of the standard IATA Fuel Supply Agreement.

[83] Mr Kelway accepted the offer on the basis that an:

> "Agreement subject to mutually accepted documentation, based off the IATA standard fuel supply agreement" [would be completed].

No further document was in fact signed so the IATA agreement was not formally incorporated. Mr Kelway did not, however, suggest the terms were not acceptable.

[84] More recently, in 2013, Air NZ's contract with ZEL stipulated percentage and indicative annual volume, the type of fuel, weekly invoices and the supply point, but again made no reference to an express supply obligation.

[85] Mr Kelway accepted in his evidence he was prepared to negotiate with fuel suppliers the terms and conditions based off the IATA standard fuel supply agreement. It was clear from his evidence that his focus was on price, margin and the freight costs, and, to a lesser extent, the term (length) of the agreements. That is consistent with the terms in the present case being confined to those issues in the email exchanges and there being no further express terms provided.

Reasonable and equitable

[86] Against that background, with those principles in mind and by reference to the *BP Refinery* criteria I return to whether an unqualified supply obligation or reasonable endeavours obligation should be implied in this case. What would be the bargain that the parties, as reasonable businessmen, must have intended to make regarding Z's obligation to supply the Jet A1 fuel at the time they entered the contract for supply?[27]

[87] Mr Gedye submitted there was nothing inherently unreasonable or inequitable about placing a strict supply obligation upon Z. Z was aware of the vulnerabilities of its own supply chain. It had considered the pros and cons of taking steps to reduce or remove vulnerability and made a business decision to accept the risk of vulnerability. A reasonable person in Z's shoes would have understood it was accepting the risk of any supply disruption. Z's now subjective view of what was reasonable was irrelevant. By reference to *Westpac NZ v Mapp & Associates* Mr Gedye submitted that it was not unreasonable to strictly hold a party to their contractual commitment.[28]

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27 *Devonald v Rosser* [1906] 2 KB 728 at 744; and *Hughes v Grenwich London Borough Council* [1994] 1 AC 170 at 177.

28 *Westpac New Zealand v Mapp & Associates* [2011] NZSC 89, [2011] 3 NZLR 751.

[88] Mr Gedye also submitted that analysing the case for an implied term by reference to allocation of risk did not add anything. It was not a separate or additional test recognised in the cases. It was simply a component of the fairness/equitableness element test referred to in the *BP Refinery* case and could be relevant to obviousness.[29] On that point, Air NZ had little or no control over the risk of the pipeline outage as compared to Z as the supplier.

[89] Ms Heine submitted that Air NZ's proposed term could not satisfy the *BP Refinery* criteria. A reasonable person standing in the position of the parties would not have understood the agreements to include such a term. It could not be said the imposition of an unqualified supply obligation on Z was reasonable and equitable. There was no suggestion that in terms of the contractual and contextual background that Z had assumed the risk of a break in the supply chain. Indeed, Air NZ had, through Mr Kelway, expressly indicated it bore the risk of supply outages and it had also done so in practical terms by accepting allocations in the past without seeking legal remedy.

[90] Next, Ms Heine submitted the term proposed by Air NZ was inconsistent with industry practice as disclosed by IATA supply contracts.

[91] Both Air NZ and Z knew that the supply of fuel via the RAP and WOSL facility was vulnerable and that if there were issues with the RAP supply could be disrupted and allocations might be imposed. Although the risk of disruption to supply was well known by both parties that issue was not addressed in their email exchange.

[92] Neither suggested a second pipeline was a realistic option. That left two ways for the risk of a disruption of the type in this case to be addressed. One still required the expenditure of significant capital either to provide additional storage capacity or to build an additional gantry at Marsden Point and have a fleet of Jet A1 fuel enabled tankers on hand for the event of such an emergency. Such capital outlay (and ongoing cost in the case of the tankers) would have the inevitable result of increasing the price of fuel charged to Air NZ, and the other airlines. Air NZ acknowledged that. Such additional expenditure and increased cost of fuel was not favoured by either party. The

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[29] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC), 16 ARL 363.

alternative way to address the risk of disruption was to ensure a proper and effective response in the event of an outage or disruption to supply, including allocations.

[93] The implied term Air NZ argues for would place the entire risk of failure in the RAP with Z. With the known risks of disruption and the informed reluctance of Air NZ (and other airlines) to pay extra for the fuel to support the additional expenditure to ensure continuity of supply, it would be unreasonable to place the entire risk of failure on Z without any qualification. The term Z argues for, in the alternative, would ensure Z has an obligation to make reasonable endeavours to continue the supply in the event of such a disruption, but if it satisfies that obligation, then both Air NZ and Z would share the losses and additional costs of disruption to supply.

[94] In terms of the *BP Refinery* criteria an obligation of reasonable endeavours is more reasonable and equitable than the absolute supply obligation Air NZ argues for. It is consistent with market practice and reflected how supply was managed in the circumstances of fuel disruption both overseas and in New Zealand. For example, the allocation of fuel in terms of supply disruption was standard industry practice which had been implemented (and accepted by Air NZ) in the past. While there was no evidence of custom the evidence of the standard IATA supply contracts is relevant to show the market practice including about allocations.[30]

[95] It is not a question of being fair but looking at what reasonable parties in the circumstances would have expected. In that context the fact both parties were aware that such disruptions had occurred in the past is relevant, as is the fact the parties had considered the possibility of further capital expenditure to avoid such disruptions but did not support it.

[96] There is no principled reason why Z should solely bear the additional costs associated with addressing the effect of the disruption. To the extent it needs to, Air NZ can deal directly with potential liability to its customers arising from cancelled flights in its terms of carriage. Air NZ can also take steps to mitigate the effect of a disruption in supply. While that comes at an additional cost, Z also incurred additional costs in taking steps to maintain supply during the disruption and to return the supply

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30 *Crema v Cenkos Securities plc* [2010] EWCA Civ 1444 at [45], [2011] 1 WLR 2066.

to 100 per cent. Z estimates its loss at approximately $5 million arising from loss of volume, loss of processing margin and additional resourcing costs.

[97] In my judgment the term proposed by Air NZ, of an absolute and unqualified obligation on Z to supply is not, in context and given the background, a reasonable or equitable condition. On the other hand, a reasonable endeavours clause requires Z to take steps to address the disruption and maintain the supply. It satisfies the test of reasonableness.

Necessary for business efficacy

[98] As noted, the agreements are not effective without some term that deals with Z's obligation to supply, particularly given the known risk to the supply. On this analysis, a condition clarifying Z's obligation to supply is necessary to give the agreement between the parties business efficacy.

[99] Mr Gedye submitted that Air NZ's proposed term satisfied the business efficacy test. By contrast, Z's proposed reasonable endeavours clause was not necessary to give business efficacy or commercial coherence to the contract. Nor was it obvious. He submitted it was effectively a back-door attempt to introduce a force majeure clause into the contract. It was wrong to seek to reallocate risk on that basis when the parties had not contracted for it.

[100] Ms Heine rejected Air NZ's submission that a reasonable endeavours obligation was an implied force majeure term in disguise. She argued that misunderstood the comparative nature of the reasonable endeavours supply obligation and the force majeure provision. A force majeure term relieved a party of its express contractual obligations. Z's proposed implied term related to the nature of the implied obligation to supply. That also answers Air NZ's submission there were no restrictions on the strict obligations to perform contractual promises short of the doctrine of frustration.

[101] Ms Heine submitted that if a supply obligation was necessary to give the agreements business efficacy then the obligation to use reasonable endeavours was all that was necessary to achieve that business efficacy. It is a well-established principle

that if the term is to be implied it should be the least onerous duty consistent with the object that is to be implied. The purpose of an implied term is to make a contract effective, not to improve the position of one of the parties.

[102] It is necessary for there to be a clause dealing with the extent of Z's obligation to supply. As discussed, the supply of Jet A1 fuel was at the heart of the contract. There was a known risk of interruption to supply. The absolute supply obligation argued for by Air NZ does not fit the business efficacy test in all the circumstances of this case.

[103] In *The Moorcock* there was a known risk of damage to the plaintiff's vessel. The Court accepted that the issue of who should bear the risk had to be addressed based on the presumed intention of the parties to give efficacy to the transaction. Where the contract said nothing about the burden of the unseen peril, the law would raise such inferences as are reasonable from the nature of the transaction. A reasonable endeavours obligation does that in the present case.

[104] Contrary to Air NZ's submission, Z did not control the supply chain. Refining NZ did. The fuel companies only had 40 per cent of the shares in that company. Despite that, Z was in a better position than Air NZ to address any disruption to supply. Z should have an obligation to take all reasonable endeavours to supply Air NZ.

[105] A reasonable endeavours obligation on Z answers Mr Gedye's argument that Z might simply decline to supply fuel to Air NZ because it did not wish to do so any more or because it could supply it to an alternative purchaser at a better price. With an obligation to use reasonable endeavours to supply Air NZ, Z could not act in that way. To do so would be in breach of the implied term. Z would be required to take all reasonable steps to procure fuel to supply its anticipated percentage share of fuel required by Air NZ.

[106] Unlike Air NZ's proposed term, the reasonable endeavours term avoids imposing on one party all the risks of the failure of the RAP, and places obligations on both parties. Air NZ must accept the fuel it has requested Z to supply, and Z must take reasonable endeavours to supply the fuel requested by Air NZ. In the event of

disruptions to the fuel source Z must respond and still make reasonable endeavours to satisfy its obligation of supply. Z's reasonable endeavours clause satisfies the test of business efficacy.

Obviousness

[107] In the *BP Refinery* case the Privy Council also suggested an implied term would also be so obvious as to go without saying.

[108] Mr Gedye submitted that an informed bystander would regard the requirement for continuous supply of an essential service to a completely dependent daily consumer as obvious. It was like the supply of electricity to a hospital or to a hotel or fuel or electricity to a transport operator. The term Air NZ argued for was both obvious and necessary in terms of business efficacy. The implied term argued for was not in conflict with any express terms of the agreement, but rather was consistent with them.

[109] The "so obvious it goes without saying" test can be problematic. By the time the matter comes to Court the parties will have divergent views on whether the term sought to be implied is so obvious it goes without saying. Lord Hoffman addressed this issue in *Belize* by effectively redefining it as what a reasonable person would understand was necessary:[31]

> [T]he requirement that the implied term must 'go without saying' is no more than another way of saying that, although the instrument does not expressly say so, *that is what a reasonable person would understand it to mean*. Any attempt to make more of this requirement runs the risk of diverting attention from the objectivity which informs the whole process of construction into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander in *Shirlaw v Southern Foundries* (*1926*) *Ltd* [1939] 2 All ER 113 at 124, [1939] 2 KB 206 at 227 is celebrated throughout the common law world. Like the phrase 'necessary to give business efficacy', it vividly emphasises the need for the court to be satisfied that the proposed implication spells out what the contact would reasonably be understood to mean. *But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board's opinion, is irrelevant.*

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[31] *Attorney-General of Belize v Belize Telecom Ltd*, *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 1 WLR 1988 at [25] (emphasis added).

[110] By way of example of that last point, and considering the position of the officious bystander for a moment, the issue turns on the question she might put to Air NZ and Z. If at the outset of the contract she said, "Should the contract provide for the situation of a disruption to supply?" reasonable parties would both answer "Yes". But if the question posed was "In the event of a disruption to supply who should bear the cost?" the responses would be quite different.

[111] A reasonable endeavours clause puts an obligation on Z to take all reasonable endeavours to supply, which is obvious, but acknowledges the context known to the parties that there may be disruption in supply. In such a case Z must take reasonable steps to deal with the disruption and to restore supply.

[112] The alternative approach is to consider what both parties as reasonable people would have agreed at the time the contract was made if it had been suggested to them.[32] In that context the background to the relationship and knowledge of the parties is important. Given the context and background discussed above a reasonable person would have understood Z could not guarantee to supply Jet A1 without disruption and its obligation to do so would have to be limited in some way.

Clear expression

[113] Mr Gedye submitted Air NZ's proposed term did not give rise to any ambiguity or uncertainty. He submitted an implied term that Z would supply the full volume of fuel required by Air NZ each day, on a continuous basis and in accordance with a daily schedule was sufficiently certain.

[114] There are, however, practical difficulties with Air NZ's proposed term. The daily schedules played no effective role in ensuring that the required volumes of Jet A1 fuel were procured for supply. Decisions relating to supply were made many

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[32] *The Moorcock* (1889) 14 PD 64, 68; *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206; [1939] 2 All ER 113 (CA) at 227; *Partabmull Rameshwar v KC Sethia (1944) Ltd* [1950] 1 All ER 51 (CA) at 59 (affirmed [1951] 2 All ER 352 (HL)); *Spring v National Amalgamated Stevedores and Dockers Society* [1956] 1 WLR 585 at 599; *Compagnie Algerienne de Meunerie v Katana Societa di Navigatione Marittima SPA* [1960] 2 QB 115 at 123; *Jamil Line for Trading and Shipping Ltd v Atlanta Handelsgesellschaft Harder & Co* [1982] 1 Lloyd's Rep 481 at 483 cf *Greene Wood & McClean LLP v Templeton Insurance Ltd* [2009] EWCA Civ 65, [2009] 1 WLR 2013 at [15].

months in advance based on the forecasts and the decisions on the day were ultimately made by the pilots, although based on daily schedules.

[115] The basis of the contract must be the forecasts and Air NZ's uplift, both of which were known.

[116] Although Mr Gedye criticised the reasonable endeavours clause as uncertain, such a clause is capable of clear expression. The Court of Appeal have confirmed that a best endeavours or reasonable endeavours obligation is enforceable where the objective is known and the steps needing to be taken to obtain it can be identified and, if necessary, prescribed by the Court.[33]

[117] As noted in *Halsbury's Laws of England,* to avoid the uncertainty that might otherwise be fatal to a contract:[34]

> [Once] the test for implication is satisfied, the courts have frequently implied a provision as to reasonableness into contracts. In some cases, this has been done so as to cure an uncertainty which would otherwise be fatal to the very existence of the contract, for instance by implying a term as to a reasonable price, valuation or sum. *But there are many other cases where the courts have implied a provision as to reasonableness: for instance* as to the reasonable duration of a contract; that a right under a contract will be exercised within a reasonable time; *that a duty under a contract will be exercised with reasonable care and skill,* and will be performed so as not to defeat the overall purpose of the contract; that rent may be increased by giving reasonable notice.

No contradiction with express clause

[118] Neither proposed clause would contradict any express clause of the contract. Where, as here, the contractual terms are brief, it is easier to imply a term as the parties have left an obvious gap in their contractual arrangements which it is necessary to fill.[35]

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33 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [115].

34 *Halsbury's Laws of England* (2012, online ed) vol 22 Implied Terms at 371.

35 *LJ Smits Ltd v Auto-Tec International* (1992) 5 TCLR 21 at 27.

Conclusion – implied term

[119] Accepting that the exchange of emails and parties' past practice leads to contract for the supply of Jet A1 fuel, it is necessary to imply a term relating to Z's obligations to supply Air NZ's requirements. The implied term spells out Z's obligation to supply which is fundamental to the contract. The term proposed by Z is the term that should be implied. In the circumstances of this case and given the context it also satisfies the *BP Refinery* criteria. By contrast, the term proposed by Air NZ does not satisfy the tests of reasonableness, business efficacy or the need for certainty.

Pleading point

[120] That gives rise to a pleading point. In its reply Air NZ denied that, even if the term to be implied was Z's alternative term, Z had failed to comply with its obligations to use reasonable endeavours to supply. Ms Heine noted that Air NZ had not, however, pleaded as a further cause of action that Z's non-compliance was a breach of contract entitling it to damages. In the absence of such an express cause of action in an amended or alternative claim she submitted Air NZ would not be entitled to damages even if the Court found Z to be in breach of its reasonable endeavours obligation.

[121] In *Williamson v London North Western Railway* one of the reasons the Court gave for rejecting a reply pleading was that the plaintiff's reply to the defence sought to raise a fresh claim.[36] That was impermissible. High Court Rule 5.63 confirms that a reply must be limited to answering an affirmative defence or positive allegation and otherwise must comply with the rules governing statements of defence.

[122] There may be force in Ms Heine's pleading point but I prefer to deal with the issue on its merits.

Has Z satisfied the reasonable endeavours obligation?

[123] For the following reasons I accept that Z has satisfied the obligation on it to take reasonable endeavours to supply fuel to Air NZ during the disruption.

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36 *Williamson v London North Western Railway* (1879) 12 Ch D 787.

[124] The parties accept that the RAP outage was caused by events outside Z's control. The best information is that the RAP was damaged by a digger working illegally in the vicinity without Refinery NZ's knowledge or approval. Allocations had to be imposed. They were an appropriate response. On the evidence they were lifted as soon as it was practicable to do so. Apart from the imposition of allocations several other issues to assist with supply were considered and addressed by the Operating Committee and Z.

[125] The issues Air NZ raised in its reply to Z's statement of defence to support its case that Z's response was inadequate are:

- Z could have provided greater volumes of storage at Wiri and/or Auckland Airport
- Z could have provided for trucking and/or shipping facilities between Marsden Point and the Airport for immediate deployment
- Z could have declined to take airport storage tanks out of commission for maintenance purposes without arranging equivalent alternative supply.

[126] The evidence to support those allegations was provided by Mr Kelway. Mr Kelway's initial evidence on the point was brief and general. For example, he said that he did not see any evidence of existing contingency plans. He also says that the fuel companies did not take "urgent steps" to enable trucking of fuel from Marsden Point to the Airport. The modifications needed at the Refinery to enable trucks to load jet fuel from the refinery tanks were not carried out until 22 September 2017. That was far too late to make any significant difference.

[127] From Mr Kelway's observation he considered the modifications needed to transport jet fuel were relatively inexpensive and did not require major modifications at the Refinery. He considered they could readily have been in place as part of contingency planning. Further, it seemed to him that most of the trucking assets used by the oil companies were focused on making sure service stations were kept well stocked. While shipping options were explored, that was only at a relatively late stage and the RAP had re-opened before any use or progress was made with shipping.

[128] Mr Dyer gave evidence for Z. Mr Dyer explained that, instead of attempting to have specific contingency planning for each of the numerous contingencies that could affect supply, the fuel companies, including Z, had established company and industry structures ready to respond. They could then respond in a tailored way to whatever issue might arise. Those structures were engaged in relation to the RAP outage. That enabled a co-ordinated response within a relatively short period of time.

[129] Mr Dyer identified the established industry structures including the Supply Manager forum mandated by the Coastal Oil Logistics Ltd joint venture agreement and the JUHI Operating Committee, together with other long-established processes, including the allocation process, and other tools, including the Jet model, maintained by the Slate group, (the operational arm of Coastal Oil Logistics Ltd) which showed how much Jet A1 fuel was in various locations in the supply chain. He also gave evidence of Z's crisis management plan. When it became clear the outage was significant a formal crisis response team was immediately set up within Z. Twice daily telephone conferences were held to consider and develop the response as the events developed. Z had 30 to 40 staff working on the response during the RAP outage, many full-time.

[130] Mr Dyer said for example, on Friday, 15 September, the Slate Group produced a jet model showing stock levels at various points in the supply chain. On the morning of Saturday, 16 September, Refining NZ advised the crack had been discovered in the pipeline creating a likely outage for a period of 10 to 14 days. Decisions were then made by Z to update its crisis response to adopt a formal, fully resourced structure and the JUHI Operating Committee immediately implemented the 30 per cent allocation. Civil Defence was also advised. Supply managers then met, and four industry work streams were agreed and established to:

- move product throughout the country;
- explore possible options for Jet A1 supply, particularly into Auckland;
- ensure the integrity of communications both internal and external;

- supply managers to co-ordinate all activities, including the four work streams.

[131] In his reply evidence Mr Kelway took issue with Z's response and criticised the generic approach which applied to all types of crises. He said that it did not deal with the particular features of the RAP outage.

[132] There is a philosophical difference between the approach advocated by Mr Kelway and the approach taken by Z and the other fuel companies. But the issue is whether Z's response in this case satisfied its obligations to take reasonable endeavours to supply Air NZ's fuel requirements.

[133] I return to the issues raised by Air NZ in its pleading. The suggestion that additional storage should have been provided is unrealistic. It is apparent from the background that it was not for Z or the fuel companies alone to make such capital investment decisions to provide for further storage at Wiri or at Auckland Airport. While Air NZ did approach Z and the other fuel companies about its increased demand in 2017 and requested the JUHI Operating Committee review whether additional storage should be installed, Mr Kelway accepted that was a request to begin a discussion. Further reports about the necessity for additional storage were inconclusive.

[134] Mr Kelway also accepted that new storage tanks could take two to three years to construct. Importantly, providing such further capacity would involve a significant capital cost which inevitably would lead to an increase in fuel price, an outcome Mr Kelway had forcefully argued against in the past.

[135] Mr Kelway's main criticism of Z's response was directed at Z's failure to use tankers to transport the Jet A1 fuel from Marsden Point.

[136] Mr Kelway considered that the fuel companies including Z could have trucked Jet A1 fuel to supply Auckland Airport if they had previously established a Jet A1 gantry at the Refinery. However, that possibility had been considered and rejected. Apart from the gantry, in order to be effective, it would require specific trucks set up

to transport Jet A1 fuel to be kept on standby. It would also have required the Refinery's cooperation and agreement.

[137] During the crisis the fuel supply managers met twice daily. With respect to the Jet A1 workstream several options were considered including a truck loading gantry at Refining NZ and a truck loading gantry at Wynyard Wharf. This was in addition to a range of other options including increasing capacity at Christchurch, the conversion of tanks at Mt Maunganui and the use of Defence Force resources as well as trucking options.

[138] The possibility of a gantry at the Refinery in response to the outage was first considered as early as 16 September and construction was largely completed by 18 September. Approval then had to be obtained for the use. Work safety issues had to be addressed. A trial run took place on 21 September and the gantry was operational from 22 September. It had a capacity of approximately 400 kl per day. Mr Dyer said the temporary gantry could not have been constructed on a permanent basis as it required dispensation from WorkSafe NZ to operate. It has since been removed.

[139] The effectiveness of the temporary gantry was limited by the lack of trucks able to transport Jet A1 fuel. Mr Dyer pointed out the reasons for that. Because of the nature of Jet A1 fuel, the industry was required to operate a Jet A1 dedicated truck fleet. All components of the fleet had to have low point drains and selective couplings to avoid the risk of petrol and diesel being loaded. Ground fuel fleets could not easily and efficiently be converted for Jet A1 use. In the North Island Z had just two dedicated Jet A1 tankers. Relocating those to Auckland Airport would have been meant diverting deliveries from other sites including from emergency services.

[140] Next, Mr Dyer explained that at the time the temporary gantry was put in place the Refinery advised that the repair work to the RAP pipeline was about to begin. On that basis allocations were able to be increased to 50 per cent by the JUHI Operating Committee. By 25 September when the shipment to Wynyard Wharf was received the RAP had been repaired and the Jet A1 in the RAP at the time of the outage had begun to be received at Wiri. As of midnight, 26 September, the Operating Committee agreed allocations were to be lifted to 80 per cent.

[141] Mr Kelway relied on earlier reports which had considered the possibility of trucking fuel from the Refinery to support Air NZ's case that a permanent gantry should have been in place.

[142] The 2012 MBIE discussion paper did refer to the possibility of trucking fuel from Marsden Point. The paper also noted that any problem in the pipeline would take a week to 10 days to fix. Z had also referred to the possibility of trucking in its submissions to the report writers at the time. Mr Dyer said that although it was considered, the option was not pursued as it was found not to be viable. That evidence was not challenged.

[143] In the 2011 Hale & Twomey report the option of trucking was considered to have less merit than other alternatives. While the 2012 Hale & Twomey report also suggested that Jet A1 could be trucked into Auckland to meet short-term disruptions, the report confirmed it was not a low cost option and would require maintenance of a dedicated trucking fleet on a contingency basis.

[144] The Hale & Twomey study on contingency options in 2017 estimated the cost of the gantry and trucking contingency at $35 million, which included the cost of having trucks on standby ready to use the gantry. In their 2017 report on petroleum supply security the authors stated that:

> Having trucks (and drivers) available for immediate use is still not justified against the alternative of obtaining them rapidly should there be an event.

[145] I am satisfied that Z was not required to have arranged a permanent gantry (and associated truck fleet) in order to meet its obligation to take reasonable endeavours to meet Air NZ's supply requirements.

[146] Finally, Mr Kelway criticised the fact that one of the tanks at Auckland Airport had been taken out of circulation before the disruption. One of the two million litre airport tanks was temporarily out of commission at the time.

[147] Mr Dyer confirmed that at the time of the outage one of the smaller 1,850 kl tanks at the JUHI was temporarily out of commission for bund maintenance. Routine testing had identified issues with the bund around the facility. Temporary bunds were

put in place around each tank so that only one tank would have to be repaired at any one time. The tank in issue was out of commission for maintenance on 21 July 2017 and was back in use by 16 October 2017. Routine maintenance was also carried out when it was out of commission. Mr Dyer made the point that storage tanks require significant maintenance every 10 years. The work can only be done when the tanks are empty. I do not consider there to be anything in this particular point.

[148] On the evidence, I find that Z did all that was required to meet its reasonable endeavours obligation to supply Air NZ with its fuel requirements following the disruption.

Frustration

[149] Given that conclusion, it is strictly unnecessary to consider Z's alternative submission that any contractual obligation it had to supply the full volume of fuel was frustrated and became incapable of being performed because of the damage to the RAP and the lack of fuel at Wiri storage.

[150] The submission can be dealt with briefly. The most recent authoritative discussion of the law of frustration is the Supreme Court decision of *Planet Kids v Auckland Council*.[37]

[151] Planet Kids operated a childcare business on land leased from the Auckland Council. The Council proposed to acquire the lease back under the provisions of the Public Works Act. Planet Kids objected. The parties eventually settled Planet Kids' claim. The Council agreed to compensate Planet Kids for its loss of goodwill. Before the agreed date for settlement the building from which Planet Kids operated was burnt down. The lease reverted to the Council under the terms of the lease. The Council argued the settlement had been frustrated with the result it no longer had any obligation to pay the agreed compensation as there was no lease to surrender.

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[37] *Planet Kids v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149.

[152] The High Court[38] and Court of Appeal[39] agreed with the Council's argument the contract was frustrated. The Supreme Court disagreed.[40] It allowed the appeal. The Could held the contract was not frustrated. The parties' main purpose had been to settle the dispute. That was not affected by the destruction of the building. The inability of Planet Kids to provide a formal surrender did not render the Council's obligation radically different. The Council still obtained the benefit it sought under the contract. The Supreme Court confirmed that, for an agreement to be frustrated, the main purpose or common object of the contract had to be rendered unattainable.[41]

[153] Mr Smith, second counsel for the defendant, argued that if Z had an obligation of continuous supply its inability to meet that obligation was caused by third party damage to assets which it did not own but which were an integral part of the supply chain. The fact the risk of damage to the RAP was foreseeable did not prevent the operation of the doctrine of frustration.[42] The effect of the damage to the RAP was a frustrating event that brought the existing arrangements for continuous supply to an end.

[154] Mr Smith further submitted that it was unnecessary for the contracts to continue for Z to continue to supply Air NZ with fuel, as it had continued to supply fuel, both during the outage and afterwards on terms reflecting industry practice.

[155] In my judgment the position is clear. The contracts would not have been frustrated had an obligation of continuous supply been implied. As Mr Gedye submitted, generally frustration is an all or nothing concept. Its effect is to bring the contract to an end and to discharge the parties from further performance.

[156] The provisions of sub-part 4 of the Contract and Commercial Law Act 2017 do not provide for partial frustration. Section 68 repeats the previous provisions of s 4(4) of the Frustrated Contracts Act 1944. A contract will be frustrated where its future performance is frustrated.

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38 *Planet Kids v Auckland Council* HC Auckland CIV-2011-404-1741, 16 December 2011.
39 *Planet Kids v Auckland Council* [2012] NZCA 562, [2013] 1 NZLR 485.
40 *Planet Kids v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149.
41 At [9] and [13].
42 *Planet Kids v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [158]

[157] While in *Planet Kids* the Supreme Court acknowledged partial impossibility can still lead to frustration, that will only be where the main purpose of the contract is defeated.[43] That has not occurred in the present case. Partial performance and the remaining ability to perform further parts of a contract are relevant to whether the contract can be said to be frustrated. While full supply was not possible, reduced supply was and full supply was resumed after a short period.

[158] Limited supply continued during the outage and after the damage was repaired full supply was resumed. For a limited period (15 days) Z was unable to supply as much fuel as Air NZ required but it cannot be said the main purpose and common intention of the contracts, being for Z to supply Air NZ with Jet A1 fuel, was radically altered, such as to make it unattainable. The contracts continued after 30 September 2017 in exactly the way they had prior to 15 September 2017.

[159] Z's alternative argument that the contracts were frustrated by the damage to the RAP must fail.

Result/orders

[160] The supply contracts are to have implied into them a term that Z is to take all reasonable endeavours to supply the fuel required by Air NZ.

[161] The plaintiff's claim for an inquiry into damages is dismissed.

[162] Judgment is entered for the Z defendants against the plaintiff.

Costs

[163] Costs to scale would appear appropriate. I allow for second counsel. If the parties are unable to agree they are to exchange memoranda: Z to file by 21 June 2019; Air NZ to reply by 5 July 2019.

Venning J

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[43] *Planet Kids v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [77]; and GH Treitel *Frustration and Force Majeure* (2nd ed, Sweet & Maxwell, London, 2004) at [5–002].