IN THE SUPREME COURT OF NEW ZEALAND

SC 48/2016
[2017] NZSC 111

BETWEEN	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INCORPORATED Appellant
AND	AIR NEW ZEALAND LIMITED Respondent

Hearing:	17 October 2016 (Further submissions received 8 December 2016)
Court:	William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ
Counsel:	R E Harrison QC and C Abaffy for Appellant J G Miles QC, P A Caisley and S R Worthy for Respondent
Judgment:	14 July 2017

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Leave to admit the affidavit evidence adduced by Air New Zealand Limited in support of the application for leave to appeal in the Court of Appeal is declined.

C The appellant is to pay to the respondent costs of $25,000 plus usual disbursements (to be fixed by the Registrar if necessary). We certify for two counsel.

REASONS

ARNOLD, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[1] Pilots who fly for Air New Zealand Limited generally belong to one of two employee associations. The larger of these two associations is the New Zealand Air Line Pilots' Association Incorporated (NZALPA). The collective agreement between NZALPA and Air New Zealand, which came into effect on 5 November 2012 and expired on 4 November 2015, dealt with the situation where Air New Zealand gave other pilots better terms and conditions than those enjoyed by the members of NZALPA. Clause 24.2 of the collective provided as follows:

> During the term of this Agreement any agreement entered into by [Air New Zealand] with any other pilot employee group which is more favourable than provided for in this Agreement will be passed on to pilots covered by this Agreement on the written request of [NZALPA].

[2] In early 2013, Air New Zealand entered into a new collective agreement with the other association representing pilots, the Federation of Air New Zealand Pilots Incorporated (FANZP). The agreement with FANZP provided for higher rates of pay than the NZALPA collective agreement for B737-300 first officers and all second officers. Other aspects of the new FANZP collective reflected concessions by members advantageous for Air New Zealand.

[3] Shortly after the FANZP collective agreement came into force, NZALPA wrote to Air New Zealand invoking cl 24.2. NZALPA asked that the higher rates of pay for the B737-300 first officers and for second officers be passed on to equivalent NZALPA pilots. Air New Zealand's response was that cl 24.2 was inapplicable, primarily on the basis the clause did not permit NZALPA members to pick up particular parts of the agreement rather than the whole of the agreement. The parties could not agree as to whether or not cl 24.2 applied.

[4] The parties' dispute about cl 24.2 was dealt with by the Employment Relations Authority (the Authority). The Authority accepted Air New Zealand's argument that cl 24.2 allowed NZALPA to adopt the whole of the FANZP collective agreement but "not to select particular parts" of it.[1]

[5] NZALPA brought a challenge to the Authority's decision in the Employment Court. The Employment Court set aside the determination of the Authority.[2] Chief Judge Colgan concluded that the words "any agreement" in cl 24.2 encompassed the "constituent parts of a collective".[3] In other words, if there were more favourable terms and conditions within the agreement, those terms and conditions could trigger the application of cl 24.2. Accordingly, cl 24.2 was engaged by the agreement to pay higher rates of remuneration for the two pilot groups. The Court found that Air New Zealand was required to pass on the higher remuneration rates for the B737-300 first officers and all second officers.[4]

[6] Air New Zealand sought and was granted leave to appeal from the decision of the Employment Court to the Court of Appeal.[5] The jurisdiction on appeal does not extend to decisions "on the construction of … a collective employment agreement".[6] The Court of Appeal nevertheless considered it had jurisdiction because, while the

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1 *New Zealand Air Line Pilots' Assoc Inc (NZALPA) v Air New Zealand Ltd* [2014] NZERA Auckland 11 (Member Crichton) [*NZALPA* (ERA)] at [9] and [38].

2 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709 (Chief Judge Colgan) [*NZALPA* (EC)].

3 At [72].

4 At [80].

5 *Air New Zealand Ltd v New Zealand Air Line Pilots' Assoc Inc* [2014] NZCA 570 [*NZALPA* (CA leave decision)].

6 Employment Relations Act 2000, s 214(1). A "collective agreement" is defined in s 5 to mean an agreement binding on one or more unions and one or more employers and two or more employees.

Employment Court had stated the correct principles of contractual interpretation applicable to the collective, those principles were not correctly applied.[7] In particular, "insofar as the Employment Court considered the natural and ordinary meaning" of the term "any agreement" in cl 24.2, "it gave that meaning no force".[8] The Court of Appeal concluded that the words "any agreement" meant all of the relevant promises made by the parties and not a subgroup of those promises, that is, the whole of the collective agreement.[9] The appeal was allowed. The decision of the Employment Court was set aside and the decision of the Authority was reinstated.

[7] The question before this Court is whether the Court of Appeal was correct to conclude it had jurisdiction in relation to the appeal.[10] We address that issue after considering the factual background and the statutory framework.

The facts

[8] NZALPA was formed in 1945 and FANZP (originally, the Air New Zealand Pilots' Society) in 1990. About 75 per cent of Air New Zealand's pilots are members of NZALPA. A small number of Air New Zealand's pilots are on individual employment agreements.[11]

[9] Clause 24.2 was first introduced into the NZALPA collective in 2002. The provision has been carried through into subsequent collectives including the current collective.[12] The clause is one of three in a section dealing with the operation of the collective. The other two clauses in this section address, first, the timing of payments dealt with in the agreement (cl 24.1) and secondly, the parties' agreement that, if during the life of the collective, Air New Zealand decides "to implement

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7 *Air New Zealand Ltd v New Zealand Air Line Pilots' Assoc Inc* [2016] NZCA 131, [2016] 2 NZLR 829 (Wild, Cooper and Winkelmann JJ) [*NZALPA* (CA)] at [20]–[25].

8 At [77].

9 At [77]–[78].

10 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2016] NZSC 84.

11 The evidence of Captain Garth McGearty (an Air New Zealand Captain who was in charge of negotiations for NZALPA during bargaining for the 2002 agreement and a senior member of the NZALPA negotiation team in the bargaining for the 2012 agreement) was that around 70 to 80 pilots, "at the most", were on individual employment agreements. To put this figure in context, Captain McGearty's evidence was that 760 pilots were members of NZALPA and 120 pilots belonged to FANZP.

12 The wording in cl 24.2 was used in the equivalent provision in the 2002 collective. The clause was renumbered cl 24.2 without any changes to the text in 2004 and has been the same since.

significant changes to the way it does business" the relevant parts of the collective are to be renegotiated (cl 24.3).

[10] Air New Zealand entered into a new collective with FANZP in March 2013. The changes from the previous collective were set out in Terms of Settlement dated 15 March 2013 signed by each party's representatives. The changes in the new collective included a two per cent increase for captains and a 12.6 per cent increase in remuneration for B737-300 first officers and all second officers. As the Court of Appeal noted:[13]

> While the 2 per cent increase for captains was lower than the corresponding 2.5 per cent in the 2012 [NZALPA collective], the 12.6 per cent increase for first and second officers was significantly higher. The corresponding figure in the [NZALPA collective] was 2.5 per cent.

[11] The FANZP collective also contained what Air New Zealand described as "concessions" by FANZP to Air New Zealand. Air New Zealand's case is that the new collective reflected a package of measures such that, without agreement on the concessions, the higher rates of pay for the two groups could not have been achieved.[14] The concessions are set out in more detail in the judgment of the Employment Court.[15] For present purposes, it will suffice to mention the concessions included matters such as a special scheduling agreement for Auckland-Rarotonga services which meant Air New Zealand could reposition pilots in either direction on the sector; removal of what are referred to as "35/7 flying hour restrictions"; and relaxing of time restrictions for flight simulator training at night.

[12] We were advised that at least some of these concessions could not, in fact, be implemented without the agreement of NZALPA pilots as well. For example, as the Chief Judge observed, the proposed "removal of a numerical cap on management pilots able to operate out of seniority" was inconsistent with NZALPA pilot practice and so not yet able to be implemented.[16]

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13 *NZALPA* (CA), above n 7, at [12].

14 Clause 1 of the Terms of Settlement with FANZP and cl 13.1 of the FANZP collective provided that "[t]he rates of remuneration and changes thereto are in consideration for and conditional on the totality of the changes agreed to in this Collective Employment Agreement".

15 *NZALPA* (EC), above n 2, at [47].

16 At [47].

[13] As we have said, NZALPA wrote to Air New Zealand on 24 April 2013 purporting to invoke cl 24.2. NZALPA asked that the two particular higher rates of pay be passed on to equivalent NZALPA pilots on the basis these rates were "more favourable than provided for in" the NZALPA collective. Air New Zealand responded on 3 May 2013 rejecting the suggestion that cl 24.2 was applicable. Air New Zealand said the "selective" approach to terms and conditions was outside of cl 24.2 and the FANZP collective was not "more favourable".[17] The dispute went to the Authority.

[14] The Authority concluded the reference to "any agreement" was intended to be a reference to the collective and not to parts of it. It was important, the Authority considered, that the word "agreement" was used as a term of art.[18] The Authority also considered that business common sense supported Air New Zealand's approach to the clause.[19]

The statutory framework

[15] Section 186 of the Employment Relations Act 2000 (the "2000 Act") provides for the continuation of the Employment Court. The Court has exclusive jurisdiction over the matters set out in s 187(1). In all matters before it the Court has, for the stated purposes, jurisdiction to determine those matters in such a manner "as in equity and good conscience it thinks fit".[20]

[16] The Court of Appeal's jurisdiction in relation to appeals from the Employment Court is set out in s 214 of the 2000 Act. Section 214(1) provides:[21]

> A party to a proceeding under this Act who is dissatisfied with a decision of the court (other than a decision on the construction of an individual employment agreement or a collective employment agreement) as being wrong in law may, with the leave of the Court of Appeal, appeal to the Court

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17 Before the Employment Court it was accepted that if NZALPA's interpretation of cl 24.2 is correct, the new rates of pay for B737-300 first officers and all second officers were more favourable than those for pilots under the NZALPA collective: *NZALPA* (EC), above n 2, at [7].

18 *NZALPA* (ERA), above n 1, at [40]–[41].

19 At [45].

20 Employment Relations Act, s 189(1).

21 As from 1 April 2016 a party may appeal to the Court of Appeal without leave on a question of fact or law relevant to Part 9A of the Employment Relations Act dealing with the enforcement of employment standards: Employment Relations Act, s 214AA.

> of Appeal against the decision; and section 66 of the Judicature Act 1908 applies to any such appeal.[22]

[17] Under s 214(3) the Court of Appeal may grant leave to appeal if the Court is of the opinion that the question of law involved in the appeal "is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision". In granting leave the Court may impose "such conditions as it thinks fit, whether as to costs or otherwise".[23]

[18] In determining an appeal, the Court of Appeal may "confirm, modify, or reverse the decision appealed against or any part of that decision".[24] Instead of determining an appeal under s 214, the Court may direct the Employment Court to reconsider "either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates".[25]

[19] Section 216 of the 2000 Act provides that in deciding an appeal under s 214, the Court of Appeal must have regard to:[26]

> (a) the special jurisdiction and powers of the [Employment] court; and
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> (b) the object of this Act and the objects of the relevant Parts of this Act; and
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> (c) in particular, the provisions of sections 189, 190, 193, 219, and 221.

[20] Under s 7 of the Supreme Court Act 2003[27] this Court can, relevantly, hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against any decision made in that proceeding unless another enactment makes

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22 Subsection (1) has been amended, as from 1 March 2017, by s 183(b) and sch 3 of the Senior Courts Act 2016 by substituting "section 56 of the Senior Courts Act 2016" for "section 66 of the Judicature Act 1908".

23 Employment Relations Act, s 214(4).

24 Section 214(5).

25 Section 215(1).

26 The reference to s 189 incorporates the Employment Court's equity and good conscience jurisdiction which appears in s 189(1).

27 While the Supreme Court Act 2003 was replaced by the Senior Courts Act 2016 on 1 March 2017, it continues to apply to this case pursuant to sch 5, cl 10 of the Senior Courts Act. Section 7 of the Supreme Court Act has been replaced by s 68 of the Senior Courts Act.

provision to the effect that there is no right of appeal.[28] In addition, s 214A of the 2000 Act provides for a direct appeal from decisions of the Employment Court with leave to the Supreme Court where there are exceptional circumstances justifying that course. Section 214A mirrors the restriction in s 214(1), that is, this Court's jurisdiction on a leapfrog appeal is on a question of law "other than a decision on the construction of an individual employment agreement or a collective employment agreement".

Appellate jurisdiction in employment cases

[21] The current case raises issues about the interpretation of a collective agreement. That leads to a question as to the application of the limitation on appellate review in s 214(1), that is, the exclusion from appellate review of decisions "on the construction of … a collective employment agreement". We need to consider whether the Court of Appeal was correct to conclude it had jurisdiction to hear the appeal or whether the appeal should have been dismissed for lack of jurisdiction. This issue can conveniently be dealt with by addressing two questions:

(a) Is construction of a collective agreement off-limits for the appellate Courts?

(b) If not, what is the scope of the jurisdiction with respect to the interpretation of a collective agreement?

[22] We deal with each question in turn.

Any jurisdiction?

[23] There is, as counsel for NZALPA submitted, an argument on the plain wording of s 214(1) that the appellate Courts have no jurisdiction to consider collective agreements at all. However, that argument cannot be sustained when the wording of s 214(1) is considered in context.

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[28] Prior to the enactment of the Supreme Court Act 2003, the Court of Appeal was the highest court to which appeals could be taken in employment law matters – there was no further appeal to the Privy Council: *de Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC). See also Philip Bartlett and others *Employment Law* (looseleaf ed, Thomson Reuters) at [ER214A.01].

[24] By way of background we note first that, as Gordon Anderson states, for most of the arbitration[29] period:[30]

> … there was no direct right of appeal from the [Arbitration] Court, although the judge could state a case on a question of law for the Court of Appeal, but questions relating to the interpretation of an award were excluded, a restriction maintained in statutory form when a formal right of appeal on questions of law was created in 1977.
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> (citation omitted)

[25] The restriction now found in s 214(1) on the appellate Courts' jurisdiction to construe a collective agreement[31] is modelled on s 62A of the Industrial Relations Act 1973, inserted by the Industrial Relations Amendment Act 1977. Section 62A was in substantially similar terms to s 214(1), including the exclusion for decisions "on the construction of any award[32] or collective agreement", but the appeals, on points of law, were to be by way of case stated.[33] Provisions along the same lines as s 62A were also included in subsequent legislation: the Labour Relations Act 1987[34] and the Employment Contracts Act 1991 ("1991 Act").[35]

[26] As this Court has said, the limit on the appellate Courts' ability to construe the collective agreements appears to be "a relic of cases in which New Zealand

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29 The Court of Arbitration was established in 1894 by the Industrial Conciliation and Arbitration Act 1894, and was in operation until 1973 when it was replaced by the Industrial Court (established by the Industrial Relations Act 1973).

30 Gordon Anderson *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011) at 102–103. See Industrial Relations Act 1973, s 47(6) (as enacted) (lack of jurisdiction only basis for challenge in court); Industrial Relations Amendment Act 1977, s 62A(1) (right of appeal to Court of Appeal from the Industrial Court by way of case stated); Labour Relations Act 1987, s 312(1) (as enacted) (appeal by way of case stated); Employment Contracts Act 1991, s 135(1) and (2) (right of appeal by way of notice); and Employment Relations Act, s 214.

31 We address the question by reference to the collective agreement but the restriction applies also to individual employment agreements.

32 Awards were an instrument of delegated legislation providing minimum, legally enforceable terms and conditions of employment and minimum wages: Anderson, above n 30, at 31–33.

33 From the enactment of s 214 of the Employment Relations Act, leave from the Court of Appeal to appeal was required.

34 Labour Relations Act, s 312(1).

35 Employment Contracts Act, s 135(1). In this provision, the appeals moved away from the case stated procedure and, instead, s 66 of the Judicature Act 1908 was applied allowing appeals simply by way of a notice to appeal.

Courts of general jurisdiction declined to enter into the construction of awards".[36] Cooke P in *Tisco Ltd v Communication and Energy Workers Union*, similarly, explained the rationale behind the statutory limitation on rights of appeal as a hangover "of times when it was thought that the terms of industrial awards might be construed over-legalistically by the ordinary Courts".[37]

[27] Against this background, up until the enactment of the 1991 Act, the Court of Appeal took what has been described as a "deferential approach to decisions of the Arbitration Court that interpreted industrial agreements".[38] McGrath J in *Secretary for Education v Yates* said that:[39]

> Awards were viewed as extensions of the legislation until the 1987 Act. Even after its passage, the statutory underpinning of awards meant that the principles of statutory interpretation governed their interpretation, sometimes with modifications arising from their consensual nature … . Industrial agreements were seen as akin to contracts, but nonetheless interpreted applying principles of statutory interpretation.

[28] The 1991 Act brought significant change to the way in which the nature of employment was characterised.[40] The following passage from *Canterbury Spinners Ltd v Vaughan* encapsulates the position:[41]

> No longer was there an Arbitration Court or commission with the power, even with the consent of the parties (as under the 1987 Act), to write the rules of the employment relationship for the parties. No longer was it possible … to refer to an industrial award as judicial in form but legislative in substance and effect. From 1991 a contract negotiated between the parties

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36 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at n 21; citing *Inspector of Awards v Fabian* [1923] NZLR 109 (CA) at 121 per Salmond J; and *Wellington Municipal Officers' Assoc Inc v Wellington City Corporation* [1951] NZLR 786 (SC) at 788. See also Alexander Szakats *Introduction to the Law of Employment* (Butterworths, Wellington, 1975) at 123–124.

37 *Tisco Ltd v Communication and Energy Workers Union* [1993] 2 ERNZ 779 (CA) at 781. See also *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA) at [5] per McGrath J; citing *New Zealand Related Trades Industrial Union of Workers v NZMC Ltd* [1983] ACJ 233 (SC) at 239; and *Foodtown Supermarkets Ltd v NZ Shop Employers Industrial Association of Workers* [1984] ACJ 1043 (CA) at 1048 per Somers J. See also Bartlett, above n 28, at [ER214.05]. In *Winstone Clay Products Ltd v Inspector of Awards* [1984] 2 NZLR 209 (CA), the Court of Appeal emphasised the specialist nature of the Arbitration Court and its focus on fairness.

38 *Yates*, above n 37, at [8].

39 At [6].

40 At [9]. Rose Ryan and Pat Walsh discussed the debates in the context of the Employment Contracts Act over whether or not the specialist jurisdiction was to be retained: Rose Ryan and Pat Walsh "Common Law v Labour Law: The New Zealand Debate" (1993) 6 AJLL 230 at 243–254.

41 *Canterbury Spinners Ltd v Vaughan* [2003] 1 NZLR 176 (CA) at [10] per Keith J. Cited in *Yates*, above n 37, at [9] per McGrath J.

> was the means for fixing and changing the terms of the employment relationship.

[29] McGrath J in *Yates* emphasised the "different statutory context" of the 1991 Act. He explained:[42]

> Section 135[43] had to be applied to a statutory scheme in which rights and obligations arose under employment contracts. [The Court of Appeal] quickly concluded that the general principles of interpretation of a contract applied equally to employment contracts as to any other kind: *TNT Worldwide Express (NZ) Ltd v Cunningham* … . It was in this context that s 135 was interpreted in the manner indicated, that is as retaining the primacy of the role of the Employment Court in relation to construction of contracts but subject to the supervisory appellate function of [the Court of Appeal] in relation to the law of contractual interpretation. On this reading of the statutory provision matters of contractual principle became the responsibility of the [Court of Appeal].

[30] Since the introduction of the 1991 Act (and subsequently, the 2000 Act), decisions of the Court of Appeal have been clear that the limitation on appeal rights contained in s 214 (and previously, s 135 of the 1991 Act) does not prevent the Court of Appeal from granting leave to appeal in relation to questions of principle going beyond the construction of the particular contract. Given the change in the statutory framework, this approach towards appellate review is not surprising.[44] McGrath J in *Yates* helpfully discusses the relevant Court of Appeal decisions.[45] The following examples suffice.

[31] In *Attorney-General v New Zealand Post-Primary Teachers' Assoc* (*NZPPTA*), Gault J, writing for a full court, noted that the case involved "more than the interpretation" of the relevant provision of the collective agreement.[46] What was

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42 *Yates*, above n 37, at [18].

43 Section 135 of the Employment Contracts Act, the predecessor provision to s 214.

44 This change is perhaps reflective of a more general shift in terms of the influence of the common law on employment law. In discussing the history of the first years of the 1991 Act, Gordon Anderson notes that there were a series of Court of Appeal decisions in which "the pluralist and flexible approach that had characterised employment and industrial relations law for much of the 20th century was superseded by a strongly unitary and formalistic common law approach": Anderson, above n 30, at 107.

45 *Yates*, above n 37, at [4]–[22]; citing *Canterbury Spinners*, above n 41; *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159 (CA); *Attorney-General v New Zealand Post Primary Teachers' Assoc* [1992] 2 NZLR 209 (CA) [*NZPPTA* (CA)]; *Tisco*, above n 37; *Sears v Attorney-General* [1995] 2 ERNZ 121 (CA); *Walker Corporation Ltd v O'Sullivan* [1996] 2 ERNZ 513 (CA); and *Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537 (CA).

46 *NZPPTA* (CA), above n 45, at 215.

in issue in *NZPPTA* was the implication of a contractual term into the terms and conditions of the employment of secondary teachers. The Court also referred[47] to the earlier decision of *Air New Zealand Ltd v Johnston* in which the Court said that appeals on questions of law will extend to "general principles and general implied terms".[48] In *Tisco*, Cooke P noted that the Court did have jurisdiction on questions of principle "going beyond the particular terms of a contract".[49]

[32] As McGrath J observed,[50] there was further refinement of the scope of the Court's appellate powers in *Sears v Attorney-General*.[51] In that case Richardson J for the Court said:[52]

> It is well-settled that this Court is not precluded from examining questions of principle going beyond a particular term of a contract and that where the Employment Court errs in principle in how it goes about interpreting the contract, that is an error of law for appropriate consideration by this Court under s 135 … . The same position applies where, as here, crucial questions concern the construction and application of legislation.

[33] McGrath J described this as a "shift of emphasis" to the proposition that the Court could intervene on an appeal under s 135 of the 1991 Act where there was an error of principle in the Employment Court's interpretation of the contract.[53]

[34] Some assistance is also found in the two cases cited by McGrath J in which the Court of Appeal said there was no error of principle in the Employment Court's approach. In *Wellington College of Education v Scott* the Court made it plain there was a distinction between erring "as a matter of law in the approach to the interpretation" and "simply erring in the ultimate construction".[54]

[35] Further, in *Attorney-General v Grant* Richardson P for the Court said:[55]

> The standard interpretation approach was for the Judge to consider the meaning of the words used in their context and having regard to their matrix.

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47 At 215.
48 *Johnston*, above n 45, at 165–166.
49 *Tisco*, above n 37, at 781.
50 *Yates*, above n 37, at [14].
51 *Sears*, above n 45.
52 At 125.
53 *Yates*, above n 37, at [15].
54 *Wellington College of Education v Scott* [1991] 1 ERNZ 98 (CA) at 101.
55 *Attorney-General v Grant* [1998] 3 ERNZ 259 (CA) at 267.

> In that regard he had drawn attention to the only statutory provisions providing for and limiting the power of transfer of employees of a department to positions in the same department or other departments. Against that statutory and factual background he interpreted the phrase, "placement to suitable position … in a new structure or agency established as part of the restructuring" as meaning an agency of the Crown. We cannot discern any error of law in that interpretation approach. Whether or not as a matter of construction we would have reached the same construction conclusion is not within our jurisdiction on appeal under s 135.

[36] McGrath J considered that the re-enactment in the 2000 Act of language expressing the limits on the Court's appellate powers in substantially the same terms as that in s 135 of the 1991 Act was "an affirmation of [the Court of Appeal's] approach to appellate review of interpretation of employment agreements under [the 1991] Act".[56]

[37] We agree. There is nothing to suggest an intention to limit the approach prevailing at the time of the enactment of s 214 of the 2000 Act. By that time, it was well settled that the appellate Court had some ability to consider collective agreements and there was no relevant change to s 214(1).

[38] In *Waitemata District Health Board v New Zealand Public Service Assoc* Chambers J, concurring with the majority but writing separately, suggested there were two changes introduced by the 2000 Act which might be important in terms of the Court's appellate jurisdiction.[57] The first of the changes identified was that the Employment Court's equity and good conscience jurisdiction had "arguably been significantly increased".[58] The other was the inclusion, in s 216 of the 2000 Act, as a specific requirement that the Court of Appeal must have regard to the Employment Court's equity and good conscience jurisdiction. Chambers J observed that the predecessor to s 216 (s 137 of the 1991 Act) contained no similar reference to s 104(3), the equity and good conscience provision in the 1991 Act. Chambers J did not reach a view on the significance of these changes but said "arguably, they might suggest a return in this Court to the more deferential approach which McGrath J detected in the pre-1991 decisions".[59]

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56 *Yates*, above n 37, at [19].

57 *Waitemata District Health Board v New Zealand Public Service Assoc* [2006] 1 ERNZ 1029 (CA) at [46]–[47].

58 At [46].

59 At [48].

[39] As to the first of these changes, the Employment Court's equity and good conscience jurisdiction is set out in s 189(1) of the 2000 Act. There are differences between the scope of the jurisdiction under s 189(1) and that as found in s 104 of the 1991 Act. The jurisdiction now extends to "all matters" before the Court when previously some matters such as tort actions arising out of a strike or lockout were excluded.[60]

[40] In addition, as Chambers J noted, the reference to equity and good conscience in s 189(1) has to be construed in the context of the broader scheme of the Act.[61] The objects set out in s 3 of the 2000 Act, as enacted, include building "productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship" in the ways set out in that section.[62] In addition, s 4 imposes a duty on the parties to an employment relationship to deal with each other in good faith.[63] Finally, s 143 describes the objects of pt 10 of the Act which deals with the various institutions established by the Act.

[41] As to the second change referred to by Chambers J, s 137 of the 1991 Act did not contain a specific reference to the equity and good conscience jurisdiction in s 104(3). It did, however, direct the Court on an appeal to "have regard to the special jurisdiction and power" of the Employment Court.

[42] We do not consider these matters alter the position in relation to the interpretation of the limit on appellate review in s 214(1). The scope of the equity and good conscience jurisdiction may be relevant to the approach to interpretation.[64] But, given the approach to the appellate jurisdiction was well-settled by 2000, a more direct change in the provisions dealing with appeals would have been necessary to lead us to the view that what would amount to a complete change in approach was intended.

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60 See the discussion in Bartlett, above n 28, at [ER189.02(1)].

61 *Waitemata District Health Board*, above n 57, at [46].

62 Employment Relations Act, s 3(a), as it read prior to 1 December 2004, when s 4(1) of the Employment Relations Amendment Act (No 2) 2004 came into force.

63 Employment Relations Act, s 4(1)(a).

64 We heard no argument on how the jurisdiction may be relevant and this aspect was not relied on in this case. We leave the point open until a case where it may arise.

[43] Further, we do not see the scheme of the 2000 Act as a whole as evincing an intention that the role of the appellate Courts would revert to the pre-1991 position. Section 143 is instructive in this respect. The object of pt 10, dealing with institutions, is described in s 143 as establishing procedures and institutions that:

> (a) support successful employment relationships and the good faith obligations that underpin them; and
>
> (b) recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves; …

[44] Sections 143(e), (f) and (fa) are important. For present purposes they refer to procedures and institutions that do the following:

> (e) recognise that there will always be some cases that require judicial intervention; and
>
> (f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
>
> (fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; …

[45] But s 143(g) is also relevant. That section lists as an object the provision of procedures and institutions that:

> (g) recognise that difficult issues of law will need to be determined by higher courts.

[46] That object reinforces the need for the Court to be satisfied the question in issue meets the jurisdictional threshold whilst recognising the appellate Courts have a role in determining questions of law. We add that in its report on the Employment Relations Bill, the Employment and Accident Insurance Committee referred to the introduction of the leave requirement in what became s 214 in these terms:[65]

> The role of the Court of Appeal is to provide guidance on difficult matters of law, not to determine factual matters which are more appropriately dealt with by the specialist employment institutions.
>
> To ensure that the Court of Appeal is not required to hear matters that are inappropriate for its jurisdiction, we recommend that an appeal to the

[65] Employment Relations Bill 2000 (8-2) (select committee report) at 40.

> Court of Appeal on a question of law should be by leave of the Court of Appeal, thus matching many other jurisdictions.

[47] We conclude that, viewed in context, the construction of collective agreements is not off limits altogether. The issue that arises is as to the scope of the appellate review and to that question we now turn.

Scope of jurisdiction

[48] This Court in *Bryson v Three Foot Six Ltd* observed that the limit in s 214(1) of the 2000 Act does not prevent the Court from considering "questions of interpretive principle".[66] Blanchard J, writing for the Court, cited in support of this observation the passages from *NZPPTA* and *Sears v Attorney-General* which we have set out above.[67]

[49] The Court in *Bryson* was dealing with the distinction between questions of fact and law, so the scope of the limitation in s 214(1) was not directly in issue. That said, we consider the statement in *Bryson* is a succinct summary of the scope of appellate jurisdiction with respect to collective agreements.

[50] Counsel for NZALPA took no issue with the statement in *Bryson*. However, it was submitted that, where the Employment Court had stated the principles correctly, the Court of Appeal was wrong to consider that the misapplication of those principles gave it jurisdiction.

[51] This point can be dealt with shortly. Mr Harrison QC accepted it is possible to postulate examples where the stated principles are simply given lip-service. That must be so. It would be an odd result in the current statutory framework for the supervisory appellate jurisdiction to be removed by a recitation of the principles where one or more of the principles was then misapplied or not applied at all, with an operative effect on the outcome.

[52] A classic illustration is that where the Employment Court does not correctly apply the principles for the implication of terms into a contract. *NZPPTA* is an

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66 *Bryson*, above n 36, at [20] and n 21.
67 See above at [31]–[32].

example in this category.[68] The issue there was whether the Ministry of Education was bound to continue to pay teachers non-contact time allowance at the same level as had been funded in the past. The terms and agreement in issue were set out in the Secondary Teachers' Award (Document 2173) which, pursuant to s 176(1) of the 1991 Act, was deemed to be a collective contract. There was no express provision for the allowance in the collective contract but the Employment Court found that a term to continue to pay the allowance at the same level was to be implied.[69]

[53] The Employment Court relied on a savings clause in the award which provided that unless otherwise specified the terms and conditions of employment for teachers covered by the award would be "identical with those that applied prior to 1 April 1988".[70] Section 94(1) of the State Sector Act 1988 was to similar effect. The Court of Appeal said that it was not "entirely clear" how the allowance was treated as having become a term or condition prior to 1 April 1988.[71] But the Court of Appeal said it appeared the term had been implied on the basis of custom "or in some other manner as a result of having been understood and applied by the parties in practice".[72]

[54] The Court of Appeal found there was no express term or condition prior to 1 April 1988 which was capable of carrying the implicit undertaking. There was nothing to support reasonable expectations nor were there rights or anything of that nature to make the need to imply the term so obvious.[73] The Employment Court had accordingly erred in law in the application of the principles governing the implication of terms.[74]

[55] There may also be cases where the interpretation of a collective turns on the approach to the interpretation of the contract in light of a statute. The approach to statutory interpretation in those cases may be a question of interpretive principle. Two further cases both concerning the inter-relationship between changes in the

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68 *NZPPTA* (CA), above n 45.
69 *New Zealand Post-Primary Teachers' Assoc v Attorney-General (No 2)* [1991] 3 ERNZ 641 (EmpC).
70 At 644.
71 *NZPPTA* (CA), above n 45, at 211.
72 At 211.
73 At 214.
74 At 215.

statutory minimum period of annual leave and provisions for long-service leave in collective agreements assist in illustrating the approach.

[56] In *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*, the Court of Appeal concluded it had no jurisdiction to intervene.[75] The appeal related to the New Zealand Meat Workers and Related Trade Unions collective agreements with Silver Fern Farms. In particular, there was an issue about cl 10.4 of the collectives which provided that qualifying employees were entitled to an additional week of annual holiday leave on top of the statutory minimum of three weeks' annual leave.

[57] The employer contended the "additional week" could only mean additional to the entitlement in cl 10.2 of the collective of each employee to three weeks annual holiday, that is, making a total of four weeks leave. The issue arose because the collective did not say expressly what was to happen after the statutory minimum holidays increased from three to four weeks from 1 April 2007.[76]

[58] The Employment Court concluded that qualifying employees were entitled to five weeks annual holiday after 1 April 2007. As the Court of Appeal said, it was critical to the Judge's approach that cl 10.2 had to be read after 1 April 2007 as providing for four weeks annual holiday, given that was the new statutory minimum. Randerson J for the Court stated:[77]

> It followed that if cl 10.4 of the 2004 agreement were to be literally construed, qualifying employees would receive no more than four weeks annual holiday. This was no more than the entitlement of all non-casual employees. [Judge Shaw] concluded by reference to cl 10 and the history of previous awards and agreements in the industry that the intention was to provide the minimum statutory holidays for all non-casual employees and to recognise the continuous service of qualifying employees by granting one week's annual holiday additional to the statutory entitlement.

[59] The Court of Appeal concluded that Judge Shaw had adopted "an approach to the interpretation of the agreements which was conventional and appropriate".[78]

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75 *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317.

76 Holidays Act 2003, s 16(1).

77 *Silver Fern Farms*, above n 75, at [20].

78 At [42].

As the Court said, the Judge considered "the language used in the context of the prior instruments" and focussed on interpreting cl 10 so as to "remove apparent inconsistencies and give effect to … the … purpose of the clause".[79] As there was no error in principle in approach the Court had no jurisdiction.[80]

[60] In comparison, the Court of Appeal in *Service and Food Workers Union Nga Ringa Tota Inc v Cerebos Gregg's Ltd* concluded it had jurisdiction.[81] In that case, the Employment Court said the entitlement to a further week's leave provided for long-serving employees in the collective was no longer an enhanced or additional entitlement from 1 April 2007 and instead became subsumed within the four weeks annual holidays provided by the Holidays Act 2003.

[61] The Court of Appeal found the Employment Court had erred in two ways which gave the appellate Court jurisdiction. First, the Employment Court had focussed principally on the "statutory nature and purpose of annual leave instead of construing the relevant contractual provisions according to their plain meaning and purpose".[82] Secondly, the Employment Court did not apply what was by then "a settled line of authority" in the Court of Appeal and the Employment Court in cases which were factually very similar.[83]

[62] The differences in outcome in the two cases indicates the scope of the interpretive principle. The error must extend beyond construction of an individual collective to the principles and the approach in general that is taken.

[63] Before turning to the application of our approach to the present case we also need to address the submission from counsel for NZALPA that in *Yates* the formulations of the two majority Judges, McGrath and William Young JJ, were potentially broader than the approach in other Court of Appeal authorities. This submission was made with reference to the following statement of McGrath J:[84]

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79 At [42].
80 At [46].
81 *Service and Food Workers Union Nga Ringa Tota Inc v Cerebos Gregg's Ltd* [2012] NZCA 25, [2012] ERNZ 38.
82 At [47].
83 At [48].
84 *Yates*, above n 37.

> [20] Accordingly under the 2000 Act, as under the 1991 Act, if the Employment Court reads the terms of an employment agreement in a manner that was not open to it this Court may intervene on the basis that a wrong principle has been applied, which may include that what the Employment Court has done does not in law amount to an orthodox interpretation of the contract. The latter conclusion will not lightly be reached but is an aspect of appellate supervision of the interpretation of agreements in the Employment Court jurisdiction under the 2000 Act.

[64] Counsel referred also to the observation by William Young J that it was necessary to identify "the true issue of construction" and to "seek to resolve that issue by interpretation (using orthodox techniques)".[85]

[65] It was submitted that the first observation was wrong if it was inviting interpretation by the appellate court to determine if the Employment Court's approach was one that was "open". The second observation was wrong, the appellant says, where the Court first works out what the appellate court considers is the competing, true, interpretation and works backwards from that. We agree that it is always necessary to identify the error of interpretive principle. With that caveat, we do not read either observation as widening the test or as departing from the requirement that an error of principle must be identified. McGrath J makes it clear in the passage cited above that what is envisaged is an approach that "does not in law" comprise an "orthodox interpretation". William Young J describes a conventional two-stage approach, that is, identify the error of principle before interpreting the contract in light of the correct principles. We interpolate here that, as we discuss later, in some cases the second stage will involve remittal back to the Employment Court.

[66] The variations in the way in which the test has been expressed underscore the fact that it is often difficult to draw the line between those cases where there is an error of interpretive principle and those which are not of that kind. Chambers J in *Waitemata District Health Board* described the difference between erring in the approach to interpretation and "erring in the ultimate construction" as "very subtle".[86] That difficulty is a reason to reiterate the need for the appellate court to

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85 At [87].

86 *Waitemata District Health Board*, above n 57, at [44]. Chambers J also noted that in that case, leave was granted provisionally reflecting the difficulties of determining "on which side of the line a particular attack comes": at [33].

identify the error and to resist "the temptation of turning errors of interpretation into errors of principle merely because [the Court] sees the result reached as wrong".[87]

[67] We turn then to consider the application of these principles to the present case.

Application to the present case

[68] The appellant submitted that the Court of Appeal was wrong to conclude that the Employment Court had wrongly applied or failed to apply correct principles. To address this submission we first discuss the decision in the Employment Court.

The approach in this case in the Employment Court

[69] The Chief Judge said he took the approach to contractual interpretation as explained most recently in *Silver Fern Farms*.[88] He set out a number of principles distilled from that case.[89] The Judge described the Court's task as being to establish:[90]

> … the meaning that the agreement would convey to a reasonable person having the background knowledge reasonably available to the parties in the situation in which they were at the time of reaching agreement.

[70] Having set out the principles, the Chief Judge turned to the case at hand. He was of the view that the contentions of both parties as to the meaning of cl 24.2 were "tenable" because of the lack of clarity in the wording.[91] But, ultimately, he concluded Air New Zealand's interpretation was "sufficiently improbable that it must be discounted".[92] The wording of the clause was more consistent with NZALPA's approach to interpretation and, importantly, the context supported that view.[93]

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87 *Yates*, above n 37, at [30] per Glazebrook J (dissenting). See also at [21] per McGrath J and at [98] per William Young J.
88 *Silver Fern Farms*, above n 75.
89 *NZALPA* (EC), above n 2, at [21].
90 At [21].
91 At [53].
92 At [53].
93 At [53].

Discussion

[71] The summary of principles of contractual interpretation set out in the Employment Court has now been overtaken by the discussion of this Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* (*Firm PI*).[94] The Chief Judge's summary in the present case should be put to one side. As was said in *Firm PI*:

> [60] … the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
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> (citations omitted)

[72] It is helpful at this point to address the respondent's submission which was directed to the last of the principles identified by the Chief Judge, namely, that "[t]he natural and ordinary meaning of the words used should not lead to a conclusion that flouts employment relations common sense".[95]

[73] Counsel for Air New Zealand submitted that there was no authority for the Employment Court to treat business common sense or commercial absurdity differently in the context of employment relations. The further submission is that while the employment relationship has special characteristics, the circumstances of this case very much suggest a commercial relationship.

[74] As the Court of Appeal observed, this principle was not explicit in *Silver Fern Farms*.[96] Rather, it appears to come from the summary in the judgment of McGrath J in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[97] of Lord Hoffmann's

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

95 *NZALPA* (EC), above n 2, at [21].

96 *NZALPA* (CA), above n 7, at n 38.

97 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] NZLR 444 at [61].

judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.[98]

[75] Chief Judge Colgan introduced this part of the judgment with a discussion of various factors which he said give collective agreements a "unique" character. The factors identified by Chief Judge Colgan included the following: the "relational"[99] nature of a collective which represents the progression of an employment relationship on an ongoing basis[100] over a lengthy period;[101] the fact that the collective is a creature of statute;[102] and the reality that, generally, collective agreements are not drafted, negotiated or settled by practising lawyers.[103]

[76] To these features, we note in addition that the duty of good faith expressly applies to bargaining for a collective and to bargaining for an individual employment agreement.[104] Further, s 31 of the 2000 Act states that it is an object of pt 5 of the Act, dealing with collective bargaining, to provide "the core requirements of the duty of good faith in relation to collective bargaining". That part of the Act from 1 December 2004 includes ss 59B and 59C which provide that certain actions will be a breach of the duty of good faith if done with the intention or effect of undermining the collective agreement.[105] It is also necessary to keep in mind the Employment Court's equity and good conscience jurisdiction.

[77] If, in referring to "employment relations" common sense, the Employment Court sought simply to capture these features, there could be no objection to that. But, if what was meant was that contracts should be interpreted so they accord with the Court's view of common sense, rather than with the wording interpreted in light of the background that is problematic. That is because this

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98 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912–913.

99 *NZALPA* (EC), above n 2, at [18].

100 At [17].

101 At [14].

102 At [16].

103 At [15]. In this case the Chief Judge observed that cl 24.2 was drafted by "a legally qualified and experienced employment advisor employed by the Union": at [15]. The clause "was probably examined, albeit perhaps cursorily, by legal advisors" to Air New Zealand: at [15].

104 Employment Relations Act, s 4(4).

105 Sections 59B and 59C were inserted pursuant to the Employment Relations Amendment Act (No 2), s 18.

exercise runs into the same difficulties with resorting to business common sense or commercial absurdity discussed in *Firm PI*.[106]

[78] We add that one of the principles set out by the Employment Court linked together the notion that the language used is generally to be given its natural and ordinary meaning with a statement about how linguistic mistakes may affect the approach.[107] That conflates two separate points.

[79] It is unclear to what extent adherence to the principles identified in the judgment was operative in the judgment of the Employment Court. However, there are some suggestions that the approach to business or employment relations common sense may have contributed to what we have concluded comprises error in interpretive principle. That is most apparent in the explanation as to why Air New Zealand's approach was unworkable. In any event, as we now discuss, we consider that in this case the Court wrongly took into account negotiations between the parties and the parties' subjective intentions. This erroneous approach has affected the outcome.

[80] As we have noted, the Employment Court approached the matter on the basis that the interpretations advanced by both of the parties were tenable but concluded that Air New Zealand's interpretation was "sufficiently improbable that it must be discounted".[108]

[81] In reaching that view, the Court gave weight to the fact that cl 24.2 was inserted primarily for the benefit of individual pilot employees of Air New Zealand. It was stated that, when the predecessor to cl 24.2 was introduced, the relationship between FANZP and NZALPA was somewhat fraught and that it was probable FANZP's collective agreement would come up for renegotiation over the course of NZALPA's collective.[109] It was also noted that NZALPA did not want FANZP to agree more favourable terms and conditions.[110] Those matters were legitimately part of the background. But the Court also, impermissibly, gave weight to the fact that

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106 *Firm PI*, above n 94, at [78]–[79] and [88]–[93].
107 *NZALPA* (EC), above n 2, at [21].
108 At [53].
109 At [73].
110 At [54].

cl 24.2 was advanced by NZALPA. In particular, Chief Judge Colgan said, it was "so unlikely that NZALPA would have proposed a term that could have negated completely its collective agreement with Air New Zealand", that Air New Zealand's interpretation of the clause could not be correct.[111]

[82] The Chief Judge also discussed a number of factors relevant to Air New Zealand's position.[112] It was noted that part of the background to the 2002 NZALPA collective was the demise of Ansett Australia, which at that point was a wholly owned subsidiary of Air New Zealand. The airline eventually collapsed, resulting in a bail out of Air New Zealand by the government. In addition, the Chief Judge observed this took place in the context of the terrorist attack in the United States referred to as "9/11" and fears about SARS/"bird flu", both of which "significantly affected Air New Zealand's operational prospects", and that the company had also appointed a new chief executive officer. It was also seen as relevant that when bargaining recommenced, having been suspended by Air New Zealand in July 2002, NZALPA gave Air New Zealand notice of its intention to strike commencing on 19 July 2002 primarily over issues of security of employment for its pilot members.[113]

[83] Again, no issue can be taken to the reference to these factors as part of the background. But the Court went beyond these objective facts to a consideration of subjective intentions when it considered Air New Zealand's possible motive in accepting cl 24.2. The Chief Judge said:[114]

> What is now clause 24.2 was agreed to by [Air New Zealand] at a time when its predominant objective in collective negotiations was to avoid strike action by pilots. That is not to say that Air New Zealand would then have agreed to anything and everything proposed by NZALPA in return for an assurance of no strike action. I consider nevertheless that this imperative meant that Air New Zealand was then prepared to take its chances with agreeing to a provision that it has recently come to realise may place it at a disadvantage in collective bargaining.

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111 At [55].
112 At [27].
113 At [28].
114 At [78].

At best, this is an assumption about Air New Zealand's subjective intention.[115]

[84] The conclusion of the Chief Judge as to the meaning of the words "any agreement" was that those words "were intended to encompass constituent parts of a collective agreement".[116] However, that conclusion does not appear to follow from the preceding part of the relevant passage in the judgment, which is in these terms:

> [72] The contrast with "any agreement" is the phrase "this Agreement" which, it is common ground, refers to the *NZALPA Collective Agreement*. By their use of these different phrases and the capitalisation and non-capitalisation of the words "agreement"/"Agreement", I conclude the parties left the definition of the phrase "any agreement" sufficiently broad to include not only a collective agreement entered into with another union (or parts thereof) but also a range of less formal agreements providing for particular terms and conditions of employment entered into with employee groups. These included, but were not necessarily confined to, other unions, and to agreements which in any event were not collective agreements. …

[85] The linguistic argument about "agreement" or "Agreement" was legitimate but one of the main reasons given for the Judge's view was that NZALPA was the initiator of cl 24.2 and of its content and that no changes were proposed by Air New Zealand. There was therefore wrongly a focus on negotiations. In addition, there has also been a particular focus on what it was NZALPA was attempting to achieve, an impermissible use of subjective intent.[117] The way in which the Chief Judge has approached the matter was obviously influenced by the way in which the case was put to him. The parties argued the matter on the basis the issue was whether "agreement" encompassed the "undivided whole" of the collective agreement (Air New Zealand's position) or "any of a collective agreement's constituent provisions" (NZALPA's position).[118] In other words, a fairly stark choice was presented. That said, the approach taken does

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115 The error is in considering the matter subjectively. The unlikelihood of a person in the particular background context agreeing to a clause may be considered objectively. But care must be taken in such an exercise for the reasons given in *Firm PI*, see above n 94, at [78]–[79] and [88]–[93]. See also *LB Re Financing No 3 Ltd v Excalibur Funding No 1 PLC* [2011] EWHC 2111 (Ch) at [46]. Briggs J said: "[q]uestions of commercial common sense falling short of absurdity may however enable the court to choose between genuinely alternative meanings of an ambiguous provision. The greater the ambiguity, the more persuasive may be an argument based upon the apparently greater degree of common sense of one version over the other". The Judge endorsed the observations of Longmore LJ put in *Barclays Bank plc v HHY Luxembourg SARL* [2010] EWCA Civ 1248, [2011] 1 BCLC 336 at [25] and [26].

116 *NZALPA* (EC), above n 2, at [72].

117 As to which see [139]–[141] below per William Young J, with which we agree.

118 *NZALPA* (EC), above n 2, at [38].

comprise an operative error of interpretive principle. The effect of the error in approach meant that the Court of Appeal had jurisdiction.[119]

[86] We add that some of the evidence that was before the Employment Court about the parties' respective approaches went beyond what is permissible in terms of evidence of negotiations.[120] It related to what Tipping J described as the "subjective content" of negotiations.[121] Under s 189(2) of the 2000 Act, the Court may admit "such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not". However, that provision does not detract from the need to maintain the key distinction between the parties' objectively apparent consensus and subjective individual intentions. The danger is that this inappropriate evidence could have influenced the approach to interpretation, as William Young J considers is the case, even if it was not explicitly referred to.[122]

Did the Court of Appeal err?

[87] The Court of Appeal first addressed the question of jurisdiction under s 214(1) of the 2000 Act. Wild J for the Court said the position was as follows:[123]

> … if the Employment Court correctly states and applies orthodox principles of contractual interpretation, this Court cannot intervene. But if the Employment Court misstates the principles, or misapplies them, this Court will intervene to ensure the law is correctly applied.

[88] In applying that approach, the Court determined that the Employment Court had erred in its application of the principles in this case. That was because the Employment Court did not consider whether what NZALPA requested be passed on (the two per cent pay increase for captains and the 12.6 per cent increase for B737-300 first officers and all second officers) was an agreement.[124] In this context,

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119 Because of this view, we do not need to address the appellant's submission about the Court of Appeal's approach to the facts.

120 There was no discussion in the negotiations about what became cl 24.2.

121 *Vector Gas*, above n 97, at [27]. See also at [13]–[14] per Blanchard J, at [70]–[79] and [83] per McGrath J, at [112], [124] and [129] per Wilson J and at [151] per Gault J. For example, Christopher Hancock, the lead negotiator for Air New Zealand in relation to the 2001 and 2002 NZALPA collective said the company "certainly did not intend that NZALPA could pick and choose particular benefits". Captain McGearty in his evidence opined that NZALPA would not have agreed to the clause if it meant what Air New Zealand "now contends".

122 Below at [134] and [139]–[141].

123 *NZALPA* (CA), above n 7, at [23].

124 At [29].

the Court of Appeal considered the ordinary and natural meaning of the words "any agreement" in cl 24.2. This led to an interpretation similar to that of Chief Judge Colgan, who adopted the meaning of "a consensual arrangement or accord".[125]

[89] However, although the Employment Court correctly identified the meaning of "agreement", the Court of Appeal said that meaning had not been applied. In particular, there was a failure to recognise the need for the agreement to include "all the promises made by the parties relevant to the particular topic".[126] That omission was to construe "agreement" as including "one benefit without any of its related burdens".[127] Having got to this point as a matter of ordinary and natural meaning, the Court reviewed the context of the NZALPA collective and the background circumstances known to the parties to see whether they assisted with interpretation.[128] It concluded that they did not.[129] On the latter point, the Court of Appeal noted that the Employment Court had found "elsewhere in cl 24.2 and in the background circumstances … reasons for departing from the ordinary and natural meaning" of the term "any agreement".[130] The Court of Appeal did not consider there were any such reasons.[131]

[90] Finally, the Court of Appeal considered the business (or employment) common sense factors and the unworkability point and their impact on meaning.[132] As part of its analysis of business common sense, the Court of Appeal observed it was unlikely that Air New Zealand would agree to the insertion of a clause in a collective with one pilot group that had the potential to undermine the other group.[133] With this reference, the purpose of the clause, that is, to avoid one union "picking off" the other was addressed.

[91] The appellant submits that the Court of Appeal itself crossed the jurisdictional bar and trespassed into construction. In particular, it is submitted that

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125 *NZALPA* (EC), above n 2, at [65].
126 *NZALPA* (CA), above n 7, at [47].
127 At [50].
128 At [51]–[64].
129 At [57] and [64].
130 At [78].
131 At [78].
132 At [65]–[75].
133 At [70].

the Court descended into construction of the collective when the word "agreement" was treated as having a single plain meaning divorcing the term from its context. The contention is that the Court could only have reached that view by undertaking a construction exercise itself and then preferring its interpretation to that of the Employment Court.

[92] While the Court of Appeal did not identify the errors of principle in the Employment Court approach in the way we have set out above, the Court did seek to identify an error of interpretive principle. The error the Court of Appeal identified was that the Employment Court had departed from the ordinary and natural meaning of the term "agreement" in a situation where there were no indicators arising from the context, properly construed, to support departing from that meaning.[134] This resulted in what the Court saw as a one sided interpretation of "agreement" to include benefit but not detriment. The error in approach identified was an error of principle such that the Court had jurisdiction.

[93] That said, the conclusion that this meant that the interpretation put forward by Air New Zealand was therefore the correct one does not necessarily follow. We raised two other possible interpretations of cl 24.2 with counsel at the hearing.

[94] The first possibility is that cl 24.2 may apply where individual terms and conditions in the rival collective are determined (as a matter of fact) to be more favourable, but only where less favourable terms which are directly related to the benefit identified are also passed on. That is, the "agreement" would constitute the more favourable term and its directly related less favourable term.

[95] The second possibility discussed at the hearing was a wider interpretation of the meaning of "agreement" in cl 24.2 whereby if a particular group of pilots is identified as receiving a more favourable term under the rival agreement, this can be passed on but only if those pilots take on all other terms as they apply to that particular group under the rival agreement. In effect therefore, in engaging cl 24.2, that particular group of pilots would essentially adopt the whole of the rival

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[134] See above at [89]. See also *Firm PI*, above n 94, at [63].

agreement. In that case then, the "agreement" would constitute all the terms of the rival collective agreement that were applicable to that particular group of pilots.

[96] This second possibility also raises the question of whether the "pilot group" means a union. That would mean that the idea that a subgroup of the unionised workforce (the B737-300 first officers and the second officers) could invoke the clause, leaving their colleagues in the standard NZALPA agreement. Air New Zealand argued that this could not work because there may be concessions by other "pilot groups" that lead to the benefit given to the subject pilot group.

What should this Court do?

[97] Against this background, the question arises as to how this appeal should be resolved. In many cases the proper interpretation of a contract will be obvious once the error is identified. That is not the case here where there are a number of possible interpretations, including that postulated by Air New Zealand. In such cases the preferable approach would have been for the matter to be remitted back to the Employment Court. We have decided, however, we should not adopt that course in this case. The following points are relevant. First, the variations in interpretation we have identified are both based on the assumption Air New Zealand is right that the notion of agreement encompasses both the benefits and burdens. That was the essence of the approach adopted by the Court of Appeal.

[98] Secondly, the alternatives we have raised have not been the subject of argument and neither party wishes to pursue them. On this aspect we should explain that, at the respondent's request, we granted leave to both parties to make further submissions on these alternatives. Neither party supported the alternative meanings and it is emphasised that neither option has been the subject of argument in the Courts below. Neither party contended we should determine whether the alternative meanings were correct.

[99] The appellant's reply submissions filed after the hearing postulate the possibility of remittal back to the Employment Court if the Court adopted an interpretation of cl 24.2 allowing a request for passing on of specific, more favourable benefits, where the associated disbenefits are also passed on or if this

Court concluded the Court of Appeal erred by crossing the jurisdictional bar. But the first part of this submission is made in the context, as we have noted, of the primary submission that this alternative meaning should not be adopted and where, as is spelt out below, we have confined ourselves to the jurisdiction point for which leave was granted. The second situation does not arise on our approach.

[100] The final point we make is that leave to appeal was applied for and granted only on the question of jurisdiction.[135] Given the combination of these matters, we have reached the view that the appropriate course is to dismiss the appeal.

[101] The claim by NZALPA considered by the Authority was a claim that Air New Zealand had breached the collective. NZALPA sought arrears of wages together with interest in relation to its affected members. The effect of our dismissal of the appeal means that the NZALPA claim fails.[136] But we should make it clear that, given our earlier comments about the availability of alternative meanings of cl 24.2 and our decision to confine ourselves to the jurisdiction point for which leave was granted in this Court, we are not making a finding that Air New Zealand's interpretation is correct. Rather, the effect of our decision is to confirm that the interpretation advanced by NZALPA is wrong.

Result

[102] In accordance with the views of the majority, the appeal is dismissed.

[103] Air New Zealand sought to rely on affidavits adduced in support of the application for leave to appeal in the Court of Appeal. The appellant objected to the admission of these affidavits. We have not had recourse to this material. In these circumstances, leave to admit this evidence is declined.

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135 The appellant's submissions in support of the application for leave to appeal recorded that if leave was granted, the appellant "wishes to contend that, in an ultimate sense, the Employment Court's interpretation of clause 24.2 was correct, …".

136 Leave to appeal in the Court of Appeal was granted on the question of whether the Employment Court erred in law in finding that the NZALPA collective meant Air New Zealand was required on request by NZALPA to pass on the remuneration provisions applicable to B737-300 first officers and all second officers: *NZALPA* (CA leave decision), above n 5.

[104] Costs should follow the event. We make an order that the appellant is to pay to the respondent costs of $25,000 plus usual disbursements (to be fixed by the Registrar if necessary). We certify for two counsel.

WILLIAM YOUNG J

My approach

[105] I agree with Ellen France J's analysis of the jurisprudence as to s 214 of the Employment Relations Act 2000.[137] This means that I accept that the Court of Appeal has a residual jurisdiction (that is, one not excluded by s 214) to intervene in respect of the construction of employment agreements where the Employment Court has not applied correct principles of interpretation.[138]

[106] It is not easy to apply s 214(1) without regard to the appropriate construction of the agreement in question. So judges must be alert to what I described in *Secretary for Education v Yates* as:[139]

> … the need to avoid reasoning along the lines that the Employment Court must have erred in law as to the interpretative techniques used given that the result in that Court differs so markedly from my preferred interpretation.

Counsel for the appellant picked up this thinking by contending that the Court of Appeal judgment was premised on (a) its own interpretation of the New Zealand Air Line Pilots' Association Incorporated (NZALPA) collective agreement and (b) the view that because this interpretation differed from that adopted in the Employment Court, the latter Court had not applied orthodox interpretation principles. I agree that such an approach would not be appropriate under s 214(1). In particular I accept that the application of s 214(1) requires the Court of Appeal to maintain a distinction between a construction based on incorrect principles of interpretation (which is reviewable) and one which represents an incorrect application of the principles of interpretation (which is not reviewable).

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137 Given on behalf of Arnold, O'Regan and Ellen France JJ.
138 This means I agree with [21]–[67] above.
139 *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA) at [98].

[107] For the reasons which follow, I am satisfied that the construction adopted by Chief Judge Colgan in the Employment Court was based on incorrect principles of interpretation.[140]

The relevant collective agreements

[108] Clause 24.2 of the NZALPA collective agreement is in these terms:

> During the term of this Agreement any agreement entered into by the Company with any other pilot employee group which is more favourable than provided for in this Agreement will be passed on to pilots covered by this Agreement on the written request of the Association.

[109] Under the clause "any agreement":

(a) is to be compared with "this Agreement" (that is the NZALPA collective employment agreement) in terms of whether it is "more favourable", an exercise which I will refer to as the "favourability assessment"; and

(b) if the agreement is found to be more favourable Air New Zealand Limited (Air New Zealand) is required, if requested by NZALPA, to pass it (that is the other "agreement") on to the pilots covered by the NZALPA collective employment agreement. I will refer to this as the "passing on obligation".

[110] The Federation of Air New Zealand Pilots Incorporated (FANZP) collective agreement in question was preceded by a terms of settlement document (Terms of Settlement) which set out the changes to remuneration described by Ellen France J.[141] It records that: "The rates of remuneration and changes thereto are in consideration for and conditional on the totality of the changes agreed to in this Collective Employment Agreement". The Terms of Settlement then sets out new clauses for the collective agreement as to remuneration which are numbered 13.1.19 for captains and 13.1.19.2 for B737-300 first officers and all second officers. These

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[140] *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709 [*NZALPA* (EC)].

[141] At [10].

operate by way of replacement for the previous and identically numbered clauses in an earlier collective employment agreement. There are then other provisions which I take to have been new.

[111] The Terms of Settlement was followed by a formal collective employment agreement which incorporated the agreed changes.

Different approaches to cl 24.2

[112] The interpretation proposed by NZALPA and adopted by the Chief Judge is that:

(a) any "agreement" refers only to the respects in which the other agreement is more favourable to some pilots than the corresponding terms in the NZALPA collective agreement (to which I refer as "benefits"); and

(b) under cl 24.2, NZALPA is entitled to require such benefits to be passed on to its pilots without any disadvantages (as compared to terms of the NZALPA collective agreement) for pilots under the other agreement. I will refer to such disadvantages as "disbenefits".

I will generally refer to this approach as the "benefits only" interpretation.

[113] I should say at the outset that I see this as an impossible interpretation. The favourability assessment under cl 24.2 requires a comparison between the "agreement" and the NZALPA collective agreement. A comparison of two agreements necessarily requires that all relevant terms will be taken into account. I do not accept that a favourability assessment could sensibly be carried out without taking into account, at the very least, disbenefits which are associated with the benefits in question. And for the same reasons, in terms of the passing on obligation, it is the "agreement", and not just the benefits part of it, which must be passed onto the recipient pilots. The benefits only approach would result in an odd mix and match for the recipient pilots who would be required to provide their services under the NZALPA collective agreement but to be paid under the FANZP collective

agreement. I can therefore see no sensible alternative to a "benefits and disbenefits" interpretation of cl 24.2.

[114] In the course of the hearing before us, three interpretations were identified which are subsets of the benefits and disbenefits approach. The first, advanced by Air New Zealand, is that the other "agreement", in this case, is the FANZP collective agreement in its entirety. I will refer to this as the "entire agreement" interpretation. Others are identified in the reasons of Ellen France J.[142] One is that disbenefits directly related to the benefits identified are required to be passed on (the "benefits and related disbenefits" approach). Another would be to treat B737-300 first officers and all second officers as a "pilot group" for the purposes of the clause so that all terms in the FANZP agreement referable to them would be passed on ("the pilot group approach"). There may well be others.

[115] I see considerable scope for argument as to which of these interpretations is correct.

[116] First, there are significant regulatory and operational constraints (including rostering arrangements) affecting Air New Zealand and the make-up of its pilot workforce (most of whom are NZALPA members). These constraints distinctly limit the ability of Air New Zealand to treat pilots differently depending on which collective agreement applies to them. The other side of this coin is that there is an associated homogenous character to the services which pilots provide. Given this, it is conceivable that the only practical difference from the pilot point of view between an agreement with non-NZALPA pilots and the NZALPA collective agreement might be the remuneration terms. If so, a sensible application of cl 24.2 would permit NZALPA to require such terms to be passed on.

[117] This leads me on to a second consideration which is the need to apply cl 24.2 so that it is not a dead letter. An entire agreement interpretation would leave it open to Air New Zealand to disapply cl 24.2 by including in the other agreement terms which, from the point of view of NZALPA, would constitute a poison pill. In this case the FANZP collective agreement arguably does contain such a poison pill in the

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142 See above at [93]–[96].

form of a requirement for pilots covered by it to be a member of FANZP. An interpretation of cl 24.2 which required all recipient pilots to join FANZP would, I assume, preclude use of cl 24.2 by NZALPA. When I pressed Mr Miles QC for Air New Zealand on this point in argument, he accepted there would be difficulties with passing on the coverage clause in the FANZP collective agreement, albeit that he contended such difficulties could be addressed by reference to the employment law principles of good faith. While I accept that this may be so, I see the problem as also bearing on interpretation.

[118] As the judgment of the Chief Judge illustrates, there are other provisions in the FANZP collective agreement which NZALPA might be understandably reluctant to have passed on to its pilots. By way of example only, there are provisions in the FANZP collective agreement of an organisational character which can only be practically implemented with the consent of NZALPA.[143] If the effect of activating cl 24.2 was all NZALPA pilots were bound by these terms, the result of activation would be to de-stabilise NZALPA's collective agreement and its future bargaining position.

[119] Against that background, I have distinct reservations about the entire agreement approach advanced by Air New Zealand and my interpretative preference is for a more nuanced benefits and disbenefits approach along the lines of either the benefit and related disbenefits or pilot group approaches already identified (in [114]) or perhaps something similar.

The relevance of the alternative interpretations

[120] The advancing by members of the Court at the hearing of the appeal of the two alternative benefits and disbenefits interpretations referred to at [114] was not received warmly by counsel. It was noted that these interpretations had not been addressed by the evidence which was led at the hearing. I am not much moved by this consideration given that much of that evidence was irrelevant and distracting, a point explored later in these reasons. And although I can understand why counsel

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[143] A point which has been fairly made by NZALPA is that FANZP can offer concessions on rostering and related arrangements which cannot be practically implemented without the agreement of NZALPA and its members.

were disconcerted by the late surfacing of these interpretations, I am entirely satisfied that the Court is entitled to have regard to them. In particular I see no need for us to confine ourselves to what I regard as the false dilemma presented to the Chief Judge. This is an important point and it warrants a brief explanation.

[121] In disputes about interpretation, the parties often offer approaches which lie at opposite ends of the continuum of possible interpretations. In such a case it is perfectly open to the Judge to come up with an interpretation which lies between those advanced in argument. So while the way in which the case was advanced to the Chief Judge provides an explanation for the result he arrived at, it would have been perfectly open to him to have come up with an interpretation somewhere in the middle, and perhaps along the lines referred to above at [114]. Indeed, it was the failure to address cl 24.2 in the round – that is in terms of what it meant, rather than what the parties said it meant – that I see as critical to the jurisdictional issue.

[122] This is not to say that the way an interpretation argument is run is irrelevant in the context of a later challenge to the result. For instance, with the benefit of hindsight (and particular in light of my reservations about the entire agreement interpretation) I think Air New Zealand was very fortunate to have obtained leave to appeal to the Court of Appeal. But, leave having been granted, the case had to be addressed on its merits by the Court of Appeal, just as it now must be so addressed by us.

NZALPA's request under cl 24.2 of the NZALPA collective agreement

[123] When dealing with the favourability assessment, the letter of request by NZALPA to Air New Zealand addressed only the remuneration terms for B737-300 first officers and all second officers and then, in terms of the passing on obligation, the letter went on:

> NZALPA now requests, in accordance with 24.2 of the [NZALPA collective agreement], that Air New Zealand Ltd pass on to pilots who are members of NZALPA covered by the [NZALPA collective agreement] and employed as B737-300 First Officers and as Second Officers the rates of remuneration applicable to each of them as established under the FANZP [collective agreement] … .

This request was expressed so as to make it clear that NZALPA was not embarking on a process which might result in all – or any – of the other aspects of the FANZP collective agreement being passed on to its pilots. It follows that the request proceeds on the basis of a "benefits only" interpretation of "any agreement".

The proceedings in the Employment Court and the judgment of the Chief Judge

The evidence

[124] A clause in the same terms as cl 24.2 was included as cl 24.3 in the 2002 NZALPA / Air New Zealand collective agreement. Much evidence was led before the Chief Judge as to the negotiations which resulted in this agreement. Despite some objections (from counsel for Air New Zealand) much of this evidence was adduced without challenge.

[125] In his evidence in chief, Captain Garth McGearty (who had been involved for NZALPA in the 2002 negotiations) said:

> 22. In the circumstances outlined above, NZALPA wanted what is now clause 24.2 in the [collective agreement] to discourage Air NZ from agreeing better terms and conditions with any non-NZALPA pilots, particularly FANZP pilots, or those few pilots on individual employment agreements. NZALPA also wanted the clause in the [collective agreement] to ensure that should any agreement containing more advantageous terms and conditions of employment be reached between Air NZ and another pilot group, FANZP in particular, those terms and conditions could at NZALPA's option be enjoyed by NZALPA pilots.
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> 23. NZALPA's reasons for seeking the inclusion of the clause which I have just outlined were discussed in the negotiations. NZALPA advised Air NZ that it wanted inclusion of a "catch all" clause to allow any subsequently-agreed beneficial terms and conditions, particularly those which might be provided to FANZP members, to be applied to NZALPA pilots. …
>
> …
>
> 26. … Air NZ's now contended-for meaning was not identified or even discussed at the time of the negotiations. From an industrial perspective, NZALPA did not seek and would never have sought the inclusion of a clause carrying the meaning for which Air NZ now contends. It would have been strategically most unwise and potentially risky for NZALPA to seek or agree to a clause that would mean acceptance of an opponent union's [collective agreement] in its entirety, even if only for a particular section of its members. It is

absurd to suggest that we would have adopted or agreed to this approach.

…

28. NZALPA discussed with Air NZ during the 2001 negotiations NZALPA's concerns about the risk that FANZP could nominally "trade away" terms and conditions for other advantages including pay increases – knowing full well that FANZP members would not in reality be called on to live with the tradeoff, but would gain a financial advantage. NZALPA advised Air NZ that it wanted what is now clause 24.2 to ensure that if any better terms and conditions were agreed, then those particular terms and conditions could then be enjoyed by affected NZALPA pilots – those terms and conditions in isolation, not the entire FANZP [collective agreement].

…

30. The ratification documents including the executive summary document sent to pilots for ratification of the [collective agreement] in 2002 sets out NZALPA's then understanding of the clause, referring to the "Inclusion of a catch-all clause to allow for any beneficial conditions enhancement to be applied to [NZALPA] pilots, should another pilot union gain an advantage during the period of the agreement". …

[126] In cross-examination, Captain McGearty accepted that the expression "catch-all" was ambiguous but he was not otherwise challenged on his evidence in relation to negotiations. The issue was, however, revisited in re-examination and questions from the Court:

Q. … I just want to ask you about the expression catch all clause which was, you were asked about and it appears in paragraph 22 of your brief, if we just go back to paragraph 22, you there say that NZALPA, meaning you, advised Air New Zealand.

A. Yes, I mean –

Q. That it wanted inclusion of a catch all clause to allow any subsequently agreed beneficial terms and conditions, particularly those which might be provided to FANZP members to be applied to the NZALPA pilots. You were asked about the expression in isolation –

A. Mmm.

Q. - catch all clause, and you agreed it could be ambiguous. Does your concession apply to your entire statement there or not?

A. No, it doesn't apply at all. The reality is that that was made in formal negotiations, it was explained … to the negotiating team, the whole negotiating team on the other side of the table, and I don't

believe anybody could have been left in any doubt as to what our intention was.

Q. As communicated.

A. As communicated.

OBJECTION: MR TOWNER …

LEGAL DISCUSSION

THE COURT:

Q. But the, the – the more important factor is that that phrase was used in the communication to members for ratification, wasn't it?

A. Yes.

Q. "Catch all".

A. Yes it was. But –

…

Q. Just coming back to this catch all phrase –

A. Mmm.

Q. – which was used I think you say in the negotiations –

A. I don't believe it was used in negotiations. I think that was a term that was used to describe what we had achieved afterwards. I think that we were very, that we'd never used that – I mean this is 14 years ago, but I'm pretty sure that that's not a term that we used at the time. It was a generic statement that covered the discussions as such, but I don't think we used it. I think that we made it very clear that we were looking to have the ability to pick up individual parts of contracts –

OBJECTION: MR TOWNER …

QUESTIONS FROM THE COURT CONTINUES:

Q. In retrospect would "catch up" have been a more accurate –

A. Yes.

Q. – description rather than "catch all"?

A. I agree.

[127] Mr Christopher Hancock, the Air New Zealand negotiator in 2002, said in his evidence in chief:

10. It was very late in the negotiations that NZALPA's Industrial Director and lead negotiator, Captain Garth McGearty, put the proposed clause 24.3 (as it was numbered at the time) to the company. I thought that the wording used was acceptable and agreed to its inclusion. I understood the words "any agreement entered into" to mean that NZALPA could, at its election but provided the FANZP agreement was more favourable, be passed on the entire agreement reached with FANZP.

11. I was comfortable that the wording Mr McGearty proposed would not enable NZALPA to request that only particular terms or conditions be passed on, given my understanding of the meaning of the word "agreement". For NZALPA to have been able to do so would have been unacceptable to the company.

12. There was very little discussion with Mr McGearty about the clause or the wording of the clause. I have read Mr McGearty's brief of evidence dated 9 May 2014 in which he states at paragraph 25 that Air New Zealand's now contended for meaning was not identified or discussed at the time of negotiations. This is correct. NZALPA came up with the wording, it was acceptable to the company, and the clause was inserted. Mr McGearty never said to me that the union's intention was that the words meant something other than what they said.

[128] Mr Hancock's evidence in cross-examination included the following exchanges:

Q. Yes. Now you say in paragraph 12 that you agree with Mr McGearty's evidence that Air New Zealand's now contended-for [meaning] was not identified or discussed and I suppose you would say because of your last sentence at paragraph 12, equally NZALPA's contended-for [meaning] was not discussed either?

A. That's right.

Q. So basically leaving aside, well leaving aside the matters we've been discussing a moment or two ago, the meaning of the clause was not discussed during negotiations?

A. That's right I mean …

Q. Yeah.

A. Maybe if we had we wouldn't have been here.

…

Q. So my, do I get a yes to agree with my proposition you didn't really think about the interpretation of 24.2 at all at the time?

A. I was thinking along the lines of this would be great if, in my wildest dreams, [NZALPA] has agreed to the same terms and conditions as the Federation Pilots.

Q. I put it to you that the, what is now the Air New Zealand interpretation of 24.2 was not something that occurred to you at the time?

A. It was.

Q. You are saying that was the belief as to meaning you formed at the time?

A. Yeah I, clear in my mind that that worked for the company.

[129] The Chief Judge also asked Mr Hancock a number of questions:

QUESTIONS FROM THE COURT:

Q. Just a couple of matters Mr Hancock, you'll be pleased to know I'm not going to ask you about all of your dreams, but just your wildest dreams as you've described them, I take it those are your industrial relations or employment relations dreams, but you used the phrase I think and I want to clarify with you that NZALPA agreeing to pick up the whole of FANZP collective agreement or something that might have been in your wildest dreams or even beyond your wildest dreams, is that what you're intending to say?

A. Yeah, another way of putting it, I didn't expect the matter to pick up the federation agreement in its entirety.

Q. Part of the bargaining team in 2002, I think for [NZALPA] included Mr Nicholson, who as I understand is trained as a lawyer?

A. Yes.

Q. Was there any legally trained representative on the company's side in that bargaining?

A. Not in the bargaining, or the time that we had access to legal advice.

Q. That was going to be my next question, to your recollection was clause 24.3 referred to external legal, the "external" beyond the bargaining team referred to "external legal advice"?

A. Probably in the context of have a look at the whole agreement, there are many other things that were probably more pressing than that particular clause, that clause have a look at this one that Adam Nicholson has given us in relation to 24.2 was never put to a legal person specifically.

Q. And the evidence which you've heard, I think, is there was no change between Mr Nicholson's draft clause and what was agreed to and what was the collective?

A. No.

The judgment of the Chief Judge

[130] The Chief Judge accepted that the notice was properly given. This was on the basis of his conclusions that:[144]

(a) For the purposes of the favourability assessment all that counts are the remuneration promises made to the pilots by Air New Zealand pursuant to the "agreement". Thus, because the FANZP pilots in issue (that is B737-300 first officers and all second officers) were to receive more remuneration than their NZALPA counterparts, their agreements were relevantly more "favourable" without there being any need to take into account disbenefits, that is the respects in which the FANZP collective agreement was less favourable, from the pilot point of view, than the NZALPA collective agreement.

(b) The passing on obligation encompasses only the benefits (that is the remuneration terms for one group of pilots) and there is no obligation on the part of the recipient pilot group to accept any disbenefits.

[131] The two conclusions are closely connected logically and for this reason it is sufficient to refer to the Chief Judge's explanation of the latter one:

> [74] I accept, also, that what is "passed on" as "more favourable than provided for in" the *NZALPA Collective Agreement* must be something that is capable of being passed on as a benefit to individual affected pilots personally. Contractual content which is not "more favourable" is not within the contemplation of what the clause directs to be passed on. Remuneration rates fall within that class of more favourable terms and conditions that can be passed on.
>
> [75] Collective agreement provisions applicable to pilots generally which operate to the benefit of the employer, are both conceptually and practically incapable of being passed on to individual pilots who are in receipt of less favourable terms and conditions of employment contained in the *NZALPA Collective Agreement*. Such provisions are, therefore, not encompassed by cl 24.2 so that its purpose is to pass on to NZALPA pilot beneficiaries particular terms and conditions which are objectively "more favourable" than those enjoyed under the *NZALPA Collective Agreement.*

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144 *NZALPA* (EC), above n 140.

[132] A brief comment on [75] is appropriate. Although the Chief Judge referred to the constraints to which Air New Zealand was subject (to some extent along the lines discussed above at [116]), he did not proceed on the basis that there were no relevant disbenefits. Indeed his judgment makes it clear that he was not able to exclude the likelihood that under the collective agreement FANZP pilots had accepted some disbenefits which were related, directly or indirectly, to remuneration.[145] This is understandable, because it was common ground that in one practical respect at least, the FANZP collective agreement is less favourable to pilots than the NZALPA collective agreement. This concerned the times at which pilots can be required to undertake simulator training.

[133] The point just made warrants a little elaboration. On a very narrow benefits and related disbenefits approach, NZALPA might have been entitled to require Air New Zealand to pass on to its B737-300 first officers and all second officers the FANZP remuneration terms (being the relevant benefits) along with the simulator training obligations in the FANZP collective agreement (which, as they are more onerous than the corresponding obligations in the NZALPA collective agreement, are related disbenefits).

[134] Much of the reasoning of the Chief Judge is expressed in orthodox terms. There is considerable focus on the text of cl 24.2 and on the context in which its precursor appeared in the 2002 collective agreement. Much attention was also paid to the practicality of the two interpretations advanced. Although I disagree with the weighting which the Chief Judge gave to some of these considerations, such disagreement would not warrant appellate review given s 214(1). More significantly for present purposes, however, there are many references in the judgment to the intention of the parties at the time of the 2002 collective agreement and, at least in general terms, to the negotiations:

> [30] By … late July 2002, NZALPA had become concerned that if it settled a collective agreement with Air New Zealand, the company could reach a subsequent agreement or agreements with FANZP providing for more advantageous terms and conditions of employment for pilots which would make membership of FANZP more attractive than of NZALPA and this could, in turn, undermine [NZALPA].

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[145] See the discussion at [47]–[49].

[31] Air New Zealand was then (in mid-2002) focused on plans for a recovery of its operations and wished strongly to eliminate the threat of strike action by the majority of its pilots (NZALPA members) which would have compromised those plans significantly. *It is probably no exaggeration to say that Air New Zealand was then prepared to consider concessions which it might otherwise have dismissed out of hand, if that meant that pilot strike action was avoided.*

[32] NZALPA then proposed the wording of what is now cl 24.2 and its inclusion in the parties' first collective agreement to be made under Employment Relations Act 2000 (the Act). *It did so in an attempt to protect the terms and conditions of its Air New Zealand pilot members and, indirectly, its own membership strength, by seeking to have a ratchet arrangement included in its collective agreement. It intended that if, following settlement of its collective agreement, Air New Zealand entered into arrangements providing for more favourable terms and conditions of employment than enjoyed by NZALPA pilots, those enhanced terms and conditions could be passed on to affected NZALPA members on request.*

…

[35] There is no doubt that Air New Zealand bargaining representatives agreed to the inclusion of what is now cl 24.2 in the original and subsequent collective agreements without discussion, negotiation or change. The controversial issue is the meaning to be ascribed to that clause.

…

[52] As decided by the Authority, at the heart of Air New Zealand's case is that the use of the words "any agreement" means any collective agreement in its entirety, but not any selected parts of it.

[53] *I have been left in no doubt that this is not what the parties in 2002 intended then cl 24.3, now cl 24.2, to mean, so that the Authority's determination cannot be correct.* It was, with respect, an unrealistic conclusion at odds with the context of, and circumstances surrounding, the parties' initial adoption of what is now cl 24.2 and its subsequent re-adoption in successor collective agreements. …

…

[55] *Both the initiative for what was to become cl 24.2, and its content, emanated from NZALPA. It is therefore so unlikely that NZALPA would have proposed a term that could have negated completely its collective agreement with Air New Zealand (the potential consequence in practice of the defendant's interpretation of cl 24.2), that Air New Zealand's position cannot be right.* …

…

[69] It is a logical corollary of [Air New Zealand's] contention that any agreement means the totality of any collective agreement, that the favourability assessment implicit in cl 24.2 would have to be one undertaken as between all aspects of the *NZALPA Collective Agreement* and the *FANZP Collective Agreement*. *I accept that this would be a very difficult, if not*

> *unworkable, exercise which would not be likely to have been an outcome intended by the parties as a matter of interpretation of the clause drawn up by [NZALPA]*. Workability/unworkability in practice is difficult to argue against as a tool of interpretation and [Air New Zealand's] interpretation would be impracticable in this sense.
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> …
>
> [71] It is clear that cl 24.2 uses the words "any agreement" and not the words 'any collective agreement'. *Had the parties intended the interpretation now contended for by Air New Zealand, they would, in my assessment, have used a phrase such as 'any collective agreement' or, indeed, consistently with Air New Zealand's case, 'the whole of any collective agreement'. There was no negotiation about NZALPA's proposed wording of cl 24.2 as would have been expected if Air New Zealand's interpretation was as it now claims.*
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> …
>
> [73] I accept, in all of the relevant contextual circumstances, that cl 24.2 was inserted primarily for the benefit of individual pilot employees of Air New Zealand who were NZALPA members. The clause was proposed and settled against two important backgrounds. The first was Air New Zealand's strong desire to avoid strike action. The second was of inter-union rivalry and the probability of FANZP's collective agreement coming up for renegotiation during the life of NZALPA's collective agreement.
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> (emphasis added)

Where I see the process as having miscarried

[135] I see the interpretative process as having miscarried in two respects.

[136] The first relates to the way in which the case was argued. Of the possible benefits and disbenefits arguments which could have been presented, Air New Zealand argued only the entire agreement approach. No consideration was given to other possible interpretations such as the benefits and related disbenefits or pilot group approaches to which I have referred at [114]. So, on the way the case was run, a rejection of the entire agreement interpretation left on the table just the benefits only interpretation advanced by NZALPA.

[137] It is only fair to counsel who argued the case in the Employment Court to recognise that the interpretations advanced were closely associated with the dynamics of the dispute. NZALPA's letter of request was predicated on the benefits

only interpretation.[146] This meant that NZALPA could not succeed in the proceedings unless that interpretation prevailed. From the point of view of Air New Zealand, the great advantage of the entire agreement interpretation was that its acceptance would mean that NZALPA would not trigger cl 24.2. If driven to identify pilot disbenefits in the FANZP collective agreement which were related to remuneration and would have a practical effect on FANZP pilots, Air New Zealand may have struggled to come up with anything more tangible than the simulator training provisions to which I have referred. Looking at the evidence given by Captain McGearty in the Employment Court, passing on to NZALPA B737-300 first officers and all second officers the disbenefit of the FANZP simulator provisions would not have troubled NZALPA.[147]

[138] I thus accept that the litigation stances adopted by the parties were understandable. It is also unsurprising that the Chief Judge confined his interpretative analysis of cl 24.2 to the two arguments which were presented. Notwithstanding this, I nonetheless regard the interpretative approach adopted as incorrect. The Chief Judge was required to interpret cl 24.2 in terms of what he concluded that it meant. This exercise could not logically be controlled by the litigation stances which the parties adopted; this given that the entire agreement and the benefits only constructions were not the only possible interpretations of cl 24.2.

[139] The second respect in which the process miscarried arises out of the extensive evidence which was given in respect of the negotiations and the subjective intentions of the parties. In light of this evidence it is understandable that there are references in the Chief Judge's judgment to the subjective intentions of the parties. In the passage set out above at [134], a number of such references are emphasised. Some of these, when taken individually, might be seen as being of little moment, perhaps as just awkwardly expressed references to context and purpose or intention objectively assessed. As well, to the extent that they relate to the dismissal of Air

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146 If NZALPA's letter had been more broadly expressed, it would have had the potential to result in the passing on to its pilots of all disbenefits which the Employment Relations Authority or Employment Court considered to be related to the remuneration terms. It is understandable that NZALPA was not prepared to take the associated risks. See [123] above.

147 NZALPA members are encouraged to volunteer for these simulator sessions in any event. The addition of a requirement in such circumstances appears a minor inconvenience when linked to the pay increase.

New Zealand's entire agreement interpretation, they might be seen as unhappily expressed reasons for a conclusion (that is a rejection of the entire agreement argument) which was well-open to the Chief Judge. I, however, do not see the references in their totality in this way.

[140] It will be recalled Captain McGearty's evidence was that a benefits only interpretation was what he intended.[148] This evidence was plainly accepted by the Chief Judge. It also appears to have been of significance to the Chief Judge that the precursor to cl 24.2 was drafted by NZALPA's solicitor and was not the subject of challenge by Air New Zealand in the negotiations.[149] The underlying idea seems to have been that because the clause was drafted by NZALPA it should be construed so as to give effect to NZALPA's intentions. There was no finding that the parties had agreed in negotiations on the meaning of the clause, compare *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[150] More generally, the evidence as to negotiations went well beyond anything that was contemplated by Blanchard, Tipping and McGrath JJ in *Vector* as being permitted by way of exception to the more general rule as to the irrelevance of negotiations.[151] For these purposes, I regard the law as accurately stated by Tipping J in that case in these terms:[152]

> The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

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148 See above at [125].

149 *NZALPA* (EC), above n 140, at [15], [35] and [77].

150 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 particularly at [28] per Tipping J.

151 See at [13]–[15] per Blanchard J and at [19]–[20] per Tipping J. The evidence as to negotiations in this case was plainly not admissible on the approach favoured by McGrath J: see at [70]–[79].

152 At [19] (footnotes omitted).

[141] In the result, I am satisfied that in both respects just identified – the failure to focus on what the clause meant as opposed to what the parties said it meant and the reliance on evidence of negotiations and subjective intention – there were failures to apply correct principles of interpretation. Accordingly, the Chief Judge's construction of cl 24.2 was open to review by the Court of Appeal notwithstanding s 214(1).

The judgment of the Court of Appeal

[142] The primary issue in the present appeal is whether s 214 precluded a review by the Court of Appeal of the interpretation adopted by the Chief Judge. For the reasons I have given, I am satisfied that s 214 did not preclude such review. Given this, I see no need to analyse the reasons given by the Court of Appeal for reaching the same conclusion.[153]

[143] I do not read the judgment of the Court of Appeal as definitive as to what it regarded as encompassed by "agreement". This is apparent from the following passages from the judgment:[154]

> … 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*. …
>
> … Mr Miles focused his argument on the Terms of Settlement. These terms conveniently evidenced the new terms FANZP had negotiated with Air NZ. The other terms of the [collective agreement] remained unchanged. To be effective, [NZALPA's] cl 24.2 request would need to be for the passing on of all the terms of the agreement – both sides of the bargain or deal. Critically, the Terms of Settlement substituted new clauses 13.1.19 and 13.1.19.2. Those new clauses gave effect to the remuneration increases … . [NZALPA's] request was for one of the benefits FANZP pilots gained under the Terms of Settlement, without the corresponding burdens. Indeed, [NZALPA's] request was for part only of the new clauses 13.1.19 and 13.1.19.2, without the corresponding burdens, even in those clauses. We are referring to the lower remuneration increase for captains (2.0 per cent against the 2.5 per cent in the 2012 [NZALPA collective agreement]). 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

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153 To some extent these reasons overlap with mine in relation to the point that the Chief Judge allowed his approach to the interpretation of cl 24.2 to be controlled by the arguments as to meaning advanced by the parties, see *Air New Zealand Ltd v New Zealand Air Line Pilots' Assoc Inc* [2016] NZCA 131, [2016] 2 NZLR 829 (Wild, Cooper and Winkelmann JJ) at [29]–[30].

154 At [47], [50], [54], [63], [73] and [74] (emphasis added and footnotes omitted).

> agreement. That is, one benefit without any of its related burdens. That is simply wrong.
>
> …
>
> Dealing with the words "entered into by the Company with any other pilot employee group" the Court merely noted the consensus that FANZP is such a group. We consider the words "entered into" support construing "any agreement" as meaning the whole agreement in the sense described … above … – all the relevant promises made by each party to the other. It is not ordinary usage to say "the parties entered into a constituent part of an agreement".
>
> … *if the "agreement" was an agreement other than an entire [collective agreement], passing it on would not overtake completely the then-current [NZALPA collective agreement]*. Clause 23 of the [NZALPA collective agreement] allows for variation of the terms of the [collective agreement], so the parts of the [NZALPA collective agreement] that were affected by the more favourable agreement could simply be replaced leaving the rest of the [collective agreement] unaltered.
>
> … Mr Harrison submitted Air NZ's interpretation of cl 24.2 would make the clause unworkable for [NZALPA]. It would, he argued, be an almost impossible exercise for [NZALPA]to work out whether the burdens and benefits in the FANZP [collective agreement] (that is, its overall package) were "more favourable" than those in the [NZALPA collective agreement]. He observed that the Employment Court had made this point.
>
> … *Further, the relevant "agreement" need not always be an entire [collective agreement], as we have said.* In such a case, the comparison may be relatively straightforward.

[144] The passages which I have emphasised are consistent with my reservations about the entire agreement interpretation but, as will be apparent, there are also remarks which go the other way. The Court generally addressed its remarks to Air New Zealand's entire agreement argument albeit in part to the Terms of Settlement rather than the formal collective agreement. There was no explicit rejection of this argument and there are some aspects of what was said that might be thought to be an endorsement of it. Further, in the passages which I have emphasised the Court did not explore in much detail either (a) how to determine what are "all the promises made by the parties relevant to the particular topic" and (b) the idea that "the relevant 'agreement' need not always be an entire [collective agreement]".

[145] To the perhaps debateable extent that the judgment of the Court of Appeal proceeds on the basis of Air New Zealand's entire agreement interpretation, I have distinct reservations about it. On the other hand, to the extent that it involves a

rejection of the benefits only interpretation, as is already apparent, I have no doubt that it was correct.

The result of the appeal and some concluding comments

[146] NZALPA's letter of request was carefully drafted. It cannot be read as a request to pass on: (a) remuneration terms; and (b) any associated disbenefits. Instead, it is premised on the benefits only interpretation. Since I reject that as a possible interpretation, I am satisfied that the result arrived at by the Court of Appeal was correct. Contrary to the view of Glazebrook J, I do not see this as a "pleading point".[155] NZALPA was presumably not prepared to take the litigation risks that would have been associated with a generally expressed request (in particular that such a request would commit it to accepting any disbenefits that the Employment Court considered to be part and parcel of the "agreement" which was to be passed on). On the basis of the notice which was given, I do not see how NZALPA could now contend, say, that it is entitled to have the remuneration terms passed on from the date of the notice when it was not prepared to accept, from that date, simulator training obligations or other relevant disbenefits, if any. For this reason, I see no point in remitting the matter to the Employment Court.

[147] I would accordingly dismiss the appeal.

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[155] See below at [219] and [227].

GLAZEBROOK J

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Introduction

[148] Air New Zealand Limited pilots can belong to one of two unions: the New Zealand Air Line Pilots' Association Incorporated (NZALPA) or the more recently established Federation of Air New Zealand Pilots Incorporated (FANZP).

[149] NZALPA and Air New Zealand entered into a collective employment agreement which came into effect 5 November 2012 and expired on 4 November 2015. Clause 24.2 read:

> During the term of this Agreement any agreement entered into by the Company with any other pilot employee group which is more favourable than provided for in this Agreement will be passed on to pilots covered by this Agreement on the written request of the Association.

[150] Clause 24.2 was first introduced in a 2002 collective agreement and has been carried through subsequent collective agreements since then.

[151] Air New Zealand entered into a new collective agreement with FANZP which came into effect 14 April 2013. For B737-300 first officers and all second officers

this collective agreement provided for higher rates of pay than for comparable pilots covered by the NZALPA collective agreement.[156]

[152] NZALPA wrote to Air New Zealand on 24 April 2013 requesting that these higher rates of remuneration be passed on to its first and second officers in accordance with cl 24.2. Air New Zealand refused on the basis that NZALPA could not claim only part of the FANZP collective agreement under the clause.

[153] In disagreement with the majority, I would have allowed the appeal against the Court of Appeal's decision upholding Air New Zealand's interpretation of cl 24.2. This is for three reasons. The first is that I do not consider the Court of Appeal identified any error of principle in contractual interpretation by the Employment Court. Secondly, I do not consider that the errors of principle in contractual interpretation discussed by the majority in this Court were operative. Thirdly, any possible error was in any event one in the application of cl 24.2 and not its interpretation.

[154] Had I agreed with the majority that there were operative errors of principle in contractual interpretation by the Employment Court, I would have remitted the case to that Court to determine the proper interpretation of cl 24.2.

Did the Court of Appeal identify an error in the principles of contractual interpretation?

[155] I agree with the majority that the Court of Appeal, despite s 214(1) of the Employment Relations Act 2000, has jurisdiction to consider an appeal where the Employment Court has not applied the correct principles of contractual interpretation. I therefore generally agree with the majority's exposition of the history of the provision and the relevant cases.

[156] Appellate courts must, however, take care not to assume jurisdiction where there is not a relevant error of principle.[157] By excluding appeals on the construction

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[156] Referred to in this judgment as "first and second officers".

of individual or collective employment agreements Parliament envisaged that an Employment Court decision on construction would be final, even if its interpretation of a contractual provision was wrong.

[157] In accordance with the cases discussed by the majority, for the Court of Appeal to have jurisdiction under s 214(1), any error must be an error of principle in contractual interpretation and not any other more general error, even if that other error could be loosely characterised as an error of principle. Further, any error of principle in contractual interpretation must be operative in the sense that the error affected the construction of the agreement.

[158] Usually any such error of principle should be obvious. Thus, it should normally be possible to identify it up front, rather than after a detailed analysis of the contract. If that approach is not taken, there is a danger of an appellate court concluding that the interpretation of the Employment Court does not accord with its view and therefore erroneously concluding that there must have been an error of principle in contractual interpretation, as against an error of interpretation which is immune from challenge under s 214(1).[158]

[159] I accept the submission of NZALPA[159] that in this case the Court of Appeal fell into the above trap. Although there were purported errors outlined by the Court of Appeal, these were identified in the course of that Court itself interpreting the contract. And, for the reasons set out below, the identified errors were not errors of principles in contractual interpretation.

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157 The cases discussed by the majority illustrate that it is not always easy to draw the line and therefore that s 214(1) might warrant reconsideration by Parliament. However, while it is in force, it must be applied meticulously with full respect paid to the (sometimes subtle) differences between errors of principle in contractual interpretation and errors in interpretation, the latter being immune from appellate review.

158 As is emphasised by the majority above at [66] and also by William Young J above at [106].

159 Set out above at [91] of the majority judgment.

Reasoning of the Court of Appeal

[160] The Court of Appeal started its judgment by saying that it needed to determine two issues:[160]

> (a) *Jurisdiction*: Does this Court have jurisdiction under s 214(1) to hear this appeal?
>
> Only if yes to (a):
>
> (b) *Erroneous interpretative approach*: Was the Employment Court's approach to the interpretation of cl 24.2 of the [collective agreement] erroneous in law?

[161] On the first issue (the jurisdiction point) the Court said:[161]

> … if the Employment Court correctly states and applies orthodox principles of contractual interpretation, this Court cannot intervene. But if the Employment Court misstates the principles, or misapplies them, this Court will intervene to ensure the law is correctly applied.

[162] It then recorded Air New Zealand's submission that there were "methodological errors" in the Employment Court's approach in that the Employment Court, although correctly stating the principles of contractual interpretation, had not applied them.[162] The Court of Appeal said that if this "argument succeeds, then want of jurisdiction is not a barrier to this appeal".[163] The Court then immediately turned to question (b): whether the Employment Court's approach to the interpretation of cl 24.2 was wrong in law. Thus the Court of Appeal never in fact determined question (a).

[163] The Court of Appeal began its assessment of question (b) with a preliminary observation. It said:

> [29] The Employment Court's task was to interpret cl 24.2, in particular the words "any agreement". Given that it was put to the Judge that "any agreement" referred to the whole FANZP [collective agreement], it is perhaps understandable that the Judge did not consider whether what [NZALPA] requested be passed on was an agreement. In other words, whether it came within the words "any agreement".

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160 *Air New Zealand Ltd v New Zealand Air Line Pilots' Assoc Inc* [2016] NZCA 131, [2016] 2 NZLR 829 (Wild, Cooper and Winkelmann JJ) [CA decision] at [5].

161 At [23].

162 At [24].

163 At [25].

> [30] Notwithstanding the way the case was put to him, we consider the Judge needed to do that and the fact that he did not has resulted in an erroneous interpretive approach.

[164] I confess to having difficulty understanding these paragraphs. As outlined below, the Employment Court considered that its task was to decide whether "any agreement" referred to the whole of the collective agreement or to part of it.[164] In any event, even if the criticism were justified, it would not be an error of principle in contractual interpretation. It would merely be an interpretative error.

[165] The Court of Appeal outlined the contractual interpretation principles identified by the Employment Court Judge,[165] and set out two "authoritative restatements of the correct approach to the interpretation of contractual provisions" since the Employment Court's decision.[166] The Court of Appeal then moved on to consider the "natural and ordinary meaning" of the words "any agreement" as found in cl 24.2.[167]

[166] The Court of Appeal considered that the Employment Court had correctly identified the meaning of the word "agreement" but had failed to apply this meaning.[168] The purported error identified by the Court of Appeal was that:[169]

> … 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.

[167] It is notable that the Court of Appeal did not analyse whether this was an error of the principles in contractual interpretation. The Employment Court can be wrong, and even simply wrong, without there being an error which is susceptible to challenge on appeal.

[168] The Court of Appeal then went on to consider whether the words, in the context of the NZALPA collective agreement, supported the Employment Court's

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164 See below at [216].
165 CA decision, above n 160, at [31]–[33].
166 At [34]–[35], referring to *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. Of course only the first of these was binding on the Court of Appeal.
167 At [40].
168 At [47].
169 At [50].

interpretation. It said that this was to assess whether the Employment Court correctly applied the principles of contractual interpretation.[170]

[169] The Court of Appeal reviewed the Employment Court's analysis of cl 24.2 and also assessed the context itself. It concluded that there was not much of assistance in cl 24.2 but the "few aids" it discerned pointed in the direction of Air New Zealand's interpretation.[171]

[170] Contrary to the Court of Appeal's assertion, this was not an exercise to assess whether there were errors in the principles of contractual interpretation. It was instead a clear example of the Court of Appeal itself undertaking an interpretive exercise to identify error in the Employment Court's interpretation. This was not a proper exercise for the Court of Appeal to undertake in light of the limits on appellate review in s 214(1).

[171] Next, the Court of Appeal considered whether there was anything in the background circumstances that assisted. The conclusion reached was that, while the circumstances in 2002 might "explain the genesis and aim of cl 24.2, they [did] not assist in interpreting the words 'any agreement'".[172]

[172] Again, the Court of Appeal was conducting an exercise of contractual interpretation rather than identifying an error of principle in contractual interpretation. This is evident from its conclusion: "[w]e do not agree with the Employment Court that the background circumstances support its interpretation of those words."[173]

[173] The Court of Appeal, again in what appears to be a standard exercise in contractual interpretation, then considered business (or employment relations) common sense, concluding, like the Employment Relations Authority,[174] that this

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170 At [51].
171 At [57].
172 At [64].
173 At [64].
174 *New Zealand Air Line Pilots' Assoc Inc (NZALPA) v Air New Zealand Ltd* [2014] NZERA Auckland 11 (Member Crichton) [ERA decision] at [44]–[45].

favoured Air New Zealand.[175] Finally, turning to the submission of unworkability put forward by NZALPA, the Court of Appeal said that it was "unprincipled to interpret a contract so as to avoid a bad outcome for one party".[176]

[174] In its conclusion, the Court of Appeal said that the Employment Court began by accurately stating contractual interpretation principles but did not correctly apply them.[177] In particular, the Employment Court had given the natural and ordinary meaning of "any agreement" no force and reached a conclusion inconsistent with that meaning.[178] To the extent the Employment Court considered that the background circumstances provided a reason for departing from that ordinary and natural meaning, there were no such reasons.[179]

My assessment

[175] The first point is that the Court of Appeal never answered the first question it set out (jurisdiction), otherwise than by itself undertaking an exercise in contractual interpretation, concluding that Air New Zealand's interpretation was the correct one and identifying a number of supposed interpretative errors in the Employment Court's approach.

[176] The main error in the Employment Court approach identified by the Court of Appeal appears to have been the "one-sided" interpretation of the term agreement.[180] I cannot see this as error of principle in contractual interpretation.[181] At most, it is an erroneous interpretation of the word "agreement" in the particular contract and thus outside the scope of appellate review provided in s 214(1).

[177] I would not even class the error identified by the Court of Appeal as one of general principle. I would not rule out that there may be circumstances (albeit unusual) where the term "agreement", in a particular context or in a particular contract, could be one-sided. There is certainly no reason why the term

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175 CA decision, above n 160, at [65]–[70].
176 At [75].
177 At [76].
178 At [77].
179 At [78].
180 See above at [166].
181 I thus disagree with the majority's view set out above at [92].

"agreement", in the context of a contract, could not be referring to part of an agreement.

[178] This is especially so in the context of a collective employment agreement, which binds not only the parties (the employer and the union) but all employees who are members of the union and whose work comes within the coverage clause of the agreement.[182] Not all of the terms of a collective agreement will, however, apply to all the employees that are bound.

[179] To give a most basic example, both the NZALPA and FANZP collective agreements provided different rates of remuneration for different categories of pilots, including for example the first and second officers and captains. Although all the first and second officers are bound by the collective agreement, they cannot claim captains' rates of remuneration.

[180] In any event, in this case all the Employment Court was asked to (and did) determine was whether cl 24.2 meant the whole of the FANZP collective agreement or part of it. It found in favour of the latter.[183]

[181] The part of the collective agreement identified by the Employment Court (being the part of the collective agreement relating to the first and second officers) was not without consideration. Under the FANZP collective agreement, the first and second officers were paid for flying. This same burden was shared by the NZALPA first and second officers. The contention of NZALPA was that their first and second officers should be paid the same as the FANZP first and second officers for this work. There was thus no claim to benefit but not burden.[184]

[182] It is true that the FANZP first and second officers took on additional burdens.[185] The ones that directly affected those first and second officers appear to have been limited to:

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182 Employment Relations Act 2000, s 56.

183 The Court's reasoning process is discussed below at [200]–[211].

184 On this point I disagree with William Young J that there was a "benefits only" interpretation: see above at [112]–[114], [123] and [132]. See also at [185]–[188] below.

185 For more, see *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709 at [47] [Employment Court decision].

(a) the timing of flight simulator training;[186] and

(b) agreement to other changes in terms and conditions, should these be able to be implemented (in practice dependent on NZALPA pilots agreeing to them also).

[183] I did not, however, understand Air New Zealand to have argued in the Employment Court that these additional burdens taken on by the FANZP first and second officers explained the differential rates paid to them. Rather its argument was that the whole of the concessions and burdens, in the context of the whole of the collective agreement, explained the differential.[187]

[184] The Employment Court did consider the wider burden contended for by Air New Zealand (that is, that contained in the whole collective agreement) but considered that benefits to Air New Zealand under the collective agreement provisions "applicable to pilots generally … [were] both conceptually and practically incapable of being passed on to individual pilots."[188] Again, if the Employment Court was wrong in this view, it would not constitute an error of principle in contractual interpretation. It would be an error in the interpretation of the provisions of the collective agreement or an error of application as I argue below.[189]

[185] I do not accept that the Employment Court made the findings as set out in William Young J's judgment,[190] namely that for the purposes of the favourability assessment only the remuneration promises were relevant and that the passing on obligation related to benefits only. Rather, the Employment Court's determination was limited to whether "any agreement" was in relation to the whole agreement or

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186 As I understand it, this was the only change that could be implemented without NZALPA pilots also agreeing.

187 Relying on the fact that the FANZP collective agreement provided that the changes to the rates of remuneration were "in consideration for and conditional on the totality of the changes agreed to in this Collective Employment Agreement".

188 Employment Court decision, above n 185, at [75].

189 See below at [216]–[220].

190 See above at [130].

part.[191] The extracts from the Employment Court judgment referred to by William Young J,[192] in my view, have to be read in light of this limitation and the view that the Employment Court took that the more generic benefits to Air New Zealand did not translate into tangible burdens for individual groups of pilots.

[186] I also do not accept that the evidence referred to by William Young J supports a "benefits only approach".[193] Captain McGearty's[194] evidence amounted to no more than an assertion that if, for the same work, one particular group in another collective agreement received higher remuneration, then this should be passed on. Whether an agreement was more favourable was to be assessed without regard to supposed concessions that had no real value. As Captain McGearty said:

> 28. NZALPA discussed with Air NZ during the 2001 negotiations NZALPA's concerns about the risk that FANZP could nominally "trade away" terms and conditions for other advantages including pay increases – knowing full well that FANZP members would not in reality be called on to live with the tradeoff, but would gain a financial advantage. NZALPA advised Air NZ that it wanted what is now clause 24.2 to ensure that if any better terms and conditions were agreed, then those particular terms and conditions could then be enjoyed by affected NZALPA pilots – those terms and conditions in isolation, not the entire FANZP [collective agreement]…
>
> 33. While I was NZALPA Industrial Director the clause was not formally invoked because NZALPA never perceived a significant undermining of NZALPA or "favoritism" arising between the various agreements and [collective agreements]. At times NZALPA's pay rates were ahead of FANZP and at other times behind. This was largely due to the dates on which the various [collective agreements] were settled. The pay structures were different and operated on a swings and round-a-bouts / leap-frog basis. The 2002 [collective agreement] required the rostering system used by Air NZ to apply to all pilots. Changes could only be agreed if all parties agreed the changes. This meant that our rostered working conditions were the same as FANZP, neither advantaged nor disadvantaged. This is also the reason most of the conditions conceded by FANZP to Air NZ cannot be utilised by Air NZ without NZALPA's agreement.

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191 See above at [180]. I accept that the Employment Court did set out the relevant gains and concessions made by Air New Zealand (Employment Court decision, above n 185, at [47]–[49]), but I consider that it did not, because of the concession made by Air New Zealand as set out below at [187], have to consider these explicitly.

192 See above at [131].

193 See above at [125]–[126]. But in any event this was evidence of subjective belief.

194 An Air New Zealand Captain who was in charge of negotiations for NZALPA during bargaining for the 2002 agreement and a senior member of the NZALPA negotiation team in the bargaining for the 2012 agreement: see above at n 11 of the majority judgment; and [125] of William Young J's judgment.

[187] The Employment Court recorded that it had been conceded that, if NZALPA's interpretation of cl 24.2 was correct (that it could encompass part of an agreement), then the terms of the FANZP collective agreement were more favourable.[195] This concession could legitimately be taken as an acknowledgment that any additional burdens related only to the first and second officers could be discounted as negligible.[196]

[188] The concession would have seemed unsurprising with regard to those changes which could not be implemented without NZALPA pilots also agreeing, as any additional burden assumed by the FANZP pilots was theoretical rather than real.[197] It appears that any additional burden assumed by FANZP pilots as to the flight simulator hours was also negligible. Evidence was given that Air New Zealand had contacted a number of NZALPA pilots to undertake flight simulation training outside working hours on a voluntary basis. NZALPA encouraged its pilots to agree to this in order to facilitate the company's training program.

[189] There were two other purported errors identified by the Court of Appeal.[198] The first was that it was unprincipled to interpret a contract to avoid a bad outcome for one of the parties.[199] That may be right but it is perfectly orthodox to assume that parties intend a workable contract and to interpret the contract in that light,[200] as the Employment Court did in this case. Indeed, the Court of Appeal did that itself in

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195 Employment Court decision, above n 185, at [7]. Air New Zealand says it did not make that concession but, even if that is correct, it cannot convert what the Employment Court did into an error of principle in contractual interpretation. Further, as discussed below at [220], at most it would be an error of application of the contract.

196 I note that William Young J says that, given the regulatory and operational constraints affecting Air New Zealand, it is conceivable that the only practical difference between a collective agreement with NZALPA and a collective agreement not involving NZALPA might be remuneration terms: above at [116]. I agree.

197 See above at [137] of William Young J's judgment.

198 See above at [171]–[173].

199 CA decision, above n 160, at [75].

200 See for example the comment of Longmore LJ in *Barclays Bank plc v HHY Luxembourg SARL* [2010] EWCA Civ 1248, [2011] 1 BCLC 336 at [25] that "when alternative constructions are available one has to consider which is the more commercially sensible". See also Neil Andrews "Interpretation of contracts and 'Commercial Common Sense': Do not overplay this useful criterion" (2017) 76 CLJ 36.

assessing "employment relations commonsense"[201] with regard to Air New Zealand.[202]

[190] The Court of Appeal identified another alleged error in its conclusion: that the background did not, contrary to the Employment Court's view, override the plain meaning of the term "any agreement".[203] If the Court of Appeal meant by this that plain meaning prevails unless it clearly is displaced by the background, this fails to recognise the more symbiotic nature of the relationship between words and background. A court's task is to identify what a "reasonable person having all the background knowledge which would reasonably have been available to the parties" would have understood them to be using the language in the contract to mean.[204]

[191] It is true that the text (meaning in the document as a whole) remains centrally important in any contractual interpretation exercise and, if that text has a plain and ordinary meaning, that would normally be assumed to prevail.[205] It is also true that any exercise in contractual interpretation should generally start with the text. Nevertheless that text must still be interpreted in light of the relevant background. As Lord Hoffmann said in *Charter Reinsurance Co Ltd v Fagan:*[206]

> … the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural.

[192] If the Employment Court had failed to consider the background at all or if it had not paid any regard to the text these could be categorised as errors of principle in contractual interpretation. Here at most the Employment Court could be seen as having got the balance between the text and the background wrong. That is a mere interpretative error and immune from appellate review.

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201 I agree with the majority's comments on employment relations common sense above at[76]–[77].

202 Of course, if there were no jurisdiction to entertain an appeal, the Court of Appeal should not have been itself interpreting the collective agreement.

203 CA decision, above n 160, at [78].

204 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann. See also *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14] per Lord Hoffmann; and *Firm PI 1 Ltd*, above n 166, at [60] per McGrath, Glazebrook and Arnold JJ.

205 *Firm PI 1 Ltd*, above n 166, at [63] per McGrath, Glazebrook and Arnold JJ.

206 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (HL) at 391.

[193] In any event, as noted above, the Employment Court was only asked if the term "agreement" meant the whole of an agreement or part of it.[207] In deciding between the two interpretations put forward, that Court took into account a number of factors, including textual. It did not use the background to override the meaning of the text. From its analysis of the document as a whole the Court concluded that there were indications going both ways, but important textual indications as well as background and workability favoured NZALPA's interpretation.[208]

[194] Even if the Employment Court was wrong in this view, it was not an error of principle in contractual interpretation. It was merely an interpretive error. There is no jurisdiction to appeal against such errors.

Interpretive error

[195] The Court of Appeal then went on to make its own error of interpretation. Even if NZALPA's interpretation of cl 24.2 was wrong, it did not automatically follow that Air New Zealand's interpretation was correct. A number of alternative interpretations were available. Two of these are discussed in the majority judgment (and were broached with the parties at the hearing of the appeal).[209]

[196] I venture a third: that any additional pay not related to any additional burdens should be passed on under the clause. In this case that would mean that, to the extent the remuneration received by the FANZP first and second officers is higher for the same work, it should be passed on to the NZALPA first and second officers. If the added remuneration is payment for added burdens, it would not be passed on.

[197] It seems to me that this may be the most plausible alternative interpretation of cl 24.2(1). If any additional burdens had to be passed on for cl 24.2 to apply, one would have expected some mechanism for working out the existence and extent of such burdens. The absence of such provisions may favour my alternative interpretation.

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207 See above at [180].
208 See below at [200]–[211].
209 See above at [94]–[96].

Conclusion

[198] The Court of Appeal had no jurisdiction under s 214(1) to entertain the appeal on the basis of the "errors" it identified, because these "errors" were not errors of principle in contractual interpretation. In addition, the Court of Appeal made interpretive errors of its own.

No operative error of principle

[199] The majority has identified a number of errors of principle in contractual interpretation in the Employment Court's approach.[210] I am in general agreement with that discussion.[211] I do not, however, agree that these were operative errors and therefore do not agree that they would have given the Court of Appeal jurisdiction to intervene. To explain why it is necessary to analyse the Employment Court's reasoning in more detail.

Analysis of the Employment Court decision

[200] The Employment Court first performed what it called a "micro-analysis" of the text of cl 24.2.[212] The Court then considered the FANZP collective agreement.[213] The Court concluded that both interpretations of cl 24.2 contended for by the parties were "at least tenable because of the unclear wording of the clause".[214] The Court said, however, that it considered Air New Zealand's interpretation "sufficiently improbable that it must be discounted".[215] NZALPA's interpretation was considered "preferable in the context in which the clause was agreed upon, originally and subsequently".[216]

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210 See above at [79]–[86] of the majority judgment and at [136]–[141] of William Young J's judgment.

211 With regard to subjective intention, this is not one of those cases that could come within the category of cases discussed by David McLauchlan in "Contract Interpretation: What Is It About?" (2009) 31 Sydney L Rev 5 where clear actual mutual intent is shown. See also William Young J's judgment at [139]–[141]. I am not as convinced that the lack of negotiation and the identity of the party who first proposed the clause was irrelevant but it is not necessary for the purposes of this judgment to decide the point.

212 Employment Court decision, above n 185, at [36]–[42]. This involved breaking the clause down into its various components to identify the issues as a result of the competing interpretations.

213 At [43]–[51].

214 At [53].

215 At [53].

216 At [53].

[201] There were a number of factors that led the Employment Court to this view. It found some assistance in the wording of cl 24.2, including the use of the word "in" rather than "by"[217] and the fact the term "any agreement" was used rather than "any collective agreement."[218] It was also assisted by the fact that the word agreement in the term "any agreement" was not capitalised, by contrast to the phrase "this Agreement" in the same clause.[219] The Court considered that the opening words of the NZALPA collective agreement "[d]uring the term of this Agreement" supported an interpretation that would not "see it superseded by another collective agreement passed on in its totality during [its] term", an effect it thought arose under the Air New Zealand interpretation.[220]

[202] Even if there might be room for argument as to whether all these textual considerations do support NZALPA's approach,[221] it cannot be an error of principle in contractual interpretation to seek elucidation of meaning from the text. The Employment Court considered the arguments of the parties based on the Employment Relations Act and on balance found the statute not to be of assistance.[222] Again, there is no relevant error of principle in this approach.[223]

[203] The Employment Court identified two main background factors: Air New Zealand's desire to avoid strike action and the "inter-union rivalry and the probability of FANZP's Collective Agreement coming up for renegotiation during the life of NZALPA's Collective Agreement".[224] While the Employment Court did refer to subjective intent and negotiations when discussing these factors, it did not need to do so. These factors could clearly be inferred from facts that could

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217 At [57].
218 At [71].
219 At [72]
220 At [76].
221 See above at [84]–[85] of the majority's judgment.
222 Employment Court decision, above n 185, at [58] and [66].
223 The Court of Appeal also found this argument of little assistance and preferred to put it to one side: CA decision, above n 160, at [72].
224 Employment Court decision, above n 185, at [73]. I agree with the majority (above at [86]) and William Young J (above at [139]) that much of the evidence put forward by the parties relating to background factors was irrelevant on the basis that it related to subjective intention. Section 189(2) of the Employment Relations Act permits the court to admit such "evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not". But this does not extend to permitting irrelevant evidence to be introduced.

legitimately be taken into account by the Court. This means that the errors were not operative.

[204] The facts that were referred to by the Employment Court that could legitimately have been taken into account included the "particularly competitive relationship" between FANZP and NZALPA at the time cl 24.2 was first included in the collective agreement in 2002.[225] It was said this relationship was one "which descended into hostility from time to time", as evidenced by cases heard in the Employment Court previously.[226]

[205] The Employment Court was confronted by "why would I agree to that interpretation" arguments put forward by both sides. It was obliged to consider these and assess, in light of the text and the background, what objectively the clause meant. The difficult relationship with FANZP meant that it was legitimate for the Employment Court to infer that it was unlikely that NZALPA would agree to a clause that would have effectively negated its collective agreement with Air New Zealand.

[206] The Employment Court considered that the workability of the clause operated against Air New Zealand's interpretation as, on that interpretation, the "favourability assessment implicit in cl 24.2 would have to be one undertaken as between all aspects of the *NZALPA Collective Agreement* and the *FANZP Collective Agreement*".[227] The Court accepted that would be "a very difficult, if not unworkable, exercise" which would not be likely to have been the outcome intended by the parties.[228] Further, this result would effectively bring the NZALPA collective agreement to an end, a result that could not have been intended by NZALPA.[229]

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225 Employment Court decision, above n 185, at [54].
226 *Julian v Air New Zealand Ltd* [1994] 2 ERNZ 612 (EmpC).
227 Employment Court decision, above n 185, at [69] (emphasis in original).
228 At [69].
229 At [70].

[207] NZALPA had served a notice of intention to strike in July 2002.[230] It was not unreasonable to infer Air New Zealand would have wished to avoid a strike. This then could legitimately be taken into account when assessing Air New Zealand's argument that a prudent business person would not have agreed to a clause with NZALPA's interpretation.[231]

[208] Further, with regard to Air New Zealand's proposed interpretation, the Employment Court, in my view correctly given that the FANZP 2013 agreement post-dated the relevant NZALPA collective agreement by some ten years,[232] rejected the view that cl 24.2 should be interpreted in light of the "package deal" nature of the 2013 FANZP agreement.[233] The Employment Court said:[234]

> … Air New Zealand structured, or agreed to the structuring, of the *2013 FANZP Collective Agreement* in the knowledge of the existence of clause 24.2, and with the risk of an adverse interpretation of that clause. The answer to Air New Zealand's problem now is not to re-interpret clause 24.2 to suit the nature of the *2013 FANZP Collective Agreement* but is, rather, to re-negotiate clause 24.2 when the *NZALPA Collective Agreement* expires.

[209] The Court also rejected the view that NZALPA's interpretation of the clause would have left Air New Zealand with an unquantifiable contingent liability, Air New Zealand's contrary argument on "workability".[235]

[210] While courts do have to be cautious before applying their own view of business common sense to the interpretation of a contract,[236] there is nothing wrong as a matter of principle in contractual interpretation with considering the workability of the varying interpretations contended for.[237] It is unlikely that parties would intend a clause to be unworkable.[238]

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230 At [28].
231 Air New Zealand's "business common sense" argument had resonated with the Employment Relations Authority: ERA decision, above n 174, at [44]–[45].
232 See above at [150].
233 Employment Court decision, above n 185, at [51].
234 At [51] (emphasis in original).
235 At [61]–[63].
236 See *Firm PI 1 Ltd*, above n 166, at [88]–[97]; and above at [189].
237 See above at [189].
238 William Young J also considers issues of workability: see above at [117].

[211] Finally, the Employment Court considered that cl 24.2 was intended primarily for the benefit of individual pilot members of NZALPA. This too in the Employment Court's view militated against Air New Zealand's interpretation.[239] I interpolate that I see nothing wrong with this view. The union is the party to the collective agreement but it is acting for the benefit of its members and the terms of the collective agreement become the terms of the members' employment. Further, it must also be correct that an overall operational benefit to Air New Zealand is not necessarily a specific burden to individual employees, even though that operational benefit may have freed up funds to pay more in remuneration.[240]

Conclusion

[212] It is clear from the above that the Employment Court undertook what I see as, in large part, a totally orthodox exercise of contractual interpretation.[241] Any errors of the principles in contractual interpretation that were made by the Employment Court were not operative. Factors taken into account as a result of any such errors could have been inferred from other facts which were legitimately taken into account.

[213] Further, for the reasons set out above, I do not consider that the Employment Court decided on an interpretation that had regard only to benefits.[242] In any event the Employment Court was not required to consider any additional burdens in light of the concession made by Air New Zealand.[243] Any mistake as to the nature of any concession (if any) made is not an error of principle in contractual interpretation and is in any event a mistake relating to application and not interpretation as discussed below.[244]

[214] William Young J alleges that there is another error of principle in the Employment Court judgment: that the Employment Court saw its task as being to choose between the two interpretations put forward by the parties and did not

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239 Employment Court decision, above n 185, at [73].
240 See above at [185].
241 See also the judgment of William Young J above at [134].
242 See above at [181] and [211].
243 See above at [180].
244 See below at [216]–[220].

consider possible other interpretations.[245] I have difficulty in seeing this as an error of the principles in contractual interpretation. It would appear to widen the possibility of appellate review, as it would likely often be possible to consider there might be some middle ground between the interpretations contended for by the parties or some other obvious interpretation. This would lead to appellate courts effectively substituting their view for that of the Employment Court, contrary to the prohibition in s 214(1).

[215] In my view, even where an obvious possible interpretation was not considered, this would be a mere interpretive error unless the failure resulted from an error of the principles in contractual interpretation (for example by refusing to take account of clearly relevant background factors). I do agree, however, that the courts below should have considered alternative interpretations and further that this Court was entitled to consider alternative interpretations to those advanced by the parties.[246]

Application of the clause

[216] The Employment Court expressed the issue as being whether, as Air New Zealand contended, the words "any agreement" mean any other collective agreement in its entirety[247] or whether it could, as NZALPA maintained, mean selected parts of it.[248] As indicated, the Court answered that question in NZALPA's favour.

[217] It seems to me that this was the interpretation question at issue. Once that interpretation question was answered, the next question was one of applying that interpretation of the contract to the facts. This would have meant analysing the extent to which the rates payable to the FANZP first and second officers were in fact more favourable in terms of cl 24.2: that is, the extent to which they were paid more for the same work.

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245 See above at [120]–[121] and [136].

246 Of course this would only be allowable if there had been operative errors of contractual principle by the Employment Court.

247 The interpretation accepted by the Employment Relations Authority.

248 Employment Court decision, above n 185, at [52].

[218] This would have required analysing any additional burdens the FANZP first and second officers took on and assessing the value of those as against the additional benefits. It seems to me that the resulting difference (if any) would be the more favourable remuneration rates that had to be passed on. In my view this would be the result on any of the suggested interpretations of the clause, except that of Air New Zealand. If more was being paid for the same work, this would need to be passed on.

[219] I do not think it can be seriously suggested that cl 24.2 requires an all or nothing approach so that, if Air New Zealand could point to any additional burden however small, the clause does not apply. Nor, it seems to me, would it matter if NZALPA wrongly requested all of the benefits to be passed on. I do not consider that a wrong request for all benefits under the collective agreement would mean its first and second officers would lose their entitlement to part of the benefits, as William Young J would hold.[249] This is essentially a pleading point, which has no place in an employment relations regime where there is a duty to act in good faith.[250]

[220] The Employment Court did not, however, need to answer the question of application because of the concession recorded in the judgment that, if NZALPA's interpretation of the contract was correct, then the terms were more favourable.[251] If the Employment Court was mistaken and this concession was not made, or the Court misunderstood the nature of the concession, then this would be an error of application not in the principles of contractual interpretation.[252]

Should the case be remitted to the Employment Court?

[221] If I agreed with the majority that there had been operative errors of the principles in contractual interpretation in the Employment Court, then this would mean the Court of Appeal had jurisdiction, although not on the basis that the Court of Appeal found. In turn, that would mean that this Court would have jurisdiction to intervene. The fact that the errors the Court of Appeal identified were

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249 See above at [146].
250 As set out in s 4 of the Employment Relations Act.
251 See above at [187].
252 If Air New Zealand maintains that the concession was wrongly recorded then it seems to me that the appropriate remedy would be to ask for a recall of the Employment Court judgment.

not errors in the principles of contractual interpretation could not remove that jurisdiction.[253]

[222] As the majority note, once an error of principle in contractual interpretation is identified, the proper interpretation is usually obvious.[254] That is not the case here where multiple possible interpretations have been identified, including those still contended for by the parties and a further possible interpretation raised by me above.[255] In such a case the proper course would be to remit the case to the Employment Court, being the body Parliament has tasked with the final decision on the interpretation of employment agreements. The parties could of course by agreement ask the appellate court to decide the issue, but here the parties both oppose that course. I do not agree that the factors identified by the majority mean that in this case the matter should not be remitted. I discuss each in turn.

[223] The first is that the essence of the approach by the Court of Appeal is that benefit cannot pass without burden and that this is also the essence of the contrary interpretations postulated by the majority. While that might be true, the differing interpretations have very different effects and the other interpretations suggested by the majority and the third alternative interpretation suggested by me have not been the subject of proper argument or decision.

[224] I share William Young J's reservations about the Air New Zealand interpretation of cl 24.2.[256] The effect of not remitting the case to the Employment Court would be that this interpretation prevailed but without further consideration in light of the proper principles of contractual interpretation by the Employment Court, the specialist body charged with the task of interpreting employment agreements. By default, the Air New Zealand interpretation would stand. That is not a result this Court should countenance.

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253 If NZALPA's further submissions to this Court suggest that this is not the case, I reject that contention.

254 See above at [97].

255 See above at [196]–[197].

256 See above at [117]–[119] and [143]–[145].

[225] The second reason given is that neither party wishes to purse the alternative interpretations. It is true that both parties were unenthusiastic about the other possible interpretations discussed at the hearing and maintained that their respective original interpretations remained correct. Both also argued in their further submissions that the matter should not be remitted. This was on the basis, for Air New Zealand, that the Court of Appeal was right both to intervene and in its interpretation. For NZALPA this was on the basis that there was no jurisdiction to intervene, either on the basis the Court of Appeal did or on any other basis. This would mean there was no jurisdiction to consider any alternative meanings. However, in its further reply submissions, NZALPA submitted that the matter should be remitted to the Employment Court if this Court found that a third meaning was at issue (assuming this Court decided it did have jurisdiction to intervene).

[226] As to the fact that leave was granted only on jurisdiction, it seems to me that it is implicit that this Court may nevertheless consider other interpretations, particularly in a case such as this where there were multiple interpretations available. NZALPA maintains in its further submissions that it has always argued (including in this Court) that its interpretation was in any event correct.

[227] William Young J also would dismiss the appeal without remission to the Employment Court. The result of the approach taken by him would be to leave in place an interpretation of cl 24.2 about which he has distinct reservations.[257] To my mind this is an odd result, based on what is essentially a pleading point. It is especially odd when considered in light of William Young J's comments about the courts' duty to consider a middle ground interpretation.[258]

Conclusion

[228] I would have allowed the appeal and restored the Employment Court's judgment on the basis that there were no operative errors of principle in contractual interpretation in the Employment Court. This means that the Court of Appeal lacked jurisdiction under s 214(1) of the Employment Relations Act to hear the appeal.

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[257] See above at [143]–[145].
[258] See above at [121].

[229] Even if I had considered there to be operative errors of principle in contractual interpretation, I would have remitted the case to the Employment Court to decide on the proper interpretation of cl 24.2. Without remission to the Employment Court, no court will ever definitively have decided on the proper interpretation of cl 24.2. That cannot be either right or fair, especially in the context of a collective agreement governed by the Employment Relations Act.

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