IN THE SUPREME COURT OF NEW ZEALAND SC 48/2016

BETWEEN **NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INCORPORATED**
Appellant

AND **AIR NEW ZEALAND LIMITED**
Respondent

Hearing:	17 October 2016
Coram:	William Young J Glazebrook J Arnold J O'Regan J Ellen France J
Appearances:	R E Harrison QC and C Abaffy for the Appellant J G Miles QC, P A Caisley and S R Worthy for the Respondent

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CIVIL APPEAL

MR HARRISON QC:

May it please Your Honours, I appear for the appellant with my learned friend Ms Abaffy.

WILLIAM YOUNG J:

Thank you.

MR MILES QC:

May it please Your Honours, I appear with Messrs Caisley and Worthy for the respondent.

WILLIAM YOUNG J:

Thank you Mr Miles. Right Mr Harrison?

MR HARRISON QC:

There's some supplementary materials to be distributed if I may. There's a supplementary bundle of authorities that provides a recent Court of Appeal decision and two Canadian Supreme Court authorities. There's a single page sheet that's associated with that called appellant's note to accompany supplementary authorities, and that simply takes you to the paragraph references and saves you separately noting them but I will speak to those authorities later and there's also separately provided the Court of Appeal decision in *Waitemata District Health Board v New Zealand Public Service Association* [2006] ERNZ 1029 (CA), which I should have brought to your attention earlier and is cited in the respondent's submissions.

So I will, of course, just simply speak to my submissions, but the nub of the points I will be developing is that outlined at page 2 of the written submissions onwards. Our complaint about the judgment below is that it overturned what we say is a perfectly good interpretation of clause 24.2 by the Employment Court, despite what I will call the jurisdictional bar imposed by section 214(1), and as I note there the complaints are essentially twofold, although the second fold perhaps has two aspects that's summarised in paragraph 11 on page 3 of the written submissions. We take the point that the key passage in the Court of Appeal judgment, which is that set out on page 2, the indented passage in the middle of page 2, where it requires the Employment Court to correctly state and apply and seize the jurisdictional bar as not applicable if the Employment Court misapplies principles, even if

correctly stated. That, in my submission, goes too far in terms of not only the bulk of the existing authorities, both in this Court in one instance and at Court of Appeal level. In any event on a principled approach now looking at the bar and what it's intended to do at the level of this Court, that goes too far. So 11.1, to look at whether the Court, the Employment Court misapplied orthodox principles of contractual interpretation which it is correctly stated and purported to apply is simply wrong in principle, that's leg one of the argument. And while I'm on leg one I submit, although it's not critical that to speak of orthodox principles as the text is also unsatisfactory. The basis for intervention is error of law not heterodoxy so that to speak of something as being orthodox or not orthodox is, with respect, something of a distraction. So the real issue is was the result, was the result that the Court of Appeal here reached as a matter of its own construction of the employment agreement in question. The answer to that is plainly it was and that exceeded the jurisdictional bar. It did so either because 11.1 the wrong principle was formulated or 11.2, even if misapplication is a legitimate principle of intervention, it cannot extend to deciding misapplication by means of construction of the employment agreement in question contrary to the interpretation that the Employment Court has adopted. So here we say if you get down, if you dig down into the detail of the Court of Appeal's reasoning, they went to the interpretation of the agreement, they disagreed as a matter of construction with the Employment Court, that was wrong but then also the second leg of the second point is that as well they disagreed with the Employment Court's analysis of the contractual background and they did so by disagreeing simply as a matter of fact and opinion. That's a further error because as is well established the appeals on fact are not permissible unless it's a no evidence scenario.

WILLIAM YOUNG J:

But normally, leaving if it was an issue of construction of something other than an agreement within the exclusion, wouldn't that be a question of law even though there maybe questions of fact that bear on the context which bear on the interpretation to be adopted?

MR HARRISON QC:

If you, if the Employment Court is construing something other than an employment agreement, for example, and there are illustrations of this where it's the Holidays Act 2003, the agreement refers to the Holidays Act and the Court says this is our interpretation of the Holidays Act and it carries through into the agreement and if that interpretation of the Statute or it might be the Employment Relations Act 2000 itself, if that is wrong then that's error of law, it's exterior to the exercise of construction of the agreement itself.

WILLIAM YOUNG J:

Are there ever agreements other than employment agreements which the Employment Court must construe, probably there are, aren't there?

MR HARRISON QC:

There might well be, there might well be and I mean if you – there often are, there might be employer policies and things like that, not necessarily agreements but other documents external to and perhaps referred to or implied into the employment agreement and I guess it gets tricky then whether you extend the jurisdictional bar to such documents but –

WILLIAM YOUNG J:

It's just as a general, all I'm really doing is challenging you on what I suspect is a peripheral point, that if an issue of construction arises, the facts that are material to the construction contextual facts are formed to be considered as a question of law, not one of facts I would have thought.

MR HARRISON QC:

No I don't accept that, and that was the point I was making. The –

WILLIAM YOUNG J:

Well say it wasn't, say there wasn't this bar and of course there is, wouldn't the context in which the agreement had been reached be material to its interpretation and therefore be able to be considered under the rubric question of law?

MR HARRISON QC:

Well yes, I mean the context or if you like, the contractual background is part and parcel of the principles of interpretation. I accept that, so the Employment Court here had to identify the contractual background and then bring that to bear on its interpretation of the actual language. My point is that when the Employment Court identifies and finds the particular contractual background, it is making findings of fact. Those findings of fact are not reviewable by the Court of Appeal as the Court of Appeal seem to say here, on their merits. They are only reviewable if in turn there was no evidence to support them because it's a two-fold prohibition, it's a prohibition on appeals against construction and it's an appeal limited in any event to error of law, and you can't simply correct the findings of the Employment Court Judge here as to the purpose of the provision and the parties' intentions at the time by saying we disagree. Those facts were found and unless the finding of those facts independently involves its own error of law, the Court has gone too far.

GLAZEBROOK J:

What, say there's a situation where findings of fact should have been made but weren't and I'm not suggesting that's the case here, but it might be something slightly that Justice Young was getting at, in the sense that if there was vital background that was needed for interpretation and the facts weren't found as they should have been, is that part of an error of law?

MR HARRISON QC:

The Employment Court can err on the way to its assessment of the contractual background in a variety of ways, by not finding facts, perhaps by failing to give adequate reasons, by a misstep in reasoning on the way to its factual finding by ignoring critical evidence. Those are all possibilities, in that event you get at the interpretation outcome in the Employment Court by saying it erred in law on the way to its finding as to the contractual background and if that was material error then you've got a successful appeal arguably, I do accept that. But that's not this case, the Court of Appeal with the greatest respect, just waded in and said we, left, right and centre we disagree, we

disagree and that's the situation – indeed it takes me to the first of – before I develop those arguments –

ARNOLD J:

Could I just make sure I understand one point. When you say that misapplication is outside the jurisdiction of the Court, if you have a situation where the Employment Court refers to the leading authorities and quotes pieces from them that correctly state the law but when one looks at the analysis that the judgment, that the Court has gone through it, for example, gives decisive weight to the subjective intention of the parties or one of the parties, something of that sort. So you've got something which is inconsistent with the legal principles, is that misapplication in your view or is that something that falls within the jurisdiction of the Court of Appeal?

MR HARRISON QC:

That, if I may say so with respect, is a very pertinent question. My response is that simplistically to say the test is whether you misapply the principles and the reason why the Court misapplied is they didn't construe the wording the way we say it should be construed. That is not a misapplication ground. You could postulate cases where the Employment Court correctly stated the principles but effectively only gave lip service to them, because it turned around later and completely and grossly ignored those principles, didn't bring them to bear, or brought entirely the opposite proposition to bear, and Your Honour's example of directing yourself, it's an objective test, but then deciding it on the basis of the subject of intention of one party only as an example of that kind of lip service approach.

ARNOLD J:

Yes.

MR HARRISON QC:

And I agree that would be a ground for intervention provided the intervention isn't ultimately based on construction of the employment agreement and saying that's why they got it wrong. And perhaps, it's also more subtle than

that, because of course if at a certain point if the appellate court establishes error of law outside their jurisdictional bar, remedially it is permitted to substitute its own correct interpretation. So at a certain point the appellate court can interpret but only once it's notionally allowed the appeal and held that the jurisdictional bar doesn't prevent the outcome.

Now I'm going to go on and look at the authorities and develop these arguments in a little detail, but I wanted to make, to deal with two factual points. The first is this, that the evidence as to the contractual background in this case was actually completely compelling in favour of the Employment Court's conclusion that the Air New Zealand interpretation was not intended by the parties at the time 24.2 was negotiated and equally that the parties did intend that individual more favourable terms of employment in the other agreement would be the subject, could be the subject of a passing on request.

GLAZEBROOK J:

Just a question, and it may be terminology in the Employment Court, and also terminology that you're using, but there is a bar on looking at negotiations still as against background, and also on looking at subjective rather than objective intentions, and it's certainly in the Employment Court and the reference to negotiations that you make in your submissions may slide over that bar. I understand that it might be a question of terminology because a lot of the things referred to would objectively, against the background, leave one perhaps to come to the view that you're expressing in terms of purpose.

MR HARRISON QC:

I don't accept, with respect, that there is such an absolute bar on referring to negotiations. My submission is that the principle is that parties should not give, parties to a contract should not give evidence about their own subjective understandings. But if there are negotiations which lead to an agreement, and whether in writing or oral, and those demonstrate a common view of the purpose of a particular provision then, in my respectful submission, that

evidence is not excluding and it's precisely that evidence that I was about to refer to.

WILLIAM YOUNG J:
So you say it's okay to lead evidence as to negotiations as to who proposed a particular clause?

MR HARRISON QC:
Yes –

WILLIAM YOUNG J:
Which is what –

MR HARRISON QC:
It's, well who proposed it and why. If the parties are in agreement that party A proposed the clause, and it was for a reason that both sides understood and accepted the clause was to address –

WILLIAM YOUNG J:
Well if – that's –

MR HARRISON QC:
– that is admissible background, that's the obvious background that the party, that's the context, the context was –

WILLIAM YOUNG J:
I would have thought you'd have looked, I mean you'd probably get to the same answer here because on the face of it the clause is one that was intended to favour NZALPA, that's the way it looks. But I don't think it really matters that it was actually put up by NZALPA or what the NZALPA negotiator thought about it.

MR HARRISON QC:

It's not what was thought about it, it's what was known, the situation that the parties knew existed at the time was discussed in negotiations –

WILLIAM YOUNG J:

See that's the bit I'm more hesitant about –

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

– I don't mind what the parties knew at the time, what I don't really like is what they discussed in negotiations.

MR HARRISON QC:

Well can I just – it's really; it's a distinction without a difference. If the background was XYZ and there is common ground that that background was XYZ because the parties had discussed and were agreed on XYZ during their negotiations, then that's the, a) that's the background and b) why would you exclude that very evidence which thereby proves that that was the background they both had in mind?

WILLIAM YOUNG J:

For convenience.

GLAZEBROOK J:

Yes, that's what all was said because otherwise what you'll have is people coming with about 50,000 different iterations of particular clauses and everybody having to trawl through those iterations of the clauses in order to say what the final result meant when in fact it's an objective test, especially if third parties need to look at the contract to say what the contract means.

MR HARRISON QC:

Well I mean we're getting into –

GLAZEBROOK J:

And here we do have third parties because we have people who might not be union members, weren't involved in the negotiation. When I say "third parties" it's actually a contract on behalf of other people and there might be even more of an argument actually contrary probably to what the Employment Court said for the words, now that's not necessarily to say that the words have to be interpreted in a particular way but it is a general background that would be known to the parties and probably to the employees, but also it might be an argument, more of an argument for say and the employees ought to be able to read this thing and know what they're entitled to, without having to trawl back through negotiations.

MR HARRISON QC:

That's true to a point but only to a point, and we're getting into some fundamentals of general principles of contractual interpretation here and I don't have a problem with doing that but on the one hand –

GLAZEBROOK J:

But they, to a degree the Employment Court Judge said that there were different principles involved in the interpretation of employment contracts for the sort of – and of course there will be different principles for interpretation of various types of contracts because there will be different backgrounds, but it seems to me that this might come closer to a public contract than it – which was discussed in A1, is that the right – maybe – I don't know how people –

WILLIAM YOUNG J:

PO?

ARNOLD J:

P1.

GLAZEBROOK J:

P1 yes, rather than the contract between the parties whether more of a background may be important?

MR HARRISON QC:

Yes I'm aware of the line of approach that Your Honour's referring to and it's now being said that there's got to be a constraint on reference to the background where you have a document that is quasi-public or quasi-public that third parties might want to rely on, but that's often documents which aren't strictly contracts as such, they maybe something more or something slightly different than a –

WILLIAM YOUNG J:

They can be contractual like an easement, something like that?

MR HARRISON QC:

Yes.

WILLIAM YOUNG J:

But that is a contract.

MR HARRISON QC:

Well yes but it also becomes a public registered document and third parties are going to read the easement and –

WILLIAM YOUNG J:

But third parties will read this?

MR HARRISON QC:

Well this is what I'm about to develop, if I may. The position of a collective employment agreement may be thought to fall somewhere in between but closer to the pure contract model and I say this because of the effect of the Employment Relations Act. The Employment Relations Act says explicitly that the parties to an employment, let's say a collective agreement, are the union and the employer but there are, the employees covered are bound by the agreement. Those employees will also have ratified the agreement and they have empowered the union as their agent to conduct the negotiations on their behalf. So those employees are not similar to the complete stranger who

reads a caveat. They are tied into it by reason of their membership of the union who's done the negotiation on their behalf.

WILLIAM YOUNG J:
What about later members, people who weren't members at the time?

MR HARRISON QC:
Well –

WILLIAM YOUNG J:
There'd be a few like that I'd imagine?

MR HARRISON QC:
Yes, yes, well fair enough, but nonetheless that point, with respect, is not enough to develop a principle that the contractual background ought to be considered only, if at all, in the most attenuated way in respect of a collective agreement. The position is that there will have been representations made. In practice, rightly or wrongly, previous, the drafting changes when a provision is drafted are looked at as part of the history of leading to the way the wording was ultimately agreed on and it's a useful resource. We do it with statutes.

GLAZEBROOK J:
Do you mean drafting changes in terms of actual collective agreements rather than negotiation changes?

MR HARRISON QC:
Yes, that's right.

GLAZEBROOK J:
Because I can understand that as part of a relevant background and this is a rolled over effectively agreement.

WILLIAM YOUNG J:
So you mean a change between one collective agreement and a succeeding agreement?

MR HARRISON QC:

Well that would be one example, or if the clause is being proposed and it's proposed in this form and then –

WILLIAM YOUNG J:

We are more hesitant.

MR HARRISON QC:

Yes, I understand that, but I may have said all I can on this particular topic. For better or for worse I maintain my position and I want to take Your Honours to what I said was the evidence.

GLAZEBROOK J:

Of course you may not need it because it may be sufficient to be able to look at the non-change and the background, in terms of this particular clause through the actual collective agreements and the public background.

MR HARRISON QC:

Well I just want to make the point that the evidence I'm going to canvas is the reason essentially why Judge Colgan in the Employment Court was quite clear as to what the parties intended and that they did not intend the clause to be limited to the, another collective agreement in its entirety. The evidence is all one way and it starts at page 25, the appendix to my submissions.

O'REGAN J:

Is that the issue though? Because the Court of Appeal seemed to be talking about the settlement agreement between the other union and Air New Zealand rather than its collective.

MR HARRISON QC:

That is, with the greatest respect, a complete red herring and irrelevant and I'll come to why. In essence, the passing on request related to the FANZP collective agreement provisions in question. It wasn't a request that related to the so-called settlement agreement. I'll deal with that now, shall I?

O'REGAN J:

It's up to you, I'm happy to wait.

MR HARRISON QC:

I'll come back to it. So the position as per the appendix page 25 of my submissions is that this is all background, in my submission. You had the two unions during the negotiations leading to the introduction of this provision. Rival unions and they, FANZP had already settled a short-term collective agreement but the ALPA negotiations had with Air New Zealand had become prolonged so ALPA was about to settle a collective agreement with Air New Zealand with the FANZP renewal negotiation about to take place shortly after. FANZP pilots had – sorry, ALPA pilots had already been on the receiving end of lesser remuneration terms and conditions. ALPA was concerned at, with all that as part of the background, that FANZP might very shortly settle a collective agreement with better remuneration yet again, and they'd have leapfrogged ALPA and it's against that background of the temporal sequence of the two unions collective agreements that we come into the appendix. First we had Garth McGearty who was the negotiator for ALPA and as we see at page 25, my heading 2, in his evidence-in-chief he says para 20, "At this stage ALPA became concerned that if Air New Zealand are to settle to CEA prior to FANZP ALPA risks a situation where Air New Zealand could reach an agreement with ALPA provided better terms and conditions so as to encourage ALPA members to change camps and undermine." And then he says at 22, "In the circumstances outlined above ALPA wanted what is now 24.2 to discourage Air New Zealand from agreeing better terms and conditions with any non-ALPA pilots, particularly FANZP pilots or those few on individual agreements. Wanted to ensure that should the agreement contain any more advantageous terms and conditions, those terms and conditions could at ALPA's option be enjoyed by ALPA pilots."

WILLIAM YOUNG J:

See that's in evidence of an intention that conflicts with the language of the provision –

MR HARRISON QC:

With respect it –

WILLIAM YOUNG J:

– terms and, unless terms and conditions means all terms and conditions at least referable to the pilot group. I would have thought –

MR HARRISON QC:

May I just proceed, it's not just unilateral one side's position because he goes onto say, "ALPA's reasons for seeking the inclusion of the clause were discussed in the negotiations, ALPA advised Air New Zealand that it wanted inclusion of the catch all phrase to allow and he subsequently agreed beneficial terms and conditions to be applied." And then he says at 28 over the page, "And discussed with Air New Zealand during those negotiations the risk that FANZP could normally trade away terms and conditions for other advantages. ALPA advised Air New Zealand they wanted what's now 24.2 to ensure if any better terms and conditions were agreed, then those could then be enjoyed."

WILLIAM YOUNG J:

That raises a point I do want to, you to deal with perhaps later. Is there any trade-off that the FANZP pilots, first officers and second officers in substance will have to bear the brunt of to get the better salaries that ALPA pilots wouldn't have to?

MR HARRISON QC:

Certainly Air New Zealand claimed there was. My short response to that is that it's completely irrelevant to the interpretation of this –

WILLIAM YOUNG J:

Well it may not irrelevant to me. If – I mean if the effect of the Chief Judge's conclusion is that agreement means the promise is on one side but not on the other then I really struggle with it. Now I also struggle with the big argument of Air New Zealand that the agreement means the whole collective agreement

because I can't see how that could work but I could possibly see how you could say the employment condition as a whole for first officers could be transported from one agreement to the other, if that were practical.

MR HARRISON QC:

Well the position is that what the, what clause 24.2 is about is the passing on of what is more favourable, not the passing on of what is less favourable but before Judge Colgan in the Employment Court, the position of Air New Zealand was that agreement with a small (a) in 24.2 could only mean an entire other collective agreement was a term of art and they've shifted a little, it maybe on that, and I'm not sure where, quite frankly I don't understand where the Court of Appeal ended up on that issue.

WILLIAM YOUNG J:

All right well I find it –

GLAZEBROOK J:

He can –

WILLIAM YOUNG J:

– a difficult argument.

GLAZEBROOK J:

I just wanted to give an example perhaps so that it can be concrete and it might be in working out what's more favourable and what's less favourable, so say for instance there was an agreement that as long as the pilots worked 60 hours they got paid $12 an hour, but if they only worked 40 hours they got paid $10 an hour. Now if the ALPA pilots were only working 40 hours, would that be actually less favourable than the other conditions, what do you call it – FANZP or –

MR HARRISON QC:

FANZP.

GLAZEBROOK J:

FANZP. Because, so it might not be what is the agreement, it might be what is less or more favourable?

MR HARRISON QC:

Well, my, ALPA's position has been consistently that the purpose, I'm going to answer that. The purpose of the clause is to enable ALPA to specify by notice particular more favourable terms and conditions within an agreement including a collective agreement. It does become, then, a matter of judgment and interpretation whether a particular specified term or condition is severable from some other correspondent obligation, and Your Honour's example is a perfectly good one, where there would be an argument that the favourable bit is unseverable from the unfavourable bit, and in fact if I may I'll deal with this point because it's a matter of the way the Court of Appeal approached this terms of settlement issue Your Honour Justice O'Regan asked me about, because I think it illustrates the other side of the coin. If we go to volume 3 and the terms of settlement are at tab 22. Page 2, sorry, 345. Now, and just also have in front of Your Honours the Court of Appeal judgment at para 50, page 53 of volume 1 in the case, because para 50 – this is the argument that parallels the proposition Your Honour Justice Glazebrook has just put to me and the way it was seen by the Court of Appeal. They noted that Mr Miles had focused on the terms of settlement which hadn't been a focus at all in this way before Judge Colgan. My submission is that the terms of settlement were and are completely irrelevant, that's my first proposition, because they were not the subject of the passing on request. The passing on request related to the FANZP collective agreement. As a matter of law the terms of settlement were superseded by the FANZP collective agreement when it was ratified, that's the way it worked. It's like any, if you had a heads of agreement which is then superseded by the formal agreement, it's the formal agreement that matters. But under the Employment Relations Act that is emphatically the case because that's what the statute says upon ratification.

ARNOLD J:

Are you suggesting these terms of settlement are not reflected in the collective agreement?

MR HARRISON QC:

I am, I am just saying that it's irrelevant whether they are or not. You go to, if you want to run the argument about both benefits and disbenefits in terms of passing on, you look to the FANZP collective agreement not the terms of settlement.

ARNOLD J:

So you don't look at its background?

MR HARRISON QC:

Well, we're not interpreting the FANZP for present purposes to ascertain the meaning of a disputed provision. The FANZP collective agreement was negotiated by Air New Zealand and FANZP in the full knowledge of 24.2. ALPA was not privy to those negotiations and the outcome of those negotiations cannot alter the meaning of 24.2 for ALPA purposes. So my first point, and it's only my first point, but I'm going to, just dealing with this topic and getting rid of it, my first point is that the terms of settlement were irrelevant because they were not the subject of the passing on agreement. They were not the other agreement for clause 24.2 purposes. But secondly, if we look at para 50 of the judgment they then say, "Critically the terms of settlement substituted new clauses 13.1.19," et cetera. Those new clauses gave effect to the remuneration increases. ALPA's request was for one of the benefits FANZP pilots gained without the corresponding burdens, indeed ALPA's request was for part only on new clauses 13.1.19. Now the point is that if we go to, back to page 345 what the new 13.1 said was, "The rates of remuneration and changes thereto are in consideration for and conditional upon the totality of the changes agreed in this collective agreement." So it's not a case that as per Your Honour Justice Glazebrook's example, you got paid at a top rate but only if your productivity complied and if your productivity didn't comply then you got the lesser rate, it's that they chose cunningly I

suppose, to express the rates of remuneration as conditional on the totality of the changes. That's not the same thing as saying there is a particular disbenefit inextricably linked to this benefit and you can only take the benefit if you take the disbenefit.

WILLIAM YOUNG J:
There are two disbenefits, one I'm not too troubled by, one of the disbenefits is the captains don't do that well.

MR HARRISON QC:
Yes.

WILLIAM YOUNG J:
So I can see that the, the argument is that NZALPA, ALPA can only take the whole lot and it's therefore got to disadvantage its captains, then that makes the passing on clause pretty impractical to apply, so that disbenefit I'm not too troubled by. But say it is the case that the FANZP pilots have to work a little bit harder for their 12.6 per cent increase than the ALPA pilots, what would you say about that disbenefit?

MR HARRISON QC:
Well that's Justice Glazebrook's example and my –

GLAZEBROOK J:
Well is it the case under the FANZP agreement is the question really?

MR HARRISON QC:
Yes exactly. I mean if it explicitly said as per Justice Glazebrook's question to me, you must work X hours harder and only if you work that X hours do you get the increase, then I can see the force in the point.

WILLIAM YOUNG J:
Say the effect of the contract is they have to work harder?

MR HARRISON QC:

Well one I don't accept that that is the effect of contract.

WILLIAM YOUNG J:

Well I'm quite interested in that point because I mean the clause, the pass on clause I guess is intended to or its purpose, because it's easy to slip into subjectivism, the purpose of it is to prevent groups of pilots being picked off by a rival union, so I can understand that it might be –

MR HARRISON QC:

That's – I agree.

WILLIAM YOUNG J:

– sensible to look at it in terms of whether a group of pilots is getting a better deal in terms of whether that deal can be passed on. Now if the disbenefits are just colourable then I'm not too troubled by it but if the disbenefits are real then I am a bit troubled by the idea that you can just cut the agreement in half and pass on the pay and not the disbenefits.

MR HARRISON QC:

Well there's a couple of –

WILLIAM YOUNG J:

You probably think they are colourable because I suspect most of the way, of the things that affect pilots are governed by regularity requirements and simply the dynamic of a roster which applies to everyone?

MR HARRISON QC:

Well that's right there's – I mean it is an unusual industry because there are provisions, because the – on any particular fleet the workforce, whatever union they belong to, has to be rostered in a particular way. There are provisions for – the seniority list applies across everyone.

WILLIAM YOUNG J:

Meal breaks really have to be the same I guess?

MR HARRISON QC:

They have to be the same, the way leave is arranged, time off, all of those regularity things have to be common so that the advantage that Air New Zealand, the advantage they got, Air New Zealand got across the board were perceived by it to make life easier. For example I think there was a greater ability to schedule simulator training in weekends, for example. The simulator is the machine you hop in to upskill or keep current. So –

WILLIAM YOUNG J:

Would it not be fair to require ALPA pilots who wanted the increase to do the same, to submit to the same requirement?

MR HARRISON QC:

No, I don't accept that, because if you – I mean we're arguing on a particular premise which is that assume the clause permits you to nominate a particular benefit such as remuneration, then, this is my premise, and I only concede this far, then you could argue that if there is a disbenefit that relates to how that remuneration is calculated or fixed, the disbenefit comes with it. I don't accept that the intent of the clause was to enable more generic disbenefits that apply not to remuneration but to other aspects of the operation, or apply generally across the board to all FANZP benefits –FANZP members, that is a significant, step significantly too far.

ARNOLD J:

But isn't that somewhat unrealistic in the sense that from the company's point of view if it can achieve efficiencies in its operations, for example by being able to schedule pilots to do simulator training in the weekends and so on, it gets a cost saving and it's prepared to pass that on to pilots, isn't that –

MR HARRISON QC:

The way I would respond to that is twofold. One, on the hypothesis that the clause is appropriately interpreted as permitting a request to pass on something, particular terms and conditions within the agreement, it doesn't have to relate to the entire agreement, which means we've rejected the Court of Appeal approach on that hypothesis, it is then a matter of interpretation to determine precisely what is within the contemplation of 24.2 that gets passed on in terms of the kinds of disbenefits that do. So we're still –

WILLIAM YOUNG J:

I would say that a conclusion that agreement encompasses unilateral promises seems to me to be so badly in the wrong place that it would infer that a wrong turning has been taken.

GLAZEBROOK J:

Well of course it doesn't, it's not only one-sided in the sense that you do have to work to get the money, so there's no question that you have to work.

WILLIAM YOUNG J:

But don't you have to do the same work, the work of the same –

GLAZEBROOK J:

Then, I think, your point is you work out whether it is the same work or whether the disbenefits are so closely associated with that or with other advantages, and one of the other advantages of this contract is the pilot has got a much lesser increase than they would have done without –

WILLIAM YOUNG J:

I'm not so worried about the different categories of pilots because I think if you lump them all together the clause is never going to work. Or perhaps I'm obsessed by the facts of the case.

MR HARRISON QC:

I do make the point that, on the hypothesis we're just debating it's still a matter of interpretation. First of 24.2 then maybe of the FANZP CEA to decide whether the alleged disbenefit is sufficiently part and parcel of the claimed benefit. That's still the matter of construction but the second point I wanted to make before we leave this is before Judge Colgan that possibility was simply not being canvassed because the Air New Zealand position was it had to be an entire collective agreement. So Judge Colgan was never invited to come to grips with this benefit/disbenefit analysis or to analyse the clause as a matter of construction from that perspective, let alone the FANZP agreement. But coming back to page 346, a provision that simply –

ELLEN FRANCE J:

Sorry, just in relation to that, in paragraph 47 of Judge Colgan's judgment he does list various things that are, and then identifies to which party they are in advantage or disadvantage.

MR HARRISON QC:

Yes, he does.

ELLEN FRANCE J:

You don't take any issue with the way in which those factors are identified?

MR HARRISON QC:

No I don't take any issue with those. His finding is to, his find to that list no. and there were numerous generic changes of advantage to Air New Zealand, those listed. I accept that there was a generic or general series of changes as 13.1 on page 345 of volume 3 encapsulates. There were changes agreed to. The real issue is I was, on the hypothesis we've been debating, what is the effect of 24.2 properly interpreted, a matter I'm saying that Judge Colgan was never asked to address and did not address and a matter ultimately still of construction of the agreement. So that's my response and the terms of settlement issue is simply a red herring in my submission. If that argument

has to be run then it has to be run and can be run by reference to the FANZP collective agreement which is what –

WILLIAM YOUNG J:
Well the FANZP, just so I fully understand, the FANZP collective agreement effectively implements the settlement agreement?

MR HARRISON QC:
Yes it does and that, but all I'm saying –

WILLIAM YOUNG J:
And replaces it?

MR HARRISON QC:
– is here are the terms of settlement. I mean what the Court of Appeal basically said, oh, well Judge Colgan didn't have the case argued by reference to the terms of settlement, therefore we can take an entirely fresh look at it, but that with respect is –

WILLIAM YOUNG J:
Well I understand what you're saying.

MR HARRISON QC:
I simply don't accept that so it was one of a number of ways in which the Court of Appeal sought to relegate the Judge's reasoning to the background and I simply don't accept it. Now –

GLAZEBROOK J:
Well the other thing probably is that it probably does not only require an interpretation but possibly some factual findings on how important in terms of money some of these things were because probably the main reason the first officers got more was because the captains got less is my understanding of what Judge Colgan says.

MR HARRISON QC:

To which we say too bad.

GLAZEBROOK J:

Well no, no but exactly irrelevant so the, then the extent to which the other benefits or disbenefits might have been specifically related to the first officers, when my understanding is at least with some of them aren't referable to all of the first officers.

MR HARRISON QC:

I agree that there's not only some interpreting to be done by the Court that has the jurisdiction to do it, there's also some fact finding because there was a concession –

GLAZEBROOK J:

And they weren't asked to do it by Air New Zealand or the Judge wasn't asked to do it is the point.

MR HARRISON QC:

There was a concession that the terms, the terms of remuneration targeted in our request were more favourable so it was conceded, so Judge Colgan didn't need to do the favourability comparison because he was only comparing the benefits, the subject of the request.

WILLIAM YOUNG J:

Can you, how – is the concession recorded in this judgment?

MR HARRISON QC:

Yes it is Your Honour. Paragraph 7 and I think there's another point at which it's conceded as well. Page 17 for the case.

ARNOLD J:

That's on the basis that your interpretation is correct?

MR HARRISON QC:

Yes, but there were only two competing interpretations.

ARNOLD J:

Yes you know see I understand that but it's on the basis that your view that it means the pilots and ALPA can, if you like, cherry pick or whatever, take the advantage. If that's right it's accepted that obviously a higher rate of pay is favourable?

MR HARRISON QC:

Yes, I'm not saying that the concession is binding for all time, I'm simply saying that it was directed to the, to that particular argument and it meant that he didn't have to consist and consider benefits and disbenefits associated with what we'd nominated.

So I'm still trying to take Your Honours through page 26 in fact no I'm going to persist just for a moment more I'm nearly finished so these, this isn't a written submission, so it says about five lines down within para 28 of that brief, ALPA advised Air New Zealand that it wanted what is now 24.2, ensure that if any better terms and conditions are agreed then those particular terms and conditions could then be enjoyed by effective New Zealand Pilots, ALPA pilots. Those terms and conditions in isolation not the entire FANZP CEA made it very clear they were looking to have the ability to pick up individual parts of contracts. Then he gives evidence about the Air New Zealand negotiator's evidence before the Employment Relations Act and that's set out, and Mr Hancock himself said then and again before Judge Colgan, he acknowledged this background which is set out half way down page 26, the background was that FANZP had already enjoyed the benefits of its 2001 CEA for a year were renegotiating and they wanted, ALPA wanted 24.3, which became 24.2, and didn't want to settle for a new CEA only to have FANZP later conclude a more favourable CEA, and Mr Hancock was questioned and he acknowledged that the concern was that ALPA members were years behind on pay, sucking on the hind tit, and what's happened in the past won't happen again, and then Mr Hancock's own evidence is summarised over the

page again they were, that's the background, and finally in telling the in cross-examination, bottom of page 37, he had referred to the benefits issue, the benefits of a new FANZP CEA and almost at the bottom of the page I said, "Well what, specifically what benefits are you referring to there in your clause 9?" "The pay increases." "The pay increase?" "Mmm." And over the page. Question, "So the position then was, and was the subject of discussion and correct me if I'm wrong, that FANZP had already enjoyed their pay increase under the 2001 CEA for one year, correct?" Answer, "Yeah, yeah, and they were about to get another one potentially." Question, "Yes and that was ALPA's specific concern, the higher remuneration benefits being enjoyed by FANZP members, correct?" Answer, "yeah, yeah, they're going to be behind yet again." Question, "On pay?" Answer, "Yes." So that, leaving aside the debate we had about whether that constitutes negotiations and therefore shouldn't be referred to it is very clear from an evidential point of view that that's the background and that they were negotiating a clause that would address the possibility that with a new FANZP agreement, ALPA members would be behind on pay.

The second evidential point I wanted to make, it's taken longer but I will make it very shortly, I want to record our formal objection to this bundle of additional affidavits which has been put in over objection and is referred to in some of the footnotes as having evidential significance. The affidavits are affidavits from deponents from Air New Zealand in support of the leave application in the Court of Appeal. They were not before Judge Colgan. There's been no application to adduce them as evidence in either the Court of Appeal or this Court, and it's just completely unacceptable to have the – and it's not fresh evidence either. It's completely unacceptable, in principle, to have that material before the Court, and I note for completeness it just came out on the 12th of October, there's a Court of Appeal decision called *Lean Meats Oamaru Limited v New Zealand Meat Workers And Related Trade Union Incorporated* [2016] NZCA 495, at paragraph 22 the Court of Appeal had this to say, in the course of his argument counsel sought to rely on statements in the affidavit, I'm paraphrasing, filed in support of the leave to appeal application. Request not pursued. We record it is unlikely we would have admitted any

evidence. Affidavits in support of an application for leave to appeal can be used for that purpose only and are not a back door for admission of new evidence on a substantive appeal. So we object to that.

Now, got all that out of the way hopefully. I turn to my submissions and the authorities on the jurisdictional bar and that takes me to page 7 of the written submissions and as I note at para 23 of those submissions, "The jurisdictional bar on construction appeals is a further constraint on an already constrained right of appeal. Though not only is the right of appeal constrained to decisions shown to be wrong in law, it's then further confined to exclude appeals on error of law, on decisions of construction." Now as I note at para 25, if you started with a clean slate then you might well interpret 214(1) as an excluding appeal against all decisions on the construction of an employment agreement if it the product of all, any kind of legal error and that's not the way it ultimately has been interpreted. But we shouldn't just start from, we need to go back and start from ground zero, if you like, that that is what the provision actually says rather than start from the most liberal –

GLAZEBROOK J:
You could put the submission that high if you wanted to because I don't think it's come before this Court as it in that form.

MR HARRISON QC:
Yes, well certainly I do put the submission that you start with that wording and it's pretty clear that it contemplates a bar on and all decisions of the construction of an employment contract and indeed gives the Employment Court permission to make errors of law including, one could say, errors of interpretation principle. I don't have to go that far to get to the result I'm arguing for. I can rest on my distinction between formulating the correct principles of interpretation and applying them, saying that you draw the line between those two. But we've got the background which is what Justice McGrath summarised in *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA) which I have set out in the way the matter develops, I've set that out on page 8 and the position in para 27 is we've got the case law that

says well if you've got error in the formulation of a relevant principle of contractual interpretation or other relevant law such as the law relating to implication of terms or interpretation of a Statute which happens to interface with the contract, then that falls outside the jurisdictional bar. But if you're just looking at construction or interpretation of an employment agreement per se, are there any other kinds of error of law than error in the formulation of the principles and interpretation which fall outside the jurisdictional bar, I submit not. And I note the *Yates* case and I'll come back to it but I'll just do a quick survey of the authorities which I've set out on page 9 and following. In para 30 the *Attorney-General v NZ Post-Primary Teachers Association* [1992] 2 NZLR 209 (CA). In para 30 the *NZPPTA* case is at tab 4 of the bundle of authorities and it's drawing a distinction which is generally drawn in that last paragraph, "Appeals will extend to general principles and general implied terms," because that was an implied term case, "In contracts of employment as distinct from construction of individual contracts." Of course the law of implied terms or some kind of implied terms seems to have moved on and now some superior Courts are saying that implication of terms is of itself a matter of construction of employment contracts, so we've got that little – again the law has moved on so whether, how that works through – but it doesn't affect us here because there was not implied term. *Tisco Ltd v Communication & Energy Workers Union* [1993] 2 ERNZ 779 (CA).

ARNOLD J:

In that case the Court did talk about misapplication principles and say that was within jurisdiction.

MR HARRISON QC:

Yes, you get the occasional, you get the occasional reference to misapplication, you do, I accept that. But without really formulating what that means –

GLAZEBROOK J:

And you have said that –

MR HARRISON QC:

– and going back to the critical issue that Your Honour asked me about before. Yes sorry –

GLAZEBROOK J:

No, sorry that was the point I was making, that you do concede there can be misapplication of the principles if in fact they have not been applied, even though they've been correctly stated?

MR HARRISON QC:

Yes, that's a correct statement followed by a non-application although we start to get...

GLAZEBROOK J:

Yes.

MR HARRISON QC:

And in *Sears v Attorney-General* [1995] 2 ERNZ 121 (CA), again there's a reference, and *Tisco* and *Sears* at the bottom of page 9 there's the reference to going beyond the particular terms of a contract, which I submit is a helpful guideline. If you, in order to intervene the appellant's Court has to reach a conclusion about the particular term of the contract rather than a principle going beyond the disputed particular term of the contract, then it's within the jurisdictional bar.

WILLIAM YOUNG J:

If these cases are to be applied and not rejected, they could apply to interpreting a contract by reference to what one of the parties intended because that, on the face of it, is an error of principle as opposed to –

MR HARRISON QC:

If it's apparent that, and this is a point I conceded earlier, if it's apparent that the Employment Court has relied on the subject of intent of one of the parties only, then that could be –

WILLIAM YOUNG J:

What about the subject of intent of both parties, is there authority that supports the view that an agreement can be construed, that – and it's not really I suppose as the end result, it's the practical point that the Court should entertain arguments as to what both parties thought a clause meant and so that if their intentions coincide the clause must be construed in accordance with that intention, because there'd often be disputes about that of course?

GLAZEBROOK J:

David McLauchlan would say there are cases that do that, that agreed dictionary, his agreed dictionary exclusions and that's what he argues as, that should be used to say that subjective intentions are actually relevant but – so he would certainly say and one of his examples would be the agreed dictionary which is a clear exception, i.e. cat –

WILLIAM YOUNG J:

But that –

GLAZEBROOK J:

– meets dog.

WILLIAM YOUNG J:

– there is an agreed dictionary.

MR HARRISON QC:

The agreed dictionary starts to merge into the situation where you've got both parties subjective statements and intentions are a matter of record and there is no dispute about them –

WILLIAM YOUNG J:

Well you know they tend to bicker about them.

MR HARRISON QC:

There is then no dispute that it becomes an objective fact that both sides intended consequence X so it becomes objective if there is unanimity as to what the purpose of the provision was.

WILLIAM YOUNG J:

But was there really unanimity, and agreed unanimity that ALPA could insist on the passing on of terms and conditions but not the corresponding obligations?

MR HARRISON QC:

Well, the answer to that is that it would, it wasn't ever debated at that level of refinement in evidence and it wasn't debated that level of refinement before Judge Colgan so he didn't find on the point.

WILLIAM YOUNG J:

He must have made some, it must have been debated to some extent because he did come up with that list that Justice France has referred to?

MR HARRISON QC:

That was, he was simply, His Honour was simply outlining the evidence for the airline but he then went onto say well it's all irrelevant anyway because the FANZP agreement was negotiated subsequently and by Air New Zealand in the knowledge of –

WILLIAM YOUNG J:

Well I don't, well I'm not sure, I agree he doesn't really have to interpret in a, quite the same way the transfer agreement but he still has to form a view of it in terms of whether a) it's more favourable and b) then coming back to clause 24.2, what is the agreement that is to be passed on; is it one set of promises or is it the promises and the corresponding promises?

MR HARRISON QC:
That wasn't the defence of the case that Air New Zealand was running and all Judge Colgan was doing was prudently summarising the evidence and arguments on both sides.

WILLIAM YOUNG J:
Right.

MR HARRISON QC:
But he then goes on explicitly to say, well I'm not taking that into account.

GLAZEBROOK J:
Well I suppose the Air New Zealand point was that all of those disbenefits had to be handed on. So in fact it was perfectly logical to summarise them because the Air New Zealand point was that because it was in consideration of all of those, including the differential rates for captains, and some of the advantages, some of the disadvantages, then the whole thing had to be taken or nothing at all. So that was the Air New Zealand before him.

MR HARRISON QC:
Air New Zealand was effectively saying that you take the lot for all other pilots, the FANZP replaces the ALPA collective agreement. That was the point we had to meet. It wasn't that for those pilots the subject of the notice from ALPA, they had to become, they had to go under the FANZP agreements. That wasn't it. But anyway, let's go back to the case law. In *Sears*, bottom of page 9 and over the page, not precluded from examining questions of principle going beyond a particular term of the contract, and over the page that were the Court is in principle and how it goes about interpreting the contract that's an error of law. Now that's a rather ambiguous statement but it's not, I don't accept that that's' how the principle should be formulated.

And then in *Walker Corporation Ltd v O'Sullivan* [1996] 2 ERNZ 513 (CA) that statement is repeated in the body of the passage there and then the Court concludes, "We think the learned Judge in the Employment Court did adopt

the wrong approach in adopting the service agreement." I don't accept that that is the test, or a test, of general application and if I was going to pick one case at Court of Appeal level where, in my respectful submission, the Court plainly went too far, it would be this one in terms of the outcome where they really do, the Court really does, after that, following that passage, just go straight to the interpretation of the contract and say we disagree with the Court belows interpretation.

Wellington College of Education v Scott [1999] 1 ERNZ 98 (CA) erring as a matter of law in the approach to the interpretation, fair enough, as distinct from simply erring in the ultimate construction, and then it adds, "The application of that construction to the facts of this case," in absence of any factual support for the factual conclusion will be an error of law, that's consistent with the point I was making about there being a no evidence standard when you look at the contractual background not direct review.

Then there's *Service and Food Workers Union Nga Ringa Tota v Cerebos Gregg's Ltd* [2012] NZCA 25, [2012] ERNZ 38, which I have summarised, and then there is *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721. in this Court at tab 10, page 371 to 72 in a footnote, and at the top of page 11 this Court said, "The limitation prevents an Employment Court from construing a term or terms of a contract but does not prevent it from considering questions of interpretive principle." That's it in a nutshell. I'm perfectly happy with that statement. Prevents an Appellate Court from construing a term or terms of contract. And there's also, of course, within the decision there is reference to the common law principle which it says doesn't apply under section 214, that interpretation of a contract is a question of law, which I want to come back to when I get to these Canadian cases.

So I deal with *Bryson* and then also add in, which isn't in the submissions, perhaps around about, just before para 34 this *Waitemata District Health Board* case which is a hand up. I note that Your Honours Justice Glazebrook and France were, delivered a joint judgment in that case in the Court of Appeal. So in that case you've got, a little assistance with the

eyesight, sorry it's a judgment of Justice Glazebrook's at paragraphs 9 to 12, "Section 214 will preclude this Court's jurisdiction unless the Judge made an error of principle that transcends the particular contract. Such an error of principle may arise where irregular or unorthodox construction techniques are used." And then over the page as Justice McGrath said, "The Employment Court where it claims privacy in relation to the construction of contracts but this is subject to the supervising appellant function of this Court in relation to the law of contractual interpretation." And then there's a review of the other, of the judgments in *Yates* including your own Justice Young's. At 12 there's a reference to the *TLNZ Auckland Ltd v Neenee* [2006] ERNZ 689 (CA) where, although the Court considered the Judge's construction to be wrong, "No irregular or unorthodox construction techniques were apparent."

And then at, there are some matters of interest in Justice Chamber's separate judgment where he notes the, at para 30 at the top of page 1039, "That the meaning to be attributed to the current position and its predecessors is rather unclear. Numerous decisions not all reconcilable, what amounts to construction has been the subject of such subtle interpretation that no employment lawyer could be confident in advising the client. What has happened is that resourceful employment lawyers have attempted to push through the loopholes left by this Court." And then His Honour notes with characteristic frankness that he, at 34 that he had an instinctive concern about the interpretation under appeal, he found it necessary to analyse the Judge's construction of the agreement even though the appeal on construction Is not permitted. He says, "It is however only by undertaking the construction exercise oneself, that one readily, really analyse accurately whether the appellant's attack is in substance, albeit not in form an attack on construction." Well I acknowledge with respect and I've been, I've suggested it was the wrong approach that Your Honour Justice Young in *Yates* starting with the construction –

WILLIAM YOUNG J:

Starts, what does it mean and if it's different then there must have been an error of principle.

MR HARRISON QC:

Yes I'm submitting that's not the right approach but I'm noting that what Justice Chambers has said here but I go back to –

GLAZEBROOK J:

Although to be fair, Justice Young considered there hadn't been the interpretation of the contract at all in *Yates* so it wasn't –

MR HARRISON QC:

Yes, and likewise I'm not suggesting, I'm not submitting that either *Waitemata* or *Yates* is wrong in the conclusion that was reached; we're talking about methodology. But I just go – and on this question whether the Court should embark on this interpretation exercise I just go back to what I said was the *Bryson* nutshell which again is on page 11 of my submissions, "The limitation prevents an appellate court from construing a term or terms of a contract." So that's why I said I'm happy with that in a nutshell because it supports my submission that certainly as, generally speaking the starting point should not be to set up a competing interpretation which is precisely what the Court of Appeal did in this case.

So in any event I'll leave Your Honours to read the rest of *Waitemata DHB* and the way His Honour addressed these issues. He noted at 44, "Presciently that some point in the near future either this Court or the Supreme Court will need to review the jurisprudence. The difference between erring as a matter of law in the approach to interpretation of relevant provisions, amenable to review and simply erring in the ultimate construction which is excluded," is to my mind very subtle having thought that in some cases the Court of Appeal may have exceeded its jurisdiction could not resist the temptation to correct the legal error when it perceived it. That's what happened in this case and the jurisdiction was, in my respectful submission, exceeded.

Now so I look at page 12 and following at *Yates*, and I'm not going to go through what I've written there, but I do submit, as I have said at 44, that principled appellate review cannot begin with setting up a competing interpretation and then concluding that the result arrived at by the Employment Court was not driven by the application of orthodox construction techniques. The proper approach is to search for error in legal principle, identify the error, then search for it, and you've got to actually say, you've got to identify what you're looking for is a precise and particular error which is what the Supreme Court of Canada says is the approach, and I'll come to that. So that's *Yates*.

I want to go to the supplementary bundle of authorities, and I should be able to get through that by the time we reach the –

GLAZEBROOK J:
Is there, say on the face of the judgment, which I think is probably the *Yates* issue, although I didn't see it that way, but there are some interpretations that are so outside of what one might think of as the normal range, that there must have been an error of principle?

MR HARRISON QC:
I don't accept that that is, that, with respect, is a sloppy way of approaching it and introduces –

GLAZEBROOK J:
It would be sort of a *Wednesbury* way, isn't it?

MR HARRISON QC:
Yes, it is, and that's, you see that coming through in the respondent's submissions. No reasonable Employment Court could have reached this interpretation.

GLAZEBROOK J:

Well it's more that it is so insane it's very much the very *Wednesbury* one that no sane, not reasonable, but sane decision-maker could have come to that decision without having made an error of principle.

MR HARRISON QC:

Well, one, I don't accept that that is an appropriate formulation given the nature of the jurisdictional bar. Two, it can only operate if the appellate courts in fact embarks on its own construction which is, again, impermissible. But as I note in *Yates* I've heard the headnote in *Yates* in para 46 and it's, while it's talking about not applying orthodox principles, in fact the reality there is that the Employment Court said that you needed an express power in the contract, ignoring the principle that powers, contractual or otherwise, can be conferred by implication. So that was, I mean that's an error of interpretation principle not reached by means of an appropriate enquiry. Identifying a precise error, that it's an error of principle and not merely a disagreement over construction. Now these –

ELLEN FRANCE J:

Why do you say irrationality is not a question of interpretive principle?

MR HARRISON QC:

Because it, well, one, it isn't. I mean, it's a new principle in interpretation which is being invented by the respondent in this case. It's not part of the principles of contractual interpretation that – your principle is avoid absurdity. Your interpretation should avoid commercial absurdity and so on and so on. That's a principle, and if you fail to – if that principle is relevant and you fail to formulate it, then that's one thing, but to say that you step back, you don't look for any misstated principle of interpretation, you just go to the end result and say, well, I fundamentally disagree with it and because I fundamentally disagree with it, it can't possibly be a reasonable interpretation, that's starting at the wrong end, and given the nature of this privative clause it's not the appropriate principle for this Court to formulate.

Now these supplementary bundle of authorities, there are three of them, *AFFCO New Zealand Ltd v New Zealand Meat Workers Union* [2016] NZCA 482 is very recent. My notes summarise what they're about and so can I go to the notes, the one page note. The discussion of jurisdiction at tab 1, paras 29 to 30 was that, "Intervention is justified if the Court is satisfied that the Employment Court has erred, either in its reasoning process adopted to justify its conclusion or has applied an incorrect principle, and not has incorrectly applied a correct principle which is the way the Court of Appeal in this case formulated the principles of interpretation." And I note that also that although that although in *AFFCO* the Court intervened, the case really involves the jurisdictional threshold issue of whether seasonal workers were in law employees at the material time which is really a threshold jurisdictional issue like was, as was the case in *Bryson*. Now the two Canadian, the Supreme Court of Canada decisions I came across *Sattva Capital Corporation v Creston Moly Corporation* 2014 SCC 53 , [2014] 2 RCS 633, because I saw a note on *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co* 2016 SCC 37. *Sattva* has been around for a little while, it's at tab 2 and if I could just talk through my notes in the time available. So there's two principles in *Sattva*, one what I call a self-denying ordinance for appeals concerning contractual interpretation generally, secondly addressing the question of an appeal limited to questions of law only and availability of appeal in cases involving contractual interpretation. The second is our concern here.

Now, as to the first aspect, it is of interest if we go to, start at paragraph 42 of the Supreme Court's judgment. Obviously the approach to appellant review in a general appeal is, appears to be different in Canada, at least since this case, they look at the, at paras 42 and 43, they look at the test. Is it a question of law or a mixed fact of law, interpretation of a contract. They note at 43 that historically it was regarded as a question of law, that's the approach that *Bryson* took, of course. Then they say at 44, "The historical rationale no longer applies," that rationale was that jurors were illiterate of course and so on, which *Bryson* noted. 46, "The shift away from the historical approach in Canada is based on two developments, first an adoption of approach of

contractual interpretation directs Courts to have regard to surrounding circumstances." Obviously those are factual issues and over the page, often referred to, top of the page, "Often referred to are the factual matrix." Second is, "The explanation of difference between questions of law and questions of mixed fact." So they then go onto conclude at 50, the Court says, "The historical approach should be abandoned, contractual interpretation involves issues of mix fact and law as it is exercise in which the principle is a contractual interpretation applied to the words of the written contract considered in the light of the factual matrix." So that was the first point.

Now the second point arises because that the proposed appeal in *Sattva* was against an arbitrators," this is my para 5, "Arbitrators of a contractual interpretation ruling required leave, had to involve a question of law," and that can be seen from paras 38 and 42 of the judgment. So then there's a discussion starting at para 53 on page 660 where the Court says, "Nevertheless," and despite the fact that it's a mixed fact in law, "It may be possible to identify an extricable question of law from within what was initially characterised as a question of mixed fact and law. Legal errors made in the course of contractual interpretation include the application of an incorrect principle, the failure to consider a required element of a legal test or the failure to consider a relevant factor. There's no question that many other issues in contract all do engage substantive rules of law. The requirement for the formation of the contract capacity of parties; evidential requirements. Courts should be cautious in identifying extricable questions of law and disputes over contractual interpretations," and the reasons are spelled out in what follows in 54 and 55. And he goes on, this is I submit of assistance, in 55. "As mentioned above, the goal of contractual interpretation to ascertain the objective intentions of the parties is inherently fact specific. A close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare," and that's the kind of debate we've been having this morning including, for example, with Justice, Your Honour Justice Arnold.

Now then in *Ledcor* and I, if I may just finish this very quickly. In *Ledcor* my para 6, “The Supreme revisited and refined the first of the two aspects, the standard of appellant review,” and at paras, this is tab 3 at para 20 and following. “Standard form contracts, their interpretation is better characterised as a question of law subject to correction review.” But that was in a general appeal rather than one limited to error of law. So they, whether rightly or wrongly as a matter of principle, it seems a little bit of an about turn, they regarded, perhaps expedience is the best word; for expedience reasons they treated standard form contracts beyond, operating beyond the contracting parties as requiring a more merits based review in a general appeal.

So for what they’re worth, those authorities are added into the mix and if it’s a convenient point, we can have the adjournment.

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.49 AM

MR HARRISON QC:
Yes Your Honours we’ve been reviewing some authorities on the jurisdictional bar and I’m, just before I part with the topic, at page 10 of the respondent’s submissions, para 31 there is an attempt to summarise the law relating, using extracts from various authorities. I don’t want, I just place on record I don’t accept that summary. Often or in a number of instances within that para 31 summary things are taken out of their context or the quote is incomplete within the relevant passage so I don’t accept the emphasis that emerges from that but we needn’t go any further than that.

So overall looking at my first point about the, what is the appropriate test to determine whether the jurisdictional bar applies, I do continue to emphasise that a test of whether the Employment Court has correctly applied principles interpretation is impermissible because it can only operate as I say in my para 47, “In practice it can only operate by the appellate court itself entering upon construction of the employment agreement in question and at that point the

appeal turns into an appeal against the particular construction adopted by the Employment Court." So it's a kind of double whammy. I say that the test, the correctly applied test is wrong because it will inevitably draw the appellate court into a exercise of construction, it's inevitable. Alternatively I go onto argue, well in this case it did do so and that's a jurisdictional error on the part of the Court of Appeal in any event.

So that is – it is as I have argued then, to sum up, it's one thing to say that the Court must apply correct or indeed must apply orthodox principles, which presumably means correct, correctly stated principles to its task. It's a quite another to say that it must not incorrectly apply correctly stated principles or to step back and say that the interpretation must be one that the appellate court can characterise somehow as an orthodox interpretation, that's going too far.

So the second alternative ground, middle of page 14, is that the jurisdictional bar was transgressed when the Court of Appeal embarked in this case on a competing exercise of interpreting clause 24.2. And I note at para 50 that the judgment, the Court of Appeal judgment really does proceed by the Court formulating its own competing interpretation of 24.2 contrary to that of the Employment Court and then it is as a consequence of that that the conclusion is reached that the Employment Court's differing interpretation misapplied correctly stated principles of contractual interpretation. And that was because conclusory, ultimately, the Court of Appeal said that the Employment Court's interpretation was to be disregarded as simply wrong. That's the case, volume 1, paragraph 50 of the Court of Appeal judgment, which is at page 53. We've been there before, it's the reference to the bringing in the terms of settlement. The request was only part – essentially, the last few sentences, "Essentially the Chief Judge concluded that any agreement could include just one part of an agreement, indeed, just one part of one part of an agreement. That is, one benefit without any of its related burdens. That is simply wrong."

I don't accept that the postulated burdens were related burdens. We've been through that argument and I don't accept that the conclusion that any agreement could include part of an agreement –

WILLIAM YOUNG J:

There may be a sort of a, not entirely engaging with the arguments here, but what I suppose troubles me with the Chief Judge's approach is that he has created for ALPA pilots a mix and match contract that's got the FANZP pay but the ALPA obligations.

MR HARRISON QC:

If we set aside the pejorative term "cherry pick".

WILLIAM YOUNG J:

Well I'm not, I didn't –

MR HARRISON QC:

His interpretation is that the ability to request passing on is an ability to request a particular term or condition, provided it is, the requested term or condition is more favourable than the corresponding term or condition in the ALPA agreement.

WILLIAM YOUNG J:

But it does create a new contract for the pilots affected which once the passing on is in place means they get FANZP pay for ALPA obligations.

MR HARRISON QC:

We can quibble about this but I don't accept it creates a new contract. It simply, because 24.2 itself contemplates that there could be an enhanced particular term, it simply pro tanto amends the remuneration, here the remuneration provision for this category of pilots. But it's not an entire new contract.

WILLIAM YOUNG J:

But for each individual pilot there's a new contract. That pilot's contractual entitlement to pay changes but contractual obligations don't.

MR HARRISON QC:

The contractual entitlement changes. The balance of the obligations continue unaltered.

WILLIAM YOUNG J:

I mean, I know you won't like the premise of the question, but if you just engage with its merits. Would it really be impracticable for pilots affected by the transfer to accept the FANZP obligations?

MR HARRISON QC:

It depends which obligation you identify.

WILLIAM YOUNG J:

I'm identifying those that, say we're talking about first officers of 737s, which they're not flying any more obviously but forget that. Would it be possible for the obligations of FANZP first officers to be assumed by ALPA first officers, in consideration for the increased pay, thus they would have to be available for weekend simulator training.

MR HARRISON QC:

I'm not sure I can answer that question because it's not a matter which was addressed in the Employment Court.

WILLIAM YOUNG J:

It is addressed in very general terms in para 75 of the Chief Judge's judgment.

MR HARRISON QC:

I don't accept that feasibility is.

WILLIAM YOUNG J:

Well he said it was conceptually and practically incapable of being passed on to individual pilots, but I'm not sure what he meant by – unless he means the whole collective agreement.

MR HARRISON QC:

I think he's responding to the Air New Zealand argument that – what His Honour is saying, and this is why I find it difficult to answer the question as posed, what he's saying is that a collective agreement like this one contains provisions of general application like rostering, provisions which benefit the union rather than the individual pilot, and that's why you can't have, and it wasn't in contemplation, that you would, the FANZP collective would completely take over so that's what he's addressing rather than addressing –

WILLIAM YOUNG J:

But say you treat pilot employee group as including first officers. You could say substitute the ALPA obligations, replace the ALPA obligations with the FANZP obligations unless there's something that makes that impracticable.

MR HARRISON QC:

And the answer to that is because the case was not conducted on that basis –

WILLIAM YOUNG J:

I understand that.

MR HARRISON QC:

– I don't know. I mean even spending a week, weekends in the simulator, I'm not prepared to say that that is feasible in respect of all of the pilots the subject of the request. You might say, well, for an individual pilot, yes, maybe it could be, but if we went back to square one and looked at whether that was feasible we might find the pilots that ALPA would be able to mount an argument that it's simply not feasible for the entire operation. I don't know so I'm not prepared to concede the point.

WILLIAM YOUNG J:

No, all right.

MR HARRISON QC:

So getting into the, my second major line of argument, I submit that the, with the greatest respect, that the Court of Appeal went out of its way to look for errors, and having done so identified a number, but on further analysis it's either uncharitable or unfounded. If I just ignore my notes for a moment and just take you to some passages in the Court of Appeal judgment. We can begin at page 46 of the case. no, sorry, page 47, the preliminary observation. As I noted earlier the contention at 26 that the argument had a different focus and was firmly based, para 28, on the terms of settlement, I don't accept that that was a proper distinction. It was a distinction that ultimately, as I argued before the break, went nowhere or goes nowhere. And then at 29 the Employment Court says, "The Employment Court task was to interpret clause 24.2 in particular the words 'any agreement'." But then that's firmed up on at 36 later where it said, "the issue for the Employment Court was the meaning of the words 'any agreement' in the phrase," et cetera. I don't accept that that – that's wrong, that's too narrow. The issue for the Employment Court was the interpretation of clause 24.2 as a whole against a contractual background, and the issue that Judge Colgan was asked to decide was really the issue that he identified at page 32, para 56 of his judgment, the differing interpretations. The plaintiff's interpretation. The question is whether individual terms and conditions can be passed on upon request. The plaintiff's position or, can it only be the whole of a collective agreement the defendant's position and the Authority's conclusion.

Now it's then said at, going back to page 47, the Court says in para 29, "Given that it was put to the Judge that 'any agreement' referred to the whole FANZP CEA, it is perhaps understandable that the Judge did not consider whether what ALPA requested be passed on was an agreement… whether it came within the words 'any agreement'." Now that, with respect, is a mischaracterisation of both the issue and what, the way the Judge went about interpreting and was entitled to do so. He addressed this by saying, by asking what an agreement in general terms was, and he concluded that it included, and was not limited to, an entire collective agreement, and then he went on to conclude that it, given the background and textual indications the Judge

identified, an agreement included a part of an agreement, a particular term or condition identified as more favourable. So he addressed all of the issues and it's really wrong, in my submission, to characterise the Judge's not considering this particular issue.

So then we note at page 48, para 31, there's no issue with the statement of contractual interpretation principles, then and now. I refer to para 36, page 49, that same, submitting that it's mischaracterising the issue to focus solely on the words "any agreement". They then go on at page 50 to look at their version of the natural and ordinary meaning of the words "any agreement" and the way they do this is worth noting. When they say, at 40, referring to *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432, central to the interpretation is the natural and ordinary meaning of the words in question. Well, then the words in question, I would submit, are not any agreement. They are the entire wording of clause 24.2. But the Court of Appeal is not prepared to focus on the entire wording, which is what Judge Colgan looked at and interpreted. It wants to focus on the words "any agreement" in isolation. So at 41 it says, "Any agreement are common words," then gives some synonyms, then it gives a law dictionary definition, law of contracts, so straight into contracts, then at 45 the Court notes that the Chief Judge correctly identified the meaning of agreement and they emphasise the final sentence at that passage where His Honour said, "Agreement means a consensual arrangement or accord in the context of employment and I concluded [sic] was intended so to mean."

Now that is then taken out of context and used to identify an error at para 47 where the Court takes the submission from my learned friend and says, "We agree. Fundamentally an 'agreement' is an exchange of promises. At a minimum, it must include all the promises made by the parties relevant to the particular topic. Having correctly identified the meaning of 'agreement' the Employment Court did not apply that meaning. The final sentence of [65] of its judgment is inconsistent with the conclusion it reached at [72]." So go back to para 45 of the Court of Appeal's judgment I said that was taken out of

context. By that I meant that Judge Colgan was there dealing with the Authority's view that the word "agreement" was a term of art that, and meant, could mean only a collective agreement. So what Judge Colgan was doing was rebutting that term of art proposition by saying that agreements may take many forms, not confined to collective agreements and generally it means a consensual arrangement et cetera. So that statement is then taken by the Court of Appeal and treated and the later reasoning as to the interpretation of clause 24.2 overall is treated as inconsistent with it. But you can't just say that because this in itself is flawed logic on the part of the Court of Appeal, you can't say that because one word is treated as having a usual meaning, when Judge Colgan went on to look at the entire provision, against the contractual background, he was somehow doing a somersault. He wasn't. he as interpreting. He said, in context the words used are ambiguous and I will interpret them having regard to various textual indications and the contractual background as I have found it to be. So it really is an unduly interventionist stance which is dependent on the Court of Appeal setting up a completely competing interpretation of clause 24.2, which is totally dependent on a legalistic, the legalistic interpretation of agreement, which is in paragraph 47, and in, even that premise of the Court of Appeals is flawed, and I refer in my written submissions at para 53 to another approach to agreement in *Body Corporate 162791 v Gilbert* [2015] NZCA 185, [2015] 3 NZLR 601. That's a passage in para 53 from the Court of Appeal judgment but it's quoted in turn in this Court by Your Honours Justice Young and Glazebrook in the Supreme Court judgment which is reproduced for convenience at tab 11. The point is that there is a degree of inconsistency between the more, the wider ordinary meaning of "agreement" attributed in the *Gilbert* case and the more legalistic exchange of promises, must include all promises relevant to a particular topic, of the Court of Appeal in this case. but at the end of the day the point again is that agreement was not the only word which was required to be construed. Judge Colgan went ahead and construed it but the Court of Appeal chose to focus very largely on the one word only and then to attribute error on that basis.

WILLIAM YOUNG J:

I'm going to put a proposition to you I put before only in slightly different terms, but I hope simpler terms. If the agreement gave FANZP first officers 10 per cent more but they had to work 5 per cent harder, would ALPA pilots get the 10 per cent but not have to work the 5 per cent harder?

MR HARRISON QC:

That would –

WILLIAM YOUNG J:

Or would they get 5 per cent more.

MR HARRISON QC:

That would depend, as I responded earlier, that would depend on a yet to be articulated interpretation of clause 24.2, to be articulated by an Employment Court Judge, does 24. On its correct interpretation require disbenefits to be counted alongside benefits, and we don't have an Employment Court interpretation of that. Secondly, if so –

WILLIAM YOUNG J:

Well I kind of agree with that actually.

MR HARRISON QC:

And secondly, if so, as a matter of interpretation of the FANZP agreement and factual enquiry, are the claimed disbenefits so linked with the claimed benefits –

WILLIAM YOUNG J:

I wouldn't think, I remember a case in the Employment Court where it was said that a covenant, restraint of trade was unsupported by consideration because there was nothing specific in the consideration provided by the employer that related to that. Now that was entire hearsay and was struck down because when you look at promises you balance the whole set of promises on one side against the whole set of promises on the other, and

while I can see difficulties with that I just can't see that there are really difficulties with that for the moment, when you're looking at a particular employee group, which might be pilots of certain category –

MR HARRISON QC:

To ignore the fact that the mutual promises in a contract are, it's the mutual promises that are the mutual considerations, is an error or principle. This is a question of interpretation and then once you've interpreted 24.2 maybe in turn interpretation of the other agreement.

WILLIAM YOUNG J:

Well I'll put it to you bluntly. I think the outcome that's arrived at is a very unusual one. To construe agreement as referring to promises on one side only and not the burdens. And I'll just carry on for a moment, and I wonder whether that is an error which has been reached because the Chief Judge looked at the interpretation of the contract through the subjective intentions of ALPA.

MR HARRISON QC:

I don't accept that he did that.

WILLIAM YOUNG J:

You don't accept either proposition.

MR HARRISON QC:

I don't accept either proposition. I certainly don't accept that he looked at it through, in that way. For one thing, to repeat myself, it's not the way the matter was argued before –

WILLIAM YOUNG J:

He talks about intention all the time –

MR HARRISON QC:

But secondly, secondly –

WILLIAM YOUNG J:

He talks about intention all the time which I find troubling.

MR HARRISON QC:

He talks about the parties, what the parties did not intend and what the parties did intend, yes he does. But again, I simply do not accept that the way, even if we embarked on the exercise that the Judge did not, I do not accept that in this particular case it can be said that the particular pilot wage increase that were the subject of the request were factually or contractually linked to any specific disbenefit which the ruling failed to articulate. It's simply not the case here. It's possible, as Justice Glazebrook began by going to, to postulate a contractual linking of benefit and disbenefit, explicitly. That didn't occur here. All that there was was a general statement that all of the concessions that Air New Zealand have made –

WILLIAM YOUNG J:

I'm not worried about that one because that links the benefits and disbenefits of the different categories of pilots. It's just zeroing in on the particular pilot groups affected because they're all dealt with in the collective agreements, why should one try and dissect the promise that each party makes to the other as to whether they are particularly linked as opposed to simply being part of the general promises that the other parties promises are consideration for them?

MR HARRISON QC:

Because clause 24.2 envisages a request for the passing on of terms that are more advantageous not terms that are less advantageous.

WILLIAM YOUNG J:

But only to the extent that they are more advantageous.

MR HARRISON QC:

No, that's a matter of interpretation with respect and it's an interpretation that no one has yet reached in this case ever. And –

WILLIAM YOUNG J:

Okay well look, all I want to do is put the proposition to you which you have rather rejected and –

MR HARRISON QC:

Okay, no – let me put it this way –

GLAZEBROOK J:

Well if there was a view, put it this way probably, if there was a view that there had been an error of principle in the Employment Court so, for example, if we were of the view that he'd relied on subjective interpretation, then and sent it back to the Employment Court to look at that in a proper manner, what would your answer be then if you were arguing in front of the Employment Court, I suppose that's the best way of putting it?

MR HARRISON QC:

To what Justice Young's been putting?

GLAZEBROOK J:

Yes so would it be a factual question, for instance, as to whether there was – because in fact you can only ask for that under 24.2 if there is a more favourable term. And if in fact the more favourable is coupled with more onerous conditions that are specifically related to the particular group, what's your answer then? The problem is too much hypothetical but...

MR HARRISON QC:

If Your Honours were the Employment Court you'd be looking and you know with the benefit of 20/20 hindsight there'd be competing interpretations. One, the ALPA interpretation that you can ask for merely the benefits and disregard the benefits, I would say disregard the benefits unless they are inextricably bound up, disregard the disbenefits rather unless they are

inextricably bound up with the benefits. That would be ALPA. The original, at the other end of the scale there would be the original Air New Zealand approach that it's only a collective agreement in the whole of the collective agreement, then there would be a middle ground alternative which is what we've ended up debating which is you can only ask for the benefits if all, everything that is weighed on the other side of the scale whether directly, whether it's remuneration or not, it's somehow everything that came in, you must also accept all of the rough with the smooth.

WILLIAM YOUNG J:
Yes with the smooth.

MR HARRISON QC:
And those are competing interpretations for the Employment Court –

GLAZEBROOK J:
Or alternatively I suppose only get the 5 per cent if you're not prepared to take the 10 per cent of, on Justice Young's view.

MR HARRISON QC:
But where we have, I mean we come back to the jurisdictional bar. The middle one, the middle ground one was not canvassed, there's been no interpretation of it as it keep saying, and it's for the Employment Court hearing what evidence as to the effects of the FANZP collective agreement maybe relevant, to address that issue should it be a tenable interpretation. What is wrong is the Court of Appeal's approach.

WILLIAM YOUNG J:
Okay well I'm sort of rather with you on those two propositions.

MR HARRISON QC:
As Your Honour pleases. So just carrying on and looking at this, I just wanted to make the point then, talking about any agreement, it really is an unfair allegation to, claim to make rather that there is a fundamental inconsistency

with Judge Colgan having dismissed a term of art argument by pointing out that agreement is wider, is not merely a term of art and has a wider meaning and then to conclude that he's guilty of an inconsistency. So my argument spelled out in some detail in the written submissions is that the Court of Appeal has basically rolled up its sleeves and committed two crimes in terms of the jurisdictional bar. One is it has rejected the Employment Court Judge's very detailed analysis of the contractual wording to set up a competing interpretation and secondly it has rejected the Employment Court's view of the contractual background which doesn't simply rely on findings as to the interpretation of the, the joint intention of the parties although I've defended that anyway in terms of it being the history of the negotiations and they basically, as I have set out in the submissions in some detail, they basically have overturned factual findings along the route. And in my submission really the, the reasoning is at certain points, with the greatest respect, in the Court of Appeal judgment is quite strained and involves a double standard.

When we get to the dealing at page 56 with business common sense there is a very dismissive approach to a factual finding which is summarised at para 65 of the Court of Appeal judgment. The Court reached, "The Employment Court reached a considered view and it articulated reasons for it that the Air New Zealand interpretation did not accord with business common sense." And the entire premise of this was that it was flawed anyway because what Air New Zealand was saying was, "When we concluded the most recent FANZP collective agreement we did a very careful calculation of the costs to us and we would not when we entered into the FANZP collective agreement have exposed ourselves to contingent or unquantifiable liabilities under and pursuant to clause 24.2." Well that, so what – the clause 24.2 was already in existence and the real issue was what it was intended to mean, first when initially agreed to and secondly when renegotiated periodically in an uncontroversial manner, I mean how can you come along afterwards and say well because we were very careful when we were negotiating the FANZP agreement about our exposure to unquantifiable contingent risks, that affects the interpretation of clause 24.2. So when Judge Colgan reasoned that way it wasn't for the Court of Appeal blithely to dismiss that as it did in para 66 by, in

the manner that's reasoned at that point and equally the rejoinder to my argument which is summarised at para 70 which is what I've been putting forward is for the Court of Appeal to say we think it unlikely Air New Zealand would agree to insertion in its CEA with one of those groups, part of employee groups of a provision that had the potential to undermine the other group. Well there was simply no evidence to support that contention and Judge Colgan's judgment records that at the time the Air New Zealand was asked to agree and did agree to clause 24.2 it was desperate to settle. So one could be cynical and say that given the relationship, the relations between the two unions and Air New Zealand it's far from unlikely that Air New Zealand would be prepared to sacrifice one group to another. But to take such a benign approach dismissive of the factual findings of the Employment Court without any evidence to support it is unacceptable.

And then there's my final complaint in this long list just extemporising on the written submissions is about the way the Court of Appeal dealt with the unworkability argument from para 73 onwards, this was trying to meet the Air New Zealand argument about working out where the burdens and benefits in the entire contract were more favourable. And it said there was no evidence supporting my submission. Well in my written submissions I provide the chapter and verse evidence there was evidence about the unworkability issue but it was directed towards the entire FANZP CEA because that was the case we had to meet. And then it said, "In any event even if clause 24.2 would be difficult of operation; that is not a reason for giving it other than its plain meaning. It simply means that ALPA requested insertion of a clause of which it cannot make much or any use." Well the answer to that is as Judge Colgan said, an interpretation of which renders the clause practically useless is to be avoided both for that reason and because it's inconsistent with business or employment relations, common sense to suggest that this specific clause requested against the background which is recorded is useless. And that is not rejecting an interpretation that renders the clause practically useless, isn't the same as interpreting the contract to avoid a bad outcome. That I submit is, it doesn't, that principle doesn't apply to interpretations which render the clause, I note the word "merely" unusable but

that itself is a far more egregious error of contract and interpretation principle than anything that the Employment Court was accused of. To suggest that it's an interpretation principle of general application that, interpretations which render the relevant term "unusable" are perfectly acceptable and to be dismissed with a judicial shrug of the shoulders is quite wrong in my submission.

So the conclusions portion of the reasoning there is there at page 59 and just looking at para 77. "Insofar as the Employment Court considered the natural ordinary meaning of the words "any agreement" gave that meaning no force." Wrong, in my submission. It gave the meaning force. It said any agreement means a collective agreement or other form of less formal agreement but also includes part of such an agreement, provided that part of the agreement is an identifiable term or condition of employment which is more favourable. It did interpret those words in the context of clause 24.2 as a whole. Then it says, "It erred in failing to identify the 'agreement' to be passed on," for the same reason. Respectfully submitted, wrong. And it reached the conclusion, "Inconsistent with the natural and ordinary meaning," again I submit, wrong. Likewise, para 78, rejecting the proposition that there were no reasons for departing from the postulated ordinary natural meaning of the words. The Court, as part of, important the Court as part of its interpretation exercise identified those reasonings. That's part of the construction of the contract. the factual underpinnings can't be challenged on a no evidence basis and in doing so by rejecting the factual findings of the Employment Court again the jurisdictional bar was transgressed. So that's just summarising what I've said in writing.

Unless Your Honours have any further questions, those are my submissions.

WILLIAM YOUNG J:

Thank you. Mr Miles.

MR MILES QC:

Well, Your Honours, I propose to just use as a framework my written submissions, but I will take you to the relevant parts of those submissions before I start each segment, I suppose, of my response. But if you have those submissions in front of you, you will see that we really start with identifying what we consider to be the three errors that the Court of Appeal identified in the Employment Court judgment, that's at page 4 of the written submissions. While each of these errors we say are discrete, one or two of them are, of course, interlocked. But the, each of them, we say, are failures to apply the orthodox interpretive principles and the first is the failure to apply the obligation of sorting out what is the natural and ordinary meaning of the phrase "any agreement" within clause 24. Secondly, and part of that same paragraph we say that the factors that influenced His Honour in the Employment Court were extraneous, irrelevant or unhelpful. None of them had any specific relevance to determining how a reference to any agreement, which is a very straightforward and relatively simple concept, but no indication how a reference to any agreement could be construed as meaning any part of an agreement, and that was the fundamental finding that Judge Colgan reached at, I think, paragraph 72 of the judgment, and we say that such a conclusion could not be reached if His Honour had adopted the orthodox principle of assessing what is the natural and ordinary meaning of agreement.

GLAZEBROOK J:

So what do you say the Judge should have said in relation to this? That the agreement means the agreement as a whole and it couldn't just be the agreement related to the first officers?

MR MILES QC:

Correct.

GLAZEBROOK J:

So you would reject Justice Young's third ground, or third possible interpretation. It's all or nothing?

MR MILES QC:

Well, can we go back just to a bigger picture. The Judge got it right when he said that the reference to an agreement doesn't necessarily mean a collective agreement. It just means an agreement. It can be in the collective, it can be in a subsidiary agreement, it can mean any of the side agreements that might be negotiated as part of the collective or during the term of the collective, and we agree with that.

What he then went on to say and what we say is a complete non sequitur when you look at that relevant paragraph, he said, "And that includes a part of an agreement." Of course, it doesn't, it doesn't follow for one moment that because an agreement refers to a number of, could refer to any form of agreement so long as there was consensus between the parties as to what the terms of the agreement that an agreement could mean a part of an agreement.

So in coming into the more specific issue here, it was argued in front of Judge Colgan that what was referred to there was the collective but as a backup and my friend is wrong to say to you that the backup argument wasn't presented. The backup argument was that the agreement could be the terms of agreement reached on the 15th of March. Now I accept –

WILLIAM YOUNG J:

But isn't that just the same thing or not?

MR MILES QC:

Well it becomes a segment of the collective, Your Honour, because when you look at the collective which is here and you look at the terms of agreement which are really just additions and variations to a number of terms.

WILLIAM YOUNG J:

So you'd read the terms of settlement or whatever plus the immediately preceding collective agreement and effectively that's what's in the final collective agreement I take it?

MR MILES QC:

Well what I'm saying is that the negotiations that took place that culminated in a specific document, and the specific document headed up terms of agreement, dated 15th of March, but that was always intended then to be incorporated, so long as it was ratified, that would then be incorporated into the collective.

GLAZEBROOK J:

Well what about the, that then they've gone. The terms of agreement have gone once it's ratified and incorporated into a collective agreement so why are we going back to the terms of agreement?

MR MILES QC:

Because that wasn't an agreement, it was reached on the 15th –

GLAZEBROOK J:

Well it might well have been but if it's no longer an agreement because it's been superseded by something else and no longer has any force then why would we go back to that, it might have been an agreement but it isn't any longer?

MR MILES QC:

It was certainly going to be incorporated and all of the terms, including clause 13.1, the crucial clause that says, “All of the conditions and terms that have been negotiated on the 15th of March are interlocked. They're all conditional on each of them being agreed. So that clause you will find in the collective as well as all the other clauses –

GLAZEBROOK J:

But if it's no longer an agreement because it's been superseded why would you go back to those terms?

MR MILES QC:

Well I don't accept, Your Honour, that it's no longer an agreement.

GLAZEBROOK J:

Well it no longer has any force and it certainly doesn't have any force over the individual employees, does it?

MR MILES QC:

No because they're, no because it's been – well with all due respect Your Honour seems to be splitting hairs.

GLAZEBROOK J:

Well I just can't understand why it makes a difference going back, probably Justice Young's point. If in fact it's all incorporated into the new collective agreement what on earth would you be doing going back to the settlement agreement and where does it get you?

MR MILES QC:

Well it only gets you in the sense that when you look at clause 24 you ask yourself what sort of agreement were the parties bearing in mind, what would it cover? And Air New Zealand would say, "Well, we're not taking an only technical view about this, we're looking at what the parties would have considered to be an agreement at the time and they undoubtedly reached an agreement on the 15th of March. I'm comfortable if Your Honours take the view that because –

GLAZEBROOK J:

Well which parties are we talking about now?

MR MILES QC:

The union and Air New Zealand.

GLAZEBROOK J:

Which union? Because it's not ALPA, is it, because ALPA had already had this in place before this even came into existence?

MR MILES QC:

But why is that relevant, Your Honour.

GLAZEBROOK J:

Well you're saying the parties would have had in mind that as an agreement when it wasn't even born or even thought of at the time 24.2 came into existence. So why are you looking at subsequent events not even by the same parties in order to say what the objective meaning of 24.2 is, I don't understand it?

MR MILES QC:

Well let's go back to the beginning. What Judge Colgan said was the appropriate time to look at this is when the Air New Zealand and ALPA agreed that it should be inserted back in about 2001 or thereabouts. Now, the evidence or the factors that the Judge relied on in assessing what agreement meant was that Air New Zealand was in financial difficulty and was very reluctant to be put in a position where there would be a strike.

GLAZEBROOK J:

I'm not sure this is going to help me on why we're looking at agreement between somebody else, a settlement agreement between somebody else that occurred after the latest iteration at 24.2 in terms of interpreting 24.2 and why that makes your client's position any more likely than just looking at the collective agreement itself.

MR MILES QC:

Well, I'm perfectly comfortable, Your Honour, with looking at the collective agreement.

WILLIAM YOUNG J:

I think it might be better if we just look at the collective agreement. I really think this is a side issue. The collective agreement was in force when ALPA gave its notice.

MR MILES QC:

Absolutely, so the issue then is, what does "agreement" mean when it was used in clause 24.

WILLIAM YOUNG J:

Okay. Well, I think you can take that, I think, as being referable generally to the collective agreement but it may include – and this is an issue – components of that agreement and if so does it include unilateral promises or does it in relation to a component or does it include the whole mix of promises that were referable to that component?

MR MILES QC:

Well, given in particular clause 13 which specifically says that none of the conditions, including the remuneration, specifically talks about the remuneration.

WILLIAM YOUNG J:

So it's really clause – that's really the point you're relying on. I would have thought that that was implicit in the collective agreement anyway, that it's a set of promises in exchange for a set of a promises.

MR MILES QC:

I wouldn't disagree for a second, Your Honour. The reason that I come back to clause 13 is that it's the final nail, if you like, in the argument and the evidence –

GLAZEBROOK J:

So you don't – just to be really clear you don't accept the middle ground that was postulated by Justice Young that it might be the set of promises that are

related to the first and second officers, ignoring the other things that are nothing to do with the first and second officers.

MR MILES QC:

Absolutely not, Your Honour.

GLAZEBROOK J:

All right. So it is an all-or-nothing argument for Air New Zealand.

MR MILES QC:

Yes, absolutely. The reason I say that is that the evidence that I'll take you to is absolutely specific about that and secondly clause 13 is equally specific.

WILLIAM YOUNG J:

So you wouldn't want to win the appeal on that – you're content to lose the appeal on the proposition that you're advancing, that it's all-or-nothing?

MR MILES QC:

Well, if we're talking about –

WILLIAM YOUNG J:

To be quite frank, I don't find the Court of Appeal's interpretation very attractive.

MR MILES QC:

You have to look at the whole of the agreement.

WILLIAM YOUNG J:

No, I don't find it particularly plausible that agreement means the entire collective agreement so that if New Zealand ALPA wants to give a notice it has to effectively replace its collective agreement.

MR MILES QC:

That's why we are arguing the proposition that agreement has a wider meaning than just the collective. An agreement can mean any agreement that's reached.

GLAZEBROOK J:

But where does that get Air New Zealand in the current case apart from its argument that it has to replace the – that it's all or nothing? If we're not with you on all or nothing, you want to lose the appeal.

WILLIAM YOUNG J:

Probably not.

MR MILES QC:

Absolutely not.

GLAZEBROOK J:

Well, then, if we're not with you on all or nothing what's the backup position and do you accept a backup position in the sense that Justice Young has put, that you look at specific disbenefits – I hate that word and I hate even using it – that might be associated with the benefits for the particular group that we're talking about?

MR MILES QC:

Well, I suppose I'm relying on the traditional grounds, Your Honour, that support my argument. Firstly the evidence is quite specific. The evidence is that a number of concessions – there are at least 11 isolated by Judge Colgan – were negotiated specifically as tradeoffs for raising the remuneration.

GLAZEBROOK J:

Well some of them don't operate because they can't operate without the whole of the rosters changing as I understand it.

MR MILES QC:

I'm not sure I follow that Your Honour.

GLAZEBROOK J:

That's what Judge Colgan said. I don't know whether it's true or not but he said that some of those can't actually operate for the FANZP pilots unless the ALPA pilots accept them too because of the rostering systems. No I have absolutely no idea whether that's the case, that's what Judge Colgan said.

MR MILES QC:

What I can say, Your Honour, is that what Judge Colgan at around about from paragraphs 40 onwards onto about 50 recognised that the package deal that Air New Zealand was putting forward was literally that.

WILLIAM YOUNG J:

Well I understand that, I understand that the captains got less and the entry level pilots got more.

MR MILES QC:

It's not so much that, Your Honour, it's not so much that the captains got less it's that those other 11 or so concessions enabled Air New Zealand to make sufficient savings to them be able to pay the officers that, the first and second officers more within the financial envelope.

WILLIAM YOUNG J:

Well maybe, Captain McGearty said a lot of the concessions that were made by Air New Zealand were notional because they couldn't in fact be implemented without ALPAs assent and that I understood then the response to that from Air New Zealand was not really denial, it was rather this is a first step in the road to getting more flexibility on these issues from ALPA.

MR MILES QC:

Well it was also, it was way more than that. The evidence of Ms Kelly is that these have financial consequences.

GLAZEBROOK J:

And is that evidence that is objected to or is that evidence –

MR MILES QC:

Not at all. This is in the –

GLAZEBROOK J:

So this was in the Employment Court?

MR MILES QC:

Absolutely.

GLAZEBROOK J:

Just checking, sorry.

MR MILES QC:

Okay, and can I take you to that because obviously that's an issue.

GLAZEBROOK J:

Well it may or may not be.

MR MILES QC:

I just want to be satisfied that Your Honour at least are aware that that evidence is –

GLAZEBROOK J:

No, I'm not trying to stop you taking us to it.

MR MILES QC:

No, I was going to do that anyway, Your Honour.

GLAZEBROOK J:

I wouldn't think anything else, Mr Miles.

WILLIAM YOUNG J:
So this is tab 13, is it?

MR MILES QC:
Yes, it's, tab 13, yes. It starts at page 104. You'll see that they said, "Well we're not going to agree to splitting pay increases until other terms have been negotiating." They need to make –

GLAZEBROOK J:
Sorry, what paragraph is that?

MR MILES QC:
Paragraph 9, Your Honour. They need to make concessions. Concessions had to be made because there would be higher salary costs for the company.

GLAZEBROOK J:
I see.

MR MILES QC:
And then that is continued at paragraph 10, paragraph 11, over the page at 105, lines about 15 down. You'll see at lines 25 down, "FANZP understood if they didn't formally agree to the concessions that made throughout bargaining –

WILLIAM YOUNG J:
I really find all of this evidence pretty objectionable actually, it's all just about negotiations. You might say well we were provoked because the other side did it first but –

ARNOLD J:
This is negotiations about the other agreement though.

WILLIAM YOUNG J:

Yes, but it's still – I suppose that's true, yes.

MR MILES QC:

And I think –

WILLIAM YOUNG J:

Well that probably is a fair comment.

MR MILES QC:

Yes, thank you, Your Honour.

WILLIAM YOUNG J:

Well of course it would be a fair comment.

GLAZEBROOK J:

Well I don't know because you're still then interpreting the FANZP contract which –

MR MILES QC:

No there's no – the Judge accepted this. When you go to that part of –

GLAZEBROOK J:

I mean all it's doing is saying exactly what is said in the contract itself it really what I'm saying in clause 13.

MR MILES QC:

Yes, but it's explaining why and it's putting into context clause 13.

GLAZEBROOK J:

Yes.

MR MILES QC:

And they then go on at page 106, half way down at 19, the clause was inserted, that will be clause 13, was inserted because the pay rates were a direct and inextricable and it was stopped but –

WILLIAM YOUNG J:

Look, I agree with all that. I mean to my way of thinking it's too obvious to require explanation that in an agreement, unless there is something explicit to the contrary, the collective of promises on one side correlates to the accumulation of the promises on the other and you don't have these little notional dot, dot, dot, lines linking some. So I don't have a problem with any of that.

MR MILES QC:

But Your Honour then, as I understood your –

WILLIAM YOUNG J:

What I was saying is that I'm unattracted by the proposition that clause 24.2 can only operate if ALPA is prepared to replace its collective agreement with the FANZP agreement. So I find that a proposition that doesn't seem to me to make any sense.

MR MILES QC:

Well Your Honour –

WILLIAM YOUNG J:

So I'm struggling to make sense and I would be inclined to interpreter “pilot group” as including any definable group of pilots who have an employment relationship with Air New Zealand and that could include, as a subset of FANZP, say, it's second officers.

MR MILES QC:

Would you include the trade offers in that Your Honour?

WILLIAM YOUNG J:

I would include the promises that they make to get that pay increase.

MR MILES QC:

So the –

WILLIAM YOUNG J:

So I would look at the employment agreements that result between Air New Zealand and members of that group and I would be inclined to think, although Dr Harrison will say it's none of my business really because this is all for the Employment Court, but I would be inclined to think that's fine for ALPA to say, “Treat our second officers as you treat FANZP second officers and of course they will be prepared to accept the obligations that FANZPs second officers accept.” Now it's conceivable that that's simply not practical but I haven't yet heard why.

MR MILES QC:

But that ducks the crucial issue that it is not feasible to increase their salaries unless the concessions kick off.

WILLIAM YOUNG J:

Well this is where, I think this is a point you may have to meet. For myself I don't see how the Court can operate sensibly on the basis you propose. There’s nothing in it for our part if it's limited –

O’REGAN J:

And anyway it was designed to make sure that the FA pilots didn't get more than the, the FANZP didn't get more than the ALPA ones so that's just, if Air New Zealand chose to pay them more they knew they were going to have to pay the ALPA pilots more as well. But I don't see why the fact that Air New Zealand basically triggered the clause is NZALPA’s fault. Air New Zealand could easily have avoided this by not paying the FANZP pilots more.

MR MILES QC:

Absolutely, but because they reached what Air New Zealand and FANZP considered to be a mutually attractive consensus and they were careful enough to say that one is absolutely conditional on the other.

O'REGAN J:

But they just triggered a clause which advised them to do something for the ALPA pilots, that's Air New Zealand's problem.

MR MILES QC:

Not if agreement is construed in the traditional way.

O'REGAN J:

But that's a nonsensical, that interpretation basically says ALPA has to say to the pilots that are worse off, you have to accept a worse deal so your friends get a better one, and how could ALPA possibly impose on its own members a worse deal, it wouldn't even be allowed to do that. So what you're saying is the clause is a complete nonsense and it can't have been intended to be a complete nonsense.

MR MILES QC:

It's a clause that becomes increasingly difficult to operate depending on the complexity of the negotiations but keep in mind, Your Honours, that these negotiations that took place was unusual in the sense that there was this massive trade off of the increased salaries with a significant number or concessions. Now what I'm instructed is that's an unusual negotiation in terms of employment law, that normally they are much more one issue deals and just to give you an example, tacked on to the collective are a whole series of schedules setting out side deals, meals and rosters and similar things. All of those are agreements that could be passed on. I accept that a complex set of negotiations dealing with a collective where there are tradeoffs for different divisions of the company make it difficult to operate in practice if the idea was that the entire bundle would be transferred.

O'REGAN J:

What you're saying is Air New Zealand, by the way it phrases the clause in its agreement with FANZP, gets to decide whether clause 24.2 can be activated or not. I mean, it could have put this into a single clause. It could have put it into one that says this depends on everything else. It could have put it into a site agreement. You're saying Air New Zealand basically gets to control how clause 24.2 works and that can't be right.

MR MILES QC:

Well, I don't think so, with respect, Your Honour, because if for instance the request had said on behalf of the officers, "We now require the increased remuneration of the officers and at the same time all the obligations that those officers have, as well," then that would be another issue. It was never framed in that.

WILLIAM YOUNG J:

I know that and you didn't frame it either but it's just that the whole purpose of the clause must have been to protect ALPA's membership from being picked off by favourable offers to other pilot groups and on the face of it, the offer of substantial pay increases to junior pilots is susceptible to the inference that that's the sort of thing that was intended. So it can construe the argument in a way which means it doesn't have this effect which one would think was its purpose would be odd, which is what troubles me with the Court of Appeal judgement.

MR MILES QC:

It still comes back though, Your Honour, I think, that you have to construe agreements here. You have to construe clause 24, and that's part of the ALPA collective. But you also then have to construe what it is that ALPA has sought and have they sought something that is capable of being an agreement? When you go back –

WILLIAM YOUNG J:

Where is the notice? Have we got it or not?

MR MILES QC:

Yes, we have. It's at volume 3. It's, I think, tab 24. You'll see that in the third paragraph they talk about the new rates and the last paragraph on that page, ALPA now requests in accordance with clause 24.2 that Air New Zealand pass on to pilots who are members of ALPA the rates and remuneration applicable to each of them.

WILLIAM YOUNG J:

Okay. Well, on your argument and on the hypothesis I put forward that that wasn't a very well-drafted notice, your response, Air New Zealand's response was a flat denial or didn't say, "Sure, but they've got to turn up for simulator training at weekends."

MR MILES QC:

Well, it wasn't quite as blunt. If you go over the page, you'll see the response. The company doesn't agree that its recent agreement entered into with FANZP gives rise to any ability to make a request pursuant to 24 or in the manner that they've done. The company doesn't accept that the isolated and selective approach to terms and conditions fall within clause 24 or that FANZP is now more favourable to your request is consistent, et cetera. So the basic argument was raised at that time, that you can't pick and choose. If you're going to ask – and it's not a question of not carefully drafted, Your Honour. The letter from ALPA is very carefully drafted. They have no intention of picking up the –

WILLIAM YOUNG J:

Well, it picks up what they want. It's consistent with their interpretation. But it's never really been advanced by Air New Zealand that yes, of course we'll pay your pilots what we're paying the FANZP pilots providing they do simulated training at weekends.

MR MILES QC:

And all the others, yes.

WILLIAM YOUNG J:
Well, what are the others?

MR MILES QC:
They're set out in Judge Colgan's judgment.

WILLIAM YOUNG J:
But many of them don't seem to be very substantial because they can't be implemented unless ALPA agrees.

MR MILES QC:
Well, the collective – let me take you to them.

WILLIAM YOUNG J:
Well, we might do that after lunch. 2.15.

COURT ADJOURNS: 1.00 PM
COURT RESUMES: 2.20 PM

MR MILES QC:
Your Honour, we were on the topic of the letters and what was being sought. Just a preliminary point, if you go to tab 24, the request from ALPA, they set out clause 24.2 and there's a reference in the second line to "any agreement entered into by company with any other pilot employee group". I'm not sure how relevant this is to Your Honours, the views that you've been expressing, but it was accepted by Judge Colgan that that was a reference to a union so it's –

WILLIAM YOUNG J:
Sorry, the group of pilots?

MR MILES QC:
That reference in clause 24.2 on the second line to any other pilot employee group, that's a reference to a union.

WILLIAM YOUNG J:

But it isn't necessarily confined to a union.

MR MILES QC:

Well, it was conceded.

WILLIAM YOUNG J:

I didn't think it was. Let's have a look and see what he says.

MR MILES QC:

If you go to paragraph 39, it's common ground this includes another union but there's no consensus whether the phrase might mean other groups such as non-unionised pilots as a group.

WILLIAM YOUNG J:

Yes, well, that's what I had in mind. I agree it could include a union but I thought it could include also other groups.

MR MILES QC:

But it doesn't include subgroups of a union.

WILLIAM YOUNG J:

Why not? Why couldn't it include a group of first officers?

MR MILES QC:

Well, because the union conceded it didn't.

WILLIAM YOUNG J:

Well, did it?

MR MILES QC:

That's what it says. Common ground.

GLAZEBROOK J:
It includes another union.

WILLIAM YOUNG J:
But it doesn't – there's no concession. I mean, it probably wasn't being thought about but I don't think there's the concession there that it can't include a group of, a particular subgroup within the union, can it? Does it?

MR MILES QC:
Well, there's never been the slightest suggestion that it means a subgroup within a union.

WILLIAM YOUNG J:
Well, I rather thought it might, actually, given the whole idea that you pass on to first officers and second officers the remuneration rather assumes that they are a group of employees.

MR MILES QC:
Well, yes, they are, Your Honour, of course. They're a group in a sense that they're – well, they're a group but the point is what sort of group clause 24 is talking about and it was conceded in front of Judge Colgan that that referred to unions.

WILLIAM YOUNG J:
Well, yes, of course it refers to unions. But it's – what isn't conceded is whether it's confined to unions.

MR MILES QC:
Well, I can only say, Your Honour, that there's been no suggestion at all today that that's the case, so that's the first point. The second, the issue of what can be passed on. It is, I think, an essential element of the appellant's case and it's certainly an essential element of mine that what must be passed on must be an agreement as understood by clause 24. So the request has to consider – a Court has to consider whether a request envisages the sort of

agreement which was considered to be the agreement that is relevant under clause 24.

So that comes back to that crucial argument, then, as to what was being sought and whether it could ever have come within the rubric of what is traditionally considered to be an agreement. So you have to go back to the terms of agreement. Whether those terms were incorporated in the collective or not is irrelevant. It remains a discrete agreement and a discrete segment of the collective. So it is perfectly feasible to go to the collective and say, "These were the elements that were agreed on the 15th of March." What was the basis of that agreement? It was simply that not one of the factors that were agreed with the officers were, became part of the agreement until they were linked and agreed to with the concessions.

If I can take Your Honours to clause 13, you'll see how precise that clause is. Just the same volume, if we go to tab 23 and in particular to page 436, that's section 17 headed up "rates of remuneration". 13.1, general provisions. The rates of remuneration and changes thereto are in consideration for and conditional on the totality of the changes agreed in this collective employment agreement.

So you cannot ignore that provision when assessing whether what was being sought was an agreement or not. It's a submission that Air New Zealand advanced in the Employment Tribunal, successfully. It advanced it in front of the Employment Court, unsuccessfully. It advanced it in the Court of Appeal, successfully, that that clause was fundamental in saying you cannot pick and choose as to take one condition rather than the concessions.

O'REGAN J:
But isn't that just a statement of the obvious, though? I mean, agreements are – one side agrees to certain things in exchange for the other side agreeing to other things. I mean, it's not – it doesn't really add anything to that, does it?

MR MILES QC:

Well, it – in my submission, Your Honour, it totally negates the suggestion that an agreement could be part of that agreement.

O'REGAN J:

What it says is that our agreement to put up the rates is conditional on that, isn't it?

MR MILES QC:

Well, it says the rates of remuneration and changes are in consideration for et cetera. Isn't that saying as clearly as you can that you can't cherry pick?

GLAZEBROOK J:

Well, they can't cherry pick, the parties to the contract can't cherry pick.

O'REGAN J:

It says the FANZP pilots can only get the higher rates because they agreed to other things. Well, that's a statement of the obvious. That's what the contract says. It doesn't say anything about clause 24.2. It's a different agreement.

MR MILES QC:

No but clause 24 does talk about an agreement and it's where – it talks about an agreement –

O'REGAN J:

The agreement is the whole of tab 23, on your argument.

MR MILES QC:

So when you go to that agreement, what can be taken and what is the agreement, and the agreement must – in my suggestion – can only be the whole of what was agreed on the 15th of March.

WILLIAM YOUNG J:

Well, I think I understand the argument. What troubles me – and I suspect others – is that it means that something that is within the mischief of clause 24.2 isn't caught by it so I mean, we are really construing clause 24.2 rather than this document.

MR MILES QC:

All right. Well, let's go to clause 24.2 then and I suppose two points I want to make on that, Your Honour. I'm going to take you to the evidence before the Court as to what – the extent to which that clause was considered back in 2001 or 2002 and what the parties intended it to mean and I accept entirely that intention is irrelevant but we've had a lot of evidence from what the union considered to be the intent and it should at least be on the record as to what Air New Zealand understood. But the bigger issue I think is the conceptual issue. Your Honours are saying, well, clause 24 was designed to ensure that if FANZP does a deal that puts ALPA on the back foot, ALPA can recover, effectively.

Now, firstly, of course, they can recover that three years later because their collective agreement lasts for three years. But secondly, the – it is important to go to the deal that was struck because in my submission what was reached was a sophisticated agreement where Air New Zealand was able to pay their first and second officers more because the captains recognised that the disparity of salaries was unfair and secondly that Air New Zealand got significant pay offs as a result. Now that's a sophisticated and attractive deal. What Your Honours are concerned about is that there's an element you say of unfairness because certain groups, I suppose the officers in ALPA, are not getting the increase in the salary.

WILLIAM YOUNG J:

I don't really, it's not, I'm not really into fairness run, fairness in that sense. I'm just looking at the purpose of clause 24.2 and looking at whether that purpose is furthered or frustrated by your interpretations.

MR MILES QC:

It's furthered Your Honour because it was always intended that whatever the deal was, it would be passed on and it would seem to be a very unattractive proposition from an employer's point of view if it can do a sophisticated deal with one group of employees that as a price of raising the salaries they're required to work harder or differently but a rival union can then take the good and not the bad.

WILLIAM YOUNG J:

Well you see I don't think they could do that. I mean I think if they get 10 per cent more pay for having to work 10 per cent harder than the other union can't say well we want 110 per cent of the pay but we're only going to work 100 per cent.

GLAZEBROOK J:

Which actually was conceded by Mr Harrison.

MR MILES QC:

Well yes, it's all those fundamental pointers that you are entitled to take the plus without the –

GLAZEBROOK J:

Well no, he conceded in that circumstance you couldn't, that because it was exactly the example I gave.

MR MILES QC:

Well if my friend –

GLAZEBROOK J:

But with a slight twist to it but in any –

MR MILES QC:

Yes. Now it's not quite as straightforward as that because the reason that this agreement was reached was not just because the first and second officers

handed over, if you like, more flexibility. The flexibility issue which goes to the heart of most of those concessions applied to the captains as well. In other words it ran right through all of the pilots. So it's not as straightforward as ALPA to say well we'll take the first and second officers' deal but we'll take the downside as well, we'll take the flexibility, because the captains are also required to act for flexibility to make the whole package work.

Now is there any reason in principle why ALPA shouldn't say a series of propositions that were acceptable to one group of pilots, a couple of hundred or so, shouldn't be acceptable to us.

GLAZEBROOK J:
That happens all the time doesn't it, that's why you have different unions who negotiate different rates, so what we're –

MR MILES QC:
So why shouldn't we?

GLAZEBROOK J:
– looking at is what clause 24.2 means in the context of that reality.

MR MILES QC:
But what's the downside Your Honour of ALPA then saying we will take, as we're obliged to, we think on balance it's a plus for us.

GLAZEBROOK J:
Well the downside is the deal would be that the captains take a cut, wouldn't it?

MR MILES QC:
Yes, and why shouldn't they because the captains, the other captains who are –

GLAZEBROOK J:

Well because the captains don't want to.

WILLIAM YOUNG J:
They never will.

MR MILES QC:
But nor do the captains, certain captains deliberately, the FANZP captains said we will take a cut, what –

GLAZEBROOK J:
Well they must have had some reason for doing that.

MR MILES QC:
Yes because they thought that the first and second officers weren't being paid enough.

GLAZEBROOK J:
Well, that's fine but they have made that decision. It's not something that you would want to impose on other people or say it should be imposed.

MR MILES QC:
They're not imposed on them at all. All they have to do is weigh it up and say, "Is it better for the union as a whole, for all our members as a whole, and if it is we'll take it." But how could it be –

WILLIAM YOUNG J:
Well, it may depend a bit on how many captains there are and how many first officers in the union.

MR MILES QC:
Yes, but that's not something that this Court can get into.

WILLIAM YOUNG J:

No. I'm not particularly interested in why the FANZP captains decided to do something. I'm more interested in clause 24.2, what does it mean? Is what happened here within the mischief of the clause? Now, I'm inclined to think it is. Now, where I'm not really with the Chief Justice or with Mr Harrison is that I don't – I think if there was a tangible disadvantage that the first officers and second officers accepted to get the pay increase, then I would think that that would have to be passed on under clause 24.2 but I haven't actually seen any indication – and none was raised in evidence of such a disadvantage.

MR MILES QC:

Well, let's go to that paragraph in Judge Colgan's judgment where he sets out the concessions. That's at paragraph 47. That's after a number of paragraphs confirming that this was a package deal and then he says at 47, "The defendant's unchallenged evidence discloses other games and concessions made by Air New Zealand, which is the constituent elements of its package and as a consequence is able to agree to significant remuneration increases." Then he sets them out. Now, the – apart from the first two, Your Honour, which – all of them are to Air New Zealand's advantage apart from the first one. The second one arguably was just for the benefit of FANZP employees. All of the rest are a series of concessions adding to flexibility and they all can be picked up by ALPA if they choose to. Now –

WILLIAM YOUNG J:

But some of them aren't implementable without ALPA's approval.

MR MILES QC:

Well, in that case they can't take the increase in payment.

WILLIAM YOUNG J:

But what it means is that – I mean, it's a sort of a chasing its own tail exercise. It would mean that remuneration in exchange for disbenefits that aren't real such as, for instance, flexibility of transfers or secondment to overseas bases would then change their character when the ALPA pilots took them on.

MR MILES QC:

Don't understand that, Your Honour. Why do you suggest that?

WILLIAM YOUNG J:

Sorry, I'll put it round the other way. There is, in fact, unless ALPA as a whole accepts greater flexibility, this is a disbenefit that doesn't mean anything.

MR MILES QC:

Well, you could say that about every concession. They all have to be – before they kick in they have to be agreed by all the employees because all the employees are getting the increase.

WILLIAM YOUNG J:

The greater flexibility in the fourth bullet point on page 029 doesn't in fact adversely affect the transfer for pilots, does it, because it's not being implemented.

MR MILES QC:

Well, it hasn't been implemented because ALPA hasn't agreed. I'm sorry this is sounding circular, but each of these concessions are able to be accepted by the ALPA pilots if they choose to do so.

WILLIAM YOUNG J:

You're putting a poison pill in the agreement that ALPA is made to take over.

MR MILES QC:

I'm at a loss to understand that proposition, Your Honour. This poison pill you talk about is a pill accepted by 200 of the other pilots.

WILLIAM YOUNG J:

Are there 200?

MR MILES QC:

I think it's roughly 200 to 800 but I'm subject to correction on that.

WILLIAM YOUNG J:
Is it 120 or something?

MR MILES QC:
Okay. Well, it's significant enough to form a – to be a serious union. The point is, Your Honours, that a quarter or a fifth of the workforce has agreed that the concessions that they have made are worthwhile making in order to get an increase in –

WILLIAM YOUNG J:
Except they don't have any tangible effect on them.

ARNOLD J:
Isn't the answer to this in paragraph 49 where the Judge says, well, some of these concessions or gains may be related directly or indirectly to the first and second officers, some do not, and he gives the example of the management pilots. So the Employment Court Judge seems to have thought that some of these concessions did relate to the group who got but not all of them, some of them didn't?

MR MILES QC:
Yes I think that's fair. Yes.

ARNOLD J:
So that's about as far as we can take it.

WILLIAM YOUNG J:
There was no argument and I suppose this is, I suppose it's old ground but it wasn't Air New Zealand's argument that there were any particular provisions referable to first officers and second officers that the ALPA pilots who wanted a remuneration would have to accept. I mean it was never suggested that

okay, that we'll pay the ALPA pilots the higher rate but they do have to do simulator training at the weekend?

MR MILES QC:

No I mean obviously they didn't, they – I don't think they had that in the back of their mind when negotiating with FANZP, what did they have at the back of their mind and there's evidence of it is that they deliberately put clause 13 in there just in case they said ALPA had a view that they could cherry pick, so they deliberately put that in there. And I can, I'll take you to that evidence Your Honour because that's the, it's there. You'll find it –

GLAZEBROOK J:

That doesn't help an interpreting an earlier contract does it? I mean it may say well on the view we took of the interpretation of that earlier contract, putting this clause in stymies them, that's great but the question whether it does stymie them can't be looked at because Air New Zealand thought in a later contract that it would.

MR MILES QC:

I don't understand the reference to stymie Your Honour?

GLAZEBROOK J:

Well you say that the whole point about putting clause 13 there was to make sure there wasn't an ability to cherry pick –

MR MILES QC:

I'm sorry.

GLAZEBROOK J:

– so stymie in the sense of not allowing them to make that claim.

MR MILES QC:

No, no but I think it's perfectly relevant evidence to say that –

GLAZEBROOK J:

All it does is show that Air New Zealand thought whether rightly or wrongly that its interpretation was correct and by putting that clause in they would make it clear there wasn't cherry picking –

MR MILES QC:

Yes.

GLAZEBROOK J:

– but that is all dependent on Air New Zealand's interpretation being accepted?

MR MILES QC:

Correct, I accept that.

GLAZEBROOK J:

So it doesn't help the interpretation?

MR MILES QC:

It's just consistent, that's all.

GLAZEBROOK J:

Well you wouldn't expect them to be inconsistent..

MR MILES QC:

It's been known.

GLAZEBROOK J:

Well actually that's true, that's true. Although not when they're specifically thinking about that particular point I wouldn't have thought.

MR MILES QC:

Let me just give you the references anyway so you can have a look at it. But the relevant evidence of Mr Hancock, I'll just take you quickly to that, it's back in volume 3 –

GLAZEBROOK J:
Three or two?

MR MILES QC:
Two it should be, yes. And it's tab 18. Mr Hancock was the lead negotiator for Air New Zealand in 2001. If you go to paragraph 10, 11 and 12 at 158 through to 159 he just sets out how clause 24 came into being, it was very late he said, "I thought it was acceptable, I understood the words of any agreement meant that ALPA could at its election but provided the FANZP agreement was more favourable we passed on the entire agreement." He said at 11, "I was comfortable with that." At 12 there was very little discussion about the clause or the wording of it. So it maybe that both sides were at odds from day 1 as to what it meant but it's clear that certainly Air New Zealand never thought that agreement could enable terms and conditions to be taken.

If you then go to page 163 you'll see down at the bottom of that page when cross-examined by my friend he says at line 25, "Well leaving aside the matters we've been discussing a moment, we have the meaning of the clause wasn't discussed during negotiations, that's right." Then at 165 at the top, "I was thinking along the lines that this would be –

WILLIAM YOUNG J:
Are you seriously suggesting that what he thought the agreement means is material to our task?

MR MILES QC:
Well I accept that typically that evidence does tend not to be right, I accept that, but there's been a good deal of evidence –

WILLIAM YOUNG J:

Well I know but I'm equally dismissive of the ALPA evidence.

MR MILES QC:

All right.

WILLIAM YOUNG J:

I just think it's irrelevant what they thought. Only the context is relevant but not what each individual negotiator thought.

MR MILES QC:

Well can I at least then take you to 167 which I think is admissible because Hancock is saying had this come up, we would never have accepted it.

GLAZEBROOK J:

Well –

WILLIAM YOUNG J:

Well he would say that.

GLAZEBROOK J:

Yes, why is that relevant?

MR MILES QC:

Well if you go back then to, as –

WILLIAM YOUNG J:

I mean the ALPA people would say the same I imagine. I mean there's just, it's exactly what you'd expect, it's just –

MR MILES QC:

All right. It was, it's just my friend took some time taking you to that cross-examination.

WILLIAM YOUNG J:

Yes but rather over sort of grumbling resistance from me I think.

MR MILES QC:

Okay, I'll leave it at that Your Honour. Let me then move on perhaps to more traditional basis for saying that Judge Colgan's analysis was faulty. What his judgment did and what the Court of Appeal did is they looked at a number of the standard factors that you look at in assessing meaning. The first knob is one being what's the ordinary meaning and the Court of Appeal adopted what I consider to be at the right argument, when picking up on *Firm PI 1 Ltd* and Lord Neuberger et cetera, that if you look at the plain and ordinary meaning agreement means agreement and so on. And then he looked at whether any extraneous factors in the contract itself might assist. He looked at the factual matrix at the time and whether any of that would have assisted and then he finally looked at sort of commercial reality. Now there's nothing in the ALPA agreement per se that assists, none of my friends relied on and none we're relying on so there's, the clause has to be construed as it is. What Judge Colgan relied on though to then run the argument that an agreement meant a constituent part of the agreement was back in 2001 the principal factor that influenced him was that Air New Zealand was in financial trouble, it was terrified there'd be a strike and hence ALPA was able to insert a clause that it wouldn't normally be able to do and Air New Zealand was unable to resist it.

Now putting aside whether any of that is correct or not and I'm not challenging that; that was the evidence but it's the implications of that that's significant.

WILLIAM YOUNG J:

What I don't accept about the Judge's approach is where he takes in account what the ALPA negotiator, Captain McGearty, said as to what his intention was which was remuneration terms and provisions should be passed over. Well I don't' see that as helpful either.

MR MILES QC:

Quite, but it was the two further elements that I was concentrating on at this stage Your Honour. That how can it help in assessing what agreement means by saying Air New Zealand was in a position where it would have agreed –

WILLIAM YOUNG J:
I don't think it helps very much at all.

MR MILES QC:
No.

GLAZEBROOK J:
Well apart possibly from the argument why would any commercial entity agree to this, they would have to have been mad therefore it can't mean that, so that's the only limited purpose.

MR MILES QC:
Quite. And the contrary position which helps us I would say, is that it's perfectly okay in its form as understood by Air New Zealand because Air New Zealand's perfectly happy in having whatever deal it's done.

WILLIAM YOUNG J:
So it was absolutely hopeless a deal for ALPA on your interpretation, it's unenforceable?

MR MILES QC:
Well hopeless and unenforceable are different issues Your Honour, it's –

WILLIAM YOUNG J:
Well it's hopeless because it's practically unenforceable.

MR MILES QC:
But I don't accept that Your Honour. It's not, it's perfectly enforceable if ALPA says we will accept those.

WILLIAM YOUNG J:

Yes well ALPA can't do that –

MR MILES QC:

Why not?

WILLIAM YOUNG J:

Well they've said they can't and I don't think that was challenged was it?

MR MILES QC:

I'd need to look at the evidence.

WILLIAM YOUNG J:

Well how could they force on their pilots a pay reduction, for instance?

MR MILES QC:

Well that's –

WILLIAM YOUNG J:

I mean you're saying it's theoretically possible, no doubt it is, I don't know enough about the –

MR MILES QC:

Well it's not only theoretically possible Your Honour, it's realistically possible if in the big picture the ALPA captains have the same concerns as the FANZP captains, that they actually want a fair deal now.

WILLIAM YOUNG J:

Well no that's just a rhetoric because I mean, we can't – it's not something we can really deal with whether the deal's fair or not fair.

MR MILES QC:

No, but it's only in the context that you're saying it's hopeless –

WILLIAM YOUNG J:

What I'm saying is that, as I understand it and it seems to me to be logical, it is inconceivable that ALPA would say, replace our collective agreement with the FANZP collective agreement.

MR MILES QC:

They don't have to say that though Sir. They can say replace those elements of the collective agreement that was agreed in March because that's a package that is discernible and discrete.

WILLIAM YOUNG J:

Well I'm not sure they could do that actually.

ARNOLD J:

That's certainly what their letter referred to, the settlement agreement. They regard it obviously as a package.

WILLIAM YOUNG J:

Yes.

ARNOLD J:

That's when they institute it.

WILLIAM YOUNG J:

But a settlement agreement presupposes, I mean it's amendments to an existing document. Clause 13.1 has got the number which identifies where it's to fit into in a document. Isn't it implicit in the terms of settlement that the collective agreement, what they're agreeing to is a collective agreement as modified from what was there before by this document?

MR MILES QC:

Yes, and I don't think that takes away the element of the package that was incorporated, Your Honour. You're still I think can properly envisage that as a discrete agreement, intended of course to be incorporated, but that could be

passed on like, as they called other or lesser agreements. I see no reason in principle why that can't be done.

WILLIAM YOUNG J:
But how a clause number 13 operate unless you've got clauses one to 12 in there as well and clauses 13.1 on, I mean it's not a freestanding document?

MR MILES QC:
No, but it's –

GLAZEBROOK J:
What's it going to amend though in the ALPA agreement?

MR MILES QC:
Well –

GLAZEBROOK J:
I mean I can't see it fitting in because it's amending the FANZP, or however we're saying, agreement.

MR MILES QC:
But the whole series are quite specific issues. So the clause on working 35 hours over a specific period of time which is one of these, the 35.7.

GLAZEBROOK J:
And that does seem to be one that, well we can't tell really.

MR MILES QC:
No, but that was one that could of course be picked up by ALPA and it was an important one because it means that in certain circumstances when they are sitting overseas and they've done their 35 hours they can't fly back, a new pilot has to be sent over and so on.

WILLIAM YOUNG J:

But can they implement that without ALPA, without the rosters or without ALPA's co-operation over the rosters?

MR MILES QC:

I don't know, Your Honour.

GLAZEBROOK J:

And under regulations?

MR MILES QC:

There's no point in them all agreeing to something that can't be instigated.

GLAZEBROOK J:

Well they've agreed to a whole lot of things that can't be instituted. Isn't the –

MR MILES QC:

But only some of them can't be instituted because ALPA won't agree, that's all.

GLAZEBROOK J:

No, I understand that but that means they're agreeing to nothing really, so it doesn't really matter if they agree to them.

MR MILES QC:

Well it's an odd –

GLAZEBROOK J:

And they might matter to Air New Zealand because it might be the thin end of the wedge et cetera, but it doesn't matter to the pilot at all.

MR MILES QC:

Well I –

GLAZEBROOK J:

I mean if you agree to something that's a disadvantage that's never going to happen, then it's not exactly hitting you anywhere is it?

MR MILES QC:

Well I don't think it's as black and white as that. I – a similar –

GLAZEBROOK J:

That might be right but we don't have anything in front of us or any evidence whatsoever on that.

MR MILES QC:

No, so I think what you are left though and if you just make a note that the evidence of, well it's actually in my submissions, it's at page 6 of my submissions –

ARNOLD J:

Sorry page what?

MR MILES QC:

Page 6 of my submissions where we've set out the evidence of Bernadette Kelly where she sets out why these conditions were significant and –

WILLIAM YOUNG J:

I thought what she was saying was they're a first step to obtaining greater flexibility with, within the airline as a whole?

MR MILES QC:

Well they're a bit more than that Your Honour because there was a financial envelope that they couldn't go without and by agreeing to pay the extra remuneration they were able to make the savings. So, they – Air New Zealand clearly considered that there were – enough of those concessions would be operative to enable them to make the savings they did.

GLAZEBROOK J:

We don't have an indication as to why those savings were made, do we, apart from less pay for the captains?

MR MILES QC:

Sorry Your Honour?

GLAZEBROOK J:

Well whereabouts is that evidence, sorry you said at page 6 of your submissions, I'm just – what page is it in the evidence, sorry, that's –

MR MILES QC:

Yes if you go to page 6 of my submissions –

GLAZEBROOK J:

Well yes but what –

MR MILES QC:

– the footnotes –

GLAZEBROOK J:

I actually want to go to the evidence rather than your submissions.

MR MILES QC:

Sure, sure. If you go to footnote 3 and 4 you'll see at tab 3 –

GLAZEBROOK J:

All right so, tab 3?

MR MILES QC:

Sorry tab 13 at page 103 and I'll take you to that.

GLAZEBROOK J:

All right.

MR MILES QC:

Her evidence really starts probably at page 104 I think at line 9 and might have taken Your Honours through this but you'll see at paragraph 9 and 10 and 11 the concessions that were necessary, similarly at 105 lines 23 down to 33 and 106 and then at pages, well there are then probably 20 pages dealing with the various concessions and there's considerable detail dealing with those. For instance if you look at paragraph 46 at page 120, "Limiting the number of hours that a pilot can fly in a seven day period creates rostering difficulties for Air New Zealand. 1, 2 et cetera. By the time the pilot has flown to LA the total flight is 36 hours, puts the pilot over that limitation. That pilot cannot be rostered to complete the tour of duty until the following seven day periods and that leads to considerable expense and delays et cetera," at 47. So –

WILLIAM YOUNG J:

Well that doesn't apply to first officers on 737s, does it apply to second officers?

MR MILES QC:

I thought it did Your Honour but –

WILLIAM YOUNG J:

Well I thought that the 35/7 were really affecting the long haul international flights?

MR MILES QC:

Yes I believe so.

WILLIAM YOUNG J:

Which wouldn't be the first officers on the 737s, it might be the second officers, I don't know.

MR MILES QC:

I, well it certainly – I don't know Your Honour, I was under the impression it was one of the key concessions and applied I thought to them all but...

GLAZEBROOK J:

Where does it say they landed up paying more than they would have done because they were prepared to pay something and then the union just asked for a different split according to paragraph 11? So did they land up paying more than they were originally saying they would pay, because if they didn't then I don't know where these savings come in to enable them to do that?

MR HARRISON QC:

Paragraph 9, page 104.

GLAZEBROOK J:

Paragraph 9. I understand they say they'd need to make concession but they're actually just saying they want a different split of the 2.8 which means that these concessions that Air New Zealand wanted didn't enable them to pay the 2.8 because Air New Zealand was going to pay 2.8 in the first place.

MR MILES QC:

True, but they needed the concessions to pay the 12 per cent.

GLAZEBROOK J:

Well that's what I wanted to ask.

MR MILES QC:

Yes.

GLAZEBROOK J:

Well, no, they said it was, no, sorry, a different split.

MR MILES QC:

Well I think that's what they're talking about because they never intended to pay them that high to start with. That only came about as the negotiations continued when they realised they might be able to do a deal along those lines.

WILLIAM YOUNG J:

I see that the fatigue risk management system, the 35/7 issue hasn't been implemented because it requires co-operation from ALPA. So that's a concession the pilots, the FANZP pilots made that doesn't have any immediate practical effect.

MR MILES QC:

Sure.

GLAZEBROOK J:

I suppose it could have an effect in the sense that if an individual like when the person fell sick found themselves in that situation they would have to fly under the FANZP agreement as against being able to say no. So in individual cases I guess it might have an effect.

MR MILES QC:

It might, yes. At 122 you've got a discussion about the simulator and how that was a significant restriction. The problem there was that the pilots would only agree to use of simulator up to, I think, 10.00 in the evening and then for a number of hours this extremely expensive bit of machinery remained unused and Air New Zealand was having to send pilots over to Australia to get the training because they just couldn't, it was so busy. So another example of significant savings with further flexibility.

See at 53, “This concession is saving the company a significant amount of money because FANZP members can now be assigned the 10.00 pm to 2.00 am simulator slot whereas they hadn't been able to before.”

There is a reference, that question from Justice Glazebrook, and it may be somewhere else as well but if you go to page 153 where there were questions from the Court the Judge said, “Ms Kelly, can you help me. Do I take it that for the FANZP collective bargaining Air New Zealand had a budget for remuneration increases?” “Yeah.” “And that was a round dollar figure?” “Correct.” “We didn't wish to exceed but might be flexible on how it was divided up?” “Yes, and also because we knew that potentially if their strategy worked they might increase their numbers,” as Captain McGearty alluded to. “We needed to get concessions in other areas of the collective so that when we predicted what the numbers may look like at the end of this it was still within the cost envelope. So things like night simulators, et cetera, save the company what we could give to the pilots.”

GLAZEBROOK J:

Well we don't know whether that's $2 or $20, do we? It's just that it doesn't anywhere – it's not clear to me that what they were prepared to offer in the first place was actually anything other than a different split between first officers and the captains. One would think it probably was but it doesn't ever say so and it never cost these benefits that were supposedly achieved. I can't imagine that just a simulator cost is going to really be unbelievably significant and if it were then one would have expected her to say so.

MR MILES QC:

Well she did, Your Honour.

GLAZEBROOK J:

Well where? She just said it was nice for us. Well it could be nice because it saves them a whole lot of money. If it saved them a whole lot, you’d think she’d say how much.

MR MILES QC:

Well she said a significant amount of money.

GLAZEBROOK J:

Well where does she say that?

MR MILES QC:

I thought I'd read that to Your Honour, that was –

GLAZEBROOK J:

Well I think it, it actually talks about, I don't know if she talks about just the concessions, it was...

MR MILES QC:

Yes at paragraph 53. "This concession is saving the company a significant amount of money."

GLAZEBROOK J:

Sorry, I can't see where it says that?

O'REGAN J:

Paragraph 53.

MR MILES QC:

At line 30.

GLAZEBROOK J:

Paragraph 53, sorry what page are we on?

MR MILES QC:

122, paragraph 53. This is her evidence-in-chief. "Another key concession." I haven't discussed with Your Honours whether those affidavits that were part of the leave application are admissible or not. My friend obviously opposes them. I considered that they were before the Court and that they would be permissible if they added anything significant to the discussion.

O'REGAN J:

Well they weren't admitted as evidence in the appeal though were they?

MR MILES QC:

I, my recollection is there was no decision one way or the other but I might be wrong.

O'REGAN J:

Well did you apply for them to be admitted evidence?

MR MILES QC:

I think I worked on the basis we had enough, I think it was a pragmatic decision Your Honour rather than – we certainly didn't have a formal ruling and I think just for the sake of you know getting on with it, we relied on –

O'REGAN J:

But in principle, the fact that something's admitted in one part of the proceeding doesn't necessarily mean it's admitted in an appeal does it?

MR MILES QC:

I accept that.

O'REGAN J:

So you did need a ruling, if you haven't got a ruling it's not, it wasn't in evidence was it?

MR MILES QC:

It was sort of in limbo I guess Your Honour. I don't think it was one way or the other. I would have thought that it was, that if this Court shows to look at those affidavits because there's evidence in there that you wouldn't necessarily expect in the Employment Court because it dealt with sort of bigger issues and if that evidence was of any assistance and some of it I think could be, that it would be open for the Court to look at.

WILLIAM YOUNG J:

But it wasn't relied on in the Court of Appeal?

MR MILES QC:

No it wasn't. I mean my friend filed an affidavit in reply, it's not as if –

WILLIAM YOUNG J:

But it was full of complaint.

MR MILES QC:

Well – the reason I mentioned it now is that when I look at the page 7 of my submissions, there's a reference there to the affidavit of Darin Stringer who dealt with the or added evidence, I suppose, to the proposition that because of those concessions about the 12.5 per cent increase, the terms of settlement fell within the budget parameters. I mean we've got that evidence from Kelly but it's clearly more specific evidence from Stringer on that point.

GLAZEBROOK J:

Why would accept non-fresh evidence for the first time on a second appeal, on a matter of jurisdictional interpretation?

MR MILES QC:

Your Honour, I'm not going to spend a lot of time on this. It's not essential to my argument. I think it would be helpful to Your Honours but it's not going to be determinative.

WILLIAM YOUNG J:

Well perhaps leave that there.

MR MILES QC:

I wonder whether now would be a time to move on to at least the jurisdiction argument which, after all, was my friend's primary argument that there was this distinction between a Court stating what the interpretative principles are and actually carrying out those principles, and my friend reiterated several

times during his submissions that there's some principle that says that so long as you actually set the principles out correctly it no longer, it's irrelevant whether they were in fact applied.

GLAZEBROOK J:
It's not really what he landed up saying though, is it, after questioning by particularly Justice Arnold?

MR MILES QC:
Well –

GLAZEBROOK J:
So it's not something you have to counter, is it?

MR MILES QC:
Okay, well I wouldn't normally have to counter it because there is literally no authority for the proposition and it makes absolutely no sense at any level, but just so that Your Honours have a clear idea of where that proposition has been advanced, namely that the appellate supervision kicks in not only on the basis of whether you've actually set out the principles correctly but whether you've applied them. You will find that in the first of those relevant cases, that's the *Attorney-General v NZ Post-Primary Teachers Association* decision where at page 214, I think it's paragraph 49, they specifically talk about the application of principles being part of the appellate process, and what you'll find as you go through each of the subsequent Court of Appeal judgments in the 1990s, *Tisco Ltd v Communication & Energy Workers Union*, *Walker Corporation Ltd v O'Sullivan*, *Sears v Attorney-General*, *Principal of Auckland College of Education v Hagg* [1997] ERNZ 116, [1997] 2 NZLR 537 (CA), they all adopt the *PPTA* formulation. So it's quite clear that that's part of the process.

Yates, of course, that was again quite specific. If we just go to *Yates* because I'm not sure my friend did finally. It's in the appellant's bundle of authorities. We have Justice McGrath's survey of the relevant issues at paragraphs,

really, 15 through to 23 and the key paragraph I think probably being paragraph 20 where, “If the Employment Court reads the terms of an employment agreement and in a manner that was not open to it this Court may intervene.” And he touches on Justice William Young’s judgment at 23, “I conclude the Chief Judge didn't apply orthodox principles in reaching the construction,” and in particular then citing William Young J, “Wrongly imported principle,” et cetera. Justice Glazebrook, I know you accepted that it was open to the Employment Court to reach the conclusion it did and hence disagreed that there was jurisdiction to intervene but that is entirely understandable, if I may say so, because it was premised on the proposition that that was a result which a Court applying orthodox principles and interpretation was entitled to reach. It doesn't matter if the Appellate Court disagrees, it was still a proposition open to the Court.

I would also rely on Justice Young’s formulation at 97. “This Court is required to recognise and comply with the limitation the appellant jurisdiction et cetera, but the Court is also required to recognise that the parties to Employment Court litigation are entitled to the application of orthodox legal principles,” so once again the affirmation that applicability is just as relevant. “Though it’s plainly so to the application of terms but it also applies more generally. If satisfied the Employment Court errs in principle and how it goes about interpreting a contract to have jurisdiction to interfere, and you are also entitled to interfere where the substance of the complaint is the Employment Court didn’t construe the contract in question.” And one of the arguments that we’ve used is that the terms of agreement being a contract and an agreement also had to be construed by the Employment Court. It didn’t, the Court of Appeal said at paragraphs, I think at 28 and 29, it was understandable why it didn’t because it wasn’t emphasised at the time but had the Court done so it would have been forced into the, well force is perhaps too strong a word but if it had followed orthodox principles, it would have recognised that the agreement that it was construing was the, effectively the terms of an agreement, the March document and which cannot be cherry picked because of the condition of clause 13, making it clear that they were each conditional on all of the others being agreed. So we would say that the

recognition by the Court of Appeal that was another interpretative error is significant.

And just to complete that grouping of cases, *Cerebos* which I think is the last statement in the Court of Appeal on this issue, that also at paragraph 46 made it clear that applying the correct principles was just as important as stating them. So in our view the law is clear, it's been settled for 25 years, there is no, the sort of distinction which my friend relied on in his written submissions and for most of his oral submissions, was split between stating and applying the principles, is not a dichotomy known to the law, that the result, the decisions reached by the Employment Court could not have been reached following those standard orthodox principles and if I can just now take Your Honours quickly to a couple of key paragraphs in the judgment. Some of these have already been considered already but I just want to emphasise why we say these two or three significant errors have taken place.

What the, what Judge Colgan did was he set out, quite correctly, the correct legal principles and you'll find those at paragraph 21. He then discussed the background. Now what he does and this we say is significant. If you go to 32, he's discussing clause 24 and it's derivation.

GLAZEBROOK J:
Sorry 30?

MR MILES QC:
32 Your Honour.

GLAZEBROOK J:
32, thank you.

MR MILES QC:
Page 24. His Honour said, "NZR then proposed the wording was now 24.2 and its inclusion in the parties' first collective agreement. It did so in an attempt to protect the terms and conditions of its Air New Zealand pilot

members and indirectly its own strength by seen to have a rational agreement including its collective agreement. It intended that following settlement of its collective agreement Air New Zealand entered into arrangements providing for more favourable terms and conditions of employment, then those enhanced terms and conditions could be passed on." Now what is highly significant is the constant iteration of the phrase "terms and conditions". If that had been used in clause 24 I could have understood the argument but it was not used, the word was "agreement" not "terms and conditions" and had individual, had terms and conditions been used with the clear implication that it was individual terms and conclusions that might be more favourable could be passed, then I could understand. But they never used that, only in Judge Colgan's judgment and in I think occasionally in McGearty's evidence do they use the word terms and conditions. And I can only say Your Honour that in a document which has been, which is a formal and significant document, lawyers were involved, the judgment mentions that and the word was agreement, not terms and conditions.

He says at 34, "Despite the particular facts of this case focusing on remuneration," its, "Clause 24 is broadly worded so that terms and conditions other than remuneration are potentially covered." Well it's, clause 24 just talks about agreement. Now he then microanalyses it he says and once again, well you'll see that at 38 he says well, the phrase any agreement, "The defence case is a work of art," meaning a collective agreement. There was never that argument it was a work of art, it just meant it included the collective agreement. The plaintiff's case for a broader interpretation meaning more generally any agreement that maybe reached between persons. But it still has to be in agreement and similarly when you get down to 41, once again the use of terms and conditions again. The significance of paragraphs 43 to 47 or 50 is that they recognise that this was a package deal, he even records clause 1.31 at paragraph 45. So there's no doubt he was aware there was a package deal, no doubt he was aware of those concessions set out at 47. At 50 what this evidence does show is that in 2013 the FANZP agreement was regarded as Air New Zealand as a package deal. So he then raises a misleading argument at 51, if the defendants – this is half way down 51.

"If the defendant's case as at clause 24.2 should be interpreted in accordance with the package deal, then I don't agree." Well of course they did, what they were saying was that the package deal was an agreement which was encompassed by clause 24. It was never suggested that one, that you would construe clause 24 because of the FANZP agreement. So this was just an argument set up which he rejected, it was an argument never raised by Air New Zealand.

Defendant's interpretation and he sets out our argument but what he says at 53 is, "I've no doubt that the Air New Zealand's proposition wasn't what the parties intended; unrealistic conclusion at odds with the context and circumstances." Now what were the circumstances, what were those conditions, I've already discussed with Your Honours. The only circumstances he talks about are those circumstances that back in 2001 Air New Zealand was in this difficult position, which we say, so what? That doesn't assist you as to what the term "agreement" was supposed to cover and it certainly doesn't suggest in any orthodox way that agreement should be construed as a part of agreement. So we say the –

WILLIAM YOUNG J:
Say the FANZP agreement had said entitlement to the enhanced remuneration is dependent upon the employee being a member of FANZP which effectively is what it does say actually at page 378 –

MR MILES QC:
Yes practically.

WILLIAM YOUNG J:
– does that mean that if ALPA had wanted to pass on the benefits it would have to, as it were, lose the membership of the pilots who got –

MR MILES QC:
There's never been the slightest suggestion they would.

WILLIAM YOUNG J:

But why would, I mean that's the sort of poison pill I've got in mind. Why wouldn't you say, why wouldn't you be able to say but this is a term of the agreement and the only way they can do it is if they self-destruct?

MR MILES QC:

Was it a term of the, terms of the March –

WILLIAM YOUNG J:

Well you could, see the FANZP agreement at page 378 is a reasonably, I understand a usual coverage term so it only applies to employees of Air New Zealand who are members of FANZP which is what you'd expect.

MR MILES QC:

Yes. I don't –

WILLIAM YOUNG J:

In a sense it's a term of the agreement, an employee can't claim to be entitled to benefits under the agreement unless a member of FANZP.

MR MILES QC:

Clause 24 was never intended by the parties to have that requirement Your Honour, that would be –

WILLIAM YOUNG J:

Well that would be, I mean that would be a sort of a complete poison pill.

MR MILES QC:

A complete, and I don't think it ever, I don't think it ever entered the heads of anyone that that was the necessary implication.

WILLIAM YOUNG J:

But why wouldn't you be if your argument is right, why wouldn't Air New Zealand simply by drafting –

MR MILES QC:

Well it's not a favourable –

WILLIAM YOUNG J:

– the other agreements make it practically impossible for ALPA to try to pass them on?

MR MILES QC:

Well I think, I think they'd just be bad faith bargaining Your Honour.

WILLIAM YOUNG J:

Well I was going to ask you about section 4. Because does that provide any materiality, is that material to our task, the obligation of good faith?

MR MILES QC:

It hasn't been touched on Your Honour, it's certainly never been raised as a material issue.

WILLIAM YOUNG J:

You see it might provide a mechanism for softening the interpretation of the relevant provisions. In other words one could interpret them on the basis that both parties will act in good faith in relation to them.

MR MILES QC:

I think Mr Harrison would have raised it if he thought that it helped him Your Honour.

WILLIAM YOUNG J:

Well he raised related provisions, I think the 59 (b) and (c) or (a) and (b).

MR MILES QC:

Yes that's –

WILLIAM YOUNG J:

But they're not –

MR MILES QC:

That was floated once or twice and I think just left on the basis that it didn't go to the heart of the argument Your Honour.

WILLIAM YOUNG J:

All right.

MR MILES QC:

The, yes the only, the next paragraph where His Honour really delineates the further factors that influenced him. You get that at 56, "The following factors favour the plaintiff's interpretation." And then there's the rather odd paragraph at 57 where the Judge did get muddled about what agreement he was talking about. And it was such a minor point anyway where he thought the word "in" was significant rather than "by" but he was actually talking about the wrong agreement. I think we just put that aside. And really then we get into a business common sense. Now I don't think it's ever been suggested in any of the important cases dealing with the construction of contracts that business common sense if the final arbiter, I've always understood that it's more as, as Judge Colgan said really, that it's a form of cross-checking that the primary argument always is, what is the plain meaning, the meaning that would be understood by the reasonable person in possession of all the material facts at the time. And it's only if there's argument that the plain words do not reflect the intentions of the parties that you get into a discussion about whether they make commercial sense or not and generally speaking the commercial sense tends to be, I think, undeterminative, it's not difficult to think of a business case for both, on both propositions.

But what Air New Zealand argued, and I think rightly so here, is that in the big picture of course it made sense that if the agreement meant whatever the deal was that was struck with FANZ, it's not going to be inherently objectionable to ALPA, I mean they're still pilots doing exactly the same thing, they're not

going to agree to something that isn't to their advantage. What ALPA was concerned about was whether the deal was going to be so good that their position until the negotiation for the next collective was going to be affected. But what makes no business sense for Air New Zealand or for any employer is that if they do a deal sufficiently complex where the pay rise is conditional on different forms of work conditions, then it's the whole deal that has to be passed on. So business common sense we would say clearly favours the Air New Zealand interpretation.

ARNOLD J:

The Judge refers several times to "employment relations common sense" and I understand the point that this is occurring in a collective agreement setting and obviously the setting is relevant and for myself I felt it somewhat uneasy about the employment relations common sense and I'm not exactly sure what that is?

MR MILES QC:

Well I'm not sure either Your Honour because, and earlier on in the judgment the Judge goes to some pains to say that a collective agreement is a different agreement from a commercial agreement and that the relationship between employer and employees are different from a commercial relationship and while we all understand that there obviously are elements of a employment relationship that are unique, ultimately though it's about as commercial as you can get. I mean if you define commercial as defining the circumstances in which you get paid and which you spend eight hours a day working on, you can't get it anything much more commercial than remuneration and the deal you're supposed to give as a consequence of being paid. And in that sense it's understandable that the Courts and since the early '90s have said it has to be defined by orthodox contractual principles because they're contracts; while taking into account if you need to, the unique elements of employment. What though Judge Colgan didn't do, I mean having made this point that somewhere there's a sort of conceptual difference, if you like, between the forms and the contracts, what he didn't do is explain whether there were any material differences here or material factors that would influence him into

determining that an agreement meant what he said the agreement was rather than what Air New Zealand. So on, at each of the series of examinations, I suppose, as to how you assess these meanings, he either failed to centre on the significant issue or added elements that on any orthodox interpretation just don't help.

There is, Your Honours I know aren't necessarily with me on this but at 65 he says well, "I don't agree with the employment authorities' conclusion that the word agreement is a term of art," and I didn't think so either. Even at its worst, its true meaning is not a collective agreement or certainly not the totality. "Agreements referred to may take many forms, aren't confined to collective agreements, it means a consensual arrangement or accord." Now we wouldn't take issue with that but what we say is then effectively, contradicts himself is when he goes to 72, probably the key paragraph in the judgment, where he says, "The contrast with any agreement is the phrase 'this agreement'," which refers to ALPA, "By the use of different phrases and the capitalisation, non-capitalisation of the words 'agreement', I conclude the parties left the definition of a phrase 'any agreement sufficiently broad' to include not only a collective agreement entered into with another union but also a range of less formal agreements providing for particular terms and conditions. These included but weren't necessarily confined to other unions and to agreements which are not collective agreements." And so far, so good. We've said that agreement can cover those side deals which you will find, you know annexed to the collective and any other arrangements so long as it's a complete arrangement. It's the last sentence which seems a complete non sequitur, so too, "I conclude the words 'any agreement' were intended to encompass constituent parts of a collective agreement." And for the life of me I cannot see how that sentence can ever follow in any logical form the argument that he's been building up at 72 coupled with his acceptance at 65 that an agreement means some mutual consensus. So it's not surprising, in my submission, that the Court of Appeal concluded that it was simply wrong to reach this conclusion and it couldn't have done so following any orthodox principle of interpretation.

And you know when he tried it, when – he does get onto this, the extraneous matters that might help, that's the next paragraph are two important backgrounds. "Air New Zealand's strong desire to voice strike action and to union rivalry." And one can quite understand the anti-union rivalry, that of course, but it doesn't help on whether it's an agreement or a bit of an agreement. And the strong desire to avoid strike action is also utterly neutral in terms of what agreement means. So neither of these crucial elements he says as part of the background can assist in determining what the meaning of that phrase is. And that was pretty much the conclusion.

I have set out all of these arguments in my written submissions. The areas again I, which are the ones that – and I've just been discussing those, I reiterated those at paragraph 45. We then have set out the failure to apply the natural and ordinary meaning, and I've discussed why we say the Judge failed to do that, and we've given you *Zurich* and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 all the usual authorities on that. The Court of Appeal set out several definitions of agreement and at paragraph 56 we picked up on those. The arguments about extraneous circumstances and the business common sense, all of which were dealt with in the Court of Appeal. Your Honours will recall that when the Court of Appeal went through that judgment they adopted the same formula and they just used and dealt with each of those elements in their judgment.

At page 29 of my submissions we deal with the third element, the failure to consider what could be passed on. This was paragraphs 29 and 30 in the Court of Appeal where they said the Employment Court's task was to interpret clause 24 and the words "any agreement". "Given that it was put to the Judge that 'any agreement' referred to the whole FANZP CEA, it is perhaps understandable that the Judge did not consider whether what ALPA requested by passed on was an agreement. In other words, whether it came within the words 'any agreement'." But that, of course, is fundamental and that's what we have discussed at some length today. "Notwithstanding the way the case was put to him, we consider the Judge needed to do that," and of course he had to do that because once you've determined what clause 24

meant, what sort of agreement it was intended to cover, then you look at what the request was for, and you assess whether that came within the definition or the category, and we just say, and it's said ad nauseam, that it was an agreement that had to be passed on. So that was the, another of the interpretation elements that we rely on.

WILLIAM YOUNG J:
Did you say the whole agreement has to be passed on except the coverage provision?

MR MILES QC:
Well what I –

WILLIAM YOUNG J:
That is a bridge too far?

MR MILES QC:
That is certainly a bridge too far, Your Honour, and I do continue, though, to say that the 15th of March agreement certainly intending, if ratified, to be incorporated into the collective, but is nevertheless an agreement in its own right.

WILLIAM YOUNG J:
But, sorry, but the actual notice was in relation to the collective agreement, wasn't it? Or am I wrong on that?

ARNOLD J:
The notice was in terms of the settlement.

WILLIAM YOUNG J:
I see.

GLAZEBROOK J:
But referring to it having been ratified, I think, so –

MR MILES QC:

Yes.

ARNOLD J:

Yes it does.

GLAZEBROOK J:

So if it's ratified it's –

ARNOLD J:

But then it says settlement agreement (collective agreement). So it refers to –

GLAZEBROOK J:

But it becomes, the settlement agreement effectively becomes a collective agreement.

MR MILES QC:

Yes, they talk about the ratified terms of settlement.

GLAZEBROOK J:

Because you could have a possibility, in terms of the settlement agreement you're not going to just pick and choose the bits from the settlement agreement, you would still require them to work the hours they've agreed to under the more general agreement.

WILLIAM YOUNG J:

The passing on was specifically in relation to the rates of remuneration applicable under the collective agreement.

MR MILES QC:

Yes, although, it's an interesting, it's a sentence which I think I would be inclined to agree with. The last sentence in that second paragraph. "The ratified terms of settlement provide an increase," et cetera, so that letter recognised, I think, that that agreement was and remained a discrete agreement, albeit part of a collective.

ELLEN FRANCE J:

So you say they could have asked for the whole of that agreement to be passed on and that would be within clause 24.2?

MR MILES QC:

The whole of the collective, Your Honour?

ELLEN FRANCE J:

No, no.

MR MILES QC:

The whole of the terms of agreement?

ELLEN FRANCE J:

The whole of the terms of settlement.

MR MILES QC:

Yes.

GLAZEBROOK J:

You rather say they have to.

MR MILES QC:

They have to, yes.

GLAZEBROOK J:

If they didn't ask for part of it so –

MR MILES QC:

They had to, yes, that was it.

GLAZEBROOK J:

So it's just –

ELLEN FRANCE J:

But you're not saying they had to then take on the whole of the –

MR MILES QC:

Of the collective, no.

ELLEN FRANCE J:

– collective as amended?

MR MILES QC:

Correct.

O'REGAN J:

But wouldn't you dispute that it's advantageous overall?

MR MILES QC:

The 15th of March agreement?

O'REGAN J:

Aren't you saying the concessions made by FANZP were of equal value to the benefit they got therefore it's not more favourable or are you accepting that getting a higher rate of pay is more favourable even if you have to give away ground –

MR MILES QC:

I don't think we have to, I don't think that's part of the equation Your Honour. The only issue of what is more favourable is whether the package was a better deal overall for the ALPA members.

O'REGAN J:

I know but are you saying even on a package basis it was a better deal, because I thought you were disputing it?

MR MILES QC:

Well I don't think I have a view. I, you can clearly – I suppose I have a view that because it was, the deal was reached, both sides saw it as having advantageous, who won, who would know, but both sides liked what they got and I can't say whether the package would have been more favourable to ALPA than what they were currently operating under. What is quite clear is that if you were able just to take the increased remuneration to the first and second officers on their own, I mean that's obviously more favourable because it's another 12 per cent but overall, who would know? You could legitimately, I think, from Air New Zealand's point of view say well it probably was but ALPA wasn't prepared to make that analysis and they had to if they were going to take advantageous and I think in a way that confirms that perhaps the overall point of that clause was never that it was going to be used when the issues were finally balanced, it was always going to be there just in case there was some king hit that the other union managed to negotiate and which made it untenable for the ALPA members to continue until the next collective. Now that's just –

GLAZEBROOK J:

What say they were absolutely no concessions in there at all and you just had some differential rates that were paid to different parties. Are you saying that you couldn't say and, so in fact all of them were exactly the same as in the ALPA agreement apart from the first officers who got a bit more money, perhaps with some concession they had to make specifically in relation to the first officers, what do you say in relation to that?

MR MILES QC:

I think it would depend entirely on –

GLAZEBROOK J:

Probably not a good example because we can't have it exactly the same because it wouldn't –

MR MILES QC:

And I think the other difficulty –

GLAZEBROOK J:

But there hadn't been any diminution or anything, they all got 12 per cent, it just happened to be that the captain's rate was still below the captain's rate in the ALPA agreement.

MR MILES QC:

Mmm.

GLAZEBROOK J:

But there wasn't any, no concessions made in respect of anything, the captains just got 12 per cent, the other – but captains happened to be less than the ALPA agreement?

MR MILES QC:

I think if there was still an equivalent of clause 13 and there might be because Air New Zealand –

GLAZEBROOK J:

Well it's implicit anyway because it's a collective agreement and it's all dependent on all of the terms. It's just that some of the terms are only applicable – because if it says a captain has to work 40 hours, that doesn't mean the first officer has to work 40 hours in accordance with that clause.

MR MILES QC:

Yes.

GLAZEBROOK J:

So it's a slightly odd agreement in that it will have different effects for different groups of employees, because some of the provisions won't be applicable, especially you know, I'll pay you that for doing that is certainly not applicable to anyone other than the particular group of the employees.

MR MILES QC:

Sure. I think, I think the reason you couldn't is because of the underlying rationale behind, I suspect, all deals that are struck as part of a collective, that every time you pay someone, one group more, you have to do a deal with the other or, look I'm – there has to be, they're so interconnected is really what I'm saying.

GLAZEBROOK J:

Well not necessarily because you could say well we're absolutely only going to give an increase to the captains, you take it or leave it union. That happens quite often I suspect.

MR MILES QC:

Well I –

GLAZEBROOK J:

And then the union decides to take it or leave it. If they take it well then that's what they've accepted and their members have accepted that.

MR MILES QC:

Sure. Well I think I said earlier on that this particular negotiation was unusually complex and that typically –

GLAZEBROOK J:

Well I sort of wonder about that actually because they're always negotiating all sorts of different terms and concessions, aren't they, that's why it takes them so long? I don't mean Air New Zealand necessarily, I just mean all of, all employers.

MR MILES QC:

Your Honour I'm just passing on my instructions on that. I –

GLAZEBROOK J:

They might have in the context of Air New Zealand but I wouldn't have thought it was very unusual generally.

MR MILES QC:

Well those were my instructions and I mean I – it's pretty unusual I think that one group, particularly a powerful group like the captains, are prepared to actually get less than –

GLAZEBROOK J:

That, I can understand that and unusual, no, that I can understand. Sorry I thought you were saying it was unusual to have all sorts of concessions with increases which I would have thought was absolutely what normally happens.

MR MILES QC:

I think this was unusual in the sense that the tradeoffs were so significant because they then resulted in a big increase on one segment and drop in the other so it was an unusual set of –

GLAZEBROOK J:

Well it wasn't a drop, it just wasn't as big an increase, wasn't it?

MR MILES QC:

Well not as big, yes, well it was 2 per cent instead of 2.8 I think. But I did say earlier on that if, for instance, it was a one issue deal or perhaps a relatively straightforward deal, then it would be easier for Court to construe that agreement as perhaps having separate and discrete issues. I think it comes down, as always really, to the wording of the deal and just how complicated it is but one way or the other it would always have to be a sense that this was the complete agreement reflecting this group.

I'm conscious that I'm nearly out of time Your Honours. I suppose the only point I haven't touched on and it's possibly one that Your Honours have already accepted but one of the key arguments run by my friend was that the

reason that a Court could not get into analysing whether the judgment had in fact applied orthodox principles is because the Court is then construing the agreement which it can't do. I don't accept that for a moment and no Court dealing with this issue has accepted that. Every judgment inevitably requires an analysis of the process by which the Employment Court reached the decision it did, that's just part of the appellant's supervision and having analysed the judgment, analysed the agreement, worked out what the, what, whether orthodox principles have been applied and if they've been applied, then whether you disagree or not becomes irrelevant. It's only if the conclusion is reached that having gone through the appropriate analysis using orthodox principles, you form the view that no Court could have reached that conclusion had it applied proper principles. So I don't accept that argument for one moment and there's no authority that I'm aware that supports my friend's proposition.

Unless there's anything else I can help Your Honours with, those are my submissions.

WILLIAM YOUNG J:
Yes, Mr Harrison?

MR HARRISON QC:
Thank you Your Honours. I'll try and address separately the question of the jurisdictional bar and what it means and how it operates and then deal with some of the criticisms that have been reiterated and expanded on so far as interpretation of the clause 24.2 itself is concerned.

One question which has arisen is whether Judge Colgan can be said to have erred in principle in his approach given he referred to the parties' intentions at certain points, and I think it was, my learned friend said on the one hand that he accepts that intention is irrelevant in contractual interpretation, but equally I noted him on a number of occasions talking about the parties' intentions as being this, the parties' intentions being that. My submission on that point is that it's perfectly permissible to refer to the parties' intentions, and merely

doing so is not, itself, indicative of error in approach. I'll give two examples of why I make that submission. At page 49 of volume 1 of the case the Court of Appeal is referring to Lord Neuberger in *Arnold v Britton* and he says when interpreting written contract a Court is concerned to identify the intention of the parties by reference to the reasonable person, what a reasonable person would have understood, et cetera. So it's, and there are various things that are then brought to bear in order to identify the intentions of the parties. So in that sense referring to the –

WILLIAM YOUNG J:
But look at point 6, "Disregarding subjective evidence of any parties' intentions."

MR HARRISON QC:
Yes, disregarding subjective evidence of any individual party's intentions, but that's not to say that if the evidence is that a clause was inserted for a particular purpose, that evidence isn't, cannot form part of the background. But at the moment I am just saying that the fact that Judge Colgan referred to the intention of the parties when he got to the point of trying to nail down the meaning, is not, of itself, an error of law, and likewise my second reference is to *Firm PI 1 v Zurich*, the joint judgment I think of Your Honours Justice Young and Glazebrook and –

WILLIAM YOUNG J:
Not me I think.

GLAZEBROOK J:
No.

MR HARRISON QC:
Sorry.

GLAZEBROOK J:
Justice Arnold.

MR HARRISON QC:

But you don't have this in front of you but at paragraph 60 it said, "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 reasonably available. This objective meaning is taken to be that which the parties' intended." So my only point is that it's limited to this, we had the debate about the negotiations and so on. For Judge Colgan to have fixed on a view that what the, ultimately what the parties' intended was this or that, is not itself, doesn't, of itself, mean that he – using that shorthand which my learned friend repeatedly used, is not, does not indicate an error of approach in principle.

The debate over what is the true test. The debate over what is meant by "supervision of the application of the correct principles". The intervention, what I effectively, I suppose was conceding in response to Justice Arnold, you can intervene perhaps in certain circumstances to ascertain whether the correct principles were applied but not to ascertain whether they were correctly applied, so is the Court having stated the principles, one assumes ordinarily that the Court is going onto apply them. If there is a counter indication in the judgment that they were not then applied, that may depending on the nature of the case be appropriate but what the Court can't do is say the principles were correctly stated, they were then applied but I'm going to decide that they weren't correctly applied as an exercise of setting up a competing construction of the contract, that is where the intervention principle quite clearly, in my submission, infringes the jurisdictional bar. And although my learned friend in his very last breath did refer to this question of the point where any such appellant analysis infringes the jurisdictional bar, really the argument for the respondent doesn't come to grips with that critical issue. He says well, and this is the difference between us, "The appellate court must be able to interpret the provision for itself in order to see whether orthodox principles were applied." I say that that, that's an unacceptable starting point, sometimes it may be necessary; I sort of hedge my bets on that in talking about *Yates* but it remains a no-go area ultimately to set up, to construe the agreement in order, purely in order as the Court of Appeal did

here, to conclude that the correct principles were wrongly applied. So that's all I think I want to say on the major issue of how the jurisdictional bar should be interpreted and works.

Although we've gone round in circles on this matter of the FANZP agreement and clause 13, I just do want to submit strongly that, two propositions one, a subsequently agreed provision such as clause 13 of the FANZP collective agreement cannot possibly impact on the interpretation of clause 24.2 so the logically prior question is, what does clause 24.2 mean? Now the Court of Appeal's approach was to say that it was clear and unambiguous and Judge Colgan erred in law in concluding otherwise. And there is still an adoption of that approach by my learned friend but with what we have now is, as has clearly emerged today, are three competing interpretations at least of 24.2. One, the original ALPA approach which I outlined earlier and then the other one, the original Air New Zealand approach, that agreement must be a full collective agreement, and then the one that sits somewhere in the middle. What, leaving aside which of those three competing interpretations is correct in the ultimate sense, what it demonstrates is that clause 24.2 was, as Judge Colgan originally held, capable of more than one meaning, demonstrably. The Court of Appeal rejected that proposition out of hand and found error there. Well, there plainly isn't error in that quarter because the analysis, I submit, demonstrates otherwise. So that leaves Judge Colgan in the position of having brought his particular set of findings about the background and his own analysis of the wording of the provision, having adopted the correct approach and not acted in defiance of any purported clear and unambiguous meaning.

Now that being the case, you interpret the clause. If it's the ALPA primary meaning that you can request the passing on of those provisions, which are more favourable and ignore the disbenefits, then these issues around the FANZP agreement in clause 13 simply fall away. If it's the sort of middle ground interpretation that's been put to me today, which is some aspect of the benefits and disbenefits, well if there are benefits requested and there are associated disbenefits and they must also be passed over, if that is the true

interpretation, then how does that interface with the FANZP agreement and clause 13. It's only clause 13.1 that is relied on by Air New Zealand. They really submit that that clause means that the whole of the FANZP disbenefits have to be passed over. But my submission is if the Court was determining that shade of meaning of clause 24.2, there's still a task of interpretation which I've argued should be for the Employment Court. But leaving that to one side, what is the, how do you formulate the necessary connection between requested benefit and supposedly connected disbenefit.

WILLIAM YOUNG J:

Can I give you a possible answer? I would be inclined to treat employee pilot group as including any identifiable group of employed pilots, which would include first officers on 737s, and I would look at the terms of their contracts of employment, as reflected in the ALPA collective agreement, and look at the terms of their employment agreements, resulting from the other agreement, and if the latter terms are more favourable, I would be inclined to say that they are entitled to have them passed on. Now, so that their employment agreements would be effectively the same as if they were employed under the FANZP agreement. Now there are one or two things about that that make me uneasy. First of all is that it means that, talking personally, I would be construing the agreement not the Employment Court. On the other hand, I do think there's an error of principle in the Employment Court Judge's approach, that he's too subjective, and I think it's material because I am extremely doubtful as to his conclusion. I also don't agree with the Court of Appeal's interpretation so there may not be much left. Or it may be that it should just be referred back to the Employment Court on the hypothesis I've been advancing.

MR HARRISON QC:

Yes. Well I –

GLAZEBROOK J:

But not one that Mr Miles wishes which is to advance.

MR HARRISON QC:

Yes.

WILLIAM YOUNG J:

We may just, could possibly say well if there were any significant conditions that affected the employment of the pilots, it was for Air New Zealand to identify them and they haven't in a concrete way.

MR HARRISON QC:

Or you could, Your Honours could simply answer the question posed which –

WILLIAM YOUNG J:

But I would answer that question yes.

MR HARRISON QC:

Yes the answer to the question yes, the Court of Appeal exceeded its –

GLAZEBROOK J:

But they were entitled to but not on the grounds that they did I suppose is the other –

MR HARRISON QC:

The question posed answered yes, the Court of Appeal exceeded its jurisdiction –

WILLIAM YOUNG J:

No, well I would say that it was entitled to do what it did, sorry it was entitled to review the judgment.

GLAZEBROOK J:

But not on the grounds of them not coming to the conclusion –

WILLIAM YOUNG J:

Yes because I think there was an error of principle but I don't agree with the result so I mean I can't just, we can't just answer the, give it a yes or no answer, attractive though that might be.

MR HARRISON QC:

Well interestingly when Your Honour Justice Young interrupted me, if I may put it that way, I was about to put to, that Your Honour had, the way that Your Honour had postulated the test or criterion under what I've called, and I'm calling the middle ground interpretation, is if there was a tangible disadvantage it would have to be passed on. Now that I see is different from what Your Honour –

WILLIAM YOUNG J:

Well I'm not, I'm all over the place on that. I'm also interested in section 4 of the Employment Relations Act as to whether that might provide a sort of a softening of what might otherwise be in a, a sort of reasonably formal contractual approach.

MR HARRISON QC:

Well I come back, my original point was there is still an interpretation issue on the middle ground as to what the test is which should go back to the Employment Court but leaving that to one side, my preferred middle ground interpretation is to say the disbenefit has to be directly related to the benefit, so if you identify a particular benefit here, the wage increase in order to say take the rough with the smooth, the rough has to be interconnected with the particular benefit that is requested. So it's by no means not remotely as wide as Your Honour Justice Young has put to me that basically if the second officers asked for a passing on, they get all of the terms and conditions in the FNAZP agreement that governs second officers. That is not what the clause –

WILLIAM YOUNG J:

I would agree it wouldn't include, if there is provision in the FANZP agreement, that the union fees be deducted and sent to FANZP.

MR HARRISON QC:

Well there's, but there's a whole lot of provisions in, and of course this is why we originally argued that a workable interpretation of the clause which requires a more favourable comparison, supports our argument that you may request a particular benefit and that particular benefit is then easily compared for favourability with the corresponding benefit, the pay rate, for a second officer against the pay rate under the FANZP agreement for a second officer, whereas as soon as you widen it out you get an impossible and unworkable comparison exercise. If you widen it out to the entire two collective agreements, how do you compare the package under one agreement with the package under another, even if you just widen it out to the second officers under one agreement to the second officers under another agreement, it's still an unworkable comparison. That is why you don't interpret the agreement that way.

WILLIAM YOUNG J:

Captain McGearty said that in evidence.

MR HARRISON QC:

Yes.

WILLIAM YOUNG J:

He said, but it was a very general term. He said you can't just adopt the provisions for one sub group.

MR HARRISON QC:

Yes, he was addressing the company position at that stage but what I'm submitting is that the, on the middle ground interpretation, if you say the requested benefit, there must – sorry, the alleged disbenefit that it must be directly in relation to the requested benefit because that enables you to

compare the two sets of conditions under the agreement. As soon as you widen it out too far, you've got an unworkable provision, and that's why you don't do that. So that's all I really wanted to say on that point.

I just want to, I think, one final point that my learned friend made in criticising Judge Colgan at paragraph 72. It's a line that the Court of Appeal took as well. That's at page 36 of the case on appeal. Your Honours will remember my learned friend takes para 72, "All acceptable down to so too I conclude the words any agreement were intended to encompass constituent parts and he said, well there's no, it's a complete non sequitur. My response to that, as in the Court of Appeal, is that actually it's not, he doesn't meant that what's gone before is the reason for his final sentence conclusion. He goes on to state the reasons for his final sentence conclusion in paragraphs 73, 74, 75 and 76, which follow. So he says, so too I conclude, but then he goes on to give reasons for that conclusion.

GLAZEBROOK J:

And in any event it might not be a non sequitur if he – the particular parts of the collective agreement referring to particular employee groups as being constituent parts of the agreement which would be that middle ground interpretation that's been put to you.

MR HARRISON QC:

Yes. Unless I can be of further assistance that's…

O'REGAN J:

Can I just ask you one thing? These pilots are no longer flying 737s, presumably, so is there any point in trying to establish whether the terms are equal between the two groups if, in fact, they've stopped – I mean I presume they're now A320 pilots, are they, or something else?

MR HARRISON QC:

There may not be a point in trying to establish – well, there's no point, I suspect, and there's not enough evidence for this Court to do that comparison

exercise and it would be, you'd be doing it under severe handicaps, but also, as Your Honour notes, that may be academic. But, of course, as was mentioned at the leave stage, clause 24.2 is in the current collective agreement, so its interpretation is still very much a live issue. It's certainly not moot by reason of the matter Your Honour Justice O'Regan mentions.

WILLIAM YOUNG J:

Thank you. We'll take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 4.18 PM