IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA369/2023
[2025] NZCA 474

BETWEEN	WESTGATE TOWN CENTRE LIMITED (IN LIQUIDATION) First Appellant
AND	WESTGATE PROPERTIES LIMITED Second Appellant
AND	NZRPG MANAGEMENT LIMITED Third Appellant
AND	WESTGATE TOWN CENTRE (2017) LIMITED Fourth Appellant
AND	WESTGATE PROPERTIES (2017) LIMITED Fifth Appellant
AND	NZRPG MANAGEMENT (2017) LIMITED Sixth Appellant
AND	AUCKLAND COUNCIL First Respondent
AND	AUCKLAND TRANSPORT Second Respondent

Hearing:	16–17 September 2024 (further information received 2 October 2024)
Court:	Goddard, Cooke and Palmer JJ
Counsel:	B D Gray KC, A I C Denton and G N M Tompkins for Appellants R B Lange, L B Harrison and A G A Trask-Coombs for Respondents
Judgment:	17 September 2025 at 12 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay one set of costs to the respondents for a complex appeal on a band B basis together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Palmer J)

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Summary

[1] From 2002, Waitakere City Council (Waitakere City), developed a vision for a new metropolitan Westgate Town Centre (the Town Centre), to be located across Hobsonville Road (later renamed Fred Taylor Drive) from the original Westgate Shopping Centre (Original Westgate).[1] The New Zealand Retail Property Group (NZRPG) worked with Waitakere City to develop the Town Centre. The plaintiffs in the High Court, and the appellants here, are part of NZRPG.[2] Waitakere City and NZRPG entered something akin to a customised, relational public-private partnership over a prolonged period, as reflected through a number of planning and contractual documents.

[2] In the middle of all of this, the Auckland "super city" was created, taking over Waitakere City's obligations. Auckland Council also entered into further agreements with NZRPG in relation to the Town Centre. NZRPG consider that Auckland Council and Auckland Transport took a fundamentally different approach to that originally envisaged, developing Fred Taylor Drive as an arterial route rather than a pedestrian-friendly town centre road, delaying upgrades to Maki Street South for nine years, failing to construct Northside Drive East, and failing to ensure construction of the envisaged bus interchange at an agreed location. NZRPG allege that this involved multiple breaches of various contracts entered into in relation to the Town Centre. Auckland Council and Auckland Transport consider their actions did not breach any applicable contractual obligations. NZRPG sued Auckland Council and Auckland Transport for breach of contract on several grounds. The High Court

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1 *Westgate Town Centre Ltd v Auckland Council* [2023] NZHC 1455 [judgment under appeal] at [32]–[36]. This judgment generally adopts the nomenclature used by the High Court in the judgment under appeal. In particular, we refer to the appellants collectively as "NZRPG" except where otherwise indicated. We note that there are unresolved issues between the parties as to which entities are parties to which agreements, and who is entitled to enforce them.

2 At [2].

held that NZRPG had not made out any of the contractual breaches it alleged.[3] NZRPG appeal.

[3] The contractual provisions relied on by NZRPG must be interpreted in accordance with well-established principles.[4] The aim is 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" each of the contracts was entered into.[5] Adopting that approach, each of the four grounds of appeal fail:

(a) The parties agreed from the outset that their shared vision for the Town Centre did not create binding contractual obligations in the absence of more specific agreements. Apart from anything else, this was a necessary qualification given the statutory functions of Waitakere City (and its successor local authorities). Contractual obligations were then spelled out in the subsequent contractual documents, but these were specific and limited, and did not create broader contractual obligations to deliver the shared vision. The contractual terms need to be interpreted in light of that context, which means there is limited scope for implied terms expanding the councils' contractual obligations beyond what was specifically agreed, or for interpreting the express terms to similar effect.

(b) The contractual documentation did not specify the design standards for the design and construction of Fred Taylor Drive that NZRPG allege were expressly required. Nor did they provide an adequate basis for an inference that generic statements of vision about aspects of the Town Centre constituted contractually binding specifications of quality standards for the design and construction of Fred Taylor Drive.

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3 At [675].

4 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696; and *Stirling v Maitland* (1864) 5 B & S 840.

5 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann. See also *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 4, at [60].

To suggest otherwise appears contrary to the commercial realities of risk allocation agreed to by the parties. The existence of an implied term to this effect is also contradicted by the express allocation of all responsibilities for the design and construction of Fred Taylor Drive to Waitakere City.

(c) There was no contractual commitment by Waitakere City to construct Northside Drive East. Indeed, there was express contractual recognition that there was no such agreement. Against that backdrop, a commitment to fund and construct Northside Drive East cannot be implied based on express terms governing the development of Fred Taylor Drive, and an alleged need to construct Northside Drive East to make the contemplated redevelopment of Fred Taylor Drive possible. It is implicit in most contracts that neither party will take steps that prevent performance of the contract by bringing to an end circumstances on which that performance depends. But in the present case, construction of Northside Drive East was not necessary to avoid undermining the Fred Taylor Drive contractual commitments. If a commercial commitment of this scale and significance had been intended, it would have been provided for expressly. It was not. And it cannot be implied.

(d) The contractual documents relating to the upgrade of Maki Street South initially left key details to be discussed and agreed by the parties. Once agreement was reached, the work was carried out by Auckland Council and Auckland Transport in a timely manner. There was no breach of an implied term to carry out agreed work within a reasonable time.

(e) There was a shared understanding about the location of the bus interchange, but there was no contractual obligation on the parties to fund or construct that interchange until agreement had been reached by the parties and Auckland Transport on the terms of the relevant easements, the design and specifications for the interchange, a service level agreement, and funding for construction. In the absence of

agreement on those matters, the failure to fund and construct the bus interchange was not a breach of contract.

What happened?

[4] The factual context to this appeal is set out comprehensively in the High Court judgment and is not contested. We provide a high-level summary before considering the four more specific issues raised on appeal.

General background

[5] There is a Westgate Shopping Centre, called Original Westgate in the High Court, near Massey, Auckland.[6] It is on land still largely owned by companies controlled by Mr Mark Gunton, which are part of NZRPG.[7] NZRPG originally considered developing a vertical mall,[8] which was submitted to be like that at Sylvia Park in Auckland.

[6] In the late 1990s and early 2000s, a series of decisions were taken by central government, the Auckland Regional Council, Waitakere City, and other councils in the Auckland region to address expected growth.[9] From 2002, Waitakere City developed a vision for the Town Centre, to be located across the street to be known as Fred Taylor Drive from Original Westgate.[10] NZRPG submit they gave up pursuing a vertical mall at Original Westgate. They worked with Waitakere City to develop the integrated Town Centre instead.[11] In essence, Waitakere City and NZRPG entered something akin to a customised, relational public-private partnership over a prolonged period which depended on good working relationships.

[7] In summary, the parties' vision was pursued through the following instruments:[12]

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6 Judgment under appeal, above n 1, at [3].
7 At [3]–[4].
8 At [33].
9 At [25].
10 At [32]–[36].
11 At [302].
12 At [6]–[8].

(a) In July 2004, Waitakere City signed a memorandum of understanding (the MoU) with one of Mr Gunton's companies, IMF Westland Ltd, agreeing to work together to achieve shared goals for the Town Centre.[13] The MoU recorded that it was not legally binding, and did not replace the need for a more detailed formal contractual relationship.[14] The MoU is part of the context of the subsequent contracts.

(b) In March 2005, Waitakere City notified a series of plan changes, including Plan Change 15 (PC 15) which provided for the establishment of the Town Centre.[15] The vision for the Town Centre was set out in the proposed Massey North Urban Concept Plan (MNUCP).[16] In May 2007, a Joint Hearings Panel recommended approval of PC 15, which occurred the following month.[17] NZRPG and others appealed aspects of PC 15 to the Environment Court.[18] We reproduce below a map from the proposed PC 15, as amended in accordance with Waitakere City's decisions of 20 June 2007. Precincts E, A and B are, respectively, the Original Westgate, the Town Centre (along with Original Westgate), and an area for large format activities.[19]

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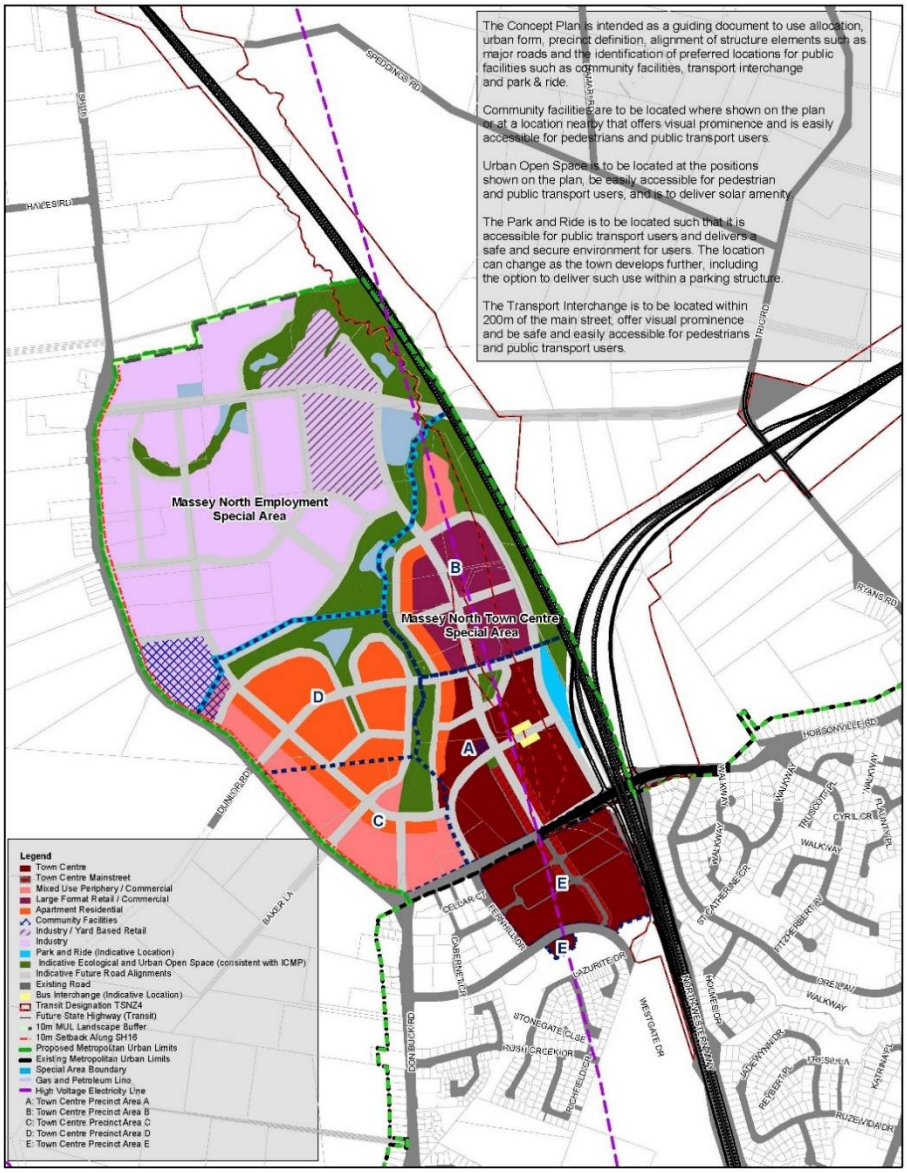
13 At [37].
14 At [38].
15 At [42]–[43].
16 At [7].
17 At [53].
18 At [60].
19 At [45].



Policy 11.44 of the Waitakere City District Plan stated:

> The Massey North Town Centre Special Area shall be developed for urban activities which recognise the importance of the area as a major town centre and its suitability for a range of sustainable urban development outcomes. This area should be developed in a way which achieves an integrated and compact town centre, providing for a broad range of mutually compatible activities and employment opportunities that are integrated with public transport, is surrounded by a supportive town centre periphery and provides a strong community focal point.

(c) In March and April 2009, NZRPG applied to Waitakere City for approval of Comprehensive Development Plans (CDPs) providing for

more developed designs than the high-level vision set out in PC 15.[20] Waitakere City and NZRPG worked together on the CDPs for Precincts A and B, which were not finalised until 2010.[21]

(d) In July 2008, Waitakere City confirmed its interest in becoming financially involved in the project, working with NZRPG as a debt funder or equity partner for the development of the Town Centre.[22]

(e) In May 2009, Waitakere City authorised the purchase of land for streets and other infrastructure in the Town Centre under the Public Works Act 1981, with a financial cap of $29 million plus GST, by adopting Resolution 698/2009.[23] The Resolution referred to an "asset set 'B'" plan (the Asset Set B plan), which identified the streets and infrastructure, as well as key land holdings, envisaged within the Town Centre.[24]

(f) At this time, it also executed the Maki Street South Acquisition Agreement (MSSAA) with three NZRPG companies.[25] The MSSAA principally concerned the sale and purchase of the land on which (the then) Westgate Street roadway was constructed, and the granting of easements in gross for adjacent footpaths (retained by a NZRPG company) and other necessary rights.[26] The MSSAA is a key contractual document in relation to one of the issues examined below (issue 3).

[8] In the middle of all of this, the Auckland "super city" was created, replacing previous Auckland local authorities, including Waitakere City. The Local Government (Auckland Council) Act 2009 (the Auckland Council Act) established Auckland Transport in September 2009,[27] and the Auckland Council from

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20 At [69].
21 At [102].
22 At [65].
23 At [77].
24 At [78].
25 At [81].
26 At [81] and [304].
27 Local Government (Auckland Council) Act 2009, ss 2(2) and 38.

1 November 2010.[28] Also on 1 November 2010, s 35 of the Local Government (Tamaki Makaurau Reorganisation) Act 2009 (the Reorganisation Act) dissolved local authorities in the Auckland Region, including Waitakere City.[29]

[9] Auckland Council succeeded to various aspects of the legal rights, responsibilities, powers and obligations of Waitakere City in relation to the Town Centre by operation of s 35 of the Reorganisation Act or by re-execution of certain contracts by Auckland Council. Auckland Transport, under s 46 of the Auckland Council Act, gained certain powers and functions relating to the Auckland Transport system. In particular, it has most of the functions and powers of a council under pt 21 of the Local Government Act 1974 and the powers of a council under s 591 of the Local Government Act. Section 47(1) also deems Auckland Transport to be approved as a requiring authority under s 167 of the Resource Management Act 1991 for "constructing or operating or proposing to construct or operate roads in relation to the Auckland transport system" and "the carrying out of an activity or a proposed activity … in relation to the Auckland transport system for which it or the Auckland Council has financial responsibility".

[10] During and after the transition from Waitakere City to Auckland Council:

(a) In February 2010, Waitakere City and two NZRPG companies concluded an infrastructure funding agreement (IFA), which is one of the key contractual documents requiring interpretation. Among other matters, it made provision for some of the obligations of the parties regarding the funding of infrastructure generally for the development of the Town Centre. Waitakere City would undertake or procure specified works and projects at its expense, contribute to the cost of specified development work by a NZRPG company and acquire from a NZRPG company certain land and interests for $23 million, at most. On that land, Waitakere City and a NZRPG company would build specified roads and other key infrastructure. Waitakere City would contribute to the costs of works by the NZRPG company. The

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28 Sections 2(1) and 6.

29 Judgment under appeal, above n 1, at [86].

Asset Set B plan was attached as Schedule 2 of the IFA. On 17 November 2009, the IFA was confirmed by the Auckland Transition Authority (ATA). The IFA was concluded against the background of NZRPG facing financial pressures.[30]

(b) In August 2010, the CDPs for Precincts A and B were approved by the Commissioners appointed by Waitakere City.[31]

(c) In October 2010, four Works Development Agreements (WDAs) (WDA 1, WDA 2, WDA 4, and WDA 5) and two Cost Sharing Agreements (CSAs) (CSA 1 and CSA 2) were executed by NZRPG companies and Waitakere City. WDA 1, WDA 4 and WDA 5 set out arrangements by which a NZRPG company would carry out works for Waitakere City, and how costs would be allocated.[32] CSA 1 and its variations are key contractual documents requiring interpretation. Relevantly:

(i) CSA 1 was an umbrella agreement, with a detailed Demarcation Schedule specifying which party was responsible for the funding, design and construction of each infrastructure item , with specified quality standards. CSA 1 was expressed to prevail over the IFA if they were inconsistent.[33]

(ii) WDA 1 and WDA 4 set out arrangements by which a NZRPG company would construct identified infrastructure works on behalf of Auckland Council, principally on others' land.[34]

(iii) WDA 5 set out arrangements by which a NZRPG company would undertake earthworks for identified infrastructure works

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30 At [322].
31 At [102].
32 At [110].
33 At [331].
34 At [324] and [326].

that Auckland Council was to construct in accordance with the IFA.[35]

(d) Because they had not been confirmed by the ATA as required, in November 2010, Auckland Council re-executed the WDAs and CSAs, and concluded further WDAs with NZRPG.[36]

(e) In September 2011, the Environment Court made consent orders for the CDPs, including detailed design conditions relating to Precincts A and B of the Town Centre.[37]

(f) In May 2013, three NZRPG companies and Auckland Council executed WDA 3, adding to and modifying specific arrangements agreed in the IFA.[38] This is explained further in relation to issue 3.

(g) On 31 May 2017, Auckland Council and NZRPG signed WDA 9 further amending the IFA. As explained further in relation to one of the issues we address below (issue 4), WDA 9 provided for NZRPG to manage the design, consenting and engineering approvals and procure and construct the upgrade of Maki Street South and the footpaths to specified quality standards.

[11] The High Court judgment states that it is not straightforward to describe what happened "over the seven and a half years between Auckland Council and Auckland Transport taking over responsibility for the … Town Centre project" and the commencement of these proceedings.[39] Plainly, it is not straightforward. The judgment outlines the events and correspondence in the context of difficult relationships between the parties and in the wider context of the global financial crisis (GFC).[40]

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35 At [327].
36 At [9] and [119].
37 At [123]; and *Midgley v Auckland Council* EnvC ENV-2010-AKL-253, 6 September 2011.
38 Judgment under appeal, above n 1, at [174].
39 At [133].
40 At [137]–[272].

[12] We do not need to repeat this exercise for the purposes of deciding the issues on appeal. Suffice to say that NZRPG consider that Auckland Council and Auckland Transport took a fundamentally different approach to that originally envisaged, redeveloping Fred Taylor Drive as an arterial route, delaying upgrades to the Maki Street South for nine years, not constructing the envisaged public transport interchange, and not constructing Northside Drive East. NZRPG say this involved breaches of contractual obligations. Auckland Council and Auckland Transport consider their actions did not breach any relevant contractual obligations.

[13] When the High Court Judge made the necessary factual findings he said he engaged in an exercise involving review of documents in the common bundle of documents before the Court that had not been referred to by the parties.[41] We agree with Mr Gray KC's point that, to the extent the High Court judgment was predicated on material in the common bundle that was not referred to by witnesses or in submissions,[42] the material was not evidence properly before the Court, under s 132(2) of the Evidence Act 2006 and r 9.5(4) of the High Court Rules 2016 (the Rules) and the Judge should not have taken such material into account. However, Mr Gray accepted that the documents referred to in the judgment were all in evidence and does not dispute the Judge's factual findings regarding the background context. So the point does not provide any support for NZRPG's appeal.

Proceedings

[14] On 6 March 2018, NZRPG filed these proceedings.[43] In their amended statement of claim dated 31 March 2021, they alleged Auckland Council and Auckland Transport had failed to comply with their contractual obligations, including by failing to construct various elements envisaged for the Town Centre in PC 15 and the CDPs. NZRPG say that, because of the breaches, the Town Centre is dysfunctional and less attractive, and they have suffered loss in reduced income and reduced asset

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41 At [23] and [134]–[136].
42 At [293].
43 At [273].

value.[44] In the High Court, they claimed damages of $87,775,175 plus interest and costs.[45]

[15] NZRPG's claims are advanced in the broad context of the development of the Town Centre. The claims relevant to this appeal, as described in NZRPG's submissions, are that Auckland Council and Auckland Transport failed:

(a) to design and construct the redevelopment of Fred Taylor Drive as an integrated, street-based town centre and an extension of Original Westgate, as provided for in the contracts;

(b) to give effect to an implied term to construct Northside Drive East, including a bridge over State Highway 16;

(c) to upgrade Maki Street South with a reasonable period of time, as they were required to by an implied term; and

(d) to design and construct a bus interchange at the location that had been agreed.

[16] A number of personnel from Waitakere City gave evidence for NZRPG, including:[46]

(a) the former Mayor, Sir Robert Harvey and the former Deputy Mayor, Ms Penelope Hulse;

(b) the former Director of Waitakere City, Dr Graeme Campbell;

(c) a planning consultant engaged by Waitakere City, Mr Mark Tollemache; and

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44 At [276].
45 At [16].
46 At [24] and [130].

(d) the joint Managing Director of Resource Co-ordination Partnership Ltd (RCP) — which was engaged by Waitakere City, Auckland Council and NZRPG — Mr Jeremy Hay, and a Director of RCP, Mr Fraser Robertson.

[17] In general, Auckland Council and Auckland Transport submit that the High Court did not err in any material respect. In the High Court, as in this Court, they deny they are contractually responsible for achievement of the broader vision for the development of the Town Centre.[47] They submit some of the contractual obligations alleged by NZRPG do not exist, to the extent they do they have been satisfied, and if any breach has occurred it does not give rise to the losses claimed.[48] The difficulties with the development were largely the product of commercial circumstances arising from the companies losing their principal funder as a result of the GFC.[49]

[18] Van Bohemen J heard the case in a lengthy hearing, from 14 February 2022 to 7 April 2022, in the High Court at Auckland. He held that NZRPG had not made out any of the contractual breaches they alleged.[50] Because of that, he did not resolve the issue of causation or whether the specific NZRPG entities that brought the proceedings would be entitled to recover any losses.[51] The parties disagree as to whether the quantum of damages was resolved but agree that it is not to be addressed in this appeal.

[19] NZRPG seek orders that Auckland Council and Auckland Transport breached their contractual obligations and remitting the matter to the High Court to determine recoverability and quantum. Auckland Council and Auckland Transport seek to uphold the High Court judgment. Each side seeks costs upon success. They agree that the appeal should be categorised as complex and certification for second counsel is appropriate.

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47 At [18].
48 At [19]–[20].
49 At [22].
50 At [675].
51 At [674].

[20] After outlining the appropriate general approach to contractual interpretation and implied terms, we examine each of the four issues on appeal, including the relevant factual findings in more detail.

Contractual interpretation

Principles of contractual interpretation

[21] The parties do not disagree on the relevant principles of contractual interpretation and implied terms. As quoted by the High Court:[52]

(a) In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* the Supreme Court stated:[53]

> [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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> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.
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> …
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> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation

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52 At [279]–[280] and [291].

53 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 4 (footnotes omitted).

other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

(b) In *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, the Supreme Court restated that approach, saying:[54]

> [46] The objective approach as articulated in *Firm PI* is one grounded in the policy objectives identified above: the desirability of providing the certainty needed to facilitate the efficient conduct of commerce; of holding people to the bargains they make; and of supporting access to justice through the efficient and just conduct of proceedings. Giving primacy to the written words of the agreement accords with the policy of providing commercial certainty. It also recognises that since the written contract contains the words the parties chose to record their agreement, the language used to do so has to be important. But by allowing a contextual reading of those words, the *Firm PI* approach recognises both that words have to be read in context and that the promotion of commercial certainty should not be allowed to defeat what the parties actually meant by the words in which they recorded their agreement. The objective approach to this contextual assessment is a legal construct designed as the best way of reliably determining the true agreement as recorded in the words of the contract. It rejects the parties' subjective evidence of intent as irrelevant to what both parties meant and as generally unreliable. Rather, the court (embodying the reasonable person) assesses the evidence reasonably available to both (or all) of the parties at the point of contract which could bear upon the meaning of those words. Overall, this is a test which best supports the aim of the efficient and just conduct of proceedings.

(c) The Court in *Bathurst Resources Ltd* also summarised the principles to be applied to the closely related question of implied terms, stating:[55]

> [116] To conclude, the principal points that govern the implication of terms are as follows:
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> (a) The legal test for the implication of a term is a standard of strict necessity, a high hurdle to overcome.
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> (b) The starting point is the words of the contract. If a contract does not provide for an eventuality, the usual inference is that no contractual provision was made for it.
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> (c) While the task of implication only begins when the court finds that the text of the contract does not

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54 *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 4 (footnotes omitted).

55 Footnotes omitted.

provide for the eventuality, the implication of a term is nevertheless part of the construction of the written contract as a whole. An unexpressed term can only be implied if the court finds that the term would spell out what the contract, read against the relevant background, must be understood to mean.

(d) As with the task of interpreting a contract, the inquiry for the court when considering the implication of a term is an objective inquiry — it is the understanding of the notional reasonable person with all of the background knowledge reasonably available to the parties at the time of contract that is the focus of this assessment. The court is tasked with the role of constructing the understanding of that reasonable person.

(e) Thus, the implication of a term does not depend upon proof of the parties' actual intentions, nor does it require the court to speculate on how the actual parties would have wanted the contract to regulate the eventuality if confronted with it prior to contracting.

(f) The *BP Refinery* conditions are a useful tool to test whether the proposed implied term is strictly necessary to spell out what the contract, read against the relevant background, must be understood to mean. Whilst conditions (4) and (5) must always be met before a term will be implied, conditions (1)–(3) can be viewed as analytical tools which overlap and are not cumulative. The business efficacy and the "so obvious that 'it goes without saying'" conditions are both ways, useful in their own right, of testing whether the implication of a term is strictly necessary to give effect to what the contract, objectively interpreted by the court, must be understood to mean.

[22] The "*BP Refinery* conditions" are:[56]

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

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[56] *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

[23] NZRPG places particular emphasis on the obligation that is generally implied into contracts that neither party will take steps that would bring to an end circumstances upon which the contract is based. That implied term is addressed in more detail below.

The High Court's approach to interpretation and implied terms

[24] As a general matter, the High Court held:[57]

> *Overall purpose of the Agreements*
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> [299] There is no doubt that the contracts entered into by the NZRPG companies and Waitakere City and Auckland Council concerned the development of the new Westgate Town Centre. There is also no doubt that it was intended that the contracts should be [interpreted] and implemented together. Many refer to and are contingent on the performance of obligations in other contracts. It is instructive that, at the time Auckland Council succeeded to Waitakere City's rights and obligations under the contracts upon amalgamation, Waitakere City's solicitors advised that the contracts should be treated as a single integrated package because that was how they had been negotiated and had been intended to operate.
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> [300] However, while I accept that the contracts should be treated as an integrated package, I do not accept that the purpose of the package was to "deliver" the vision for the Town Centre as set out in PC 15 in the comprehensive sense submitted by Mr Gray. As is evident from the history of the negotiation of the contracts and from their contents, the purposes of the contracts and of the package they comprised were more limited. The contracts were focused on the delivery of particular items of infrastructure for particular purposes, albeit within the context set by PC 15.
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> [301] At the time PC 15 was adopted, Waitakere City and NZRPG had distinct roles. Waitakere City was a local authority intending to put in place the necessary planning arrangements to enable the development of the Town Centre it wished to see established at Westgate in accordance with the vision set out in PC 15. NZRPG was one of a number of parties with interests in the area where Waitakere City wished the new Town Centre to be built, albeit that NZRPG was the most significant interested party. While Waitakere City and NZRPG worked closely together in developing the vision in PC 15, for the most part the two parties maintained their distinct roles. Waitakere City notified the proposed PC 15 and other associated plan changes and shepherded them through the RMA processes. NZRPG made submissions on the proposed PC 15 and even appealed aspects of the plan after it had been adopted by Waitakere City.
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> …

[57] Judgment under appeal, above n 1 (footnotes omitted).

Conclusions about the agreements between NZRPG companies and Waitakere City/Auckland Council

[345] Having considered the above agreements, both individually and as a package, I am satisfied that the agreements were not intended to deliver the vision set out in PC 15 as such in the manner submitted by Mr Gray. Rather, the agreements constituted a series of interrelated contracts by which NZRPG companies and Waitakere City/Auckland Council agreed on specific arrangements for NZRPG companies to construct certain infrastructure assets, principally on land owned by NZRPG companies, that Auckland Council was willing to pay for in order to secure the town centre elements provided for in PC 15. The IFA, and subsequent amendments, also provided for Auckland Council to construct, at its cost, certain infrastructure assets on land not owned by NZRPG companies.

…

[347] All of these arrangements were essentially commercial and transactional — that is, NZRPG was paid on a case by case basis for the land and services it provided, apart from the land it transferred to Auckland Council at no cost, as part of the arrangements agreed for NZRPG's development contributions.

[348] In none of these respects did NZRPG secure an on-going interest in the operation and management of infrastructure assets it built on behalf of Auckland Council, on land NZRPG had formerly owned or on land formerly owned by others.

…

[350] For these reasons, I am satisfied that, while the contracts were an integrated package and must be considered in relation to each other, it is necessary to assess the plaintiffs' allegations principally by reference to the language of the contractual provisions at issue rather than by reference to what might have been required to achieve the vision for the Westgate Town Centre set out in PC 15. I am also satisfied this approach accords with the Supreme Court's directions in *Bathurst Resources* about the need to give primacy to the written words of the agreement and that this accords with the policy of providing commercial certainty.

Submissions

[25] Mr Gray, for NZRPG, submits generally that the High Court incorrectly adopted a very narrow interpretation of the contracts. The Court failed to consider the contracts as a whole, and to have regard to the broader contractual matrix, including the evidence of Waitakere City and NZRPG as to the purpose of the contracts. A central tenet of the appeal is that the High Court did not recognise the vertical interrelationship between the IFA (and its variations), CSA 1 and the WDAs and instead treated them as horizontal. The Court's conclusion on the purpose and scope

of, and interrelationship between, resulted in an interpretation that is inconsistent with the words used and the parties' commercial purpose.

[26] Mr Lange, for the respondents, submits the High Court did not err in concluding that the various contracts were not to be interpreted as collectively imposing an obligation on the respondents to deliver the PC 15 vision as defined by NZRPG. There is no dispute the contracts were interrelated and they all concerned the same overall project. But they were concerned with multiple different specific transactions within that project. The evidence of NZRPG witnesses — particularly that of Sir Bob Harvey and Ms Hulse — about the overall long-term vision for the Town Centre does not engage with whether the relevant contracts include the contractual obligations alleged by NZRPG.

Contractual obligations here

[27] The arrangements between the parties were clearly a form of public/private partnership. But the parties' aspirations and shared vision for the Town Centre were just that. They did not create contractual obligations unless and until such obligations were set out in the contracts the parties subsequently entered. That was recognised from the outset in the MoU of 2 July 2004 which stated:

> This [MoU] has been developed over a series of meetings between the parties during February and March 2004. It does not replace the need for entering a more detailed formal contractual relationship over any specific joint development project.
>
> Nothing in this [MoU] is intended to constitute a relationship between the Council and [a NZRPG company] in the nature of a partnership or joint venture, or to constitute a Council controlled organisation as defined in s 6 of the Local Government Act 2002
>
> While the parties have entered into this [MoU] in good faith and with the intention of working together as provided in this memorandum, it is not a legally binding contract, and is not intended to impose legal obligations on either party.

[28] When further agreements were subsequently entered into they were specific in terms of what was, and what was not, to be treated as legally binding. As we address in greater detail below, there were no specific obligations of the kind NZRPG rely upon and there were express terms preserving Waitakere City's ability to exercise

statutory powers and functions in ways that were not constrained Waitakere City's contractual relationship with NZRPG. Given this framework for the parties' contractual obligations, the scope for finding additional obligations based on the overall vision as a matter of interpretation or implication is much reduced.

[29] We do not consider it matters in law whether the contracts are characterised as "vertical" or "horizontal". We agree with the High Court that the contracts should be interpreted in light of their interrelationships and that they were focused on the delivery of several different particular items of infrastructure for particular purposes.[58] Those purposes were informed by the evolving context of each party's objectives, PC 15 and the CDPs, and the legislative and organisational changes to local government. That does not turn PC 15 or the CDPs into contractual documents. Planning instruments do not in themselves give rise to contractual obligations. PC 15 retains its status as part of the planning framework as part of the Auckland Unitary Plan: a statutory resource management legal framework. It provides statutory context within which contracts, including those made by the parties in the present case, are negotiated and effected. A CDP is a planning document which outlines and guides the development of a particular area and is lodged as a resource consent.

[30] The salient point is that these are carefully negotiated and legally drafted relational contractual arrangements. They were formulated and effected over a prolonged period of high commercial uncertainty and fundamental reform of the local authority structures and organisations in Auckland. The negotiations and increasingly specific agreements, regarding several different particular aspects of work relevant to the original vision, necessarily responded to these evolving circumstances. That context informs the interpretation of the contracts in accordance with *Firm PI 1 Ltd* and *Bathurst Resources Ltd*.[59] The relevant text of the contracts remains "centrally important" and is necessary to determine the true agreement of the parties.[60] The interpretation must be undertaken with reference to the words of the relevant contract(s), read as a whole and against the relevant context, in relation to each of the

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58 At [299]–[300].

59 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 4, at [60]; and *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 4, at [46].

60 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 4, at [63]. See also: *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 4, at [46].

four specific issues raised on appeal. In relation to the alleged terms implied as a matter of fact, whether it is strictly necessary to imply such a term is similarly influenced by the context.

[31] There is a further, related reason why Waitakere City and Auckland Council could not contractually commit to certain outcomes in relation to the Town Centre. Some outcomes would depend on those bodies exercising their statutory functions under the Local Government Acts and the Resource Management Act. A contractual commitment to exercise statutory decision-making functions to secure a particular outcome, or to favour a particular party, may have been unlawful and unenforceable.[61] This feature was recognised in particular clauses of the contractual documentation. For example, the IFA provided:

> 50. [A NZRPG company] acknowledges that:
>
> a) The Council, in its capacity as a territorial authority, is required to carry out its statutory consent functions under various statutes, including without limitation the Resource Management Act 1991, the Building Act 1991 and the Local Government Acts 1974 and 2002 in accordance with the provisions of those statutes.
>
> b) Except as expressly provided in this agreement, the granting by the Council of any consent or approval by the Council as territorial authority under any of those Acts shall not of itself be deemed to be a consent or approval by the Council in its capacity as a party to this agreement.
>
> c) The Council is bound by its statutory obligations to exercise its powers, including discretionary powers, and duties under any of those Acts without regard to any relationship which it may have with the Owner under this agreement.

[32] There were other clauses to similar effect in other agreements.[62] This is a further important contextual factor when assessing the scope of the councils' obligations as a matter of interpretation, or as a matter of implied term.

[33] Moreover, the councils as elected bodies could be expected to exercise their public functions in a way that recognised the potentially changeable priorities of local government, particularly with respect to longer term aspirations involving

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61 See: *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) at 547–548.

62 Including cl 3.7 of the CSAs and cl 15 of the MSSAA.

significant public expenditure. These realities are reflected in the establishment of Auckland Council and Auckland Transport during the period of the contracts. Given these realities of local government, and local government politics, any contractual commitment to substantial community infrastructure projects such as a new town centre would be significant. Council officers would need council authority to make major commitments of this kind. Against that backdrop, any such contractual commitment could be expected to be express.

Issue 1: Was Fred Taylor Drive required to be widened so as to integrate Original Westgate with the Town Centre?

[34] Auckland Council and Auckland Transport widened Fred Taylor Drive while retaining it as an arterial route, rather than developing it as a town centre street with a focus on encouraging pedestrian activity. The first issue is whether that was inconsistent with Auckland Council's contractual obligations. NZRPG submit that Auckland Council and Auckland Transport were contractually obliged to widen Fred Taylor Drive with the form and function appropriate for a town centre road, integrating Original Westgate with the Town Centre, as contemplated by PC 15.

What happened?

[35] In addition to the general factual context outlined above, some of the non-contractual documentation has contextual relevance to this issue. Otherwise, the primary focus is on the contractual documentation. We have taken into account the evidence of the witnesses but we do not consider that it sheds material light on the issues before us.

[36] First, the MoU is relevant as context even thought it has no binding legal effect. It recorded the nature of the anticipated contractual relationship between the parties, including that the shared vision did not create contractual obligations in the absence of express agreement. A key focus of the MoU was to agree a vision and concept design for an integrated Westgate city centre. The only reference in the MoU to what became Fred Taylor Drive is where the parties recognised that:

> Westgate is currently constrained from desirable growth by the limitations imposed by the location of the current Metropolitan Urban Limit (MUL) on Hobsonville Road/State Highway 16 and the current terms of the District Plan.

[37] Second, of the 31 ways in which Policy 11.44 of the Waitakere City District Plan was to be effected in relation to all precincts, those most relevant to Fred Taylor Drive are:

> (g) Activities and buildings should be designed and located so that they address the street and public spaces thereby contributing to amenity values and in particular pedestrian accessibility and safety.
>
> …
>
> (y) Ensuring that the location and access for major traffic generators is compatible with the safe and efficient operation of the state highway network.
>
> …
>
> (aa) Ensuring that vehicle access to State Highway 16 occurs only at the Strategic Access Points shown on the Massey North Urban Concept Plan, unless it can be conclusively demonstrated that alternative access points would result in a better outcome for all of the following:
>
> - the efficiency of the road and state highway network,
> - public transport,
> - pedestrian activity,
> - urban amenity,
> - an integrated town centre focused around the mainstreet.
>
> …
>
> (ac) Ensuring that once state highway status has been removed from Fred Taylor Drive and the section of State Highway 16 north of Don Buck Road to the edge of the Massey North Town Centre Special Area, that it is redesigned in a manner which encourages pedestrian activity and movement and contributes to the integration of the Massey North town centre with a high degree of urban amenity, while ensuring vehicle movements are facilitated.
>
> (ad) Ensuring that the integration of the Westgate/Massey North town centre across Fred Taylor Drive is not compromised by heavy truck traffic travelling from the Massey North Special Employment area by introducing engineering and traffic management mechanisms that direct truck traffic away from Fred Taylor Drive.
>
> (ae) Protecting the safety of pedestrians passing between Precinct A and Precinct E, and the function of Fred Taylor Drive, by providing

> pedestrian linkages which encourage pedestrian activity across Fred Taylor Drive, between Precincts A and E Town Centre Mainstreets, when Precinct A is developed.

[38] The Waitakere City District Plan also provided, in relation to Policy 11.44, that Precinct C would:

> (a) Enable commerce, and business, one supermarket, retail services and retail sales to occur along the frontage to Fred Taylor Drive, and along the existing State Highway 16.

[39] The explanation stated:

> The Massey North Town Centre Special Area has been identified as a strategically important location for the development of the town centre. The aim is to expand the existing Westgate Town Centre to develop into an expanded and integrated town centre. In this expansion Fred Taylor Drive will remain a busy road servicing the town centre, which could have the effect of separating pedestrian activity between Precinct A and Precinct E. Therefore, it is important that provision is made for convenient, safe and attractive pedestrian connections across, Fred Taylor Drive when the state highway status is removed, while recognising that Fred Taylor Drive, will also be an important district arterial. This is to be addressed by comprehensive development plans for Precinct A and in any engineering design work for Fred Taylor Drive. The District Plan seeks to ensure that the development of a new pedestrian focused town centre to the north of Fred Taylor Drive is integrated with the existing Westgate precinct, to ensure that the area is developed as one integrated centre. The intended policy outcome will be a town centre which incorporates a compact, integrated, range of mutually compatible activities and facilities, developed in close proximity to important public and private transport corridors.

[40] The agreements subsequently entered into confirmed the more limited and specific character of the parties' contractual obligations. Clause 1 of the IFA, of 22 February 2010, makes clear the evolving nature of the Town Centre in a way that underscored the lack of a contractual obligation on the Council in the absence of specific terms:

> 1. The parties are entering into this agreement with the intention to be bound by its terms but on the understanding that as implementation of this agreement and development of the new town centre evolves it is likely that new issues and/or … issues of detail will arise which may require further negotiation and agreement. The parties agree to work together and to negotiate in good faith to find mutually agreed solutions and to incorporate any such agreements into this agreement by way of appropriate variation of agreement.

[41] Clause 4(a) of the IFA is the primary operative clause relevant to this issue. It required Waitakere City to undertake or procure, at its expense:

> (a) The widening of [Fred Taylor Drive] between the intersection of State Highways 16 and 18 to the Don Buck Road intersection. This work includes the reconstruction of relevant intersections between [Fred Taylor Drive] and the roads marked R1a1, R2a and R9h on the plan. In this regard [a NZRPG company]:
>
> (i) acknowledges that [Waitakere City's] ability to undertake this work is [dependent] on an approval from New Zealand Transport Agency ("NZTA") so long as this part of [Fred Taylor Drive] remains part of the State Highway network. [Waitakere City] will endeavour to procure the consent of the NZTA at the earliest possible date but accepts no responsibility in circumstances where the giving of that consent is delayed;
>
> (ii) is aware that some land may be required to be taken from the [Fred Taylor Drive] frontage of the [NZRPG company] land to enable this widening to occur. The dimensions of the land to be taken cannot be determined until final design of the road is completed. [Waitakere City] will use its [best] endeavours to ensure that the amount of land taken is minimised as far as is reasonably practical having regard to good road design principles;
>
> (iii) agrees that [Waitakere City] will acquire that part of the [NZRPG company] land required for road widening under [the Public Works Act] and will compensate [the NZRPG company] for the land taken in accordance with [the Public Works Act].

[42] The only other reference to "widening" is found in cl 4(b):

> b) The widening of State Highway 16 and the construction of Northside Drive (marked A 18 and A 15 on the plan at Schedule 2). This work will also include the construction of storm water ponds 6 and 7 on the plan at Schedule 2. For the avoidance of doubt, [Waitakere City] has not presently committed to the construction of a bridge over the motorway (A 14 on the plan at Schedule 2) nor to the construction (or contribution to the cost of construction) of ramps connecting Northside Drive to the motorway, although some of the funding for this work has been identified in the [Waitakere City's] 2009–2019 long term council community plan ("LTCCP").

[43] Clause 46(a) of the IFA provided:

> 46. Any work required to construct infrastructure which will be vested in [Waitakere City], or in respect of work in respect of which it is agreed that [Waitakere City] will make a financial contribution, must be:

a) undertaken to the standards and in accordance with the requirements of the relevant [Waitakere City] codes of practice. The plans and specifications for that work must be approved by [Waitakere City], acting as a Local Authority, prior to commencement of work. In the absence of agreement prior to the commencement of work, the cost of works in excess of the standards set out in the relevant [Waitakere City] code of practice will not be reimbursed by [Waitakere City] to NZRPG;

[44] In cl 50(c), a NZRPG company acknowledged Waitakere City, as a territorial authority, was bound to exercise its powers and duties under various statutes — including the Resource Management Act, Building Act 1991 and Local Government Acts 1974 and 2002 — without regard to any relationship it may have with the owner of the company under the IFA.

[45] Clause 52, an entire agreement clause, provided: "This agreement constitutes the entire agreement between the parties relating to the subject matter and supersedes all prior agreements or undertaking whether oral or written." Whilst such a clause does not wholly exclude the possibility of implied terms, the clause confirms the specific nature of the contractual commitments that the parties were agreeing upon.

[46] CSA 1, the CSA of 28 October 2010, provided, relevantly:[63]

3. DEMARCATION SCHEDULE

3.1 Allocation of Responsibilities: [Waitakere City] and [two NZRPG companies] will:

(a) acquire each parcel of land;

(b) apply for and use their best endeavours to obtain each of the consents;

(c) undertake the design work; and

(d) undertake the construction works,

that are described in the Demarcation Schedule as being the responsibility of:

(e) "WCC"; and

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[63] CSA 1 was re-executed between the two NZRPG companies and Auckland Council on 29 November 2010. The Demarcation Schedule was provided for in cl 2 of that agreement in the same terms. For consistency, we refer to cl 3 of CSA 1 when discussing the obligations in the Demarcation Schedule in this judgment because it is what originally binds the parties.

(f) "NZRPG",

respectively. For the purposes of this clause 3:

(g) the works described in the Demarcation Schedule are the works which correspond to that description in the IFA;

(h) references in the Demarcation Schedule to:

(i) "WCC Code of Practice" mean the [Waitakere City's] Code of Practice for City Infrastructure and Land Development – Engineering Standards Manual …

…

3.3 **Precedence:** To the extent that any provision of this agreement is inconsistent with any provision of:

(a) the IFA, this agreement will prevail;

(b) any other Related Agreement, the latter will prevail.

[47] CSA 1 also contained an entire agreement clause, at cl 4.17.

[48] The Demarcation Schedule attached to CSA 1 is headed "MNTC (PC 15) — Proposed Infrastructure Development Works Programme Schedule & Structure". Part 2.8 divided the works for what would become Fred Taylor Drive into 18 elements, including roading, intersection, footpaths, streetlights, street furniture, signage, landscaping and bus stops. It provided brief descriptions, quality standards and allocation of responsibilities for each. Waitakere City was designated to be responsible for all of the land acquisition, consents, design, construction and funding for all 18 elements. Almost all of the quality standards were:[64]

(a) Waitakere City's Code of Practice for City Infrastructure & Land Development (the Code), which described itself as an engineering standards manual. Section 3 dealt with transport design, and provided guidelines for the design of a number of aspects of infrastructure. In particular:

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[64] The others were: "Network utility Provider requirements" for telecoms, power and gas; and "100mm diameter (minimum)" for communications duct.

(i) Section 3.1 states it is "intended to assist in the interpretation of the District Plan … and help with design … of the transport network", and to apply to new transport infrastructure.

(ii) Section 3.3 notes:

> Roads are to be designed to fit their context and their purpose and to meet the needs of all users, not merely drafted from standard templates. The design process shall take into account the vision, objectives and desired outcomes of the 'Waitakere City Transport Strategy 2006–2040' and consider and respond to the place function, as well as the movement function.

(iii) Section 3.4 dealt generally with the design requirements of roads, including in relation to layout, pavement design, kerbs and channels, surface water channels, catchpits, sub grade drainage, and overland flow paths.

(b) The existing Westgate Town Centre development at the date of the agreement (the Westgate standard). NZRPG submit, consistent with the evidence of Mr Robertson, that this refers to standards applicable at other areas of Original Westgate, for the purpose of design consistency.

(c) The Massey North Town Centre CDP: Part 3 — Design Conditions (the CDP (Part 3)). It stated that it "contains detailed conditions applying to both Precinct[s] A and B that relate to design matters", divided into three different types: specific conditions expected to be strictly applied (denoted in red text); "aspirational" conditions which could not be written as hard and fast requirements (denoted in green text); and urban design principles "to be treated very much as high level guidance" (denoted in blue text). These would ensure an appropriate balance between certainty and flexibility.

[49] These quality standards were the same for Fred Taylor Drive as they were for other roads. A guidance note in the Demarcation Schedule provided that the Westgate standard was only to be superseded if required by the Code or if

Waitakere City requested a higher standard and paid for all additional costs. Waitakere City later did so in WDA 3 and WDA 7, in relation to the "black" and "brown" roads.[65]

Judgment under appeal

[50] The High Court held that the IFA described the widening of Fred Taylor Drive and other works and projects broadly, imposed no obligation on Waitakere City to agree or consult with NZRPG over the design and construction of the works relating to Fred Taylor Drive, and provided no financial parameters for them.[66] In relation to the IFA:[67]

> [395] On the face of cl 4(a) itself, therefore, "widening" meant simply to make Fred Taylor Drive wider and contained no connotations as to any particular design of the road to be widened. Clause 4(a)(ii) supports that conclusion. In that clause, [the NZRPG company] acknowledged that the dimensions of its land to be taken for the widening of Fred Taylor Drive could not be determined until the final design of the road was completed and Waitakere City undertook to use its best endeavours to ensure that the amount of land taken was minimised as far as reasonably practical having regard to good road design principles. Those respective acknowledgements and undertakings confirm that, at the time the IFA was negotiated and executed, there was no agreed design for the widening of Fred Taylor Drive.
>
> [396] Based on the language of cl 4 and the structure and purpose of the IFA as a whole, I find that:
>
> (a) the undertaking by Waitakere City for the "widening" of Fred Taylor Drive between the intersection of [State Highway 16] and [State Highway 18] and Don Buck Road was clear and unambiguous; it was simply to make Fred Taylor Drive wider in the section between the motorway and Don Buck Road.
>
> (b) at the time the IFA was executed, there was no agreed design for the widening of Fred Taylor Drive between the intersections with the motorway and the Don Buck Road;
>
> (c) the IFA provided no guidance on what that design should be other than the general direction that Fred Taylor Drive was to be widened; and

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65 The "black" and "brown" roads received those names in reference to the colour coding used in the Massey North Town Centre — Public Land Diagram attached as a schedule to the IFA. The "black" roads were core roads and the "brown" roads were non-core roads.

66 Judgment under appeal, above n 1, at [386]–[390].

67 At [394].

(d) the IFA provided no process by which Waitakere City was required to consult [NZRPG companies] on the design and construction of the widening of Fred Taylor Drive.

[397] Accordingly, on the face of cl 4 and the IFA as a whole, Waitakere City gave no undertaking and owed no obligation to [NZRPG companies] with respect to the design of Fred Taylor Drive beyond the undertaking to widen the road.

[51] The Judge considered what PC 15 and related planning instruments said about the form and function of Fred Taylor Drive, and the relevance of the actions of the parties regarding its design after the execution of the IFA. He found that Waitakere City had intended that Original Westgate should be integrated with the Town Centre.[68] But PC 15 and the CDP applied only north and south of Fred Taylor Drive, not to Fred Taylor Drive itself.[69] They were planning documents that said little about how Fred Taylor Drive was to be designed.[70] The Judge considered:

[408] These elements of Policy 11.44 and its explanation support the plaintiffs' argument that PC 15 and the MNUCP reflected a common understanding that the design and form of Fred Taylor Drive would need to promote the integration of Original Westgate with the new Town Centre, even though PC 15 and the MNUCP did not apply to Fred Taylor Drive. However, they also support the defendants' argument that Fred Taylor Drive would remain a busy road and an important arterial route, albeit at lower predicted traffic volumes and speeds than when it was SH 16. It is also relevant that the policy and the explanation focused on measures to facilitate pedestrian movement and connections across Fred Taylor Drive, rather than the form and design of the road itself. In that respect, the policy was directed to the effects that the design of the road would have to address rather than the design of the road itself.

[409] In fact, it is apparent that, in June 2007, when PC 15 and the MNUCP were adopted, there was no agreed plan or design as to how to achieve an appropriate balance between integrating Original Westgate with the new Town Centre while maintaining Fred Taylor Drive's arterial function. At that stage, the form and function of the road were limited to general concepts relating to mitigation of the effects of the road rather than its design. That continued to be the case over the ensuing period.

…

[411] The CDP for Precinct A did not advance matters materially in terms of the design of Fred Taylor Drive. As Mr Lange says, the CDP did not address the redevelopment of Fred Taylor Drive itself. While the design conditions in CDP Part 3 addressed street frontages along Fred Taylor Drive,

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68 At [401].
69 At [402].
70 At [403].

> they did not address Fred Taylor Drive itself. Conditions 21 and 24 were an attempt to deal with the consequences of actions outside the boundaries of the CDP. They sought to address the impact that future resource consent decisions might have on the traffic network if plans for Fred Taylor Drive and Northside Drive were not implemented. They did not and could not bring Fred Taylor Drive into the CDP.
>
> [412] For these reasons, I am satisfied that PC 15 and the related planning instruments did not provide an adequate basis for inferring any agreement on the part of NZRPG and Waitakere City on how Fred Taylor Drive was to be designed when widened in accordance with cl 4 of the IFA, except in the sense that the documents identified issues that had to be addressed in any design of the road.

[52] The Judge reached the same conclusion about the evidence of NZRPG witnesses about the intentions behind PC 15 and the CDP, and about the intention with respect to the design of Fred Taylor Drive.[71] Neither did the Judge consider that the post-contract behaviour of NZRPG, Auckland Council or Auckland Transport established any agreement that Waitakere City would build a road of the kind NZRPG allege.[72] He concluded:

> [426] For the reasons already given, I am satisfied that, when the undertaking in cl 4(a) of the IFA was made, there was no agreed design for the road and Waitakere City made no commitment in relation to the design of the road. Waitakere City undertook only to widen the road. It would have been apparent to an objective observer that widening of the road would entail a design and a process to arrive at that design. Such an observer would have concluded that, had there been an intention to commit Waitakere City to a particular design or design parameters or to a process by which that design would be approved by or consulted with [NZRPG companies], it would have been a simple matter to have provided for this, as was done for the design and construction of the works in cls 4(c) and 4(f), as well as for the Black and Brown roads. No such provision was made. The obvious inference is that the parties accepted that [the NZRPG companies] had no right of input to or approval of a major item of infrastructure that was to be built by Waitakere City at Waitakere City's expense on land that was, or was to be, owned by Waitakere City.
>
> [427] I am satisfied that these arrangements were considered and deliberate and, assessed objectively, are consistent with an acceptance by NZRPG that Waitakere City had made no contractual commitment with respect to the design of works to be built on non NZRPG land. It follows that, as far as the IFA was concerned, Waitakere City gave no undertakings as to the design of Fred Taylor Drive.

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71 At [413]–[414].
72 At [425].

[53] The Judge also concluded that CSA 1 and the Demarcation Schedule made no material change to the parties' obligations "with respect to the design and construction of Fred Taylor Drive from those set out in the IFA".[73] He found that:

(a) Ensuring consistency and integration may have been the purpose of assigning the quality standards to Fred Taylor Drive. But that did not mean Auckland Council accepted a contractual obligation to design and build the road with the form and function contended for by NZRPG, given the purpose and language of the IFA and CSA 1.[74]

(b) The Demarcation Schedule attempted "to record in a single place" the agreed works and allocation of responsibilities.[75] But it "began life" as a project management document.[76] It was not intended to, and did not have the effect of, imposing contractual obligations for the design of works over and above what was in the IFA.[77] Its purpose, and process of development, was "inconsistent with an intention to change fundamentally the nature of the contractual relationship".[78] In assigning priority to CSA 1, cl 2.3 was intended to ensure that any minor changes in the works would be reflected in the document that was later in time.[79] In any case:

> [444] Whatever the hierarchy of the standards, and whatever the effect of specifying two or more of the standards, the quality standards did not prescribe standards applicable to the key elements which [NZRPG] say were necessary to deliver the intended form and amenity of Fred Taylor Drive.

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73 At [451].
74 At [437].
75 At [438].
76 At [439].
77 At [438].
78 At [441].
79 At [441].

(c) In relation to the quality standards:

(i) There is no evidence of what the Westgate standard was for those elements and NZRPG did not plead non-performance of it.[80]

(ii) The Code was a regulatory document aimed at particular aspects of public infrastructure which did not prescribe "how Fred Taylor Drive or any other road was to be designed AND constructed".[81] There was nothing in it "that could be considered as imposing specific obligations on the defendants with regard to the design and construction of Fred Taylor Drive".[82]

(iii) The CDP (Part 3) did not apply to Fred Taylor Drive, which was outside the boundaries of PC 15 and said nothing about the design and construction of the road.[83] And there was nothing in it that prescribed how the "black" and "brown" roads were to be designed and constructed in relation to the elements NZRPG say were necessary.[84]

Submissions

[54] Mr Gray submits:

(a) The High Court's conclusion, that "widening" means "simply to make wider",[85] does not withstand scrutiny because "widen" is capable of numerous meanings. Removing all substance from the obligations means the commercial purpose of the contract is lost.

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80 At [446].
81 At [447].
82 At [447].
83 At [449].
84 At [450].
85 At [394].

(b) The CDP (Part 3) and the Code quality standards were incorporated into CSA 1 by reference. The contracts need to be read together. The fundamental contractual obligation in cl 4(a), read in context alongside CSA 1, was to reconstruct Fred Taylor Drive with a form and function required to achieve the outcomes of a town centre road as prescribed in PC 15. Traffic management was to provide for lower traffic volume, slower speeds and a "place" function, enabling high levels of integration and connectivity so the new and old town centres were not severed in two. PC 15 was not the source of obligations but the culmination of planning through which Waitakere City outlined how it would redevelop Fred Taylor Drive to fit within the Town Centre context. Other planning documents reinforce this.

(c) By the time the IFA and CSA 1 were executed, the CDP process was at an advanced stage and there was a consensus regarding the future role of Fred Taylor Drive. CSA 1 was an umbrella agreement between the parties on amalgamation of the local authorities, that incorporated design standards for each piece of work. But the High Court failed to treat the text of CSA 1 as centrally important, rendering it meaningless. It failed to have regard to evidence given by multiple witnesses about the substantive purpose and effect of the Demarcation Schedule being incorporated into CSA 1. The Demarcation Schedule specified detailed design standards and strong design directions for the design and construction of the Fred Taylor Drive works. The designer had to ascertain which applicable quality standards contained relevant directions for each specific component of work within an element and each zone. There is no evidence a design process was undertaken with reference to CSA 1 and its quality standards. As a result, the redevelopment did not have a high level of pedestrian amenity or a multi-modal roading carriageway design devised to reduce traffic speeds. That was a breach of contract.

[55] Mr Lange submits the High Court did not err in concluding they did not breach any contractual obligation in respect of Fred Taylor Drive. NZRPG's evidence said

"little about what, if anything, the parties to the IFA agreed would be designed".[86] It would not have been financially prudent or practically sensible to provide for the level of design finish from the outset, without knowing what form the adjoining land use development would ultimately take. That required the exercise of subjective judgment by a local authority required also to have regard to its regulatory functions. The Demarcation Schedule identified multiple quality standards, which were thereby incorporated into the contract by reference. But they were no more than a reference point from which it was for Waitakere City to develop an appropriate design. They did not specifically require or prescribe immediate outcomes for Fred Taylor Drive. The design exercise became the responsibility of Auckland Council and Auckland Transport, was inherently subjective and incapable of being reduced to specific enforceable requirements. And Fred Taylor Drive was constructed in accordance with the CDP (Part 3), for example in relation to building frontage typologies.

The contractual obligation regarding Fred Taylor Drive

[56] As we observed, we interpret the contractual provisions of the IFA and CSA 1 with reference to their words, read as a whole, and against the context at the time each was entered into. That includes the context of the evolving circumstances of the GFC, the local authority reforms and the evolving relationship between the parties as reflected in, for example, the MoU and planning instruments such as PC 15.

[57] In terms of the context, the MoU had nothing to say about the design of Fred Taylor Drive. It was essentially a relationship document and was explicit in having no legal effect, as is agreed by the parties. It expressly recognised that the parties' vision for the Town Centre was not contractually binding. The plan change effected by PC 15 outlined a vision for the area. It included, as discussed in the Waitakere City District Plan, Fred Taylor Drive remaining "a busy road servicing the town centre". It also included, at Policy 11.44(i)(ac), that the redesign of Fred Taylor Drive would be:

> … in a manner which encourages pedestrian activity and movement and contributes to the integration of the Massey North town centre with a high degree of urban amenity, while ensuring vehicle movements are facilitated.

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[86] At [413].

[58] As the High Court stated, Policy 11.44 "recognised that the inherent tension between reconciling the road's traffic function and integrating Original Westgate with the new Town Centre was likely to remain".[87] And when PC 15 and the MNUCP were adopted, there was no agreed plan or design as to how to achieve an appropriate balance.[88] We agree with the High Court Judge that:[89]

> … PC 15 and the related planning instruments did not provide an adequate basis for inferring any agreement on the part of NZRPG and Waitakere City on how Fred Taylor Drive was to be designed when widened in accordance with cl 4 of the IFA, except in the sense that the documents identified issues that had to be addressed in any design of the road.

[59] We also agree with the Judge that neither the IFA nor CSA 1 imposed an obligation on Waitakere City to consult with NZRPG over the design and construction of the widening of Fred Taylor Drive.[90] Clause 1 of the IFA explicitly recognised the evolving nature of the development of the Town Centre. Clause 4(a) required Waitakere City to widen the road and reconstruct the relevant intersections, depending on approval of the NZ Transport Agency | Waka Kotahi (Waka Kotahi) while Fred Taylor Drive was part of the State Highway network. There was agreement between the parties that land from a NZRPG company might be required for that purpose. But there was no specification of the nature of design or construction to be undertaken by way of contractual commitment.

[60] Having said that, we do not agree with the High Court Judge that the contractual obligation on Auckland Council and Auckland Transport was only to make Fred Taylor Drive wider. Rather, the contractual commitment was to make Fred Taylor Drive wider in a manner compatible with the parties' aspirations, so far as practicable in the circumstances as they evolved. Further obligations were then agreed in CSA 1 and the Demarcation Schedule. But we agree with the High Court that CSA 1 and its Demarcation Schedule quality standards did not specify the requirements for the design and construction of Fred Taylor Drive.[91] Its primary effect in relation to Fred Taylor Drive was, via cl 3.1 and item 2.8 of the

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87 At [405].
88 At [409].
89 At [412].
90 At [389] and [396(d)].
91 At [444].

Demarcation Schedule, to allocate sole responsibility to Waitakere City for land acquisition, consents, design, construction and funding of all 18 elements of the works associated with Fred Taylor Drive. Clause 46(a) of the IFA provided that it was the standards and requirements of the Waitakere City codes of practice, and approval by Waitakere City, that governed the works. As the Judge said:[92]

> It would have been apparent to an objective observer that widening of the road would entail a design and a process to arrive at that design. Such an observer would have concluded that, had there been an intention to commit Waitakere City to a particular design or design parameters or to a process by which that design would be approved by or consulted with [a NZRPG company], it would have been a simple matter to have provided for this, as was done for the design and construction of the works in cls 4(c) and 4(f), as well as for the Black and Brown roads. No such provision was made. The obvious inference is that the parties accepted that [a NZRPG company] had no right of input to or approval of a major item of infrastructure that was to be built by Waitakere City at Waitakere City's expense on land that was, or was to be, owned by Waitakere City.

[61] The "quality standard" column in the Demarcation Schedule primarily referenced three things — the Westgate standard, the Code and the CDP (Part 3). We make the following observations about those standards:

(a) First, the Westgate standard was not an objectively identifiable and specific standard that could be sensibly relied upon as the basis for a binding contractual obligation. That is implicitly recognised in NZRPG's decision not to focus on it in its pleadings and in submissions on appeal.

(b) Second, the transport design section of the Code was a general set of guidelines, outlining factors relevant to the design of transport infrastructure within Waitakere City in the exercise of public powers and functions. It did not specify any particular requirements in relation to Fred Taylor Drive. NZRPG offer a table in their written submissions that attempts to compare 18 aspects of the Code (and associated documents) with the built form. We do not consider that any of those

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92 At [426].

aspects constituted contractual quality standards for the design and construction of Fred Taylor Drive.

(c) Third, the CDP (Part 3), came the closest to prescribing the outcomes contended for by NZRPG. But it was still primarily a statement of general vision, reflecting its history as a project management document. It did not relate specifically to Fred Taylor Drive. It said nothing specific about the design and construction of Fred Taylor Drive. Many of the conditions in it were aspirational (green) or high-level guidance (blue). Of the more specific (red) conditions that were intended to be "strictly applied", NZRPG do not identify any as requiring anything specific in relation to Fred Taylor Drive, if indeed the document applies to Fred Taylor Drive (which it does not mention). None appear to do so. Of the most relevant sections:

(i) Maps in s 4, concerning the "Street network/Street space allocation", identify Fred Taylor Drive as a State Highway or as Hobsonville Road. It is depicted as one boundary of the area with which the CDP is concerned. It does not feature in the Street Design Matrix, which prescribes "the design parameters and space allocation for each street link", including aspects such as "One-way / Two-way", "Speed Limit" and "Footway width".

(ii) It does not feature at all in s 5, the "Streetscape elements/ Outdoor dining" section.

(iii) Section 6, relating to "Public Transport/Cycle facilities", appears to suggest some of Fred Taylor Drive would have an "[o]n road cycle lane", although that is inconsistent with the map in s 4. That is not the subject of any specific (red, blue or green) conditions in either section.

[62] We do not accept the submission that the IFA or CSA 1 or the CDP (Part 3) and other standards referred to in CSA 1, read in context, with or without the rest of the

contractual documentation, constitute a contractually binding specification of quality standards for the design and construction of Fred Taylor Drive. A reasonable person having all the background knowledge reasonably available to the parties in the situation in which they were at the time of the contract would not take that meaning from these documents, in terms of the test in *Firm PI 1 Ltd*. A reasonable person would have expected the parties to have explicitly specified such standards, which could have been expected to impact cost, quality and timing of the works, if that was the meaning the parties intended, as they said they would in their other contractual documents. To suggest otherwise appears contrary to commercial realities of risk allocation.

[63] There is no design brief of specified minimum technical requirements to be enforced, as there were in tender documents in the United Kingdom's Supreme Court judgment of *MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd*, which Mr Gray relies upon.[93] That case is distinguishable as a consequence.

[64] This ground of appeal fails.

Issue 2: Was there an implied term to construct Northside Drive East?

[65] The second issue is whether Auckland Council and Auckland Transport breached a contractual obligation to NZRPG under the IFA and/or CSA 1 to construct Northside Drive East. This is related to the first issue but also turns on argument about different kinds of implied terms.

[66] NZRPG say that Auckland Council and Auckland Transport could only meet their contractual commitment to enable Fred Taylor Drive to be repurposed as a busy town centre road if an alternative east-west route via Northside Drive East was constructed. So, NZRPG say, a term that Northside Drive East would be constructed was implied as a matter of law.

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93 *MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59, [2018] 2 All ER 22.

What happened?

[67] NZRPG submit Waitakere City gave repeated assurances Northside Drive East would be built contemporaneously with the Town Centre, and Waitakere City in its Long Term Council Community Plan (LTCCP) for 2009–2019 allocated funding to do so. They further submit Auckland Transport entered into a cost sharing agreement with Waka Kotahi to construct the bridge over the motorway that would form part of Northside Drive East, and in 2012 Auckland Transport issued letters advising it wished to lodge a notice of requirement. Around 2015, however, Auckland Council and Auckland Transport halted the work on Northside Drive East and retained Fred Taylor Drive as an arterial route.

[68] There is no express reference to Northside Drive East in the IFA, other than it being shown as a yellow road. Rather, cl 4(b) of the IFA states:

> … For the avoidance of doubt, [Waitakere City] has not presently committed to the construction of a bridge over the motorway (A 14 on the plan at Schedule 2) nor to the construction (or contribution to the cost of construction) of ramps connecting Northside Drive to the motorway, although some of the funding for this work has been identified in [Waitakere City's] 2009–2019 [LTCCP].

Relevant law of implied terms

[69] In relation to this issue, NZRPG rely on observations by the House of Lords in *Southern Foundries (1926) Ltd v Shirlaw* and two New Zealand cases.[94] Each of those authorities relied on Cockburn CJ's statement in 1864 in *Stirling v Maitland*:[95]

> ... if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

[70] In 1991, in *Vickery v Waitaki International Ltd*, while noting varieties of implications in contracts comprise a continuous spectrum of shades, this Court

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94 *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 (HL) at 717. The two New Zealand cases relied on are *Rod Milner Motors Ltd v Attorney-General* [1999] 2 NZLR 568 (CA); and *Vickery v Waitaki International Ltd* [1992] 2 NZLR 58 (CA).

95 *Stirling v Maitland*, above n 4, at 852; *Southern Foundries (1926) Ltd v Shirlaw*, above n 94, at 712; *Rod Milner Motors Ltd v Attorney-General*, above n 94, at 579; and *Vickery v Waitaki International Ltd*, above n 94, at 63.

identified three broad classes: terms implied by rules of law in certain kinds of contract; terms deduced by implication or interpretation from the express terms of the contract; and (relying on *BP Refinery*) terms held to be implied to give business efficacy to the contract.[96] The express terms of the contract for catering of a freezing works did not oblige the freezing works to continue to employ a workforce.[97] But the Court held that the features and provisions of the contract, including express references to catering, meant that implicit in the contract was that the company would provide a workforce.[98]

[71] In 1998, in *Rod Milner Motors Ltd v Attorney-General*, this Court cited the three broad classes of contractual implication identified in *Vickery*.[99] Relying on *Stirling* and *Vickery*, the Court deduced, by implication from the express terms of an import licence contract, that a plan relating to the frequency and timing of calls for tender would be substantially adhered to.[100] Alternatively, the Court would have implied a term to give business efficacy to the contract, applying *BP Refinery*.[101]

[72] We do not need to determine the extent to which there remain distinct categories of implied terms — those implied as a matter of fact of the kind addressed in *Bathurst Resources*, and those implied as a matter of law addressed in *Stirling* and the subsequent New Zealand cases. As explained earlier, in *Bathurst Resources Ltd* in 2021 the Supreme Court clarified the test for contractual terms implied in fact in a particular context.[102] They took different views on the construction of the contract.[103] The majority of Glazebrook, O'Regan and Williams JJ discussed *Vickery* in relation to their fourth principle for implying a term, in stating that the uncertainty an implied term would leave about a large liability seemed to be an indicator that implication of the term was not appropriate.[104] The minority, of Winkelmann CJ and Ellen France J, acknowledged the line of New Zealand cases associated with *Stirling,*[105] and regarded

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96 *Vickery v Waitaki International Ltd*, above n 94, at 64.
97 At 63.
98 At 64–65 per Cooke P; 66 per Richardson J; and 67 per Gault J.
99 *Rod Milner Motors Ltd v Attorney-General*, above n 94, at 579.
100 At 579–580.
101 At 580.
102 *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 4, at [2].
103 At [3].
104 At [266].
105 At [204].

implication of a term in that case as necessary to ensure the business efficacy of the contract, consistent with the approach in *Vickery* and *Rod Milner Motors Ltd*.[106] The case law on terms implied by law that NZRPG rely upon, including that a party will not take steps to disable themselves from performing the contract, is consistent with *Bathurst Resources Ltd*. We accordingly address NZRPG's argument by reference to the approach to implication of terms described in *Vickery* and *Rod Milner Motors Ltd*.

Judgment under appeal

[73] The High Court held that there was no express provision in the IFA obliging Auckland Council and Auckland Transport to build Northside Drive East and the bridge.[107] The Judge understood NZRPG's case for there being such an implied term to be premised on the parties entering into a suite of contracts to deliver the vision for the Town Centre represented in PC 15, and intending to build all the necessary elements for that vision by October 2015.[108] There was little documentary basis for either contention,[109] consistent with the Judge's findings regarding issue 1. The Judge stated:

> [501] The notion that, standing apart from or in support of these specific contractual commitments, there was a separate unwritten contractual commitment to build major items such as a road and a bridge over a motorway and to do so by a particular date is inherently unlikely. It is inconsistent with the scheme of the contracts agreed between the parties. It is also inconsistent with the express language of cl 4(b) of the IFA. It is not supported by any direct evidence as to the parties' contractual intentions. It is also not supported by the parties' post contract conduct.

[74] There was no evidence of such a common expectation at the time PC 15 was adopted or the IFA was executed, as cl 4(b) of the IFA stated explicitly, reinforcing the statutory direction in s 96 of the Local Government Act 2002 about what could be taken from adoption of the LTCCP.[110] That negates and precludes any argument that later assurances had contractual force.[111] The Judge stated:

> [510] In terms of Lord Simon's test in *BP Refinery*:

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106 At [204]–[205].
107 Judgment under appeal, above n 1, at [495].
108 At [497].
109 At [498].
110 At [503]–[506].
111 At [507] and [509].

(a) I consider it doubtful that it would be reasonable and equitable to imply in a contract that made specific provision for the construction of specific assets a term to build major items such as a road and a bridge by a particular date.

(b) I do not accept that the implication of such a term would be necessary to give business efficacy to the IFA. Importantly, under the IFA:

(i) NZRPG and its associated companies were fully compensated in cash or in kind for the land they transferred to the Council and for the works they built on that land on behalf of the Council; and

(ii) there was no process by which NZRPG had any input into the design or funding of assets to be built by Waitakere City on land not owned by NZRPG.

(c) In a contract that made specific provision for the construction of specific assets, such a term is very far from obvious.

(d) I agree the term is capable of clear expression.

(e) I agree with Mr Lange that such an implied term would be directly contrary to the language of cl 4(b) of the IFA.

[511] I do not accept that the language of cl 4(b) was concerned only with the timing of construction. It was also concerned with the fact of construction; that is, the commitment to build the road and the bridge.

[512] For all these reasons, I do not accept that the defendants were under an obligation by virtue of the express terms of the IFA to construct Northside Drive East and the Bridge or that there was an implied term in the IFA in order to give the IFA business efficacy.

[75] The Judge rejected arguments based on the cases of *Vickery* and *Rod Milner Motors Ltd*:

[516] I consider there is no real similarity between the present case and the facts in *Vickery* and *Rod Milner Motors*. There was no existing set of circumstances that formed the basis of the understandings that informed the IFA. The parties were entering into a contract to provide specific infrastructure works for a new Town Centre that had yet to be built. As I have already held, the IFA and the other contracts concluded between the NZRPG companies and the defendants were not directed at delivering the overall vision for the new Town Centre.

[517] With respect to the construction of Northside Drive East and the Bridge, the parties to the IFA expressly recorded that there was no commitment to those works. Not only was there no existing set of circumstances relating to those items; there was an express caveat that no contractual commitment was made with respect to those assets. The obvious conclusion, therefore, is that the commitments made by NZRPG under

> the IFA, and for which it was fully compensated, were not premised on any expectation that Northside Drive East and the Bridge would be provided by any particular time frame.

Submissions

[76] Mr Gray submits the Judge misunderstood NZRPG's argument about the case law. NZRPG had argued for an implied term of the kind recognised in *Vickery* and *Rod Milner Motors* rather than of the kind addressed in *Bathurst Resources Ltd.* Northside Drive East was the only identified option for diverting east-west traffic away from Fred Taylor Drive and, by failing to build it, Auckland Council and Auckland Transport prevented themselves from complying with their contractual obligations in respect of Fred Taylor Drive. He relies on *Vickery* and *Rod Milner Motors Ltd* for the proposition that a term will be implied by law to the effect that a party is obliged not to act in a way that undermines the purpose of the bargain by rendering performance of their contractual obligations impossible. Such a term will be implied where:

(a) one party has represented it intends to continue with a certain practice or maintain a certain "substratum of fact";

(b) a contract was entered into on the basis that the practice would continue; and

(c) the benefit of the contract would be destroyed or seriously undermined should that practice not continue.

[77] Mr Gray submits Northside Drive East was integral to the roading network and the viability of Fred Taylor Drive becoming a town centre road. He acknowledges cl 50 of the IFA means Auckland Council and Auckland Transport could not have promised or been deemed to have grant consents for the construction of Northside Drive East as a party to the agreement. But the evidence here shows unequivocally that the parties entered into the IFA and CSA 1 on the basis Northside Drive East would be built.

[78] Mr Lange submits the plain language in cl 4(b) of the IFA makes crystal clear what was contractually committed to, and stands implacably in the face of any implied term obliging the construction of Northside Drive East and the bridge. There was no existing state of affairs which should not be undermined, as there was in cases like *Rod Milner Motors Ltd* and *Vickery.* There is no evidence of a commitment to have the Northside Drive East link completed by October 2015. CSA 1 and the Demarcation Schedule did not refer to Northside Drive East or the bridge.

Contractual obligation regarding Northside Drive East

[79] Mr Gray's submission relies on his argument about the contractual obligation on Auckland Council and Auckland Transport to design and build Fred Taylor Drive as a town centre road. We have rejected that argument. Accordingly, this submission also fails. By failing to build Northside Drive East, Auckland Council and Auckland Transport did not prevent themselves from complying with their contractual obligations regarding Fred Taylor Drive. If there was an implied term to the effect that Auckland Council and Auckland Transport would not take steps to disable themselves from performing the contract, it was not breached.

[80] Furthermore, as Mr Lange submits, cl 4(b) of the IFA was indeed clear. Not only was there no contractual agreement to construct Northside Drive East, but there was a contractual recognition that there was no such agreement, supported by both the entire agreement clause and the clause preserving Waitakere City's statutory discretion. Consistent with that, CSA 1 and its Demarcation Schedule did not mention Northside Drive East. If construction of such an element of the Town Centre was intended to be the subject of contractual agreement, it would make no commercial sense to leave to implication the requirement of its construction and the questions of who is to be responsible for the design, construction, funding and when it was to be constructed.

[81] The *Stirling*, *Vickery*, and *Rod Milner Motors Ltd* line of cases do not assist NZRPG. First, unlike those cases, the construction of Northside Drive East was not an existing state of circumstances upon which the contractual arrangements were founded. An intention that is explicitly negatived by the contract cannot found

implication of a term into that contract as a matter either of factual or legal interpretation. Second, construction of Northside Drive East was not required for the contractual arrangement the parties entered into, or its business efficacy.

[82] This ground of appeal fails.

Issue 3: When was Maki Street South required to be upgraded?

What happened?

[83] Before the development, Maki Street South (then known as Westgate Street) was a private road, owned and controlled by NZRPG as part of Original Westgate. The MNUCP recorded there being a continuous main street in the redevelopment, integrating Precincts A and E.

[84] On 8 May 2009, after PC 15 had been adopted, Waitakere City and three NZRPG companies entered into the MSSAA.[112] It provided for Waitakere City to acquire the land comprising the Maki Street South roadway, and easements in gross over the footpath land and other adjacent land, under the Public Works Act for $6 million plus GST.[113] Nothing in the MSSAA referred to the upgrade of Maki Street South. Clause 3 of the easement terms in Schedule 2 to the MSSAA expressly obliged the NZRPG company, "at its own expense" to:

> a) Maintain the easement facility so that the surface is safe and suitable for use by pedestrians. Upon an upgrading of the easement facility the [NZRPG company] will ensure that the design treatment and quality of the upgraded easement facility is consistent with the design, treatment and quality of the footpaths on the equivalent footpaths on the northern side of [Fred Taylor Drive].

[85] Clause 6 of the easement terms provided that cl 3 (and another clause) did not preclude the parties from agreeing the sharing of costs to renew, improve or replace the surface, lighting and landscaping or street furniture of the easement facility.

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112 At [304]. Auckland Council succeeded to Waitakere City's obligations per s 35(g) of the Local Government (Tamaki Makaurau Reorganisation) Act 2009: see [120].

113 At [81].

[86] CSA 1 did not refer to the MSSAA or its timing. But cl 3.1 of CSA 1 and item 2.4 of the Demarcation Schedule to CSA 1 allocated responsibility to Waitakere City for land acquisition, consents, design, construction and funding of land acquisition, earthworks, roading, intersections, footpaths and other elements in relation to Maki Street South. The quality standard specified in the Demarcation Schedule for all the upgrade works (other than land acquisition) was: "To match Precincts A and B". Thus CSA 1 shifted responsibility for the upgrade of footpaths in Maki Street South to Waitakere City, and provided some indication of the quality standard that would apply.

[87] In February 2012, NZRPG initiated discussions with Auckland Transport over the upgrade of Maki Street South, providing updated plans.[114] It is common ground that, by 2012, there was consensus that Maki Street South would be upgraded to "integrate with" Main Street, north of Fred Taylor Drive (which would later become Maki Street North), and that Auckland Transport intended to carry out the work in early 2014.[115] A letter sent by the Project Leader from Auckland Transport on 30 April 2012 noted that there was "a general intention by other parties to upgrade [Maki Street South] to a standard that is comparable with that [of the Town Centre]". But there was no explicit contractual agreement about what the integration was to involve.

[88] On 13 May 2013, Auckland Council and three NZRPG companies executed WDA 3, varying the IFA in respect of aspects of the town square. Relevantly:

(a) Recital O recorded:

> O. The parties have agreed to negotiate in good faith and use their best endeavours to agree as soon as practicable the following matters:
>
> …
>
> • the [Maki Street South] upgrade issue.

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114 At [153].
115 At [154]–[155].

(b) Clause 5, entitled "Road construction within Precincts A & B", provided for the paving finishes for the roads in the MNUCP in Precincts A and B that were previously owned by a NZRPG company. They were to be in accordance with version four of the Isthmus paving hierarchy (which specified different kinds of paving across the two precincts). It specified the arrangements, and the consequential costs to be paid by Auckland Council, would be confirmed by a separate agreement.

(c) Clauses 16 and 28(a) provided:

> [Maki Street South] upgrade
>
> 16. The parties are agreed that Council will contribute to the cost of upgrading [Maki Street South]. The exact nature and extent of this upgrade is the subject of further discussions between the parties (see clause 28).
>
> …
>
> Outstanding issues
>
> 28. The parties agree that they will negotiate in good faith and use their best endeavours to resolve the following matters as soon as practicable, which may be the subject of a further variation of the IFA or be subject to separate agreements:
>
> (a) the upgrade of [Maki Street South], in particular how much of [Maki Street South] is to be upgraded to Precinct A standard and how much is to be upgraded to Precinct B standard (if any);
>
> …
>
> The parties acknowledge that negotiations and any agreements reached in respect to the above matters will need to include Auckland Transport.

(d) Clause 33, an entire agreement clause, provided that WDA 3 "supersedes all prior agreements whether oral or written in relation to the subject matter of this variation agreement".

(e) Clause 34 confirmed the terms and conditions of the IFA, except as expressly provided in WDA 3, and provided that the provisions of WDA 3 would prevail over the IFA in the event of any conflict or discrepancy between them.

[89] The High Court judgment comprehensively traverses the details of the ensuing funding difficulties, proposed designs, tensions and negotiations between the parties from 2012 to 2017.[116] The details relevant to the determination of this issue are summarised below. In essence, each party blames the other for the delays during this period.

[90] On 31 May 2016, WDA 9 was signed by Auckland Council and two NZRPG companies. It was agreed both NZRPG companies would manage the design, consenting and engineering approvals, and procure and construct, the upgrade of Maki Street South and the adjoining footpaths. Auckland Council would be responsible for the costs. Under cl 2.2, the timeframes for completion of the works were to be specified in a programme. Clause 2.3 committed the parties to collaborative working, "in a spirit of trust and co-operation toward the creation of an open, ethical and progressive relationship with common objectives, mutual benefits and support". The works were completed in early 2020.

More relevant law concerning implied terms

[91] Both parties rely on *Chitty on Contracts*, which states:[117]

> **25-013 Where no precise time for performance is specified** Where a party to a contract undertakes to do an act, the performance of which depends entirely on itself, and the contract is silent as to the time of performance (or merely uses indefinite words such as "with all dispatch") the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case. Thus, where, by the terms of a charterparty, the cargo was "to be discharged with all dispatch according to the custom of the port" of discharge, it was held by the House of Lords that this bound the charterer to discharge the cargo within a reasonable time, regard being had to every impediment arising out of the custom or practice of the particular port, which the charterer could not have overcome by the

116 At [153]–[271].

117 Hugh G Beale (ed) *Chitty on Contracts* (35th ed, Sweet & Maxwell, London, 2023) vol 1 (footnotes omitted).

> use of reasonable diligence. Where the act to be done is one in which both parties to the contract are to concur, the implied engagement is not that the act shall be done within either a fixed or a reasonable time, or within the time usually taken, but that each shall use reasonable diligence in performing its part. When deciding whether or not performance has taken place within a reasonable time, a court is not limited to what the parties contemplated or ought to have foreseen at the time of entry into the contract but can, with the benefit of hindsight, take account of a broad range of factors, including any estimate given by the performing party of the time which it would take for it to perform, whether the party for whose benefit the relevant obligation was to be performed needed to participate in the performance, whether it was necessary for a third party to collaborate with the performing party in order to enable it to perform, and the nature of the cause or causes of any delay in performance.

[92] Similarly, *Kennedy-Grant and Weatherall on Construction Law: Construction Contracts and Dispute Resolution* states that at common law, the time for completion of a construction contract is "if no time is stated, a reasonable time".[118] And:[119]

> The question as to what is a reasonable time is one of fact. The test of whether a contractor has completed the contract within a reasonable time is an objective one and is fulfilled "notwithstanding protracted delay, so long as such delay is attributable to causes beyond [the contractor's] control and he has neither acted negligently nor unreasonably." In deciding whether a contractor has completed within a reasonable time, all the circumstances of the case should be taken into consideration, such as the nature of the works to be done, the time necessary to do the works, the ability of the contractor to perform, the proper use of customary methods of building and appliances, and the time which a reasonably diligent builder of the same class as the contractor would take. The decision must be made by reference to what is fair to both parties.

[93] In New Zealand, in *Hunt v Wilson*, Cooke J referred to "the general principle" that, where a conditional contract of sale has no date for completion of the sale, the condition must be fulfilled within a reasonable time, "subject to the overriding consideration of the intention of the parties to be inferred from the particular contract".[120]

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118 Tómas Kennedy-Grant and Michael Weatherall *Kennedy-Grant and Weatherall on Construction Law: Construction Contracts and Dispute Resolution* (LexisNexis, Wellington, 2016) at 562, citing *Startup v Macdonald* (1843) 6 Man & G 593 (Comm Pleas); and *Charnock v Liverpool Corp* [1968] 1 WLR 1498 (CA).

119 Kennedy-Grant and Weatherall, above n 118, at 562 (footnotes omitted).

120 *Hunt v Wilson* [1978] 2 NZLR 261 (CA) at 268–269. In *Mt Pleasant Estates Co Ltd v Withell* [1996] 3 NZLR 324 (HC) at 330, Tipping J noted that although the other judges of that Court did not adopt the same line of reasoning, the approach has "subsequently been regarded as correctly stating the law". The proposition was also cited by this Court in *Sun v Peninsula Road Ltd (in req and in liq)* [2016] NZCA 427, (2016) 18 NZCPR 319 at [57], alongside *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR 1 at [40]–[41].

Judgment under appeal

[94] The High Court Judge stated that NZRPG claimed the Maki Street South upgrade works "were required to be completed by the time the first buildings were occupied for public use in Precinct A; that is, by October 2015".[121] He stated NZRPG's primary contention was based on the overall submission that the contractual agreements must be interpreted to give effect to the intention to deliver the vision set out in PC 15.[122] That included delivering the Maki Street South upgrades within the same timeframes identified in the IFA and WDA 1 and 4. The Judge stated:

> [567] For the reasons already given, I do not accept that the contracts were intended to deliver the vision for the Westgate Town Centre represented in PC 15 or that it is accurate to describe the contracts in that way. Although the contracts were inter-related, each was specific as to the matters it covered. There is no basis for importing inferences from timeframes in contracts for other works and applying those to Maki Street South, particularly when:
>
> (a) the timeframes in some of those agreements was 30 June 2012 and [NZRPG] say the agreed timeframe for completing the Maki Street South works was October 2015; and
>
> (b) there was no reference to an agreement for the construction of those works until May 2013 and no agreement concluded until May 2017.

[95] The Judge considered:

(a) Responsibility for upgrading the footpaths lay with NZRPG under the MSSAA and no timeframes were indicated.[123] There was no specific reference in the MSSAA, or in a report prepared for Waitakere City, to Waitakere City accepting an obligation to upgrade Maki Street South itself.[124]

(b) The IFA does not address Maki Street South, although it was negotiated over the same time period.[125]

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121 Judgment under appeal, above n 1, at [538].
122 At [566].
123 At [568].
124 At [569].
125 At [570].

(c) The Demarcation Schedule to CSA 1 specified no timeframe for the Maki Street South upgrade.[126] Version 4 of the Isthmus Paving Hierarchy was available at the time and distinguished between the paving finishes on Maki Street between Precincts A and B.[127] So it was not already agreed or clear what quality standard was to apply to the whole of the Maki Street South upgrade.[128]

(d) NZRPG was very clear they wanted the whole of Maki Street South upgraded to match Precinct A. But the evidence does not establish that Auckland Council or Auckland Transport accepted that position.[129] It is unsurprising Auckland Transport was reluctant to accept more costs to upgrade the footpaths on NZRPG's land unless it was provided with specific funding for that purpose.[130]

[96] He concluded:

> [575] … What matters is whether there was a contractual obligation to upgrade Maki Street South only to Precinct A standard. It is clear there was no such obligation and no agreement on how the quality standard in the Demarcation Schedule was to be applied.
>
> [576] That conclusion is confirmed by cl 28(a) of WDA 3, under which the parties agreed to negotiate in good faith and use their best endeavours to resolve as soon as possible how much of Maki Street South was to be upgraded to Precinct A standard and how much was to be upgraded to Precinct B standard, if any. The inclusion of that clause without any specific timeframe also strongly suggests there was no agreement that the upgrade was to be completed by October 2015.
>
> [577] For these reasons, I do not accept that [Auckland Council and Auckland Transport] were under an obligation to fund the upgrade of Maki Street South by October 2015 or to do so only to match Precinct A.

[97] The Judge considered the undertaking in cl 28(a) of WDA 3 was an agreement to agree, with no timeframe specified for its conclusion.[131] The records of the Project Leadership Team meetings from May 2014 to June 2015 recorded "it was for

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126 At [571].
127 At [572].
128 At [573].
129 At [574].
130 At [575].
131 At [578].

NZRPG to provide design options", which did not occur until June 2015, and they still lacked the information needed to assess their feasibility.[132] Discussions continued through until January 2017.[133] And on 4 December 2014, it was declared NZRPG "would cease to engage with Auckland Transport until there [was] a comprehensive review of the overall integrated traffic solution and its role in the town building process".[134] Accordingly:

> [581] Given these circumstances, as well as the other matters in dispute between NZRPG over 2015 and the linkages that NZRPG drew between these issues, I do not consider that it could fairly be concluded that Auckland Transport was solely responsible for the lack of progress in agreeing on how the Maki Street South upgrade was to be progressed. That is particularly so when NZRPG was effectively insisting on changing the quality standard applicable to the upgrade by insisting that all of Maki Street South be upgraded to match Maki Street in Precinct A only.

Submissions

[98] Mr Gray submits nine years is not a reasonable time to perform a contractual obligation. NZRPG's case was and is that there was an implied term that the obligation be performed at the same time as the work on Maki Street North or, alternatively, within a reasonable time, which is a question of fact, assessed objectively at the time of the contract, taking into account all circumstances of the contract.[135] Auckland Transport disputed financial responsibility for the footpath upgrades and refused to progress design works until its budget was internally approved. CSA 1 and the relevant quality standards, the Code and the CDP which had contractual effect, implicitly acknowledged the inherent link between Maki Street South and the rest of Maki Street. Auckland Council's witness acknowledged that the delays between 2012 and 2015 were due to Auckland Transport's refusal to accept the existence, extent and funding for its obligation. Auckland Transport only accepted its obligation to upgrade once it had received legal advice and advice from individuals at Auckland Council who had relevant background knowledge.

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132 At [579].
133 At [579].
134 At [580].
135 Citing *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* [2005] 3 NZLR 698 (HC) at [52] and [55]; and Kennedy-Grant and Weatherall, above n 118, at 561.

[99] Mr Trask-Coombes, for Auckland Council and Auckland Transport, submits NZRPG's argument is inconsistent with how the parties proceeded after CSA 1: in particular, WDA 3 and WDA 9. WDA 3 confirmed there was no agreement as to the exact scope and extent of the work required to complete the upgrade, how much money was to be contributed by Auckland Council and Auckland Transport, or the timing. Nothing at the time CSA 1 was entered into indicated a timing obligation linked to the completion of other works. The authorities suggest there was an implied obligation on both parties to use reasonable diligence in performing the contract. Under WDA 3 that meant the parties had to agree on the nature of the work required in relation to Precincts A and B. What was a reasonable time was not tied to the construction of Maki Street North, for which designs had been approved. Clause 28(a) of WDA 3 was an agreement to agree so it would not have been enforceable had agreement not been reached. The evidence at trial clearly established that if any party was guilty of failure to negotiate in good faith or use best endeavours, it was one from NZRPG. By contrast, Auckland Council and Auckland Transport consistently and positively engaged in the process and it was reasonable for Auckland Transport to wait for NZRPG's input on designs. Auckland Transport needed to know the understand the final designs to allocate budget. They note that NZRPG have an onus on them to demonstrate this Court should reach a different conclusion from that of the trial judge on these matters of fact.[136]

Contractual obligation regarding Maki Street South

[100] The first issue is when did a contractual obligation arise to upgrade Maki Street South and what was the obligation:

(a) In May 2009, the MSSAA provided for acquisition of the land and "upon an upgrad[e]" obliged the NZRPG company to ensure the design, treatment and quality of the upgraded footpaths were consistent with those on "the northern side of [Fred Taylor Drive]". But it did not require the upgrade of Maki Street South itself.

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[136] Citing *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [28]–[32]; and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 198–200.

(b) In November 2010, cl 3.1 of CSA 1 and item 2.4 of the Demarcation Schedule, did envisage there would be works on Maki Street South. It allocated all responsibilities for their design, construction and funding to Waitakere City. The specified quality standard was for all the works "[t]o match Precincts A and B". No timing was specified.

(c) In May 2013, recital O and cls 16 and 28 of WDA 3, reinforced by the entire agreement clause, made clear that the "nature and extent" of the Maki Street South upgrade had not yet been agreed and was to be the subject of further discussions and negotiations. One particular outstanding issue was how much of the street was to be upgraded to Precinct A standard and how much to Precinct B standard. As the High Court held, this was an agreement to agree.[137] At that time, the parties disagreed about that issue.

(d) In May 2016, the parties agreed on the arrangements for the Maki Street South upgrade in WDA 9.

[101] So in CSA 1 there was an expectation, perhaps an agreement, that Maki Street South would be upgraded. But there was no agreement about what that would involve. WDA 3 was explicit that there was no agreement on the nature and extent, or the timing of the upgrade. There was only explicit contractual agreement about what the upgrade of Maki Street South would involve in WDA 9 in May 2016.

[102] In the absence of a contractual obligation specifying what work was to be done, a corollary obligation as to timing of such work cannot be implied. If addressed in terms of the six *Bathurst Resources Ltd* principles governing implication of terms:

(a) There is no strict necessity to imply a term about the timing of the upgrade into any of these contractual documents until WDA 9, because the nature and extent of the upgrade was not agreed until then.

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[137] Judgment under appeal, above n 1, at [578].

(b) Because the contracts did not provide for it, the usual inference is that no contractual provision was made for the timing of the Maki Street South upgrade.

(c) There is nothing material to indicate what the contract, read against the relevant background, must be understood to mean in terms of the timing of the upgrade.

(d) The notional reasonable person with all the background knowledge reasonably available to the parties at the time of each contractual document, would not imply a term regarding timing of the upgrade until it was made explicit in WDA 9. That is because the parties had not agreed on the nature and extent of the upgrade.

(e) The parties' actual intentions do not affect those conclusions.

(f) In terms of the *BP Refinery* conditions, implying a term regarding timing would not be reasonable or give business efficacy to, or be so obvious as to go without saying in the MSSAA or CSA 1 for the above reasons. It would have contradicted the express terms of WDA 3 and WDA 9.

[103] The line of authority encapsulated in *Chitty on Contracts* about implying a term to act within a reasonable time is not activated in these circumstances because one party has not undertaken "to do an act" with sufficient specificity that its timing could be set. The nature and extent of the upgrade had to be agreed first. Rather, as *Chitty on Contract* states, and Mr Trask-Coombs submits:[138]

> Where the act to be done is one in which both parties to the contract are to concur, the implied engagement is not that the act shall be done within either a fixed or a reasonable time, or within the time usually taken, but that each shall use reasonable diligence in performing its part.

[104] Reasonable diligence in performing their parts involved both parties being reasonably diligent in discussing and negotiating over the applicable quality and cost

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[138] Beale, above n 117, at [25-013] (footnote omitted).

of the works in relation to Precincts A and B. Here, that is effectively an implied obligation to do what was express in WDA 3 — to discuss and negotiate those matters. In this context, that is an agreement to agree, which is not legally enforceable.

[105] If some timing requirement for completing the upgrade of Maki Street South could be implied before May 2017, without agreement on its quality and cost, we agree that NZRPG have not demonstrated that the High Court was wrong in concluding it was not breached in these circumstances. For example, the parties agreed NZRPG would provide a design option for the upgrade on 21 May 2014 but they were not provided until over a year later. The design concepts were not provided until 3 June 2015. The designs were costed at more than double what Auckland Transport had budgeted for. On 8 June 2016, it was agreed there should be a WDA for the Maki Street South upgrade. It was reasonable for Auckland Transport to be concerned about costs and to seek legal advice about its obligations. It took time for Auckland Transport to increase its budget several times.

[106] This ground of appeal fails.

Issue 4: What were the obligations regarding the location of the bus interchange?

What happened?

[107] The High Court judgment states:

> [610] … PC 15 provided that the indicative location for the Bus Interchange was on Kohuhu Lane, east of Maki Street. In the event, that could not happen because NZRPG wanted to develop a mall on the eastern side of Maki Street and did not want Kohuhu Lane to intrude into the mall. As a consequence, it was proposed in the CDP and agreed in the MSSAA that the Bus Interchange would be on Kohuhu Lane, west of the Town Square. That was later considered to be imprudent for reasons of pedestrian safety. It was after that option had been ruled out that NZRPG proposed the undercroft option.

[108] In 2013, WDA 3 amended the IFA, relevantly, to provide:

> **Background**
>
> …
>
> N. There will be a bus interchange to be constructed in the block bounded by Waru Road, Tahi Road and Rua Road

(**Waru/Tahi/Rua block)** more particularly shown on the plan attached as Schedule 7.

O. The parties have agreed to negotiate in good faith and use their best endeavours to agree as soon as practicable:

…

- access and service level agreements for the Bus Interchange;

…

Bus Interchange

14. (a) The parties are agreed that there shall be a Bus Interchange in the location shown on the plan in Schedule 7 and that WTC shall grant Auckland Transport an easement over the Interchange area generally in the form set out in Schedule 7, subject to final agreement between WTC and Auckland Transport on the matters referred to in clause 28(d). The parties agree that there will be no charge for the granting of the easement and for access to and from the Bus Interchange.

(b) The Auckland Transport Board at its September 2012 meeting confirmed that the Bus Interchange location will be as an under croft to the building WTC intends to develop on the Waru/Tahi/Rua block site, and has approved an estimated construction cost of $5,500,000 (excluding GST) for the Bus Interchange.

(c) Council agrees to assist WTC in liaising with Auckland Transport in good faith for:

(i) agreement for the engagement of WTC to construct the Bus Interchange; and

(ii) agreement of a service level agreement in respect of the Bus Interchange.

(d) WTC will agree a process and responsibilities for the design and specifications for the Bus Interchange with Auckland Transport. Prior to any tendering of the construction contract, the plans and specifications for the Bus Interchange must be approved by Auckland Transport.

…

Outstanding issues

28. The parties agree that they will negotiate in good faith and use their best endeavours to resolve the following matters as

> soon as practicable, which may be the subject of a further variation of the IFA or be subject to separate agreements:
>
> …
>
> (d) the final terms of the easement including access to and from the Bus Interchange, and a service level agreement for the Bus Interchange.
>
> The parties acknowledge that negotiations and any agreements reached in respect to the above matters will need to include Auckland Transport.

[109] NZRPG submit that, at some point, Auckland Transport changed its mind about the type of bus interchange to be constructed. A draft Auckland Transport strategic assessment of the bus interchange, dated 31 March 2015, sought to define and validate the need to change the location to be on the direct bus route to Auckland city. On 14 April 2015, an engineer at Auckland Transport sent a letter to Mr Gunton setting out timeframes to progress the development of the proposed bus interchange. It noted that if certainty for the programme was not achieved by the end of April 2015, Auckland Transport would need to look to alternative sites. On 27 July 2015, the Group Manager Roading at Auckland Transport sent a letter to a NZRPG CEO giving notice that negotiations in relation to the bus interchange were at an end and that Auckland Transport was considering an on-street option for the new bus interchange.

Judgment under appeal

[110] The High Court Judge held, in summary:

(a) There was no agreed location for the bus interchange prior to execution of WDA 3.[139]

(b) Clause 14(a) of WDA 3 recorded a series of matters that had already been agreed.[140]

(c) The express qualification in cl 14(a), "subject to final agreement between [a NZRPG company] and Auckland Transport on the matters

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139 Judgment under appeal, above n 1, at [611].
140 At [612].

referred to in clause 28(d)" of WDA 3 was limited to agreement on the terms of the easement and service level agreement.[141]

(d) Plainly, Auckland Council did not accept an unqualified obligation to have the bus interchange in Zone 2 irrespective of further agreement between Auckland Transport and NZRPG on its design and construction.[142] These are subjective matters of design and construction on which the Court cannot discern any objective obligation.[143]

(e) Subclauses (c) and (d) of cl 28 made clear that there had to be agreement between Auckland Transport and NZRPG on the design and terms on which NZRPG would construct the bus interchange.[144]

(f) As an alternative:

> [618] For these reasons, and although Mr Gray and Mr Lange did not address the issue in these terms, I consider that another way of interpreting cls 14 and 28(d) is to regard them both as subject to an implied term that the location and operation of the Bus Interchange were subject to NZRPG and Auckland Transport reaching agreement on the design of the Bus Interchange, the terms on which NZRPG would construct the Bus Interchange, the terms of the easement governing Auckland Transport's occupancy of the Bus Interchange and the terms of access to the Bus Interchange as were to be set out in the service level agreement.
>
> [619] In terms of the conditions for an implied term identified in *BP Refinery*, given that a Bus Interchange in the identified location could not operate without agreement on these questions between the landowner and the operator of the Bus Interchange, I am satisfied that such a term:
>
> (a) is reasonable and equitable;
>
> (b) is necessary to give business efficacy to the contract;
>
> (c) is so obvious that 'it goes without saying';

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141 At [613].
142 At [613]–[614].
143 At [616].
144 At [615].

(d) is capable of clear expression; and

(e) does not contradict any express term of the contract.

[620] With regard to the last condition, I consider that the implied term supplements and gives concrete effect to the various elements of cls 14 and 28(d) and is not inconsistent with their terms.

[621] Looked at in this way, it is apparent that the implied term has not been satisfied. It is also apparent that principal responsibility for that state of affairs lies with NZRPG.

…

[623] Given the above history, I do not accept Mr Gray's submission that responsibility for the breakdown in negotiations on the Bus Interchange lies with Auckland Transport. Whatever internal doubts Auckland Transport may have developed about the Zone 2 location and whatever interest Auckland Transport may have had in pursuing an alternative option, the weight of the evidence establishes that it was NZRPG that put the negotiations on the Bus Interchange on hold and refused to re-engage even when given explicit warning that Auckland Transport would look for an alternative site if it could not get certainty from NZRPG.

…

[625] Whatever the reasons for NZRPG's position, I am satisfied that the absence of a Bus Interchange in Zone 2 as identified in WDA 3 is not because of any contractual breach on the part of Auckland Council or Auckland Transport. On the basis of my finding of an implied term, that term had not been complied with and there was no prospect of it being complied with given NZRPG's position. Even on the basis of the language of cl 14 alone, because of the position taken by NZRPG, there had been no agreement on the design of the Bus Interchange or on the contract for its construction, which were necessary for the implementation of the clause.

Submissions

[111] Mr Tompkins, for NZRPG, submits that cl 14(a) of WDA 3 was a binding obligation to situate the bus interchange in Zone 2 of the development. The "and" in the clause operates disjunctively, denoting the rest of the clause addresses something separate and additional. Clauses 14(b)–(d) and 28(d) did not qualify that obligation, but separately governed Auckland Transport engaging NZRPG to build and operate the bus interchange. There was no reason certainty regarding location needed to be contingent on agreement on outstanding matters of detail regarding how the

interchange was to be built and operated. Clause 14(a) is concerned with location only, not form — the undercroft and the location did not stand and fall together. Auckland Council and Auckland Transport breached their obligations by failing to progress the bus interchange in Zone 2. Auckland Transport changed its mind because it wanted an interchange to be a "through point" stop, to take people away from the Town Centre. The High Court erred by failing to consider the motivations underlying the parties' actions. Auckland Transport did not allocate a sufficient budget and was not genuine in its interactions with NZRPG. The Judge was wrong to imply a term; the situation did not meet the standard of strict necessity in *Bathurst Resources Ltd* or the *BP Refinery* test, falling well short of the threshold for an implied term.

[112] Mr Lange submits that the only commercially practical and sensible interpretation of cls 14 and 28 of WDA 3 is that construction of the bus interchange as an undercroft in Zone 2 was conditional on the negotiation of four further agreements, regarding an easement, the service level, design and specifications, and construction. These were not mere matters of detail. Construction could not proceed without NZRPG approval because an undercroft needed to be constructed under a building on NZRPG's land. NZRPG needed to design and construct the building. The parties were left with a series of conditions in the nature of unenforceable agreements to agree. Otherwise, a NZRPG company could be in breach of contract for having failed to construct an undercroft bus interchange in Zone 2. The High Court's intensely factual inquiry into what happened was correct and should not lightly be overturned on appeal.[145]

Location of the bus exchange

[113] In the High Court, none of the parties pleaded, argued or otherwise raised an implied term argument in relation to this issue.[146] The Judge considered the same result would be obtained on the basis of the language of cl 14 of WDA 3 alone.[147] We start with that language.

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145 Citing *Green v Green*, above n 136, at [28]–[32]; and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*, above n 136, at 198–200.

146 Judgment under appeal, above n 1, at [618].

147 At [625].

[114] The text of WDA 3 indicates there were areas of agreement between the parties to WDA 3, as well as areas where there was not agreement between them or with Auckland Transport:

(a) Recital N and the first 21 words of cl 14(a) of WDA 3 indicate agreement between the parties about the location of the bus interchange as set out on Schedule 7.

(b) The next 22 words of cl 14(a) indicate agreement between the parties that the NZRPG company would grant Auckland Transport an easement generally in the form set out in Schedule 7.

(c) The last sentence of cl 14(a) indicates there was agreement between the parties that there would be no charge for the easement and for access to and from the bus interchange.

(d) Clause 14(b) records a decision of Auckland Transport but does not indicate an agreement between the parties.

(e) Clause 14(c) indicates agreement by Auckland Council to assist the NZRPG company in liaising with Auckland Transport to engage the company to construct the bus interchange and to agree a related service level agreement.

(f) Clause 14(d) indicates the NZRPG company agreed to agree with Auckland Transport a process and responsibilities for the design and specifications for the bus interchange, which had to be approved by Auckland Transport.

(g) Recital O and cl 28(d) indicate Auckland Council and NZRPG had not yet agreed, but had agreed to negotiate, including with Auckland Transport, the terms of the easement for access and a service level agreement for the bus interchange.

[115] We focus on the document as a whole, as well as the relevant background, to ascertain the meaning it would convey to a reasonable person having all the relevant background knowledge which would reasonably have been available to the parties in the situations they were in at the time of the contract.[148] According to the Supreme Court in *Firm PI 1 Ltd*, that meaning is taken to be what was intended by the parties.[149] The issue is whether the agreement on the location of the bus interchange imposes contractual obligations on the parties that are separate from, or subject to, the recognised need to reach agreement about other matters.

[116] First, Auckland Transport was not a party to WDA 3. That is explicitly recognised in cl 14(c) and in the final sentence of cl 28. It is clear from both the text of WDA 3 and its context that further negotiations were required for Auckland Transport to be subject to any commitment regarding the location of the bus interchange. The High Court stated that Auckland Transport could not rely on that fact when it was responsible for performing Auckland Council's responsibilities under WDA 3 in relation to the bus interchange.[150] Counsel for Auckland Transport submits that it has never sought to do so. But the fact that Auckland Transport was not a party to WDA 3 is relevant context that affects how it is read. Auckland Transport was obliged to exercise its statutory functions and duties, including in relation to the location of any bus interchange. WDA 3 recorded, at cl 14(b), that Auckland Transport had "confirmed" the bus interchange's location and approved an estimated construction cost. But that did not impose a contractual obligation on Auckland Transport about its location — rather, it recorded the state of affairs. It could change its mind in accordance with its statutory functions. The wording of cl 14(a) must be read with that in mind.

[117] Second, the words of cl 14(a) are capable of being read as meaning that the agreement on the location, as well as the grant of the easement, are "subject to final agreement between [a NZRPG company] and Auckland Transport on the matters referred to in clause 28(d)". Although our conclusion does not depend on this point, we consider that this is the more natural reading.

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148 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 4, at [60], citing *Investors Compensation Scheme Ltd v West Bromwich Building Society*, above n 5, at 912.

149 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 4, at [60].

150 Judgment under appeal, above n 1, at [609].

[118] Third, WDA 3 as a whole, and its context, suggests that the location of the interchange was not being contractually committed to in that agreement. The parties had previously agreed to two other locations of the bus interchange in PC 15 and the MSSAA. By the time of WDA 3, they had agreed on to a broad approach to, and another location of, the bus interchange. The agreement by Auckland Council and NZRPG about the location of the bus interchange in the first 21 words of cl 14(a) does not, in and of itself, impose a contractual obligation on any of them to do anything. It was a shared understanding, subject to final agreement. It cannot be reasonably read as imposing a meaningful contractual obligation on those parties. NZRPG's submission that Auckland Council and Auckland Transport "breached cl 14(a) by failing to progress the bus interchange in Zone 2", and the relief they seek of an order that they "have breached their obligations … to deliver a bus interchange in Zone 2", illustrate the problem of identifying what the obligation was. WDA 3 did not oblige them to do anything particular to progress the bus interchange, and they could not do so without first reaching agreement with NZRPG on a number of issues.

[119] Fourth, none of the parties, alone or together, could implement the understanding of the location of the bus interchange without further agreement being reached on the terms of the easement, the design and specifications, service level and construction. Those agreements needed to be reached with Auckland Transport. Those matters were explicitly still at large, according to both the text and the context of WDA 3. There was an agreement to agree them, which did not give rise to enforceable contractual obligations. The shared understanding of the intended location of the bus interchange by the parties recorded in cl 14(a) adds little, if anything, to recital N.

[120] Given the lack of a contractual obligation, the claim falls away. But we record that, if there was some contractual obligation between the parties about the location of the bus interchange, we do not consider NZRPG have demonstrated that the Judge was wrong in his assessment that there was no breach of contract by Auckland Council or Auckland Transport.

[121] We agree with the conclusion of the High Court. This ground of appeal also fails.

Result

[122] The appeal is dismissed.

[123] The appellants must pay one set of costs to the respondents for a complex appeal on a band B basis together with usual disbursements. We certify for second counsel.

Solicitors:
Wilson Harle, Auckland for Appellants
Simpson Grierson, Auckland for Respondents