

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA145/2017
[2017] NZCA 444**

BETWEEN

WARD EQUIPMENT LIMITED
First Appellant

TPL LIMITED
Second Appellant

AND

MARKUS JOHANNES PRESTON
First Respondent

PRESTON HIRE (NZ) LIMITED
Second Respondent

PRESTON HIRE GROUP NZ LIMITED
Third Respondent

MEVON PTY LIMITED (ACN 002 601
363)
Fourth Respondent

Hearing: 30 May 2017

Court: Kós P, French and Winkelmann JJ

Counsel: DJG Cox for Appellants
J D McBride and P T Hall for Respondents

Judgment: 10 October 2017 at 2.30 pm

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The declaration made in the High Court is set aside.**
- C Declaration made that the licence agreement was not terminable at will and on reasonable notice.**
- D The respondents must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.**

E Costs in the High Court are to be addressed in that Court.

REASONS

French and Winkelmann JJ
Kós P

[1]
[84]

FRENCH AND WINKELMANN JJ

(Given by Winkelmann J)

[1] The first appellant, Ward Equipment Ltd, and the fourth respondent, Mevon Pty Ltd, are parties to a licence agreement by which Mevon licensed Ward to import, hire and sell a range of patented construction products, and also granted the exclusive right to the use of the Preston trade mark in New Zealand.¹ The second appellant, TPL Ltd, claims to be a sub-licensee under that agreement. The issue on this appeal is whether Mevon was entitled to terminate the licence agreement on reasonable notice and, if so, whether three months' notice was enough.

[2] In the High Court Fogarty J found that the licence agreement was subject to an implied term that it was terminable on reasonable notice in the absence of breach of the contract, and that three months was reasonable notice.² Ward and TPL now appeal that finding. They argue that the implication of such a term is inconsistent with the express agreement reached between the parties. Alternatively, if a term requiring reasonable notice is to be implied, three months is not reasonable notice.

[3] For reasons we set out below we conclude that Fogarty J erred in construing the licence agreement as terminable on reasonable notice. We do not therefore go on to consider Ward and TPL's second submission that if the licence agreement were terminable on reasonable notice, three months' notice was not enough.

¹ Mevon is part of the Preston group of companies, owned by the first respondent Mr Markus Preston.

² *Ward Equipment Ltd v Preston* [2017] NZHC 240 [HC judgment] at [41] and [51].

Factual background

[4] In 1998 Mr Timothy McMaster, as director of an equipment-hire company called The Trestle Plank & Ladder Hire Co Ltd (Trestle Hire), negotiated a licence agreement with Patent Marketing Corp Pty Ltd, a company associated with Mr John Preston — the inventor of a number of innovative items of construction equipment and machinery.

The terms of the licence agreement

[5] The licence agreement granted rights to the use of intellectual property which included copyrights, patents and trade marks, and all know-how which might be of commercial use in relation to the products. The licensed products included multiple-use platforms, decks, rubbish chutes and delivery shuttles designed by Mr John Preston. It seems the most desirable item to which rights were acquired was the “SuperDeck”. This is a cantilevered, retractable, crane-loading platform system. It is designed to simplify the handling of materials on multi-storey and high-rise construction sites. A tower crane can transport large construction objects between building floors on a construction site, with SuperDecks on each floor being “rolled in and out” to take materials.

[6] Under the licence agreement Trestle Hire obtained:

- (a) an exclusive licence to import, hire, sell, modify, adapt and use the products in New Zealand;
- (b) Patent Marketing’s undertaking that it would not use the name “Preston”, the Preston corporate colours and the Preston trade mark in New Zealand; and
- (c) a right to grant sub-licences to any third party to enable that third party to sell and hire the products in New Zealand.

[7] As consideration for the licence, Trestle Hire agreed to pay a lump sum amount of AUD 208,171, which included a one-off licence fee of AUD 25,000 and

the purchase price for equipment. It also agreed to pay a seven-per-cent royalty on money received by it for the sale, hire, lease or use of the products, but that there would be a minimum royalty fee of not less than AUD 10,000 for the first year, AUD 15,000 for the second year, and then AUD 15,000 for each year thereafter but with ongoing adjustments reflecting the Consumer Price Index for each preceding year.

[8] In cl 8.5 of the licence agreement, Trestle Hire also undertook that it would “exploit and/or manufacture the Products in the Territory in an honest, diligent, trustworthy and professional business like manner”.

[9] The licence agreement contained express provision for termination. We set out these provisions below at [59]. In short, the licensee and licensor were able to terminate for breach. In addition, the licensee could also terminate at the expiration or lapse of the patents.

Dealings between the parties 1998–2012

[10] The arrangements functioned over the years, but changes were agreed. In 2003 Trestle Hire obtained Patent Marketing’s agreement to expunge the minimum royalty clause from the licence agreement. There were also changes to the identity of both the licensee and the licensor.

[11] The first respondent, Mr Markus Preston, is Mr John Preston’s son. In 2004 Mevon, a company associated with Mr Markus Preston, acquired the Preston trade marks and the patents for the SuperDeck product. We were not given the precise date, but at some point in time between 2004 and 2012 Patent Marketing assigned its licence agreement with Trestle Hire to Mevon.

[12] By 2012 Trestle Hire was experiencing financial difficulties and it was placed in voluntary liquidation by Mr McMaster on 13 August 2012. On 1 September 2012 Ward acquired all the assets of Trestle Hire from the liquidators as a going concern, with plans to operate Trestle Hire’s business through a subsidiary, TPL (trading under the name TPL Access Hire).

[13] Mr McMaster and the director of Ward, Mr Stephen Ward, negotiated with Mr Markus Preston for a transfer of the licence agreement to Ward. Those negotiations concluded in May 2013, and the terms of the agreement were recorded in a letter signed by Mr Ward for Ward and Mr Markus Preston for Mevon. The operative clauses of the 2013 agreement are as follows:

5. The purpose of this letter, when signed and acknowledged by both parties, is to place on record, in consideration of Ward Equipment Ltd making payment to the Licensor for all outstanding royalties up to the date of liquidation and amounting to \$NZ 1,943.42, that all continuing rights, obligations and liabilities of the Licensee under the said agreement (except for clause 6.2(b) shall be granted to and accepted by Ward Equipment Ltd. Payment shall be made to a NZ bank account to facilitate payment and repatriation of royalties.
6. It is acknowledged by both MEVON PTY Ltd and Ward Equipment Ltd that the terms of the said Agreement were amended with an exchange of letters dated 9 April 2002, 30 April 2002, 30 May 2002 and 12 June 2002 and that, by virtue of this exchange, that clause 6.2(b) has been expunged from the said Agreement by the original parties.
7. In consequence of the above, the said Agreement shall continue in force for the duration of the contract with Ward Equipment Ltd becoming the Licensee in place of The Trestle Plank and Ladder Hire Company Ltd.

[14] This agreement is, in our view, best regarded as a novation of the licence agreement whereby Ward assumed all of Trestle Hire's rights and obligations under the existing agreement with Mevon.

[15] Mr Markus Preston's evidence was that Mevon consented to what he characterised as an assignment of the licence agreement on the basis that Mr Ward would have capital and enthusiasm for making the SuperDeck product the success in New Zealand that it was in Australia. He understood that Mr McMaster would work for the new company that had been established by Mr Ward and he saw these developments as positive. In an email he sent on 28 November 2012, he said:

In essence, our discussion and relationship going forward is based around good faith and as agreed we wish to assist [Ward] in improving the Superdeck product in NZ.

Events leading up to termination

[16] In March 2015 Mr Markus Preston told a meeting attended by both Mr Ward and Mr McMaster that Mevon intended to enter the New Zealand market. But Ward was told that the New Zealand business would not include the licensed products and that Mevon would respect Ward's rights as licence holders of the SuperDecks.

[17] At some point Mevon became disappointed with Ward's performance. In July 2015 the general manager of the Preston group of companies wrote to Ward suggesting the parties negotiate sale to the Preston group of the "rights and Preston Superdeck™ product in NZ". Ward did not take up that invitation, but rather sought a transfer of the licence agreement to a new company to be run by Mr McMaster's son Mr Nick McMaster and TPL's scaffolding manager Mr Darcy Harkness. Mevon was not keen on that proposal. In an email sent to Ward in response, Mr Markus Preston said:

With only a handful of SuperDeck's in the fleet, with many of varying degrees of condition, some unusable, how do Nick and Darcy (or Ward) plan to service the NZ market, maintain the SuperDeck name, and service the growing demand?

If we were to even consider any transfer, a detailed plan from Nick or other would have expected at the least in order to assure us of its financial security.

[18] Although the letter suggested that Mevon had underlying concerns about Ward's performance under the licence agreement, Mevon did not raise those concerns in correspondence with Ward. The parties continued to cooperate and Ward continued to provide information to Mevon, including how they priced hire of the products.

[19] Ward was aware that Mevon was trading in New Zealand. But it only learned that Mevon had entered the New Zealand market with the products, contrary to its assurance that it would not, in June 2016. At that time Ward was advised that a quotation it had tendered for the hire of products had been unsuccessful and that the relevant contract had been award to Preston Hire (NZ) Ltd. It was also around that time that Ward discovered that Mevon had registered Preston trade marks in New Zealand. Ward regarded both actions on Mevon's part as being in breach of the licence agreement.

[20] Ward threatened Mevon and Preston Hire with injunction proceedings. In August 2016 solicitors for Mevon and Preston Hire responded alleging that Ward was itself in breach of its obligations under the licence agreement in a number of respects. In August, Ward commenced injunction proceedings seeking to restrain Mevon from further breach of the licence agreement.

[21] On 9 September 2016 Mevon, through its solicitors (also the solicitors for Preston Hire), gave Ward notice terminating the licence agreement on two bases. First, Mevon claimed that Ward was in breach of its obligation under the licence agreement to exploit the products in a diligent and professional manner in New Zealand. Alternatively, it said that the licence agreement was of no fixed duration and Mevon was therefore entitled to terminate the agreement on reasonable notice. Mevon gave Ward three months' notice of termination. It said that the Preston group would compensate Ward for its loss of margin on lost contracts for the previous six months and would cease trading during the three-month notice period.

[22] That offer was rejected but an interim accommodation reached which allowed the case to proceed to a substantive hearing. Mevon pleaded various counterclaims to Ward's claim of breach of contract, including the allegation that the licence agreement was terminable on reasonable notice. It sought a declaration that the agreement expired on 8 December 2016, subject to limited run-off obligations. The parties agreed that issue — whether the agreement was terminable on three months' notice without cause — should be severed from the other issues in the proceeding and be addressed first.

High Court judgment

[23] Fogarty J formulated the first issue for determination as whether there should be an implied term that the licence agreement could be terminated by either party on giving reasonable notice.³ He made no mention of the classic statement of principle governing the implication in contractual terms contained in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.⁴ Rather, he referred to an extensive number of cases which he said showed “the Courts across the common law world are

³ HC judgment, above n 2, at [3].

⁴ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

inclined to infer that such contracts are terminable on reasonable notice in the absence of express provision”.⁵ He said that those authorities recognise that is “simply improbable, and commercial nonsense” to suggest that commercial parties intend to contract forever.⁶ He cited with approval the following passage from a decision of the Federal Court of Australia in *Eden Construction Pty Ltd v State of New South Wales (No 2)*:⁷

It lies upon a person who says that a contract is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. Contracts which involve more or less of trust or confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other’s conduct, more or less of personal relations between the parties will fall into the last mentioned category ...

[24] As to the nature of the contract in the case before him, he said that a contract licensing intellectual property “classically falls within a contract involving a degree of trust and confidence between the parties” and that fact supported the implication of a term that the contract could be terminated on reasonable notice.⁸ He said:⁹

The present circumstances is that Ward Equipment has the opportunity but also the responsibility to actively market Prestons’ product in New Zealand. It is in truth a form of partnership.

[25] Fogarty J rejected evidence of the negotiations leading up to formation of the agreement as irrelevant.¹⁰

[26] Reviewing the terms of the contract, he said the existence of a termination clause and a whole-of-contract clause in the licence agreement did not prevent the implication of a term that the contract could be terminated on reasonable notice.¹¹ He concluded that:¹²

⁵ HC judgment, above n 2, at [4].

⁶ At [33].

⁷ At [36] quoting from *Eden Construction Pty Ltd v State of New South Wales (No 2)* [2007] FCA 689, [2007] ATPR 42-163 at [27].

⁸ At [37].

⁹ At [37].

¹⁰ At [26].

¹¹ At [40].

¹² At [41].

... this particular contract was such that it could not have been in expectation of the parties at the time that it would last forever.

[27] The Judge rejected an argument for Ward that the relevant notice period should be 12 months, accepting Mevon's position that three months' notice was reasonable in the immediate commercial context that the notice was given.¹³

Arguments on appeal

[28] The appellants' principal argument is that the term implied by the Judge did not meet the five prerequisites for implication set out in *BP Refinery*.¹⁴ They say that the five requirements cannot be satisfied for the following reasons:

- (a) The parties agreed to delete such a clause during pre-contractual negotiations and to replace it with the more enduring language employed in the contract. Further, the agreement contains an entire agreement clause. It would therefore be inappropriate to add such a term.
- (b) The term would contradict the express wording of the contract, namely that the agreement should remain on foot at least for the duration of the Preston patents provided that the licensee is not in breach.
- (c) The term is not necessary to give business efficacy to the contract.
- (d) The variation to the licence agreement (agreed by the parties in May 2013) could have added a termination-by-notice clause but the parties chose not to.

[29] The appellants also argue that Fogarty J made a number of factual errors in how he characterised Ward's performance under the contract, and that he also proceeded upon the mistaken assumption that Ward had negotiated the waiver of the minimum royalty payment as an incentive to take over the obligations of Trestle Hire

¹³ At [50]–[51].

¹⁴ And applied in *Devonport Borough Council v Robins* [1979] 1 NZLR 1 (CA) at [23].

under the licence. We see these issues as inconsequential to the outcome of this appeal and therefore prefer to focus upon the principal issue: whether the licence agreement was terminable on reasonable notice.

[30] The respondents support Fogarty J's reasoning. They say that the authorities concerning implied "termination on reasonable notice" clauses form a discrete body of law. Those authorities confirm that the usual expectation for a commercial contract of no fixed duration, of a nature which depends on an ongoing good relationship between the parties, is that it will be terminable on reasonable notice. Modern authorities interpret commercial contracts in a way that enable termination on reasonable notice, unless this would conflict with an express term. This is because it is so improbable that parties to a commercial contract intend it (absent a breach) to last forever that the courts will require clear and unambiguous language to that effect before they will find the implication of a term allowing termination on reasonable notice excluded. In this case, there is nothing in the nature or content of the licence agreement to exclude the implication of a term that the agreement is terminable on reasonable notice.

First issue: Is the licence agreement terminable on reasonable notice?

Relevant principles

[31] Two principal legal issues arise. First, whether this preliminary issue the parties seek to have determined is best approached as a question of implication of a contractual term or rather as one of contractual interpretation. Second, what is the relevant legal test and, in particular, is there a preference or even a presumption when interpreting commercial contracts, which import obligations of good faith and trust, to construe them as being terminable on reasonable notice?

[32] Neither question is straightforward if an answer is sought in the authorities. To address the first, some cases in the area refer to the task of the court as one of interpreting the contract, while others refer to the issue as one involving the

implication of the term.¹⁵ This difficulty in classification is reflected in the treatment of the issue in the leading texts. *Chitty on Contracts* contains the following statement of principle:¹⁶

A contract which contains no express provision for its determination may yet be determined by reasonable notice on the part of one or both of the parties. The question whether a contract can be determined in this way is often said to depend upon the implication of a term, although it is probably better to regard it as depending upon the true construction of the agreement. Nevertheless, since *ex hypothesi*, the agreement contains no provisions expressly dealing with determination, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement.

[33] However, *Lewison on Interpretation* states as the guiding principle of law in this case that:¹⁷

[w]here a contract does not expressly provide for its expiry or determination, a term may be *implied* that the contract may be determined after a reasonable time, on giving reasonable notice.

[34] Yet, as Fogarty J observed, the cases do not approach the issue of implication, even if framed in those terms, as one involving the application of the five-stage test set out in *BP Refinery*.¹⁸ The authorities referred to us, and those we have reviewed, make no reference to the requirements of “necessity” or “business efficacy”. They are consistent, at least, in treating the issue in substance as one of contractual interpretation.

[35] The difficulty in finding doctrinal coherence may be due, perhaps in part, to the fact that cases of quite different character have been treated in subsequent decisions and texts as a class for the purposes of this legal issue — this is of course the approach that Mevon urges on us. But within this broad class, certain categories of case can be discerned. For example, in *Minister of Education v De Luxe Motor*

¹⁵ A good example of this variance in terminology is found in *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 (HL). Lord MacDermott approached the task as one of interpretation, Lord Uthwatt as one of implication.

¹⁶ EG McKendrick “Implied Terms” in HG Beale (ed) *Chitty on Contracts: Volume 1 General Principles* (32nd ed, Sweet & Maxwell, London, 2015) 1095 at [14–032] (footnotes omitted).

¹⁷ Kim Lewison *The Interpretation of Contracts* (6th ed, Sweet & Maxwell, London, 2015) at [6.18] (emphasis added).

¹⁸ HC judgment, above n 2, at [22]–[24].

Services (1972) Ltd the Court was construing an unwritten contract.¹⁹ In other cases, the courts have been construing written agreements with no provision for termination, or with termination clauses which only bestow a power to terminate on one party.²⁰ It is this category to which the statements of general principle in *Chitty* and *Lewinson* seem to relate. In other cases, the courts have examined written agreements which contain detailed provisions for termination.²¹

[36] We take as our starting point in our review of the authorities the English case of *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd*.²² There, the House of Lords was concerned with a licence agreement for the use of a London theatre, which contained no provision for termination by the licensors but gave the licensees a power to terminate if they so desired. Lord MacDermott, with whose speech Viscount Simon and Lord Simonds concurred, said as follows:²³

My Lords, the first question in this appeal is whether the license granted by the appellants was, according to the contract creating it, revocable when the present dispute arose. The answer depends, in my view solely, on the true construction of the letters of June 10, 1942, as ascertained in conformity with the ordinary principles applicable to the interpretation of written instruments.

A power for the licensors to terminate on reasonable notice was read into the agreement.

[37] Lord MacDermott's speech was drawn upon by Buckley J in *Re Spenborough Urban District Council's Agreement*.²⁴ At issue was a written agreement which allowed only for termination by one party upon the breach of the other. The power to terminate was one-sided like that in *Winter Garden*. Buckley J said as follows:²⁵

Authority establishes that, where an agreement does not in terms confer on the parties or one of them a power to determine the agreement, whether such

¹⁹ *Minister of Education v De Luxe Motor Services (1972) Ltd* [1990] 1 NZLR 27 (CA).

²⁰ See for example *Martin-Baker Co Ltd v Canadian Flight Equipment Co Ltd* [1955] 2 QB 556 (QB); *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd*, above n 15; and *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387 (CA).

²¹ See for example *Re Berker Sportcraft Ltd's Agreements* (1947) 177 LT 420 (Ch); and *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All ER (Comm) 451.

²² *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd*, above n 15.

²³ At 203.

²⁴ *Re Spenborough Urban District Council's Agreement* [1968] 1 Ch 139 (Ch).

²⁵ At 146–147

a power should be inferred is a question of construction of the agreement to be determined in accordance with the ordinary principles applicable to such a question ... Since *ex hypothesi* such an agreement contains no provision expressly dealing with determination by the party who asserts that this should be inferred, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement

Again, the agreement was construed as being terminable on reasonable notice.

[38] Lord MacDermott's speech in *Winter Garden* was also referred to by McNair J in *Martin-Baker Co Ltd v Canadian Flight Equipment Ltd*, an authority relied on by Fogarty J in the present case. Unlike *Winter Garden* and *Re Spenborough*, the agreement under consideration in *Martin-Baker* contained no provision for termination by either party. McNair J held the agreement to be terminable unilaterally on reasonable notice. He said:²⁶

Lord MacDermott states the principle quite clearly, as it seems to me, that whether or not such a contract is determinable depends solely upon the true construction of the contractual documents as ascertained in conformity with the ordinary principles applicable to the interpretation of written contracts.

[39] In similar vein is the judgment of the English Court of Appeal in *Staffordshire Area Health Authority v South Staffordshire Waterworks Co.*²⁷ In *Staffordshire* the plaintiff hospital entered into a written agreement with the defendant water company in 1929 that the water company would "at all times hereafter" supply water to the hospital at a fixed cost, with neither provision for termination of the contract nor adjustment of the price. Goff LJ²⁸ drew from both *Winter Garden* and *Re Spenborough*. He applied ordinary principles of construction in finding that the agreement in question was terminable on reasonable notice. He regarded "the absence of any provision for a variation of the charges as of the utmost importance in this case" and as pointing towards a power to terminate, particularly given the impact of inflation upon the bargain the parties had struck.²⁹

²⁶ *Martin-Baker Co Ltd v Canadian Flight Equipment Co Ltd*, above n 20, at 576.

²⁷ *Staffordshire Area Health Authority v South Staffordshire Waterworks Co.*, above n 20.

²⁸ Who gave the leading judgment.

²⁹ At 1402.

[40] The principles applied in these cases have also been applied in New Zealand. In *The Power Co Ltd v Gore District Council*, the Gore Borough Council agreed to transfer the majority of its electricity reticulation assets to the Southland Electric Power Board (predecessor to The Power Co Ltd). By the same deed the Board agreed to supply electricity required by the Council for its own use at the fixed rate of one penny per unit. A covenant in the deed provided that it was to bind the Board and Council “for all time hereafter”. This Court said as follows:³⁰

There is no express provision conferring on the parties a power to terminate the agreement. Whether such a power is to be inferred is therefore a question of construction of the agreement in accordance with principle.

The Court refused to construe the deed as being terminable on reasonable notice, holding that the relevant clause “expressly defines [the deed’s] duration”.³¹ No other provision in the deed supported “a reading down of the words”.³²

[41] It is clear then, that in those cases which address agreements which contain no provision for termination, or which bestow a right of termination exclusively on one party, orthodox construction principles have been applied to determine whether a right to terminate on reasonable notice should be conferred to one or either party.

[42] But as noted earlier, those principles have also been applied to different contracts — contracts which contain detailed provisions for termination or which bestow rights of termination on both parties to a bilateral contract, but which do not provide for termination at will and on reasonable notice. In these cases, again the same orthodox principles have been applied. However, the weight of authority in this category of case reveals a tendency to decline to construe the relevant agreements as terminable on reasonable notice. For example, in *Colchester and East Essex Co-Operative Society Ltd v The Kelvedon Labour Club and Institute Inc*, a licence to use a carpark was automatically terminable only in certain specified events.³³ By reference to the authorities discussed above, particularly

³⁰ *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) at 550.

³¹ At 551.

³² At 551.

³³ *Colchester and East Essex Co-Operative Society Ltd v The Kelvedon Labour Club and Institute Inc* [2003] EWCA Civ 1671. These were: first, if the licensee entered into liquidation; and, second, if the licensee was no longer seized of the freehold of the adjoining premises (or was not in actual occupation thereof and trading therefrom).

Winter Garden, it was held that the licence could not be construed as containing a general power of termination.

[43] Similarly, *Re Berker Sportcraft Ltd's Agreements* concerned an agreement between a dress designer and a clothing manufacturer, pursuant to which the manufacturer was to make and export dresses bearing the designer's name.³⁴ The agreement was said to continue until determined by either party as thereafter provided in the document. The manufacturer was entitled to terminate the agreement if the commission payable by it to the designer fell short of a minimum GBP 1,000 per annum. The designer was entitled to terminate the agreement if the total sums payable to him fell below GBP 3,000 in the third to fifth years of the agreement's duration or below GBP 5,000 in the sixth or any subsequent year. Jenkins J held that the agreement could not be read as incorporating an ability to terminate on reasonable notice. When framing the relevant issue for himself, Jenkins J said that.³⁵

It is not in dispute that if such a power of determination exists *upon the true construction of the agreements*, the notice given on 29th October, 1946, would be a sufficient notice ...

[44] To sum up to this point, although cases which involve quite different contracts have been taken as a class for the purposes of this question, the authorities are consistent in treating the question of whether a contract is terminable on reasonable notice, in substance, as one of construction.

[45] We acknowledge, however, that if a court reads into a contract with existing detailed provision for termination, a term that the contract is terminable on reasonable notice, the court has in fact implied a term. It is difficult to characterise this exercise as merely determining what pre-existing provisions of the contract mean. That is why no doubt some judges have used the language of implication rather than that of interpretation.

[46] This issue of classification raised by Ward's argument — whether the task is one of interpretation or implication — is at least notionally significant because of the different test that applies depending on the nature of the task (whether the task is one

³⁴ *Re Berker Sportcraft Ltd's Agreements*, above n 21.

³⁵ At 422 (emphasis added).

of interpreting existing provisions of a contract or rather one of considering whether an additional term should be implied). We say notionally because, following on from the decision of the Privy Council in *Attorney-General of Belize v Belize Telecom Ltd*, there is an issue, unresolved in New Zealand, as to whether the implication of a term 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.³⁶ This issue was recently left open by the Supreme Court in *Mobil Oil New Zealand Ltd v Development Auckland Ltd*.³⁷ But in the United Kingdom, at least, the matter has been settled. In *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* Lord Neuberger, writing for the majority, said:³⁸

[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.

[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.

[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

³⁶ *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.

³⁷ *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48 at [81]. The Supreme Court in *Mobil Oil* referred to its earlier decision in *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43, [2009] 3 NZLR 160 at [25] and [64] where *Belize Telecom* was endorsed but the continued relevance of the *BP Refinery* criteria acknowledged. The tension between *Belize Telecom* and the *BP Refinery* criteria was also subsequently referred to and left open by this Court in *BDM Grange Ltd v Trimex Pty Ltd* [2017] NZCA 12, [2017] NZCCLR 11 at [67]. It has also generated a volume of academic comment: see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [24] for relevant citations.

³⁸ *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*, above n 37.

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.

[48] For this reason also we prefer to express no view on an issue addressed by Kós P — the interface between construction, interpretation and implication. This issue was not addressed at any length in argument before us and is not dispositive of the current appeal.

[49] We now turn to the second legal issue arising — that there is a presumption or preference in the law for commercial or mercantile contracts, importing obligations of good faith, to be terminable on reasonable notice.

[50] It is clear in England that there is no presumption or preference in favour of terminability. To return to the *Staffordshire* case, Goff LJ said the following as to whether such a presumption or preference exists:³⁹

Therefore, the defendants have to show, and the onus is upon them, why, there being no express power to determine this agreement, one should be inferred, but there is no presumption either way; the onus is not the heavy one of rebutting a presumption to the contrary. This being so, one has to consider the surrounding circumstances as well as what the parties have said or left unsaid in the agreement itself.

[51] And before *Staffordshire* in the *Re Spenborough* decision Buckley J said:⁴⁰

An agreement which is silent about determination will not be determinable unless the facts of the case, such as the subject-matter of the agreement, the nature of the contract or the circumstances in which the agreement was made, support a finding that the parties intended that it should be determinable, but there is, in my judgment, no presumption one way or the other.

[52] In New Zealand the weight of authority is against the notion that a presumption or preference exists. But again, a clear position does not emerge from a

³⁹ *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*, above n 20, at 1400.
⁴⁰ *Re Spenborough Urban District Council's Agreement*, above n 24.

review of the authorities. The issue of whether a contract should be construed as terminable on reasonable notice arose in *Minister of Education v De Luxe Motor Services (1972) Ltd*.⁴¹ In that case, as we noted above, the contract was unwritten and was for the provision of school bus services. Cooke P referred to suggestion in some authority that there is a presumption that contracts of no fixed duration are terminable on reasonable notice. Writing for the Court he said:⁴²

Whether it can be put as high as a presumption is doubtful, but we think that most Judges and practitioners today would expect to find cogent reasons in the nature or terms of a particular contract before placing on it the interpretation that there is no right to determine on reasonable notice.

[53] In *The Power Co Ltd v Gore District Council* this Court said:⁴³

It remains doubtful whether anything in the nature of a presumption to this effect arises, because in each case what is sought is the true construction of the particular agreement. For that reason other cases, although they may be of assistance, cannot be determinative of the present question.

[54] Later, in *Bobux Marketing Ltd v Raynor Marketing Ltd* this Court put the matter in a different way.⁴⁴

[68] In the end, although in a mercantile or commercial contract the Court will favour an interpretation which enables the relationship to be terminated on reasonable notice, the question remains whether the language actually used by the parties admits of an implication or interpretation to that effect.

[55] In our view there is no presumption in favour of implying or interpreting a contract so that it is capable of termination on reasonable notice. Nor is there is an interpretive preference, as the respondents would have it. We see no basis for applying a presumption or interpretive principle which favours the existence of such a term in commercial or mercantile contracts, or in respect of certain sub-categories of commercial contract. To apply a presumption of this nature would be inconsistent with the freedom of the parties to contract and inconsistent with the role of the court when interpreting the language of a contract or determining whether such a term should be implied.

⁴¹ *Minister of Education v De Luxe Motor Services (1972) Ltd*, above n 19.

⁴² At 31.

⁴³ *The Power Co Ltd v Gore District Council*, above n 30, at 550.

⁴⁴ *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 (CA).

[56] While the nature of the contractual obligations undertaken by the parties is relevant to the task of interpretation, it would be wrong to regard that factor as triggering an interpretive presumption one way or the other. In particular, we have seen no evidence to suggest that licensing contracts are customarily understood to be terminable on reasonable notice. To the extent there is discussion in *Bobux* and other cases of “favouring” such an interpretation, or requiring “good reason” to find there is no such term, we understand the point to be simply a common-sense one. It is a rare thing for a party to bind itself to a contract in perpetuity — the issue under consideration in *Bobux*.

[57] So, where has this legal discussion taken us? First, we do not decide the issue of whether the applicable test is one of construction or implication. In accordance with established principle we apply the traditional approach of construction and forego the five-stage test for implication as set out in *BP Refinery*. Second, there is no presumption or preference in favour of terminability so we do not apply one. What we are left with then is the application of ordinary contract construction principles. We therefore apply the approach set out by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.⁴⁵

[60] ... 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”. This objective meaning is taken to be that which the parties intended. 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. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

[61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.

...

⁴⁵ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

[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.

Analysis

[58] We begin with the words of the contract. Ward made reference to the content of contractual negotiations in support of the interpretation it contends for. We consider that Fogarty J was correct to treat those negotiations as irrelevant to the task of contractual interpretation and we do not propose to address that argument further.

[59] The starting point is logically the express provision for termination contained in the licence agreement. Clauses 10.1 through to 10.4 provided:

10.1 This Agreement commences on the Effective Date and shall continue thereafter without limit of time, and may be terminated in the following manner:-

- (a) in accordance with Clause 10.2 below; or
- (b) upon the expiration or lapse of all of the Patents, at the Licensee's sole discretion, and upon three (3) month's written notice to the Licensor.

10.2 The Licensee is in breach of any obligation hereunder:

- (a) if any sums payable by the Licensee remain unpaid for more than thirty (30) days after becoming due; or
- (b) if the Licensee commits or allows to be committed any other breach other than breaches in this Clause of its obligations under this Agreement and fails to remedy such breach within thirty (30) days after written notice from the Licensor requiring such remedy; or
- (c) if the Licensee has a receiver, administrator, administrative receiver, trustee or similar officer appointed to the whole or any part of its assets or any order made or resolution is passed for its administration or winding-up (unless as part of a scheme of reconstruction or amalgamation) or any meeting of the Licensee's members and creditors (or either of them) is called to consider a proposal for a composition in satisfaction of the Licensee's debts or a scheme of arrangement of its affairs, or any petition is presented to approve any scheme of arrangement relating to the Licensee being insolvent; or
- (d) if there is a change in ownership or control of the Licensee and the Licensor has not given prior written consent (such

consent shall not be unreasonably withheld or delayed) to such change in ownership or control; or

- (e) if the Licensee's shares are at any time listed on any stock exchange, the listing is suspended or revoked and the suspension or revocation remains in force for a period greater than fourteen (14) days; or
- (f) if the Licensee does not exploit the Product in the Territory for any period of three (3) months after the Effective Date; or
- (g) if the Licensee opposes the grant of any Patent or challenges the validity of any Patent granted; or
- (h) if the Licensee contests the secret or substantial nature of the Confidential Technical Information; or
- (i) if the Licensee claims that any Patent is not necessary for the exploitation of the Technical Information.

THEN the Licensor may by written notice to the Licensee terminate this Agreement with immediate effect but without prejudice to any right of action of the Licensor in respect of any prior breach by the Licensee.

10.3 The Licensee may by written notice to the Licensor terminate this Agreement with immediate effect, but without prejudice to any right of action of the Licensee in respect of any prior breach by the Licensor, if the Licensor commits any breach of its obligations under this Agreement and fails to remedy such breach within thirty (30) days after written notice from the Licensee requiring such remedy.

10.4 Termination of this Agreement for any reason shall not bring to an end:

- (a) the confidentiality obligations of the parties hereto under Clause 5;
- (b) the rights and obligations of the parties hereto under Clause 10.5;
- (c) both the Licensee's and Licensor's indemnities under Clause 11;
- (d) the Licensee's obligations under Clause 7; and
- (e) the Licensee's obligations under Clause 9.2.

[60] What is immediately apparent is that these are detailed provisions governing the termination of the licence agreement. Unlike the agreements in *Winter Garden* and *Re Spenborough*, they confer rights of termination on both parties.

[61] In broad-brush terms, the licensor secured to itself the right to terminate the agreement if the licensee failed to make prompt payment of amounts payable under the agreement or breached the agreement, if the licensee was insolvent or was embroiled in an insolvency type situation, if there was a change of ownership or control of the licensee, if the minimum royalty payments were not made, if the licensee failed to exploit the product in the territory for any period of three months, or if the licensee took steps to contest or which would undermine the intellectual property.

[62] As to the licensee's right to terminate for breach, the licensee could terminate on breach by the licensor but could also terminate at the expiration or lapse of all patents.

[63] The appellants' argument emphasised the use of the expression "without limit of time" in cl 10.1 but we attach little weight to it. The plain meaning of these words is that the agreement has no expiry date — but that much is common ground. However, we do consider that the termination clause as a whole weighs against the construction of the contract settled upon by Fogarty J. We make four broad points.

[64] First, we acknowledge it is clear that the mere fact the licence agreement already makes provision for termination is not an insurmountable obstacle to construing it as being terminable on reasonable notice. The following passage in *Bobux Marketing Ltd* makes this point:⁴⁶

[67] We accept that the mere statement that a contract is to continue "for an indefinite period" or the fact that a contract may contain certain express provisions enabling termination in defined circumstances, such as material breach by the other party, does not preclude the finding of an implicit right also to bring the relationship to an end by a period of notice which is reasonable in the circumstances which exist at the time the notice is given (see, for example, *Re Spenborough Urban District Council's Agreement*). Nor is it fatal to the possible existence of such a right of termination in one party that the other party is alone expressly given that right (*Winter Garden Theatre (London) Ltd v Millennium Productions Ltd*).

[65] But, where a contract already contains comprehensive terms for termination, it will be difficult to construe it as allowing termination on reasonable notice if that

⁴⁶ *Bobux Marketing Ltd v Raynor Marketing Ltd*, above n 44 (citations omitted).

right is not included in the clauses dealing with termination. We have already described how this approach was applied in *Re Berker Sportscraft Ltd's Agreements*.⁴⁷ *Lewison*, treating the issue as one of implication, contains the following statement:⁴⁸

... where the agreement already contains terms for termination, it will be difficult to imply further such terms.

[66] Clause 10 contains detailed provision for termination. Although the parties turned their minds to termination and provided for it in this detail, they did not include the right for either party to terminate at any time on reasonable notice. The termination rights contained in the contract seem well designed to protect each party's legitimate commercial interests. The right to terminate for breach of contract protects the parties' commercial interests and, from the licensor's perspective, ensures that the licensee is diligent in exploiting the products and produces at least a certain level of royalties for the licensor.

[67] Second, we think Fogarty J erred in the significance he attached to the removal of the minimum royalties clause from the contract. The Judge said that clause was negotiated away by Mr Preston as an incentive for Ward to take over the licence in 2013.⁴⁹ But, as we have set out above, the right to minimum royalties was waived by the licensor in 2003.

[68] Our task, which Mr McBride for Mevon did not dispute, is to interpret the contract as at the date of formation, as those were the obligations taken over by Ward in 2013, subject to the later variation of the deletion of the minimum royalty clause. But we do attach significance to the initial inclusion of that minimum royalty clause. It was part of the package of rights the licensor secured so that, while the agreement remained on foot, its commercial interests were looked after. As at the date the agreement was entered into, a failure to meet the minimum royalty payments would have triggered a contractual right to terminate.

⁴⁷ *Re Berker Sportscraft Ltd's Agreements*, above n 21.

⁴⁸ *Lewison*, above n 17, at 356.

⁴⁹ HC judgment, above n 2, at [12].

[69] Third, we think Fogarty J erred in attaching particular weight to the fact that this was a licence agreement. He said:⁵⁰

A licensing contract of intellectual property classically falls within a contract involving a degree of trust and confidence between the parties. The present circumstances is that Ward Equipment has the opportunity but also the responsibility to actively market Prestons' products in New Zealand. It is in truth a form of partnership. And it is a fact that the root cause of the breakdown in the relationship is that Ward's business is dominated by other ventures, particularly demolition, and Ward is not achieving a significant number of hire contracts for Superdeck. Prestons' [sic] entered the market in New Zealand in order to get more sales of its product in New Zealand than being achieved by its licensee.

[70] The licence agreement is not akin to a partnership. There is no common business nor any sharing of profits. The agreement provides merely for the grant of rights in return for the performance of agreed obligations and payments. The issue remains one of the application of the conventional principles of contract construction, although of course the nature of the rights granted and obligations taken on by the parties is important in that exercise.

[71] Here the licensor was granting exclusive rights to exploit its intellectual property in New Zealand. It would want to ensure that the licensee did the best to realise a market for its product, that as licensor it received an adequate return for its intellectual property, and that the licensee did nothing to undermine the value of its property. The licensor would wish to ensure that it could terminate the contract if the licensee failed to comply with these obligations. The contract, as it stood at formation, addressed each of these issues. In particular it addressed the very problem the Judge identified as supporting the existence of a right to terminate on reasonable notice: a failure to generate sufficient business for the licensor's product. It required that a minimum level of royalties be paid, although that obligation was later bargained away. Pursuant to cl 10.2(f) it is a breach if the licensee does not exploit the product for any period of three months.

[72] We note that the agreement also provided a remedy to the licensor if the licensee did not undertake its contractual obligations of exploitation in good faith. Pursuant to cl 8.5, the licensee undertook to exploit the products in an "honest,

⁵⁰ At [37].

diligent, trustworthy and professional business like manner”. Under cl 10(2)(b), if the licensee failed to rectify a breach of cl 8.5 in a timely manner, the licensor would be able to terminate the contract. We see this ability to terminate as further undermining the need for a termination on reasonable notice clause based on the fact that the licensor reposed, via the agreement, some degree of trust and confidence in the licensee.

[73] Fourth, we attach particular significance to the fact that while the licence agreement has no fixed term, it does have a natural life — even if it is not construed as terminable on reasonable notice, it will not run forever. The value of the agreement lies in the intellectual property and the licensee pays royalties for access to that. The contract provides the licensee with the right to terminate on three months’ notice when the patents expire. The inclusion of this right protects the licensee’s natural commercial interest in not being bound to the terms of the agreement after the patents have expired — it is common ground that the patent rights are the principal rights licensed under the contract. Once the licensor no longer has those rights, a licensee would have a commercial interest in being free to seek out other commercial arrangements such as manufacturing their own products or sourcing products from competitors.

[74] The fact the agreement has a natural life undermines the “common-sense” point we identified earlier at [56] that people do not usually agree to be bound to perform a contract forever. Although we were not told the expiry dates for all of the relevant patents, there is evidence that the patent for the SuperDeck expires in 2018. 2018 is a mere five years from 2013, when the licence agreement was novated. This short timeframe reinforces our position that the agreement has a natural life and that this weighs against a construction that it is terminable on reasonable notice.⁵¹

[75] The contract does not provide the same right to the licensor but that omission is also consistent with the parties’ commercial interests. A licensor, looking into the future, might well think it need not bargain for a right to terminate on expiry of the

⁵¹ We note that under s 20 of the Patents Act 2013 and s 30 of the Patents Act 1953, a patent has a term of 20 years.

patent. A licensee willing to continue to perform the contract and pay royalties after the patents have expired might be thought to be a desirable business prospect.

[76] We add that we accept Ward's submission that the parties were unlikely to include these provisions dealing with the rights of the parties on expiry of the patents if the agreement was, in any event, terminable on reasonable notice.

[77] For these reasons we consider that the Judge erred in interpreting the agreement as terminable on reasonable notice. The parties carefully constructed a bargain between them as to how long the agreement is to run, including in it detailed provision for termination. The agreement has a natural life. There is therefore no need, and indeed in our view no room, to construe the agreement so that it is terminable on reasonable notice. The respondents have not established, either as a matter of implication or construction, that the licence agreement contained a right for each contracting party to terminate on reasonable notice and in the absence of cause.

Second issue: What is reasonable notice?

[78] We do not propose to address this issue, given the principal finding.

Result

[79] The appeal is allowed.

[80] The declaration made in the High Court is set aside.

[81] We declare that the licence agreement was not terminable at will and on reasonable notice.

[82] The respondents must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

[83] Costs in the High Court are to be addressed in that Court.

KÓSP

[84] I agree with the conclusions and orders above. I add a few words on the question whether the implication of a term is, or is not, an exercise in contractual interpretation.⁵² The question arises because of the doubts cast on the 2009 Privy Council decision in *Attorney-General of Belize v Belize Telecom Ltd* by the majority in the 2015 United Kingdom Supreme Court decision in *Marks & Spencer Plc v BNP Paribas Security Services Trust Co (Jersey) Limited*.⁵³ Unlike French and Winkelmann JJ, however, I do not think the correct approach in New Zealand need be viewed as uncertain.⁵⁴

[85] To understand the debate about interpretation and implication, one has to start with why people argue at all about the content of contracts. As Professor McMeel has usefully demonstrated, there are essentially three sources of dispute about contractual content: incompleteness, ambiguity and error.⁵⁵ Significantly, both incompleteness and ambiguity may arise from either inadvertence or deliberate equivocation (where one or both parties have identified the issue ahead of entry into the contract, but prefer not to attempt to resolve it). The gap is sometimes a deliberate one.

[86] In all disputes concerning the content of a contract, whether based on alleged incompleteness, ambiguity or error, the court's task is the same. It is to identify the meaning of the contract. That task is called "construction". That word and "interpretation" are often used interchangeably. But the better view may be that interpretation, implication and rectification are all techniques of construction.⁵⁶ Certainly Professor Corbin saw construction as the broader expression, including the filling of gaps — which he did not think interpretation's work.⁵⁷ And in *Belize*

⁵² See [46]–[48] above. I am referring of course to terms implied in fact, rather than by law.

⁵³ *Attorney-General of Belize v Belize Telecom Ltd*, above n 36; and *Marks & Spencer plc v BNP Paribas Security Services Trust Co (Jersey) Ltd*, above n 37.

⁵⁴ See [47] above.

⁵⁵ Gerard McMeel *The Construction of Contracts* (2nd ed, Oxford University Press, Oxford, 2011) at 6–7.

⁵⁶ At 11–12. The subtitle of Professor McMeel's book is "Interpretation, Implication and Rectification". So all are "construction" in his scheme.

⁵⁷ Arthur Corbin *Corbin on Contracts* (revised ed, West Publishing Co, St Paul, 1960) vol 3 at 11–12 as cited in David McLauchlan "Construction and Implication: In Defence of *Belize Telecom*" [2014] LMCLQ 203 at 207.

Telecom, Lord Hoffman’s analysis was of the relationship between implication and construction, not interpretation.⁵⁸

[87] Whatever technique is involved, construction’s role in the search for meaning is always to ascertain what a reasonable person who knows the context would understand the parties to have meant by the contract. The court stands in the shoes of the parties collectively, instilled with their common contextual knowledge. The court, by definition reasonable in its outlook, imbues those whose shoes it wears with that same reasonable view.

[88] “Meaning” here is not restricted at all to what the parties said. It is not confined to the express words. For instance, it is orthodox that interpretation can involve some amendment to express words.⁵⁹ Correction of obvious error in express words does not engage the whole equitable remedy of rectification. Common law techniques for construction of contracts can do that job.⁶⁰ “Meaning” also concerns the contract as a whole, not just discreet parts of it. Ascertaining meaning may involve also ascertaining that the express words alone do not express the intended meaning of the contract.

[89] Construction of contracts is an elastic exercise. It incorporates three primary techniques — those identified earlier — interpretation, implication and rectification. These techniques apply different rules to different problems. Once that is recognised, concerns about implication being part of construction — the *Belize Telecom* approach championed by Lord Hoffman — should diminish. For instance, as just noted, interpretation may alter express words — although only where the error and answer are obvious.⁶¹ But where major modification to the express words is required, because of incompleteness or error, interpretation must give way to implication or rectification.

⁵⁸ *Attorney-General of Belize v Belize Telecom Ltd*, above n 36, at [19].

⁵⁹ See for example *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [21]–[25]; and *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 (HL) at 774.

⁶⁰ David Hodge *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, Sweet & Maxwell, London, 2016) at ch 2.

⁶¹ See authorities at n 59 above; and Hodge, above n 60, at [2-27]. This approach can be dated back at least to *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) where rectification was also pleaded, but not needed.

[90] That is because the law correctly places a premium on the express words adopted by the parties. There is good reason for that. Parties forget things; time effluxes and memories fade. Those who manage corporate contractual parties change; employees who negotiated contracts go and new managers come. The negotiating context recedes; parties come over time to rely heavily on the express words. Third parties also rely heavily on the express words: bankers, assignees, customers and co-venturers all want to know what the contract says because they too come to depend upon it. They may have little sense of the context, and little ability to obtain knowledge of it. What is more, a perceived gap may be a deliberate choice, as earlier noted. As Lord Hoffman said in *Belize Telecom*, the most usual inference to be drawn from a gap is that nothing at all was intended.⁶² Contract law does not abhor a gap.

[91] The law accordingly is resistant to altering express words by implication (a case of incompleteness — where the agreement fails to express a matter the parties intended but did not state) or rectification (a case of error — where the agreement mis-expresses something the parties both provided for and intended). It expresses that resistance by imposing a more articulated set of rules that must be conformed to before the express words are altered.

[92] In the case of rectification, the equitable remedy focuses on a subjective inquiry as to the parties' common, continuing intention. But it also applies a restraining hand where third party rights are affected. Being an equitable doctrine, the defence of laches may apply where the applicant has delayed unduly.

[93] In the case of implication, it is important to start with the point that *Belize Telecom* remains authoritative in New Zealand: applied by this Court in *Hickman v Turn & Wave Ltd* and (with slight reservation) by the Supreme Court in first *Dysart Timbers Ltd v Neilsen* and then with some greater reservation in *Mobil Oil New Zealand Ltd v Development Auckland Ltd*.⁶³ It has been suggested that *Belize Telecom*, embracing implication as part of construction, is more

⁶² *Attorney-General of Belize v Belize Telecom Ltd*, above n 36, at [17].

⁶³ *Attorney-General of Belize v Belize Telecom Ltd*, above n 36; *Hickman v Turn & Wave Ltd* [2011] NZCA 100, [2011] 3 NZLR 318; *Dysart Timbers Ltd v Neilsen*, above n 37; and *Mobil New Zealand Ltd v Development Auckland Ltd*, above n 37.

permissive of a term being implied.⁶⁴ That complaint may however be doubted. Lord Carnwath at least was of clear opinion that *Belize Telecom* has not watered down the traditional tests for implication of a term.⁶⁵

[94] The essential articulated rules for implication of terms remain. These recognise that with more substantial modification being sought to the express words of a contract, more substantial hurdles need to be crossed. So, *Belize Telecom* does not alter 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, rather abruptly dismissed by Lord Hoffman in *Belize Telecom* but reinstated by Lord Neuberger in *Marks & Spencer*, may be called on still where a gap has been identified to tell us what the parties would have said they meant.⁶⁶ Importantly, the familiar and useful five conditions for implication in *BP Refinery Pty Ltd v Shire of Hastings*, much loved by New Zealand contract lawyers (and by association, the New Zealand commercial community), remain applicable.⁶⁷ The standard grumbles continue — that the first of the five may be otiose, and that the second, third and fourth overlap. But Lord Simon noted that overlap was likely when setting them out. *Belize Telecom* suggests *BP Refinery* does not provide a series of essential independent tests, but simply a collection of methods to assess contractual meaning. In New Zealand for the foreseeable future the conditions nominated in *BP Refinery* — best viewed as guidelines — will remain a prominent part of analysis where the construction advanced by a litigant involves a sufficiently substantial change to the express contractual words as to trigger the implication of a term.

[95] The lessons in all of this are these. Implication and interpretation are not the same. Implication is however part of construction. A coherent analysis of

⁶⁴ Much ink has been spilled on this subject. See for example McLauchlan, above n 57; John Carter and Wayne Courtney “*Belize Telecom*: A Reply to Professor McLauchlan” [2015] LMCLQ 245; Andrew Robertson “The Limits of Interpretation in the Law of Contract” (2016) 47 VUWLR 191; and Matthew Barber “*Marks & Spencer* and the Future of Implied Terms” (2017) 27 NZULR 767.

⁶⁵ *Marks & Spencer plc v BNP Paribas Security Services Trust Co (Jersey) Ltd*, above n 37, at [60]. See also Lord Clarke at [76]–[77].

⁶⁶ *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 (CA) at 605; *Attorney-General of Belize v Belize Telecom Ltd*, above n 36, at [25]; and *Marks & Spencer plc v BNP Paribas Security Services Trust Co (Jersey) Ltd*, above n 37, at [24].

⁶⁷ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, above n 4, at 283.

construction is logical and desirable, recognising that all its techniques — interpretation, rectification and implication of terms — are aimed at the same object, the ascertainment of meaning of a contract. *Belize Telecom* is part of New Zealand law. It has not, however, fomented a revolution. The traditional analytical requirements for implication of a term remain applicable.

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