IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-558
[2026] NZHC 405

IN THE MATTER	of a claim for breach of contract and equitable estoppel, restitution and under the New Zealand Bill of Rights Act 1990
BETWEEN	THE NEW ZEALAND COLLEGE OF MIDWIVES INCORPORATED First Plaintiff
AND	YVONNE MAREE HISKEMULLER Second Plaintiff
AND	FIONA MARY HERMANN Third Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing: 5 August – 13 September 2024

Appearances: R A Kirkness, M C W Hickford, K E Cornegé, K J Webster, D T Haradasa, N A T Udy and R J Reeves for Plaintiffs

P H Courtney, S M Kinsler, C E Sinclair and K C Grant and L A Argyle for Defendant

Judgment: 2 March 2026

JUDGMENT OF GWYN J

TABLE OF CONTENTS

INTRODUCTION

[1] Midwifery is a profession imbued with gender.[1] It gives rise to a "gender trifecta" — midwifery care is "provided by women, for women, in relation to women's reproductive health within a model of care that supports women's empowerment and choice".[2]

[2] Lead maternity care (LMC) midwives provide the vast majority of lead maternity care in New Zealand.[3] As the Crown has repeatedly and publicly acknowledged, "midwives play a vital role in New Zealand's health care" and the "sustainability of LMC midwifery is central to the national primary maternity service."

[3] This case concerns their remuneration and other terms and conditions of their work.

[4] In 2015, the New Zealand College of Midwives Inc (the College or NZCOM) filed judicial review proceedings against the Ministry of Health (Ministry), alleging a breach of the right to freedom from discrimination on the basis of sex under the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The College and the Ministry entered into a series of six agreements between 2016 and 2018 and the judicial review proceedings were discontinued in 2017.

[5] The plaintiffs now claim for breach of contract, breach of duty to take all necessary steps and to work together in good faith, equitable estoppel and a restitutionary quantum meruit, arising from that series of agreements and, in particular, the final agreement in 2018. They also claim that LMC midwives have been unlawfully discriminated against under the Bill of Rights on the basis of gender.

[6] The claim is brought by the College and two "representative" plaintiffs. They bring the proceeding as a representative proceeding against the Attorney-General on behalf of 1,473 LMC midwives (referred to as the group members).

---

1 *Association of Ontario Midwives v Ontario (Health and Long-Term Care) (2018)* (2018) HRTO 1355 [*Association of Ontario Midwives (Discrimination)*] at [275].

2 At [242].

3 The term "LMC Midwives" is explained further at [13] below and following.

[7] The Attorney-General represents the Crown on behalf of the Ministry, as the government department that signed the relevant agreements.[4]

Background

[8] The College was established in 1989 and is a professional membership organisation representing midwives in New Zealand, including midwives working as LMC midwives. The College represents over 90 per cent of all practising midwives in New Zealand. It promotes standards of midwifery practice and represents both midwifery and women's health interests to the government, the health sector and the public. The College works alongside the Midwifery Council, which is the regulatory body for midwifery in New Zealand.

[9] The College had advocated for the legal right of community midwives to practise autonomously, without the supervision of other medical practitioners. The Nurses Amendment Act 1990 (NAA) legislated for that right.

[10] Following the NAA, midwives practised on their own account and claimed for their services in the same way and at the same rate as general practitioners (GPs), under the Maternity Benefits Schedule. In this period, both midwives and GPs (who were required to hold a Diploma in Obstetrics) were the core providers of primary maternity care in New Zealand. Midwives and GPs would often work together to share the care of pregnant women and babies.[5]

[11] In 1993, a Maternity Benefits Tribunal was established to make recommendations as to the amount and structure of fees payable under the Maternity Services Schedule. The Tribunal found that midwives and GPs (with an obstetrics specialisation) provided the same maternity service and should be paid equally for the provision of that service.[6] The Tribunal recommended that a new scale of fees be fixed which provided a fee for each component of the maternity service, and

---

4 This judgment will usually refer to the defendant as the Crown, except where it is necessary to describe the particular role of the Ministry.

5 I have used the words "woman" or "female" to describe midwives' clients. I acknowledge that clients may identify with other gender identities; this language is used for brevity and is not intended to exclude those individuals.

6 Helen A Cull and others *Report and Recommendations of the Maternity Benefits Tribunal* (19 January 1993).

each practitioner, whether midwife or GP, be paid the same rate.[7] On the Tribunal's recommendation, the Minister of Health enacted a new fee schedule on 1 June 1993.

[12] In 1993, as part of broader health care system reforms, the Health and Disability Services Act 1993 established four regional health authorities (RHAs). The Maternity Benefits Schedule was replaced by four notices under s 51 of that Act, one for each region. Section 51 notices set the payment conditions for health services funded by the RHAs. As discussed below, from May 2010 s 51 notices continued under s 88 of the New Zealand Public Health and Disability Act 2000 (NZPHDA).

[13] In 1996, the lead maternity carer (LMC) model and a modular payment structure was introduced. Self-employed community midwives became known as LMC midwives.

The LMC model

[14] The LMC model also adopted continuity of care as the primary model of midwifery care in New Zealand. As Dr Kassandra Jane explained in her evidence for the defendant, the LMC model requires one provider, the LMC — whether a midwife or medical practitioner — to provide each pregnant person and their baby with continuity of care throughout pregnancy, labour and birth, and the postnatal period, within a partnership model of care, ensuring safe, equitable, accessible and high-quality care to all people accessing primary maternity care in New Zealand. It is the LMC who is responsible for coordinating referrals to any specialist services a woman might require.

[15] The Crown wishes to provide free maternity care to New Zealand women and their babies. Lead maternity care is the preferred publicly-funded model of care to do so. Part of the rationale behind the new model was to reduce the costs of providing maternity services that could come from shared care with multiple practitioners claiming fees for the same pregnancy.

---

7 At [11].

[16] The introduction of the LMC model led to the departure of most GPs (but not obstetricians) from the provision of maternity care. As a result, almost all primary maternity care in New Zealand is now provided by LMC midwives. LMC midwives are, almost without exception, women.

Statutory Notices

[17] Since 1993, midwives have been paid under Notices issued by the Crown, which set out the terms and conditions for the provision of primary maternity services. Notices are issued under health legislation, which confers the power on the Crown or the Crown health entities to give notice of the terms and conditions on which it will make payment available to any person or persons providing services.

[18] In the early 1990s, the relevant Notice funded maternity practitioners on a fee for service basis that approximated the value and time of the service provided.

[19] In 1996, concurrently with the introduction of the LMC model, the Notice introduced a "capped", modular model.[8] Under the Notice, LMC providers received remuneration in the form of payment up to a capped fee, in return for completing specified antenatal, labour and birth "modules". The capped fee applied regardless of the amount of time actually spent by the LMC provider in providing the service.

[20] For most of the period in question the NZPHDA was in effect.[9] Section 88 of the NZPHDA authorised the issuing of a Notice. It provided:

> (1) Where the Crown or a DHB gives notice of the terms and conditions on which the Crown or the DHB will make a payment to any person or persons, and, after notice is given, such a payment is accepted by any such person from the Crown or DHB, then—
>
> (a) acceptance by the person of the payment constitutes acceptance by the person of the terms and conditions; and

---

8 Midland Regional Health Authority *Notice Issued Pursuant to Section 51 of the Health and Disability Services Act 1993 Concerning the Provision of Maternity Services 1996* (20 May 1996).

9 The New Zealand Public Health and Disability Act 2000 was repealed on 1 July 2022 and was replaced by the Pae Ora (Healthy Futures) Act 2022.

(b) compliance by the person with the terms and conditions may be enforced by the Crown or DHB (as the case may be) as if the person had signed a deed under which the person agreed to the terms and conditions.

[21] The capped, modular Notice model has been the operative funding mechanism for LMC midwives during the period relevant to these proceedings. Some explanation of what is covered by the s 88 Notice is required.

[22] There were two versions of the Notice in force during the period to which this proceeding relates. The first was the Primary Maternity Services Notice 2007 (the 2007 Notice) which was amended in 2012, 2016 and then annually thereafter. In 2021 a new Primary Maternity Services Notice was introduced (the 2021 Notice), which was amended in 2022 and 2023.

[23] The Primary Maternity Services Notice sets out the terms and conditions for the provision of maternity services in New Zealand. A person must be authorised by Health New Zealand/Te Whatu Ora (previously the Ministry) to claim under the Notice. If an authorised person provides maternity services they can claim fees for those services under the Notice. The Notice is organised into a series of modules of care with a fixed fee that is claimable for the completion of each module.

[24] The 2007 Notice affirmed that the aim of the LMC model is to provide pregnant women with continuity of care. It contained general specifications for services for which fees could be claimed. It required the LMC to carry out a registration process for each woman and provided that the general responsibility of the LMC is to assess the woman's and the baby's needs, plan their care with the woman and provide care throughout the pregnancy and postnatal period. The general specifications in the 2007 Notice also stated that LMCs must provide 24/7 services to women in their care, whether from the LMC or a back-up practitioner.[10] No fees were claimable for the general specifications.

[25] The 2007 Notice set out the service specifications for the following modules: (a) First trimester and Second Trimester; (b) Third Trimester; (c) Labour and Birth;

[10] The practical effect of this requirement on individual LMC midwives is discussed later in the judgment, at [573]–[574].

and (d) Services Following Birth. Each module set out at a high level the services the LMC was required to provide at that stage of the pregnancy. Each individual service specification within a module had a corresponding clause entitled "Payment Rules" which clarified the fee from the Schedule of Fees that could be claimed for that service specification and the circumstances in which it could be claimed. That was necessary because not all aspects of the service specification would need to be completed for every pregnancy and birth. The payment rules for the "First and Second Trimester" and the "Third Trimester" modules also established that an LMC could claim a partial fee for completing parts of those modules — for example, where a woman changed her maternity provider part way through her pregnancy.

[26] The 2021 Notice maintained a similar overall structure as well as the capped modular model used in the 2007 Notice. The 2021 Notice contains the following four modules: (a) Registrations Services: (b) Antenatal Services: (c) Labour and Birth Services; and (d) Postnatal Services. Within each module there are multiple service specifications and payment rules that apply to each service specification. There are some "additional care supplement" (ACS) service specifications that were not available under the 2007 Notice. Fees for completing these service specifications can be claimed where the LMC midwife has provided additional care due to any complex social or clinical needs of the woman.

[27] The Schedule of Fees in the 2007 Notice was amended by the 2021 amendment.

[28] The Primary Maternity Services Notice – Amendment Notice 2022 (Amendment Notice 2022), which came into force on 1 July 2022, substituted a new schedule of fees in the 2021 Notice.

[29] The plaintiffs say that the capped, modular funding model has resulted in a gradual decline in the payment and working conditions of LMC midwives, because the work required to complete each module has increased and funding under the Notice has not kept pace with inflation and costs pressures. They also say that, uniquely, their remuneration is set unilaterally by the Crown, using the Notice mechanism.

The 2015 – May 2017 Agreements

[30] On 31 August 2015, the College, on behalf of LMC midwives, brought judicial review proceedings against the Ministry, alleging that the Notice was in breach of the right to be free from discrimination on the basis of sex, protected by s 19 of the Bill of Rights. The proceeding alleged that the Notice breached s 19 because:

(a) it resulted in a disparity in earnings with general practitioners and pharmacists (both traditionally male-dominated workforces); and

(b) midwives are required to undertake additional tasks and care which have not corresponded to increases in fees claimable under the Notice.

[31] The judicial review proceedings were adjourned to allow for a series of mediation meetings between College representatives and representatives from the Ministry between August 2016 and May 2017.

[32] An agreement, referred to as the First Interim Agreement, was signed between the parties on 16 August 2016. The First Interim Agreement set out three agreed statements:

(1) The current modular structure and payment system inadequately reflects the challenges of modern midwifery practice.

(2) The Section 88 maternity notice defines and funds primary maternity care. The notice was not intended to fund Lead Maternity Care (LMC) midwives for the provision of secondary and tertiary services.

(3) The sustainability of Lead Maternity Care midwifery is central to the national primary maternity service and requires national support.

[33] The First Interim Agreement also recorded the Ministry's commitment to submit a funding proposal to the Ministry Investment Committee, for an immediate increase in fees to LMC midwives and to propose a pathway for a new national funding model "to reflect the value of primary midwifery care". A six per cent increase to LMC midwifery fees was sought from the Ministry Investment Committee. The Committee approved an increase of 2.5 per cent.

[34] A Second Interim Agreement was signed by the parties on 16 November 2016, agreeing to a further meeting on 28 November 2016, to discuss work on Budget 2017, agree on the principles to guide the development of "a new sustainable funding model for the LMC midwives" and begin discussing a co-design process for that funding model.

[35] On 9 March 2017, a Third Interim Agreement was signed. The Third Interim Agreement reaffirmed the statements in the First Interim Agreement. It also recorded:

> The parties agree that the payment of midwives should be in line with government equity principles and free from systemic undervaluation.

[36] The Third Interim Agreement also noted that the Ministry had presented a draft proposal for resolution of the College's claim which included:

> A co-design process for funding and contracting community LMC midwives which will include a budget bid for 2018 for the agreed model:
>
> a. The design of the model will reflect the principles of the New Zealand Maternity Standards which require that maternity services provide safe, high-quality services that are nationally consistent and achieve optimal health outcomes for mothers and babies, ensure a woman-centred approach that acknowledges pregnancy and childbirth as a normal life stage and ensure there are no financial barriers to access for eligible women; and
>
> b. The design of the model will also reflect the government equity principles referred to at clause 3 of this agreement.

[37] The Third Interim Agreement also recorded that a 2.5 per cent increase to LMC midwifery fees would be paid, backdated to 1 July 2016, in accordance with the outcome of the submission to the Ministry Investment Committee.

[38] Following further mediation meetings, a Fourth Interim Agreement was signed on 6 April 2017. The Fourth Interim Agreement set out further parameters for the Co-design project. These included that the Co-design project would not "remove or renegotiate the Primary Maternity Services Notice 2007" or "change the primary midwifery service model of lead maternity carers".

[39] A further mediation meeting was held on 16 May 2017, resulting in the signing of a final settlement agreement, referred to as the 2017 Settlement Agreement. It

provided for a six per cent uplift to LMC midwives' fees as part of Budget 2017, and the College formally withdrew its application for judicial review. The 2017 Agreement also stated that the co-design process as set out in the interim agreements was to continue. Priority was to be given to the appointment of a mutually agreed expert to undertake an exercise to job size and evaluate the role of community LMC midwives.

December 2018: the 2018 Settlement Agreement

[40] The 2018 Settlement Agreement, signed between the parties on 21 December 2018, is the principal subject of this litigation. The 2018 Settlement Agreement is **attached** to this judgment.

[41] The 2018 Settlement Agreement was signed by Keriana Brooking, Deputy Director-General of the Ministry of Health, on behalf of the Ministry, and the then chief executive, Karen Guilliland, on behalf of the College.

[42] The 2018 Settlement Agreement comprises, first, a series of recitals explaining the background events that led to the Agreement, including an admission by the Crown that it had breached the 2017 Settlement Agreement, and the College's decision to forgo issuing proceedings in respect of that breach, followed by 16 clauses setting out a range of obligations, and the text of a joint public statement at Appendix A (expressly included as part of the Agreement).

Further context

[43] Before discussing the detail of the plaintiffs' specific causes of action, further context is necessary.

Co-design Project

[44] As noted earlier, starting as early as the first interim agreement in August 2016, the parties recorded their agreement that the existing modular structure and payment system for LMC midwives under the Notice was inadequate. In the course of the mediation process the Crown proposed, and the parties agreed, that the response to this situation would be to "co-design" a new model for funding and contracting

LMC midwives. It was also agreed by the parties that the "co-design process and resulting funding model will be in line with the principle that equal pay has no element of gender-based differentiation and is free from systemic undervaluation".

[45] The Co-design Project began in March 2017. It involved representatives from the College and the Ministry working together as the Co-design Project Team to design a new model for LMC midwifery services in New Zealand.

[46] Before the first meeting of the Project Team, the Ministry established an internal process to guide their involvement in the Co-design Project. This included the development of a Project Plan and a governance structure made up of a Ministry Co-design Project Team and a Co-design Steering Group that the Ministry Co-design Project Team would report to.

[47] The College established a team to participate in the Co-design Project on behalf of LMC midwives.

[48] The first Project meeting was held on 22 March 2017. The parties agreed a series of "funding model principles" and "co-design principles" to guide the work.

[49] Specialist facilitators were hired to facilitate the co-design process across four key workshops throughout 2017. The four workshops were supplemented by the Co-design Team members carrying out development work between each workshop.

[50] The College consulted with its members during the process and the joint Co-design Team, including both Ministry and College representatives, gave health sector stakeholders the opportunity to consult on the development of the model.

[51] The Ministry members of the Co-design Project Team also regularly held meetings between themselves as an internal ministry team. The Ministry Co-design Steering Group also had regular meetings to monitor how the work was progressing.

[52] The Co-design Project resulted in three reports, which were published on 5 December 2017:

(a) the Co-design Payment Model Report,

(b) the Co-design Funding Model Report, and

(c) the Co-design Pricing Model Report.

[53] The Co-design Payment Model Report recommended that LMC midwives should be remunerated through a blended payment model. This is a model that blends capped and uncapped modular "fee for service" payments with incentive payments and a fixed base fee paid consistently throughout the year. The model was designed to approximate the actual costs of work done, while also driving desired workforce distribution and minimising perverse incentives.

[54] The Co-design Funding Model Report recommended the establishment of a National Community Midwifery Provider Organisation to hold a national contract through which LMC midwives would be funded.

[55] The Co-design Pricing Model Report recommended that fair and reasonable remuneration for LMC midwives should be at $170,000 for full time work, plus an additional $30,000 in recognition of 24/7 on-call obligations and $41,000 to reflect the costs of business.

[56] It was against the background of ongoing work on the Co-design project that in May 2017 the parties signed the 2017 Settlement Agreement, under which the Ministry agreed it would prepare a budget bid for Budget 2018 which reflected the Co-design Project Team's findings. In return, the College agreed to withdraw its judicial review claim (in relation to gender-based discrimination) against the Crown.[11]

[57] In November 2017, the joint Co-design Project Team presented the three reports to the Ministry Steering Group. The findings of the Co-design Project Team

---

[11] See [30] above.

were presented to senior Ministry officials in December 2017. When Budget 2018 was announced in May 2018 it did not include the funding necessary to implement the Co-design Project Team's recommendations. Subsequently, the College obtained relevant documents under the Official Information Act 1982 which revealed that the Ministry did not make a budget bid in line with the Co-design Project Team's findings. Rather, Ministry officials had advised the Minister of Health against accepting the Team's findings.

[58] It was in that context that the College and the Ministry agreed to meet for another round of mediation on 14 December 2018, where they agreed the basic text of the 2018 Settlement Agreement.

PwC reports

[59] The Co-design Pricing Model Report had recommended a fair and reasonable service price for LMC midwives, which it had quantified. Clause 6 of the 2018 Settlement Agreement referred to a process to "make a 'fair and reasonable' service price". Both the concept and quantum of that fair and reasonable service price is contested and key to much of this judgment.

[60] In early 2019 the Crown commissioned independent consultants, PwC, to prepare a report establishing a fair and reasonable service price for LMC midwives. PwC delivered its report, which concluded what a fair and reasonable take-home pay would be for a 1.0 fulltime equivalent LMC midwife, in September 2019. The plaintiffs say that, by this date, the Crown knew what a "fair and reasonable service price" was.

[61] Subsequently, in October 2019, the Ministry commissioned PwC to update the "fair and reasonable" quantum to inform what amount of funding would be necessary to address the gap between LMC midwives' then remuneration under the Notice and a fair and reasonable service price.

[62] However, the Crown did not make a bid for Budget 2020 (or any subsequent budget) to meet the alleged obligation to ensure fair and reasonable pay.

FIRST CAUSE OF ACTION: BREACH OF 2018 SETTLEMENT AGREEMENT

[63] The plaintiffs say that the 2018 Settlement Agreement contains a series of interlocking, but severable, obligations. They say that each of the core obligations under the Agreement is capable of independent performance and that a failure to perform any one of the obligations does not necessarily prevent the performance of the remaining obligations. Nor can failure to perform one obligation under the Agreement excuse failure to perform another. The plaintiffs say it is not an "all or nothing" situation.

[64] The plaintiffs also say that the 2018 Settlement Agreement includes two types of obligations — first, obligations that specify an agreed outcome for the benefit of LMC midwives; and second, obligations that commit the parties to work together on the achievement of those outcomes. The latter are the subject of the second cause of action.

[65] The plaintiffs' first cause of action is that the Crown has breached those obligations in the 2018 Settlement Agreement that relate to specific outcomes by:

(a) failing to implement a national midwifery contract by 1 July 2020 (or subsequently);

(b) failing to pay LMC midwives a fair and reasonable service price by July 2020; and

(c) failing to provide the ability for midwives to renegotiate the fees paid to them on an annual basis.

[66] The plaintiffs rely on the natural and ordinary meaning of the Agreement, construed within the context of the whole contract. That context comprises the events set out above, including the College's judicial review proceedings against the Crown and the five interim agreements that preceded the 2018 Settlement Agreement. They say that there is harmony between the plain words of the 2018 Agreement and that

context. The plaintiffs also submit that the Crown is competent to contract like any ordinary person.[12]

[67] In addition to the terms set out above, the 2018 Settlement Agreement also included (at cl 5) a commitment to develop a national midwifery provider organisation. The plaintiffs accept that obligation was conditional on further work and do not plead a breach of that obligation. As I will come to, the Crown says this obligation was interlinked with the term regarding a national primary midwifery contract.

[68] In response, the Crown's overarching submission is that the obligations in the 2018 Settlement Agreement are process obligations only. It says the plain wording of the Agreement refers to future processes, negotiations, further work between the parties and further development of a proposed new model. The Agreement merely required the parties to work together on various policy initiatives, with a view to developing a new funding and contracting model and service price for community midwifery. It did not and, the defendant says, could not, require any new model to be put in place, or any new service price to be paid. The Agreement sets out an iterative process and progress has been made on that process.

[69] The Crown also says that the plaintiffs' interpretation is inconsistent with the context to the 2018 Settlement Agreement, which included a shared understanding that more work needed to be done to develop and refine a new funding and contracting model and to determine a fair and reasonable service price. The Crown contends that there was also a shared understanding that any final decision, on a new funding and contracting model and service price, was subject to ministerial and Cabinet approval.

[70] The Crown says that even if the parties intended to be bound to the obligations asserted by the plaintiffs, the contract would be too uncertain to be enforceable. There are no objective criteria by which outstanding points could be resolved.

[71] Finally, the defendant says that the contract for the outcomes asserted by the plaintiffs would raise constitutional issues. It would fall outside the authority of the

---

[12] Patrick Monahan, Wade Wright and Erika Chamberlain *Hogg's Liability of the Crown* (5th ed, Thomson Reuters, Toronto, 2024), at [9.3(d)].

officials who entered into the 2018 Settlement Agreement and would have the effect of unacceptably fettering the Crown's future freedom of action.

National midwifery agreement

[72] The plaintiffs characterise the first obligation under the 2018 Settlement Agreement as an obligation to implement a national primary midwifery services agreement underpinned by a Blended Payment Model by July 2020. The plaintiffs rely on cl 2(c) of the Settlement Agreement, which reads:

> The Ministry hereby… confirms its commitment to the Blended Payment Model (as described in the Co-design report, but while maintaining flexibility to improve if agreed) as the basis for a national midwifery agreement, which is to be implemented by July 2020.

[73] They say that the obligation agreed in that subclause is expressly "implementation" of a national midwifery agreement; to implement something is to operationalise it. That focus on a tangible outcome is underscored by the parties' insertion of an agreed deadline by which implementation must occur — July 2020. That deadline is expressed in clear, specific language.

[74] The plaintiffs submit this obligation clearly envisages the Crown providing LMC midwives with a new national contract, in addition to the Notice. The concept of a "national midwifery agreement" had been developed by the parties as part of the Co-design Project work and was referred to in various public statements following that work. The plaintiffs point in particular to a speech given by Ms Brooking to the College's annual conference on 24 August 2018 where she said:

> But turning to community midwifery in my thoughts and commitments. I can say that it will contain the establishment of a national midwifery organisation by the 30th June '19 to be a provider; to lead to the establishment of a national maternity, a national primary maternity contract by the 30th June 2020; that the services described in the contract will be created from the useful parts of the Section 88 and from the [College]-Ministry of Health Co-design work; that the funding requests will be considered as part of Budget '19 and '20 to improve the primary maternity service price; lastly, as part of the primary maternity agreement changes, the payment approach will change, and again we'll be using the Co-design work as the change base.

[75] Ms Brooking went on in that speech to apologise for the way the Ministry had "treated the mana of the Co-design work and the people that worked so hard for it".

[76] The plaintiffs note that commissioning services by contract is common Crown practice in the health sector. Examples of this include the Integrated Community Pharmacy Services Agreement (ICPSA), the National Telehealth Service Agreement, and the PHO Services Agreement, which funds general practitioners. The plaintiffs submit that a national midwifery contract could have been agreed to under s 10 of the NZPHDA, and that this would have been consistent with that common practice. Ms Brooking's own evidence was that she "understood this model was what the College was wanting to move towards".

[77] The plaintiffs anticipated a new contract under s 10 continuing alongside the Notice, so implementation of the new contract was not contingent on LMC midwives choosing to give up the Notice and enter into the new contract.

[78] The plaintiffs say that the "blended payment model" was well understood by the parties at the date of the 2018 Settlement Agreement. The Co-design Payment Model Report, dated December 2017, described the blended payment model as "a fee structure that combines capped and uncapped fee for service payments, regular fixed payments and incentive payments to midwives" that was "designed to approximate the actual costs of work done, to drive desired workforce distribution and behaviour and minimise perverse incentives associated with each of the component payment models". The Report states that the "central goal of the blended payment model is fair pay for work done".

[79] The plaintiffs say that the service specification for continuity of the midwifery model of care (cl 2(b) of the Agreement) was also familiar to the parties at the time of the 2018 Settlement Agreement.

[80] The Crown submits that it is difficult to characterise cl 2(c) of the Agreement as an operative clause given its placement in the Agreement, amongst sub-clauses in which the Ministry confirms its "commitment" and "support" for what the Crown call "high-level principles". It says the language — "is to be implemented" — is passive and does not specify who, how or by whom implementation is to be effected.

[81] The Crown also says that it is artificial to read cl 2(c) in isolation from cl 4 and cl 8(d). Clause 4 says that a national midwifery contract agreement will be "developed", and that the Ministry will recommend it be administered nationally by the Ministry. Clause 8(d) commits the Ministry to submit policy reflecting its other commitments as part of a Cabinet paper, underscoring the need for Cabinet approval. The Crown says it was unnecessary for the Agreement to state expressly that it was conditional on Cabinet approval in this way. Nor does it plead an implied term to that effect. Rather, it says such a condition arises as a matter of interpretation from the express terms.

[82] The Crown says that when read together, those clauses envisage an obligation to collaborate on the development of a draft agreement, which would then be subject to further decision-making before it could be implemented. The Crown variously describes the July 2020 date in cl 2(c) as "indicative" and a "goal", not a "deadline".

Right to annual renegotiation

[83] The second obligation the plaintiffs say arises from the 2018 Settlement Agreement is to provide LMC midwives with the right to renegotiate the price on an annual basis. This was provided for in cl 4 of the Agreement, which includes the words "[t]he national agreement will include the ability to renegotiate price annually".

[84] The plaintiffs' submission is that the importance of this right was obvious in light of the existing model of funding — terms and conditions, including remuneration, were and are set unilaterally by the Crown in the Notice, with no right for midwives to renegotiate the remuneration.

[85] The Crown says this obligation also is too uncertain to be enforceable — it is unclear how such a right would work in practice and a specific negotiating body would have to be established to facilitate this.

Fair and reasonable service price

[86] The third obligation the plaintiffs say has not been met by the Crown is the obligation to pay LMC midwives a fair and reasonable service price.

[87] The plaintiffs say this obligation is established through several provisions of the 2018 Settlement Agreement. The key operative clause, cl 2(c), refers to the Blended Payment Model. The central goal of the Blended Payment Model is fair pay for work done.

[88] The connection between the contract and fair pay is further affirmed by cl 2(a), which reaffirms the Ministry's commitment to the Co-design principles. Those principles include "fair and equitable pay (for work done)". The plaintiffs say that in the context of the relationship between the Crown and the College, "fair and equitable pay" was the equivalent of "fair and reasonable" pay. The evidence explains the use of the term "fair and reasonable" pay in the 2018 Settlement Agreement. The plaintiffs submit that "fair and reasonable" is an objective standard and the Courts have previously demonstrated a willingness to determine that objective standard.[13]

[89] Further, cl 6 set out an agreed process "to make a 'fair and reasonable' service price for Lead Maternity Carer midwives". The obligation is not to "agree" a price. The plaintiffs say that this is because cl 6 is about a process to work out a fair and reasonable price, not to agree to a negotiated position. In the plaintiffs' submission, cl 6 reinforces cl 2(c).

[90] The plaintiffs also rely on Appendix A to the 2018 Settlement Agreement, the parties' agreed text for a joint public statement, which says "the Ministry has agreed to *ensure* a 'fair and reasonable' service price for the LMC midwives" (emphasis added).

[91] In response to the Crown criticism that Appendix A is the only place this word is used, the plaintiffs note that the precise terms of the 2018 Settlement Agreement were confidential and not made public. The only understanding that LMC midwives had of the bargain reached on their behalf was from the public statement. Further, the public statement set out in Appendix A was subsequently published with no concerns raised by the Crown, including Ministers, as to the wording of this phrase.

---

13 Edwin Peel *Treitel on The Law of Contract* (15th ed, Thomson Reuters, London, 2020) at [2-097] citing *The Didymi* [1988] 2 Lloyd Rep 108 (CA); and *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406 at 216. See also *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2001] 2 NZLR 219 (HC) at [66].

[92] In addition, the plaintiffs say that cl 6 of the Agreement must be read in the light of cl 7, which ensures that a "fair and reasonable price" can be established, notwithstanding that the parties may disagree on the precise quantum:

> If any dispute arises relating to the process outlined in cl 6 above, the parties will first engage in further mediation to resolve the dispute. If agreement is not possible the parties agreed that they will enter into a suitable process to assist in establishing 'fair and reasonable' service prices for Lead Maternity Carer midwives, which considers pay equity principles.

[93] The plaintiffs also say that the substantive nature of the obligation to pay LMC midwives a fair and reasonable service price is emphasised by the fact the obligation is time-bound. Clause 2(c) sets July 2020 as the time for the implementation of the national midwifery contract underpinned by the Blended Payment Model. This is a useful proxy for a reasonable time for performance of the obligation to pay a fair and reasonable service price to LMC midwives.

[94] The Crown responds that a lack of quantum in the 2018 Settlement Agreement means there can be no certainty as to what a fair and reasonable price is and therefore no obligation on the Crown to pay such a price.

Constitutional context

[95] Before I turn to discuss the legal status of the 2018 Settlement Agreement and the terms within it, it is necessary to consider what the Crown says are "constitutional issues" raised by this case. The Crown says that the Court should have regard to those issues in considering the nature and effect of the Agreement.

[96] As a preliminary point, the Crown says to the extent that both parties' interpretations are tenable, the Crown's should be preferred because the Ministry representative lacked authority to enter the contract.

[97] However, I agree with the plaintiffs that the 2018 Settlement Agreement must be interpreted in accordance with ordinary principles of contractual interpretation. Whether Ms Brooking had authority to enter into the Agreement is a separate question.

[98] More substantively, the Crown argues that a contract in the terms alleged by the plaintiffs would fall outside the authority of the officials who entered into it and would also have had the effect of unacceptably fettering the Crown's future freedom of action. It says that Cabinet approval was necessary for any terms to be binding.

[99] For the reasons that follow, I reject those arguments.

Capacity and authority

[100] While the defendant's case is far from clear, it appears to argue, first, that the contractual party to the 2018 Settlement Agreement cannot be the Ministry of Health because the Ministry is not a legal entity. On that basis the party must be either a Ministry official or officials, or the Crown.

[101] As to the first point, the Crown says the Ministry lacks legal personality. The Ministry was not established by a statute. The Health Amendment Act 1993 repealed s 4 of the Health Act 1956 (establishing the Department of Health) and s 7 (setting out the Department's primary functions). Those provisions were not replaced with equivalent substitutions for the Ministry of Health.

[102] Therefore, the only contractual counterparty under the 2018 Settlement Agreement must be either officials within the Ministry, as employees and the agents of the Crown, or the Crown. The extent to which officials may bind the Crown to a particular course of action is determined by the principles of agency. It is necessary for the plaintiffs to show that the official had authority as an agent, whether actual, apparent, or usual or implied, for commitments of the kind contended for by the plaintiffs.

[103] The defendant says that Ms Brooking, who signed the 2018 Settlement Agreement on behalf of the Ministry, did not have any actual authority, apparent authority, or usual or implied authority to do so, and would have been acting outside the scope of her agency relationship with the Crown in entering into the commitments contended for by the plaintiffs. The defendant says that the plaintiffs cannot rely on s 10 of the NZPHDA, which provides that the Minister of Health may negotiate and enter into a Crown funding agreement with any person. Cabinet Office Circular

CO 18(2) sets out that Cabinet approval is required for commitments with financial implications. That was lacking here.

[104] Nor, it submits, did Ms Brooking have apparent authority to enter into the agreement. The defendant says there is no conduct by the Crown, Cabinet, or any Minister amounting to a representation that Ms Brooking had the authority to enter into the obligations. Rather, Dr Clark's letter to the College on 13 December 2018 — the day before the 14 December mediation meeting — said that considerations around funding and contracting regarding a national maternity provider(s) within an integrated health care system would need to be addressed as part of the Cabinet approval process.

[105] The defendant also says that the plaintiffs cannot rely on a version of the "indoor management rule" — the principle that outsiders dealing with a company are entitled to assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.[14] The defendant says that rule cannot be used to create authority when none exists — it depends upon the operation of ordinary agency principles. It says that Ms Brooking had no actual or apparent authority to enter into the obligations claimed by the plaintiffs, and there was no basis for assuming her authority to enter the arrangement.

[106] The defendant says that if the 2018 Settlement Agreement contained the obligations which the plaintiffs say it does, it must have been apparent to the plaintiffs that there was no approval from Cabinet to enter into those obligations. It would clearly have involved onerous obligations and new government policy; these would have put the College on notice as to whether Ms Brooking, an individual Ministry official, could bind the Crown to the obligations.

[107] As to usual or implied authority, the defendant says the circumstances of Ms Brookings' agency relationship with the Crown do not imply that she could enter into contracts committing the Crown to significant changes of policy or significant additional commitments.

---

[14] Citing *Howell v Falmouth Boat Construction Ltd* [1951] 2 All ER 278 (HL).

Did the Crown signatory to the 2018 Settlement Agreement have authority? Were subsequent approvals required?

[108] I accept the plaintiffs' submission that the Crown has an inherent common law capacity to contract.[15] No statutory authority is needed, although Parliament may restrict the scope of the Crown's common law powers by statute and, in that way, restrict the Crown's power to contract.[16]

[109] The Crown can only act through its agents. Section 2 of the Public Finance Act 1989 defines the Crown as including Ministers of the Crown and all departments. Thus, the Minister of Health is not a separate legal person, but an extension of the Crown itself.[17] Ministers have the authority to enter into contracts on behalf of the Crown in connection with any subject matter within or incidental to their portfolio, without the need for Cabinet approval.[18]

[110] As the plaintiffs submit, s 10 of the NZPHDA, which allows for the Minister to negotiate and enter into Crown funding agreements, supports the view that agreements such as the 2018 Settlement Agreement come within the Ministry's powers. The Crown has a number of commissioning contracts with other health care providers, including the PHO Services Agreement, which is discussed later, and the ICPSA, under s 10. Ms Lane, who was the Ministry's Director of Service Commissioning in the period of 2016–2018, agreed in cross-examination that contracting was the primary mode by which the Crown engaged or purchased services in the health sector.

---

15 See *ABE Copiers Pty Ltd v Secretary of the Department of Administrative Services* (1985) 7 FCR 94 at 95; *James Richardson Corp Pty Ltd v Federal Airports Corp* (1992) 117 ALR 277 (FCA) at 280; and *L v South Australia* [2017] SASCFC 133, (2017) 129 SASR 180 (SC) at [153]. See also BV Harris "The Third Source of Authority for Government Action" (1992) 108 LQR 626 at 627; and ACL Davies "Ultra Vires Problems in Government Contracts" (2006) 122 LQR 98 at 102.

16 See, for example, *Attorney-General v de Keyser's Royal Hotel Ltd* [1920] AC 508 (HL); and *New South Wales v Bardolph* (1934) 52 CLR 455 at 496.

17 This is consistent with the position at common law — see *Town Investments Ltd v Department of the Environment* [1978] AC 359 (HL) at 380–381.

18 See *Bardolph*, above n 16, at 515. See also Dennis Rose "The Government and Contract" in PD Finn (ed) *Essays on Contract* (Law Book Company, Sydney, 1987) 233 at 246–247. Rose writes that in Australia, the true source of a Minister's authority is s 61 of the Australian Constitution, which states that "the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." However, that proposition must also be true in New Zealand, either at common law or through s 3 of the Constitution Act 1986.

[111] A Minister cannot be expected to deal personally with the many contracts with which their ministries are concerned. An official at an appropriate level generally has implied actual authority to act for and on behalf of the Minister within the scope of the Minister's actual authority, unless the Minister has given express or implied instructions to the contrary, or unless the authority is excluded by statute.[19]

[112] I accept the plaintiffs' submission that Ms Brooking had implied actual authority to enter into the 2018 Settlement Agreement on behalf of the Crown.

[113] The general starting point is the principle in *Carltona*, that an official at an appropriate level generally has implied actual authority to act for and on behalf of the Minister within the scope of the Minister's actual authority, unless the Minister has given express or implied instructions to the contrary, or unless the authority is excluded by statute.

[114] There was no term in the 2018 Settlement Agreement that it was subject to subsequent approvals. Indeed, the Mediation Agreement of 14 December 2018, which was the precursor to the mediation that resulted in the 2018 Settlement Agreement, specifically provided (the first plaintiff has claimed without prejudice privilege under s 57(1) of the Evidence Act 2006 in respect of the Mediation Agreement. This reference to that Agreement does not give rise to any waiver of privilege in respect of any other documents for which without prejudice privilege is claimed):

> **Authority to settle and representation at the mediation**
>
> 11 Each party must have in attendance at the mediation a person or persons who will have the ultimate authority to settle the Dispute. If that is not reasonably practical, the mediator and other parties are to be notified prior to the mediation and each party must then have in attendance at the mediation a person with sufficient authority to recommend to the ultimate decision maker whether or not and in what manner to settle the Dispute, and whose recommendation is likely to be accepted.

[115] If the parties had intended to make implementation of outcomes subject to Cabinet approval, they could and would have said so, as evidenced by the inclusion of a clause in the Fifth Interim Agreement, on 16 May 2017, that it was "subject to the

---

19 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA) at 562–563.

approval of the New Zealand College National Committee". No such requirement was included in the 2018 Settlement Agreement. Nor can the need for Cabinet approval be an implied term of the agreement, as the test for implying a term is one of strict necessity.[20]

[116] Dr Ashley Bloomfield (the Director-General of Health and Chief Executive of the Ministry of Health, at the time of the 2018 Settlement Agreement) confirmed in his evidence that Ms Brooking had the requisite authority to enter into the Agreement. Dr Bloomfield said:

> she was the — essentially the senior responsible officer and the person who had gone into the meeting on the 14th with the overall mandate from the Minister and myself.

[117] The first time the Crown raised any question over Ms Brooking's authority to sign the Agreement on behalf of the Crown was when this proceeding was initiated.

[118] The 2018 Settlement Agreement was not executed immediately after the 14 December 2018 meeting. Rather, each party went back to organise relevant authority to enter a binding and legally enforceable settlement. On 20 December 2018, Phil Knipe, the Chief Legal Advisor at the Ministry of Health, emailed the College to say that the Ministry was meeting with Dr Bloomfield that afternoon to "discuss and confirm he is OK". The final agreement was then signed by Ms Brooking for the Crown on 21 December 2018. (The email chains referred to are the subject of a s 57(1) Evidence Act without prejudice privilege, claimed by the first plaintiff. This reference to those emails does not give rise to any waiver of privilege in any other documents.)

[119] Subsequently, on 9 January 2019, Ms Brooking provided a memorandum to Ministers Clarke, Genter and Salesa (at that time the Minister and Associate Ministers of Health), updating them on the terms of the 2018 Settlement Agreement. Ms Brooking's evidence was that she also briefed the Prime Minister's Office and the Department of the Prime Minister and Cabinet. The memorandum of 9 January appended copies of the 2018 Settlement Agreement, together with the agreed public

---

[20] *Bathurst Resources v L & M Coal Holdings* [2021] NZSC 85, [2021] 1 NZLR 696 at [106].

statement. The memorandum offered Ministers the opportunity to discuss any issues with officials, if they had questions. That did not occur. There is no evidence that in the context of the 9 January 2019 memorandum and the subsequent publication of an agreed joint statement, either Minister Clarke or Associate Minister Genter sought to distance themselves from the Settlement Agreement. Nor was there any distancing on the part of the officials or the Ministers in the ensuing months.

[120] Ms Brooking was the Deputy Director-General for the Ministry of Health. Based on the principle in *Carltona*, Ms Brooking had implied actual authority to enter into a contract on behalf of the Crown, including the 2018 Settlement Agreement.

[121] I also find that Ms Brooking had apparent authority to sign the Agreement. Actual and apparent authority may coexist and coincide.

[122] "Apparent" or "ostensible" authority arises where a third party is induced to enter into a transaction with the principal by a party who appears to have authority to act but who lacks such authority. The doctrine of apparent or ostensible authority is based on estoppel by representation. The representation may be implied from the principal's conduct. As explained in *Armagas Ltd v Mundogas Ltd*, apparent authority will typically arise when the principal has placed the agent in a position that, to the outside world, is regarded as carrying authority to enter into transactions of the kind in question.[21]

[123] As noted above, cl 11 of the 14 December 2018 Mediation Agreement required each party to have in attendance a person who would have ultimate authority to settle the dispute between the parties. The Mediation Agreement itself was signed by Mr Knipe and there is no dispute that he had authority to bind the Ministry to that agreement.

[124] Ms Brooking attended the 14 December 2018 mediation as part of the Crown delegation, together with another Deputy Director-General, Anna Clark, Mr Knipe and Victoria Casey KC, among others. I accept the plaintiffs' submission that the

---

[21] *Armagas Ltd v Mundogas Ltd* (the Ocean Frost) [1986] AC 717 (HL) at 731 citing *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA).

Ministry had represented to the College that the Crown delegation, including Ms Brooking, had the authority to enter into a settlement.

[125] The Crown cites *Howell v Falmouth Boat Construction Ltd* as having "rejected the proposition that outsiders may be able to rely on dealing with public servants who act outside their authority where the servants have assumed that authority." But that case is distinguishable on two grounds. First, it involved an act done in the face of a statutory prohibition[22] and has generally been cited in New Zealand for the proposition that "an estoppel cannot be raised against the Crown in the face of a statutory requirement",[23] which is not the case here. Second, Ms Brooking did not take it on herself to assume authority, rather she was held out as having that authority by the Ministry. Although a public officer cannot hold out on behalf of the Crown that she has the right to enter into a contract when in fact no such right exists,[24] an officer of the Crown can make a contract binding on it if she has apparent authority.[25] Ms Brooking had apparent authority.

Did expenditure need to be authorised for the agreement to be enforceable?

[126] As to the argument that appropriation was a condition of validity of the agreement, the common law rule is that the Executive is competent to enter into binding contracts without an existing Parliamentary appropriation.[26] The authors of *Hogg's Liability of the Crown* state that in the absence of statutory wording to the contrary, that rule prevails in New Zealand, as it does in Australia, the United Kingdom and four Canadian provinces.[27]

[127] Unless the relevant contract is made contingent on obtaining funding, the availability of funding goes to the performance of the contract, not its enforceability:[28]

---

22 *Howell*, above n 14, at 280.

23 See, for example, *Kemp v Commissioner of Inland Revenue* (1999) 19 NZTC 15,110 (HC). In *The Queen v Rushbrooke* [1958] NZLR 877 (SC) at 882, Gresson J said "I am unable to see any distinction in principle between an act which is prohibited by statute and one which is in excess of the powers which the statute confers." But, as I have noted, the Minister of Health would not have acted in excess of his powers if he had signed the Agreement personally.

24 *Attorney-General for Ceylon v A D Silva* [1953] AC 461 (HL) at 479.

25 *Meates v Attorney-General* [1979] 1 NZLR 415 (SC) at 462.

26 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 353; *Bardolph*, above n 16, at 509; and *Hogg's Liability of the Crown*, above n 12, at [9.4(c)].

27 *Hogg's Liability of the Crown* at [9.4(c)].

28 At [9.4(c)].

> …when a payment under contract falls due, there must be an appropriation of funds in place to authorise the payment. If there is no appropriation, then the payment cannot be made, and the Crown will be in breach of its contractual obligation. The common law rule is that the absence of an appropriation does not excuse the Crown from performance. On the contrary, the Crown's failure to make the contracted payment will be a breach of contract.

[128] The Crown cites *Meates v Attorney-General*, in which Davison CJ said "liability under a contract involving the expenditure of public money cannot be discharged by a Government unless Parliament has appropriated money for the purpose."[29] But my interpretation of that quotation is that "discharged" means performed, which is consistent with the general proposition that there can be a binding obligation even if a party cannot compel performance. In any event, that comment was obiter and does not appear to have been applied on that point subsequently.[30]

[129] The fact that Cabinet may not make funding available for the performance of the Crown's contractual obligation does not (and cannot) answer the separate question of whether that obligation arose as a matter of law in the first place.

[130] The Cabinet Office Circular CO 18(2) does not assist the Crown. The Crown says the Circular requires that a proposal with financial implications, such as requesting additional funding, must be submitted to Cabinet unless it meets the criteria for approval by joint Ministers, in which case it must be submitted for agreement by the joint Ministers.

[131] But, as the plaintiffs respond, compliance with the Circular is not a condition of contractual validity. It is directory and not mandatory and relevant to "the exercise…rather than the existence of the power". As Professor Nicholas Seddon notes:[31]

> Commercial bodies or individuals dealing with the government usually do not check to see whether the public servant with whom they are negotiating has the required formal authority. Indeed, it would not be conducive to good negotiations for the outsider to ask a public servant to produce his or her

---

29 *Meates*, above n 25, at 462.

30 The quoted paragraph was cited in *Western Australia v Bond Corporation Holdings Ltd* (FCA, 10 February 1992) in the context of a strike-out application, but the application was not granted in respect of that argument.

31 Nicholas Seddon *Government Contracts: Federal, State and Local* (7th ed, Federation Press, Sydney, 2015) at [3.16].

> credentials. Further, it may be asked why it is the incumbent on the outsider to ensure that the government is adhering to its own internal procedures, some of which are, to all intents and purposes, invisible.

[132] And further:[32]

> There is a strong policy argument that outsiders who deal with the government should not be put at risk by the government's failure to observe procedures which are designed to ensure proper accountability and efficiency within government. Additionally, governments who have failed to observe procedures should not be allowed to take advantage of their own wrongs to escape otherwise valid contracts.

[133] The Crown also says that the LMC midwives' goals did not fit into the overall framework proposed by the Health and Disability System Review led by Ms Simpson. But although this and similar arguments may explain why the Crown did not perform its obligations, they are not a basis for avoiding liability or the sanction for damages. These arguments are discussed in greater detail in relation to the second cause of action.

[134] If the Crown could not be held to its contracts because they involved matters of policy or because, as a matter of policy, Cabinet did not make funding available, it would create significant uncertainty in respect of many contracts entered into by the Crown and would raise rule of law issues.

Fettering

[135] A further "interpretive" argument advanced by the Crown is that Crown agents cannot fetter the Crown's future freedom of action through contract. By signing the 2018 Settlement Agreement, the officials could not fetter the Crown's freedom to make policy choices regarding funding of healthcare services. The Crown says that the obligations contended for by the plaintiffs would impermissibly fetter future Crown action.

---

[32] At [3.16].

[136] The Crown relies principally on *Rederiaktiebolaget Amphitrite v R* (*the Amphitrite*), where Rowlatt J held that the agreement in question was not enforceable because:[33]

> …it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.

[137] The plaintiffs rebut the Crown's argument, relying on *Searle v Commonwealth*, a decision of the New South Wales Court of Appeal, which thoroughly scrutinised the fettering doctrine.[34] In *Searle*, the court concluded that an award of damages for a breach of the contract in question (a training contract between Mr Searle and the Navy, under which the Navy undertook to provide a training plan and various components to achieve a Certificate IV in Engineering) would not fetter the relevant government discretion.

[138] The plaintiffs also note that the first of the "Terms of Settlement" in the 2018 Settlement Agreement offered a public apology for breach of the 2017 Settlement Agreement and acknowledged that the Crown's failure to submit a budget bid on the terms required by that Agreement was a breach, despite the fact that the ultimate decisions on budget bids were made by the Minister of Health. They say this underscores the Crown's recognition that decisions made in the context of its political authorising environment nonetheless carry legal consequences.

[139] The Crown seeks to distinguish *Searle* on the basis that, in that case, there was no dispute over the contract terms. Rather, the Crown was attempting to reverse decisions already made. Here, the alleged commitments relate to as yet unmade policy decisions. The Crown says that it cannot bind itself to a promise in relation to future executive action. The Crown emphasises that the Court in *Searle* went on to consider the argument that the Crown can breach a contract in the public interest and pay damages. The Court acknowledged that large sums of damages may be a practical fetter on the government and the position might vary from case to case as to whether

---

33 *Rederiaktiebolaget Amphitrite v R* [1921] 3 KB 500 at 503.
34 *Searle v Commonwealth* [2019] NSWCA 127, (2019) 100 NSWLR 55.

the prospective size of a damages award would amount to a material fetter on the government's discretion.

[140] I do not accept that the principle that Crown agents cannot fetter the Crown's future freedom of action through contract somehow prevents the Crown from being subject to binding obligations under the 2018 Settlement Agreement. The Agreement was not a contract that bound the Ministry to do something in contravention of what it was required to do by statute. As to whether it is inconsistent with something the Ministry might have done in the future, the fettering doctrine as expressed in *The Amphitrite* is now "discredited" and *Searle* prevails.

[141] I agree with the plaintiffs that the effect of *Searle* is that, while a party contracting with the Crown may not be able to get an order for specific performance, breach of contract may result in damages. Here, while the College may not be able to enforce the agreement by, for example, an injunction for specific performance, damages for breach can be the appropriate remedy in circumstances where specific performance can no longer be contemplated due to policy shifts.

[142] While the Crown points to the acknowledgment in *Searle* that the prospective size of a damages award may itself amount to a material fetter on the government's discretion,[35] no evidence was called on that point. Therefore, the fettering doctrine does not preclude an award of damages here.

[143] As *Searle* reflects, the common law already acknowledges the constitutional role of the Crown, as well as the broader interests of upholding the parties' bargain.

Was the 2018 Settlement Agreement a binding contract?

[144] I turn now to consider the legal status of the 2018 Settlement Agreement and the particular terms within it.

[145] The approach to contractual interpretation is objective. The Court's role is to ascertain "the meaning which the document would convey to a reasonable person

---

35 At [130].

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".[36]

[146] While recognising that the written contract contains the words the parties chose to record their agreement, those words must be given a contextual reading.[37] The 2018 Settlement Agreement arose out of a protracted course of dealing between the parties, including promises broken by the Crown. The parties' relationship continued after the Agreement was signed and certain further steps were taken. It cannot be interpreted without regard to that context.[38]

[147] There is no dispute that the parties entered into a binding contract by the 2018 Settlement Agreement and intended to do so. The Agreement itself states "The Parties agree this Agreement is binding and legally enforceable".[39]

[148] The consideration for the contract was that the College agreed not to issue proceedings in relation to the Crown's acknowledged breach of the May 2017 Settlement Agreement.[40]

[149] The issue between the parties is, essentially, whether the Agreement is one that imposes substantive obligations on the Crown, or whether it is limited to process obligations.

[150] As above, I have found a clear intention by both parties to be bound. That intention should inform the Court's approach to contractual interpretation. The Court of Appeal's statement in *Fletcher Challenge* is apposite:[41]

> The Court has an entirely neutral approach when determining whether the parties intended to enter into a contract. Having decided that they had that intention, however, the Court's attitude will change. It will then do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities.

---

36 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].
37 At [61]; and *Bathurst*, above n 20, at [46].
38 At [30]–[39] and [43]–[62] above.
39 Clause 16.
40 Clause 15.
41 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [58].

[151] As well as assessing the terms of the contract in the broader context of the history of the parties, as the Supreme Court said in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd,* each clause "must be read in the context of contract as a whole".[42] And, earlier in the judgment, "… the focus is on interpreting the document rather than particular words …".[43]

[152] The drafting of the Agreement, it must be said, is clumsy. It uses passive, rather than active, language. Words are not used with precision — it appears to rely in places on a kind of shorthand, which is perhaps not surprising in light of the history between the parties. Concepts and commitments of different types are mixed up together.

[153] To recap, the three substantive obligations on the Crown, contended for by the plaintiffs, are:

(a) to implement a national primary midwifery agreement underpinned by a Blended Payment Model, by July 2020;

(b) to provide a right to renegotiate the price on an annual basis;

(c) to pay LMC Midwives a fair and reasonable service price.

National midwifery agreement

[154] As for the first alleged commitment, a national midwifery agreement by July 2020, the plaintiffs rely on cl 2(c) for the crux of the commitment. That provision says:

> [The Ministry] confirms its commitment to the Blended Payment Model (as described in the Co-design report, but while maintaining flexibility to improve if agreed) as the basis for a national midwifery agreement, which is to be implemented by July 2020.

[155] The Crown says it would be "incongruous" for a substantive obligation such as cl 2 to sit among clauses that affirm "high level principles". However, the Agreement begins with a "Background" section which sets out the recitals and the

---

42 *Firm PI 1 Ltd*, above n 36, at [67].
43 At [63].

context of the Agreement. Clause 2(c) does not come within that section of the Agreement but is included under the heading "Terms of Settlement".

[156] Clause 4 is also relevant. It states:

> A national primary community midwifery contract agreement will be developed, with the parties to the development of the agreement being the College and the Ministry. The national agreement will include the ability to renegotiate price annually. The Ministry will recommend that the national agreement will be administered nationally by the Ministry.

[157] Interpreting these two clauses together, and in their contractual context, it is clear that:

(a) The College and the Ministry committed to work together to develop a national primary midwifery agreement, with the College and the Ministry as parties. Although neither clauses 2(c) nor 4 specifically say that it is the College and the Ministry who will develop the agreement, it is, to my mind, plain from the context.

(b) That agreement will be implemented by July 2020 (cl 2(c)).

(c) It will be based on the Blended Payment Model (cl 2(c)).

(d) It will include the ability to renegotiate price annually.

[158] The parties were entirely familiar with what was meant by the Blended Payment Model at the time 2018 Settlement Agreement was signed. The Co-design Payment Model Report (published in December 2017) describes the Blended Payment Model as "a fee structure that combines capped and uncapped fee for service payments, regular fixed payments and incentive payments to midwives" that was "designed to approximate the actual costs of work done, to drive desired workforce distribution and behaviour and minimise perverse incentives".[44] At cl 2(a) of the Agreement, the Ministry reaffirms its commitment to the "Co-design principles".

---

[44] Referred to at [53] above.

[159] Although not specifically referred to in cl 2(c) or cl 4, the continuity of the midwifery model of care was also to be incorporated (cl 2(b)). Again, that was a concept that was familiar to the parties at the time the 2018 Settlement Agreement was signed. I agree that cls 2(b) and (c) are different in nature and, as the Crown says, somewhat incongruous, but I consider this to be a product of the clumsy drafting.

[160] The Crown says there is no clarity in the 2018 Settlement Agreement as to what the national midwifery agreement might be. I do not agree. The evidence was clear that the parties had discussed an agreement somewhat akin to other health commissioning contracts, discussed in Ms Lane's evidence, which draw on standard terms that are then tailored to the specific service providers. That agreement would sit alongside the Notice, rather than be a complete substitute for it.

[161] In any event, it is possible to envision the substantive shape of how a system or a policy will work before it has been reduced to writing. As the plaintiffs submit, the content of the contract can be agreed orally and that will be an effective agreement, whether or not that agreement is reduced to writing. In the same way it is possible to agree to the content of a service specification at a conceptual level, with the detail of that content to be reduced to writing at a later date. As long as the content envisioned is clear, any such contractual term is a certain one. The fact that the commitment could be implemented in different ways does not make the underlying obligation void. It is established that "an agreement is not void for uncertainty because it leaves one party or group of parties a latitude of choice as to the manner to which agreed stipulations shall be carried into effect, nor does it for that reason fall short of being a concluded contract".[45]

[162] Read in context, I am satisfied that the Crown was making a contractual commitment to implement a national midwifery agreement with the Ministry of Health and the College as parties by July 2020, and that agreement would be based on the Blended Payment Model.

---

[45] *Thorby v Goldberg* [1964] 112 CLR 597 at 605.

Right to annual renegotiation

[163] The second substantive obligation contended for by the plaintiffs is that the Agreement provides a right to LMC midwives to renegotiate the price on an annual basis. Clause 4 repeats that a "national primary community midwifery contract agreement will be developed" and provides "…[t]he national agreement will include the ability to renegotiate price annually".

[164] It is correct, as the Crown contends, that such a commitment could be implemented in a number of different ways. The Crown questions who would negotiate, with whom, what the process for the renegotiation would be and whether there would be any outcome guaranteed. However, that does not make the underlying obligation, to ensure that LMC midwives have a legal entitlement to negotiate over price on an annual basis, void. Whether a clause in a national midwifery agreement satisfied that requirement could be objectively assessed.

[165] I accordingly find that the second substantive obligation is also made out and binding on the Crown.

Fair and reasonable service price

[166] The third substantive obligation, the plaintiffs say, is that the Ministry will pay LMC midwives a fair and reasonable service price.

[167] I accept the plaintiffs' submission that this obligation is established through several provisions in the Agreement. The first of these is cl 2(c). The goal of the Blended Payment Model is fair pay for work done.[46] The connection between the agreement and fair pay is also affirmed by cl 2(a), where the Ministry reaffirms its commitment to the Co-design principles, which include "fair and equitable pay (for work done)". The plaintiffs refer to undisputed evidence that, in the context of the relationship between the parties, "fair and equitable pay" was the equivalent to "fair and reasonable" pay.

---

[46] Co-design Payment Model Report at 7.

[168] Clause 6 ("The Ministry agrees to a process to make a "fair and reasonable" service price for Lead Maternity Carer Midwives…") assumes an existing commitment to a fair and reasonable service price and sets out an agreed process that is intended to "make" a fair and reasonable service price. The choice of the word "make" is an odd one. The plaintiffs say it should be understood as meaning, in its ordinary sense, "to produce something", "to cause something", "to perform an action".[47] They say it is more than merely "quantifying" or "assessing" how much fair and reasonable pay for LMC midwives is. The use of the word to "make" goes further and contemplates the price will be used.

[169] If, as the plaintiffs contend, there is a pre-existing agreement or understanding that LMC midwives are entitled to a "fair and reasonable price", then it follows that cl 6 is indeed a process to establish what that price will be, for inclusion in the national midwifery agreement referred to in cl 2(c) and cl 4. I accept there was such an understanding: that is clearly demonstrated by the work of the Co-design Project Group in 2017, which was described in the Pricing Model Report as "[an] exercise to consider fair and reasonable remuneration for the work of a community midwife".

[170] The plaintiffs also point to the Public Statement appended to the Agreement which says:

> The Ministry has agreed to a process to *ensure* a 'fair and reasonable' service price for LMC midwives. The College and the Ministry will work on this together throughout 2019.
>
> (emphasis added)

[171] The plaintiffs say this, together with the language of cls 6 and 2, mean that the Crown has agreed to a process to work out what a fair and reasonable price *is*, not to agree a negotiated position.

[172] I agree with the plaintiffs that cl 6 envisions an agreement to "make" a price, not to "agree" a price. Fundamentally, cl 6 is about a process to work out what is a fair and reasonable price.

---

47 Cambridge Dictionary "Make" <www.dictionary.cambridge.org>.

[173] Having regard to the context in which this Agreement was signed (in particular, the Co-design work) I conclude that the Agreement does impose a substantive commitment on the Ministry to work with the College to arrive at a fair and reasonable service price for LMC midwives. It is not a commitment merely to negotiate on that possibility. The parties were beyond that position by the time the 2018 Settlement Agreement was signed.

Subsequent conduct

[174] The Crown's subsequent conduct also supports an interpretation that the Agreement imposed substantive obligations on the Crown. In *Bathurst*, the Supreme Court agreed with Tipping J's view in *Vector Gas Ltd v Bay of Plenty Energy Ltd* that there was no logical reason why subsequent conduct was to be treated differently to prior negotiation, the ultimate question and legal test being whether the subsequent conduct tends to prove anything relevant to the objective approach to interpretation.[48]

[175] While the Supreme Court accepted that evidence of subsequent conduct will not often be relevant, as David McLauchlan notes in "The lottery of contract interpretation":[49]

> The fact that the parties have acted consistently with a particular interpretation, or at least the party now denying that interpretation has so acted, may sometimes provide a reliable basis for an inference that *at the time of the contract* they attached that meaning to the words in question, or that one of them attached that meaning and was led reasonably to believe that the other did so too.

[176] In this case, in cross-examination, Dr Jane accepted that the 2020 Budget documents acknowledged the risk of renewed litigation from the plaintiffs in relation to fair and reasonable pay. For example, in the New Spending Initiative Summary, prepared for Ministers for the purpose of an 11 December 2019 Cabinet Committee meeting, four funding options were identified for Ministers. The paper said:

> Option 3 is the only option that is likely to enable the system transformation required to address equity, access and workforce issues. Option 3 may meet the terms of the 2018 Settlement Agreement depending on the method selected

---

48 *Bathurst*, above n 20, at [89] citing *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

49 David McLauchlan "The lottery of contract interpretation" [2021] NZLJ 256 at 257.

> by Cabinet to address community midwifery infrastructure and governance. Options 1, 2 and 4 are in breach of the 2018 Settlement Agreement.

[177] Also amongst the documents before the Court was an August 2022 memorandum entitled "Free and frank advice regarding the College of Midwives legal action". The memorandum was prepared by Martin Hefford. Mr Hefford was the Strategic Advisor at Te Whatu Ora/Health New Zealand in August 2022. The memorandum set out advice to former Minister of Health Andrew Little and Associate Minister of Health Ayesha Verrall about the Crown's "inability" to meet the terms of the 2017 and 2018 Settlement Agreements, including setting out information under headings "Breach 1" (fair and reasonable remuneration), "Breach 2" (National Provider Organisation), and "Breach 3" (Joint development of a nationally negotiated midwifery contract").

[178] The Crown did not call Mr Hefford to give evidence. The plaintiffs say that if he had been called he could have provided context around the memorandum and Te Whatu Ora's understanding of its obligations to the College under the 2018 Settlement Agreement.

[179] In response, the Crown emphasised that Mr Hefford was an official at a different agency (not the Ministry of Health) and his memorandum was written almost four years after the 2018 Settlement Agreement. It cites *Bathurst*, where the Supreme Court observed that where the subsequent conduct relied on is that of executives of corporate parties to the contract who had no involvement with negotiating the contract and no knowledge of its background, it will not be probative if the actions do not represent the view of the relevant corporate party at the time the contract was formed.[50]

[180] It appears that Mr Hefford had no involvement with negotiating the 2018 Settlement Agreement, but the Court does not know whether, at the time of signing, the Crown took the same view of the Agreement as Mr Hefford does in his memorandum. Mr Knipe, who was involved in drafting the Agreement, was not called to give evidence either.

---

50 *Bathurst*, above n 20, at [89]–[90].

[181] As David McLauchlan writes, where a party denying a particular interpretation of a contract has acted (or urged action) consistent with that interpretation, that may sometimes provide a reliable basis for an inference that at the time of the contract the party attached that meaning to the words in question.[51]

[182] Mr Hefford's evidence, taken in conjunction with, for example, the budget documents discussed in Dr Jane's evidence, may have elucidated the Crown's interpretation of the 2018 Settlement Agreement, at the time it was signed. But in the absence of evidence from Mr Hefford, or from Mr Knipe, the Court does not know the provenance of the memorandum. For example, was it specifically requested and if so, by whom and for what purpose? What triggered its request?

[183] Dr Verrall, the Associate Minister at the time, did give evidence but advised that she did not have any contemporaneous recollection of what occurred at the time relating to the Hefford memorandum. She confirmed in cross-examination that Mr Little would be the appropriate person to ask questions about Budget 2022.

[184] The Hon Andrew Little, the Minister to whom the memorandum was addressed, was the Minister of Health from 6 November 2020 to 1 February 2023. Mr Little was the Minister when the 2021 Notice was introduced, for Budget 2022 (when the Ministry prepared an initiative summary seeking the difference between PwC's fair and reasonable price and the current spend through the Notice), and provided a media interview in August 2022 after these proceedings had been filed, stating "I totally get why [LMC Midwives] are going back to court." Mr Little's evidence may have clarified the decision-making process around Budget 2022, and the circumstances surrounding the Hefford memorandum, but he too was not called to give evidence.

[185] As to others who might have given evidence on this question, as noted above Mr Knipe is the Chief Legal Advisor at the Ministry of Health and held that role throughout the relevant period covered by the proceedings. Mr Knipe signed the interim agreements between the parties on behalf of the Crown, including the mediation agreement of 14 December 2018 confirming that the Crown would be

---

51 McLauchlan, above n 49, at 257.

represented at the mediation by persons with authority to settle the parties' dispute. Mr Knipe attended that mediation and was also involved in drafting the 2018 Settlement Agreement. He briefed the Director-General of Health, Dr Bloomfield, on the outcome of the mediation before the Settlement Agreement was executed on behalf of the Crown. The first indication from the Crown that it did not regard the 2018 Settlement Agreement as a binding agreement was Mr Knipe's letter of 6 October 2021 to the plaintiffs' lawyers where he referred to it as "in the nature of an agreement to negotiate".

[186] Mr Knipe was not available to address any issues around the Crown's contemporaneous interpretation of the 2018 Settlement Agreement. Significantly, and as the plaintiffs emphasise, the Crown's failure to call Mr Knipe means he could not address the assertion by the Crown that Ms Brooking did not have authority to enter into the 2018 Settlement Agreement on behalf of the Crown. He also could not address why, in the four year period between entry into the 2018 Settlement Agreement and the initiation of the plaintiffs' proceedings, the Crown did not raise a concern about Ms Brooking's authority to execute the Settlement Agreement.

[187] In *Ithaca (Custodians) Ltd v Perry Corporation* the Court of Appeal said:[52]

> The absence of evidence, including the failure of a party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when:
>
> (a) the party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);
>
> (b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
>
> (c) the absence of the witness is unexplained.

---

[52] *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153]–[154].

> Where an explanation or elucidation is required to be given, an inference that the evidence would not have helped a party's case is inevitably an inference that the evidence would have harmed it. The result of such an inference, however, is not to prove the opposite party's case but to strengthen the weight of evidence of the opposite party or reduce the weight of evidence of the party who failed to call the witness.

[188] I have already concluded that the 2018 Settlement Agreement did create the binding obligations alleged by the plaintiffs. From the evidence referred to above, and in the absence of Crown evidence on the point, I infer that, at the time the Crown entered into the 2018 Settlement Agreement, the officials involved believed it did so as well.

Performance of the Agreement and conclusion

[189] For completeness, I address the Crown submission that it did its best in difficult circumstances and made iterative progress towards achieving a fair and reasonable service price, primarily through the changes to the 2021 Notice.

[190] The 2021 Notice did effect changes but that was plainly not sufficient to meet the Crown's contractual obligations.

[191] The parties had mutually recognised that the modular structure and payment system in the Notice was and is inadequate and not fit for purpose, hence their successive agreements to co-design a new funding model. Tweaks to that model, including increases to some payment rates, did not and cannot satisfy the contractual obligation to introduce a new contract (that is, not the Notice) that provided for a fair and reasonable service price and the right to renegotiate price annually.

[192] In conclusion, I find that the 2018 Settlement Agreement was a binding contract between the College and the Ministry, and it imposed substantive obligations in the terms pleaded by the plaintiffs.

[193] Aside from the Crown's "iterative progress" argument, it is common ground that the three obligations I have found to arise from the Agreement have not been met by the Crown. I find the defendant in breach of those obligations.

[194] The remedies available to the plaintiffs for the defendant's breach of its contractual obligations are discussed in the Remedies section at the end of this judgment.

SECOND CAUSE OF ACTION: BREACH OF OBLIGATION TO TAKE ALL NECESSARY STEPS AND TO WORK TOGETHER IN GOOD FAITH

[195] The plaintiffs' second cause of action is that the Ministry:

(a) had an implied obligation to take all necessary steps to fulfil the terms of the 2018 Settlement Agreement;

(b) had an express or implied obligation to work together with the College in good faith to fulfil their commitments under the Agreement; and

(c) breached those obligations by failing to take a range of steps and in their communications with the College.

[196] The defendant denies that it had a duty to take all necessary steps to fulfil the terms of the Agreement. It admits that it agreed to an implied obligation to collaborate and negotiate in good faith in its dealings with the College, but says that it has in fact acted in good faith.

Was the Crown under a duty to take all necessary steps to fulfil the terms of the Agreement?

[197] As pleaded, the plaintiffs claim that the defendant had an "implied obligation to take all necessary steps to fulfil the terms of the parties' agreement."

[198] The Crown says that the language of the Agreement requires the Ministry to work together with the College on a number of elements with a view to a future agreement. But it says that a duty to "take all necessary steps to fulfil" those elements does not add anything and would be "extraordinary" and "novel".

[199] The plaintiffs submit that this duty can also be characterised as a duty to cooperate with the plaintiffs by working together on the outcomes-focused

workstreams committed to under the Agreement. At common law, parties to a contract must cooperate "to the extent necessary to make the contract workable".[53] The plaintiffs say that the duty to cooperate and duty to take all necessary steps are different linguistic descriptions of the same duty, and the "necessary steps" required are the steps required to cooperate as far as is necessary to make the contract workable.

[200] The plaintiffs say that this underlying duty to cooperate is reflected in specific obligations in the Agreement. In addition to the outcomes-focused clauses of the Agreement, there are express terms that require the parties to work together. That is consistent with Cooke J's commentary in *James E McCabe Ltd v Scottish Courage Ltd* that:[54]

> …a duty to cooperate in, or not to prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract.

[201] The plaintiffs say that the implied duty they claim is therefore not extraordinary or novel, because the effect of the duty is tied to the express terms of the contract. They submit that clauses 4, 5 and 8 of the Agreement clearly include such duties.

[202] Clause 4 requires the parties to develop the national midwifery agreement together, which necessarily implicates a duty to cooperate.

[203] Clause 5 provides that the parties will jointly undertake policy work on a "National Midwifery Provider Organisation". It says "the parties will work together to develop advice…". Unlike the outcomes-based obligations elsewhere in the Agreement, cl 5 does not extend to an obligation to *establish* a national provider organisation. Rather, it provides that "accountability for the advice to Ministers sits with the Ministry".

[204] Clause 8 is also relevant. The first three sub-paragraphs define the Ministry's "commitments" in terms of "working together with the College...". The "working together" commitment is to achieve the core obligations set out earlier in the

---

53 *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014 (KB) at 1018. See also Sir Kim Lewison *The interpretation of contracts* (8th ed, Sweet & Maxwell, London, 2011) at [6.137]–[6.144].

54 *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm) at [17].

Agreement. The plaintiffs say that this clause establishes a contractual requirement to actively take steps to facilitate those outcomes.

[205] It is clear on reading those provisions of the Agreement that it provides for the parties to work together to achieve their obligations, and that the Crown had a duty to cooperate with the College.

[206] As I will turn to, the plaintiffs say the Crown has not fulfilled its duty to take those necessary steps required of it by the Agreement. The defendant denies any obligation to cooperate has been breached.

Was the Crown under a duty to work together with the College in good faith?

[207] The plaintiffs submit that in parallel with the duty to cooperate, the parties were under an obligation to work together in good faith. They say that commitment is recorded in the joint public statement at Appendix A to the Agreement (the agreed Public Statement), which says "the Ministry and the College have renewed their commitment to work together in good faith", and incorporated by cl 14.

[208] The plaintiffs also say the commitment to work together in good faith is sourced in the nature of the Agreement as a relational contract in the context of a longstanding history of engagement between the Ministry and the College. The commitment was made in the context of the Ministry breaching the 2017 Settlement Agreement and its behaviour following the breach, which included a lack of transparency and honesty. That behaviour was acknowledged by Ms Brooking in her public apology to LMC midwives at the College conference on 24 August 2018.

[209] They also say the commitment was reinforced by subsequent correspondence, such as Dr Bloomfield's letter to the College of 6 October 2020 where he reiterated the Ministry's "public commitment" to "a process to ensure a 'fair and reasonable' service price for LMC midwives". Mr Knipe, the Ministry's chief legal advisor, also wrote to the College's legal adviser on 6 October 2021, emphasising those parts of the 2018 Agreement that referred to the parties "working together".

[210] The Crown in response says that a duty of good faith is not traditionally treated as an enforceable contractual obligation. Although the plaintiffs plead the obligation as being "express or implied", there is no express good faith term in the Settlement Agreement. It says that it is difficult to characterise the public statement as forming part of the terms of the Agreement. However, it concedes that an obligation to collaborate and negotiate in good faith is implicit in the 2018 Settlement Agreement.

[211] I find that a duty to work together with the College in good faith was express in the Agreement. It is clearly set out in the Appendix, which was agreed to by the parties in cl 14 of the Agreement proper. The words used, particularly given their context, clearly indicate that the parties intended to be bound by such a duty.[55]

[212] In any event, as the Crown concedes, an obligation to collaborate and negotiate in good faith is implicit in the Agreement. Such an obligation can be given effect to by the court.[56]

[213] The plaintiffs say that the Ministry was actively required to maintain transparent and honest communication with the College, and that the Ministry's conduct repeatedly fell short of this standard. The defendant says that the evidence does not bear out that characterisation, and that Ministry officials did work with the College in good faith.

Health and Disability System Review

[214] In respect of the obligation "to develop a national midwifery agreement together", the work was never completed. The plaintiffs' submissions focus on the principal reason for this being because the Ministry understood Heather Simpson, Chair of the Health and Disability System Review (HDSR) to have directed officials to 'pause' work on a national midwifery contract. Some further context is necessary at this point.

---

55 *Firm PI 1 Ltd*, above n 36, at [60].

56 Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) [*Burrows, Finn and Todd*] at 221; and *Carter Holt Harvey Ltd v Carroll Logging Ltd* CA204/03, 21 November 2003 at [19].

[215] The HDSR was established on 3 September 2018. The Terms of Reference required final recommendations to be made to the government on a future health and disability system that is sustainable, well-placed to respond to future needs of all New Zealanders, and shifts the balance from treatment of illness towards health and wellbeing.[57]

[216] Ms Simpson was appointed by the then Minister of Health, Hon David Clark, to lead the HDSR with effect from 3 September 2018. Ms Simpson served as Chair of the HDSR Expert Review Panel from August 2018 to March 2020. The evidence given for the plaintiffs was that the obligation in cl 8 of the 2018 Settlement Agreement "to develop the national midwifery agreement together", including the "service description and payment model" was not taken further by the Ministry. This was in large part because, in late October 2019, the Ministry understood Ms Simpson to have given a direction to officials to "pause" work.

[217] Ms Simpson's evidence was that she did not direct any officials to pause work on a national midwifery organisation or national contract. Nor did she have authority to do so — she was neither an official nor a minister. But Ms Simpson did say that in the course of discussions she had with Ministers of Health and officials:

> I would have certainly made it clear that a national provider organisation for LMC midwives in the form the Ministry and the College had been talking about would not sit sensibly in the system we were recommending. On that basis, I advised Ministers and officials that I believed it would be advisable to pause work on finalising any agreement with the midwives until they had a chance to consider the more comprehensive recommendations from our report.

[218] Dr Bloomfield's evidence was that Ms Simpson had been "appointed by Cabinet effectively" and carried a high degree of informal authority. It appears that work on the national midwifery agreement was paused. Ms Brooking's understanding was that Ms Simpson informed the College of the pause at a meeting in November 2019. Dr Bloomfield also gave evidence that this message was "confirmed by Associate Minister Genter when she met with the College in early December 2019."

---

[57] Final Terms of Reference – Review of New Zealand Health and Disability System.

[219] The plaintiffs say that the pause was not directly conveyed to the College. Alison Eddy confirms that Ms Simpson met with the College in November 2019, and that Associate Minister Genter met with the College in December 2019. But her recollection of those meetings is of being told that the HDSR was "likely to advise against investment in national health structures", not that all work on structural changes to the maternity system had been stopped. In her evidence in cross-examination, Ms Simpson said she merely gave an indication of the "direction the recommendations were going".

Plaintiffs' case on breach

[220] The plaintiffs rely on the "pause" proposed by Ms Simpson, and say such a pause is the very definition of a failure to take the necessary steps to complete the work required to implement a national midwifery contract by July 2020.

[221] The evidence of Ms Eddy, who at the relevant time was Chief Executive of the College, was that by September 2019 the service specification was not complete and, despite her attempts to progress the work, no further co-operation from the Ministry was forthcoming.

[222] Nicole Pihema, who was the College President between July 2019 and November 2023, also gave evidence for the College of what she perceived as a lack of co-operation from the Ministry on the service specification work itself. She described the "disengaged" manner of the Ministry official involved in the work. Ms Pihema also gave evidence on the interlocking context of the Ministry's failure to progress other aspects of work, that is, to develop and provide advice on a national provider organisation for a Cabinet paper to be submitted in May–June 2019. The plaintiffs submit that if the advice on a national provider had been delivered on time, the College and the Ministry would have been in a position to complete the service specification.

[223] The plaintiffs' case is that no meaningful advice on a national provider organisation was submitted to Ministers or Cabinet, either in 2020 or in the May 2021 Cabinet paper eventually submitted by Associate Minister Genter. The plaintiffs largely attribute this to the pause of work on structural changes in the health system,

including a national provider organisation for LMC midwives. Ms Pihema's evidence was that sitting behind that decision was the earlier failure to progress the development workstream sufficiently to meet the contractually stipulated deadline for a Cabinet paper with this advice of May–June 2019.

[224] The plaintiffs say the duty to cooperate on the steps necessary to make the contract workable runs parallel to the duty of good faith. The latter obligation required the Ministry to actively maintain transparent and honest communication with the College. The plaintiffs submit that it has repeatedly failed to do so, pointing to three examples.

[225] First, the plaintiffs say the Ministry failed to collaborate with the College on the procurement of an expert consultant to quantify a fair and reasonable service price for LMC midwives, despite expressly saying it would do so.

[226] Second, the Ministry commissioned PwC to undertake the PwC Extension Work, updating the first PwC report's quantum for fair and reasonable service price and including new analysis to approximate midwifery operating costs. The purpose was to inform what amount of funding would be necessary to address the gap between LMC midwives' then remuneration and a fair and reasonable service price. The Ministry did not inform the College it had commissioned this work nor inform it of the outcome of the work.

[227] The PwC Extension Work was subsequently treated by the Ministry as a quantified value for the "fair and reasonable" standard in Budget 2020 documents. The Ministry did not inform the College that it had accepted a quantified figure for fair and reasonable pay, nor that it had done so on the basis of the PwC Extension Work.

[228] In fact, the plaintiffs say, the Ministry never told the College about this work. The College was left to find out about it almost five years later during the course of discovery for this litigation when existence of the PwC Extension Work became apparent to the plaintiffs. The defendant then resisted discovery of the work.[58]

---

58 *New Zealand College of Midwives Inc v Attorney-General* [2024] NZHC 1544 at [46]–[49].

Ms Brooking accepted that the Ministry's conduct in not telling the College about the work at the time was not transparent.

[229] Third, throughout 2019 the Ministry repeatedly reassured the College that it intended to perform its obligations under the 2018 Settlement Agreement while at the same time failing to make meaningful progress on the work to be done together by the parties. Most significantly, a decision to pause work under the Agreement was made as early as October 2019, but not communicated to the College. The Crown also began to subtly "recharacterise" its obligations under the 2018 Settlement Agreement, including suggesting it would adopt a staged approach to implementation of obligations, despite the clear timeframe for implementation by July 2020.

[230] The plaintiffs say that, taking the evidence as a whole, it does not illustrate good faith on the part of the Ministry. They say there is also little evidence that the Ministry treated its duty to cooperate with the College with the appropriate seriousness. They do not suggest that Ministry officials were deliberately acting in bad faith or with malintent, but say that making unilateral decisions, including ultimately the decision to breach the Agreement, with no regard to the College, is a breach of this obligation.

Defendant's case on breach

[231] The Crown denies that it breached any obligations to collaborate and negotiate in good faith. It says that officials worked diligently to progress the work streams arising from the 2018 Agreement, and points to the extensive correspondence between the College and the Ministry as the work arising from the Agreement progressed. Conversations were open and frank, with detailed updates provided in relation to the joint workstreams, the budget process (within the bounds of budget secrecy) and on broader developments within the sector. The College was also consulted each year on the allocation of budget funding for LMC midwives.

[232] The Crown says that Ministry officials were responsive and would convene meetings if serious concerns were raised. At a meeting on 1 August 2019 — almost a year prior to the July 2020 date in the Agreement — Ms Brooking indicated the

possibility of a phased approach for the proposed new contract arrangements. There is no indication the College "voiced any opposition to the prospect of phasing".

[233] In relation to the procurement of PwC, Ms Perry's evidence was that the Ministry's procurement rules precluded the College from participating in that engagement. She acknowledged that the Ministry ought to have discussed that constraint with the College at an earlier stage. In relation to the PwC Extension Work, Dr Jane and Ms Perry described it as an additional piece of work to enable officials to give full and frank advice to Ministers for budget purposes. Because it was work to inform a budget bid, Ms Brooking explained that officials "needed to be careful that the information… sat within the budget sensitive requirements". The Crown says there is nothing to suggest that this workstream was deliberately concealed in order to deceive the College, or for some malicious or ulterior purpose.

[234] As to the "re-framing", the Crown relies on funding constraints in the health sector and says that funding decisions ultimately sit with Cabinet and cannot be guaranteed. It also points to a consistent promotion of budget bids which have increased remuneration for LMC midwives. Dr Bloomfield, Ms Brooking, Ms Perry and Dr Jane gave evidence that the HDSR and, later, the COVID-19 pandemic, dramatically changed the landscape of the health sector and directly impacted on the work arising from the Agreement. It says when it became clear political assent to certain work streams would not be possible officials sought to advance alternative policy.

[235] The Crown says that the funding model being developed in accordance with the 2018 Settlement Agreement "was not consistent with the HDSR's approach" and that the impact of the reforms on the work arising from the Agreement "cannot have come as a surprise to the College".

[236] The Crown says that through the Budget 2020 process, Ministry officials attempted, in good faith, to promote a bid for an increase in funding to what would be "fair and reasonable", informed by PwC's analysis of what that sum might be. The initial bid, in October 2019, was for $422.95 million across four years. Although the amount secured in Budget 2020 was scaled to $180 million, that does not mean a

higher bid was not something the Government genuinely hoped to achieve. Dr Jane gave evidence that "getting any money at all was a huge feat in light of COVID".

[237] Although a national community midwifery agreement was not implemented, elements of the work undertaken towards that aim did inform the changes introduced through the 2021 Notice. That Notice materially improved the terms and conditions under which LMC midwives deliver their services, including raising the fees available for LMC modules to claim. The Crown says that the Notice represented the best efforts of the Crown to secure increases to the service price payable to LMC midwives.

[238] Overall, the Crown says the evidence does not support a submission that the Ministry failed to work with the College in good faith.

Discussion

[239] The content of a good faith obligation is debated, and its characteristics will be context specific.[59] In *NZ Licensed Rest Homes*, Hammond J noted that such an obligation "must limit unrestrained self-interest in favour of a respectable measure of information exchange, cooperation, renegotiation, modification of positions, and contractual adaptation."[60] The Supreme Court of Canada has held that in certain relationships, the law will require "honest, candid, forthright or reasonable contractual performance."[61] It has also said that a lack of good faith can be characterised by actions that knowingly mislead the other party, including through lies, half-truths, omissions and silence.[62]

[240] The Crown's duty to act in good faith clearly required it to do what was necessary to carry out its obligations under the 2018 Settlement Agreement, to work with the College where relevant and to maintain clear communication with the College. It was required to be honest and to reasonably update the College on its progress on core commitments.

---

59 *Burrows, Finn and Todd*, above n 56, at 221.

60 *New Zealand Licensed Rest Homes Associated Inc v Midland Regional Health Authority* HC Hamilton CP34/97, 15 June 1999 at [145].

61 *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 SCR 494 at [66] cited in *Heli Holdings Ltd v The Helicopter Line* [2016] NZHC 976 at [114].

62 *CM Callow v Zolligner* 2020 SCC 45, [2020] 3 SCR 908 at [91] and [132].

[241] By contrast, any actions by the Crown that knowingly misled the College, including through unnecessarily withholding information, would indicate a lack of good faith.

[242] I accept that constraints on public funding, Cabinet confidentiality and the Budget sensitivity of certain documents are relevant context to the Ministry's actions or lack of action. But the Ministry was a party to the 2018 Settlement Agreement. The Agreement was a relational one, where the parties agreed to work together to accomplish shared objectives. It arose out of the Ministry's acknowledged breach of the 2017 Agreement.

[243] While it is open to the defendant to argue that contextual factors beyond its control, such as COVID-19 and budget constraints, affected its ability to meet its substantive commitments, the same is not true for its obligation to work in good faith with the College. In fact, the converse might be argued — as it became more difficult for the Ministry to meet its commitments under the Agreement, its obligation to keep the College informed and where necessary seek to modify or defer those commitments, became more important.

[244] I also note that the Crown began falling behind schedule in implementing the Agreement prior to February 2020. The plaintiffs allege that the Crown failed to act in good faith and to take necessary steps throughout 2019. Plainly, the impacts of COVID-19 from February 2020 onwards cannot excuse alleged conduct before that date.

[245] The Crown emphasises the "pause" of the development of the national provider organisation as a result of the HDSR draft report and Ms Simpson's "instructions". The Crown says that it cannot have come as a surprise to the College that the national provider organisation model did not fit with the goals of the HDSR. But, in my view, that cannot excuse the Crown's actions, for a number of reasons.

[246] First, the Ministry assumed Ms Simpson had authority which she did not have (and which she agreed in evidence she did not have). It was ultimately for Cabinet to accept or reject the recommendations of the HDSR. It was not for Ms Simpson to

direct any pause in current work. Nor did she purport to do so. The Ministry ought not to have pre-empted Cabinet's decision. I accept that nor could it, responsibly, have ignored the recommendations, or earlier indications as to the direction the report was likely to take. What the duty of good faith required of the Ministry was that it keep the College apprised of developments, what they might mean and what action, or inaction, the Ministry proposed as a consequence.

[247] It did not do so. Instead, it was passive, assuming that the College must have known of the recommendations, or likely recommendations, and known they would be accepted by Cabinet. That was a breach of the obligation to work together in good faith. While it is not necessary to speculate what the Ministry could have done in substantive terms, presumably it remained open for it to, for example, continue to recommend the national provider organisation model to Ministers.

[248] In addition, the Crown began to fall behind on its commitments well before the signalled "pause" arising from the HDSR recommendations. Clause 8(d) of the Agreement required the Ministry to submit policy advice for a national provider organisation and reflecting a payment model driven by factors in the Co-design work, including the Co-design principles, as part of a May/June 2019 Cabinet paper. No advice on a national provider organisation was submitted to Cabinet.

[249] Ms Perry's evidence emphasised that the Cabinet paper's progressive delays were because the Government, not the Ministry, manages the Cabinet agenda. But in June 2019, the Ministry's website recorded that in "June and July 2019, the Ministry will actively engage with both consumers and midwives." That consultation included looking at options other than the development of a national provider organisation. The plaintiffs say the College was not formally advised of the nature of those meetings, the information to be disseminated and obtained at the meetings and the use to which it would be put in terms of the work to which the Ministry had committed under the Agreement. That tends to suggest that the Ministry was not committed to its obligations under the Agreement. In any event, it was not consistent with the obligation to work together with the College in good faith.

[250] It is also relevant that, at the time of preparing documents for Budget 2020, the Ministry had modelling from PwC that showed the cost required to fund the gap between a "fair and reasonable" service and what was currently being paid to LMC midwives, in order to meet the obligation assumed under the 2018 Settlement Agreement.

[251] In cross-examination, Ms Brooking confirmed that a small subset of the Ministry's Executive Leadership Team (ELT) was responsible for the budget process in Budget 2020 and, in particular, for deciding to proceed with a budget bid that did not provide for LMC Midwives to be paid a fair and reasonable price. Ms Brooking's evidence was that the members of that team were Maree Roberts, Deputy Director-General of Policy and Fergus Welsh, Chief Financial Officer.

[252] When he was cross-examined, Mr Welsh advised that Priority E Budget Initiatives (which included the bid relating to LMC Midwives) were led by Ms Roberts and he had no responsibility or involvement with those bids. From that evidence it appears that it may have been Ms Roberts who made the final decision to proceed with a budget bid from Budget 2020 that did not provide for LMC Midwives to be paid a fair and reasonable price.

[253] As discussed in relation to the first cause of action, the defendant says that the 2018 Settlement Agreement was conditional on the approval of Cabinet and/or Ministers. Ms Roberts may have been able to assist the Court to clarify who made the decision in relation to the 2020 budget bid, including whether it was made at official level or on Ministerial direction. But she was not called to give evidence.

[254] Nor did the Crown discover records of decisions made by the Ministry ELT or Budget Subcommittee of the ELT relating to the Budget 2020 bid, or Health Reports relating to the Budget bid initiatives for Budget 2020. When the absence of those records is considered, together with the Crown decision not to call Ms Roberts, an inference may be drawn that the evidence would have harmed the Crown's case to the extent it relies on the decision being made at ministerial or Cabinet level.

[255] The Ministry repeatedly reassured the College throughout 2019 that it intended to perform its obligations under the 2018 Settlement Agreement, but it failed to make meaningful progress on its obligations and milestones. Ms Eddy's evidence was that, by 1 August 2019, it was "increasingly apparent that July 2020 was in jeopardy". On 10 October 2019, Ms Brooking reiterated that the aim was to implement the Agreement by July 2020. But it must have been clear to the Ministry by then that the goal was impossible.

[256] The pause as a result of the HDSR draft report would not have helped matters. But, as Ms Pihema's evidence highlighted, sitting behind the pause was the Ministry's earlier failures to progress its workstreams and meet its agreed deadlines.

[257] I turn to consider the Ministry's engagement with PwC. The College was not consulted on the procurement process or the 6 June 2019 decision to engage PwC, even though in previous meetings in March and April the Ministry had agreed that the College would be able to provide input into the draft procurement documents before they were finalised. Ms Brooking accepted that was not transparent conduct by the Ministry.

[258] Ms Perry explained that the Crown was subject to internal procurement processes that precluded the College's involvement. However, she also accepted that, once the Ministry realised those constraints existed, the Ministry's failure to inform the College of the constraints "until much later" illustrated a lack of transparency.

[259] Of greater concern is the Ministry's communications regarding the PwC Extension Work. The first PwC report set out a quantum for a fair and reasonable service price for LMC midwives. The PwC Extension Work updated that and addressed what amount of funding would be necessary to address the gap between midwives' then remuneration and a fair and reasonable service price. While the Crown could reasonably say that it was unable to disclose the content of that work due to budget secrecy, it did not tell the College it had commissioned the work, or the outcome of it. When the College subsequently became aware of it, the Crown resisted discovery on the basis it was not relevant.

[260] A duty to act in good faith does not require sharing any and all information with the other contractual party. But it does require a level of transparency, particularly in a relational context such as this one. Acting in good faith required the Ministry to inform the College of its constraints with regard to the instructions to PwC and that it had commissioned PwC for extension work, given that work was directly relevant to one of the Ministry's core obligations under the Agreement. The Crown's actions with regard to its commissioning of PwC do not support a finding that it acted in good faith.

[261] In conclusion, I find that the Crown breached its duties to take all necessary steps to work together with the College to fulfil the outcomes-focused obligations in the contract, and to act in good faith, by:

(a) pausing development of the national provider organisation in October 2019;

(b) failing to reach agreed deadlines and repeatedly reassuring the College that it was still on track for the July 2020 deadline;

(c) not clearly communicating with the College, particularly about the constraints placed on its actions; and

(d) commissioning the PwC Extension Work without informing the College it had done so and without informing the College of the outcome of that work.

[262] The plaintiffs seek the same form of damages with respect to the second cause of action as for the first cause of action. The plaintiffs acknowledge that monetary remedies for these causes of action are therefore alternative, in the sense that they do not seek to recover more than once for the same loss. To avoid duplication of damages awarded in relation to the first cause of action, I do not separately award any damages in respect of this aspect of the claim.

[263] The declarations sought are considered in the Remedies section at the end of this judgment.

THIRD CAUSE OF ACTION: EQUITABLE ESTOPPEL

[264] The plaintiffs' third cause of action is a claim for equitable compensation and a declaration based on equitable estoppel. The plaintiffs claim that the Crown made representations that the payment for LMC midwives would be in line with Government pay equity principles, free from systemic undervaluation and free from any element of gender-based discrimination. LMC midwives detrimentally relied on those representations and accordingly it would be unconscionable for the Crown not to pay LMC midwives a fair and reasonable service price consistent with the representations.

[265] This claim runs in parallel with the plaintiffs' contractual causes of action.

[266] The defendant says there was no representation capable of generating a belief that service prices for LMC midwives would be at a certain price by a certain time.

The law of estoppel in New Zealand

[267] Historically there have been many doctrines of estoppel. The three strands recognised in equity were estoppel by representation, promissory estoppel and proprietary estoppel.[63] The New Zealand courts no longer generally distinguish between the various strands, now recognising a unified doctrine of equitable estoppel with its overall requirement of unconscionability.[64]

[268] Equitable estoppel may provide a remedy where it would be unconscionable for a defendant to depart from a belief or expectation that the defendant has created or encouraged in the plaintiff and which the plaintiff has relied on to its detriment.[65]

---

63 *Sutherland v Lane* [2020] NZHC 721 at [129] citing James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2013) 601 [*Equity and Trusts in New Zealand*] at 605.

64 *Equity and Trusts in New Zealand* at 602.

65 *Sutherland v Lane*, above n 63, at [129]; and *Equity and Trusts in New Zealand* at 602.

[269] While at common law an estoppel was created only by a statement of past or present fact, or mixed fact and law, that is no longer the case. The doctrine may apply where the representee has relied on a belief as to the representor's future action.[66]

[270] The elements of promissory estoppel are:[67]

(a) the existence of a promise or encouraging words or conduct by a defendant (or someone acting on the defendant's behalf) which has created or encouraged a belief or expectation;

(b) the promise or encouragement must be sufficiently "clear and unequivocal";

(c) the plaintiff has acted in reliance on the promise or encouragement;

(d) the plaintiff's reliance was reasonable in the circumstances;

(e) the plaintiff will suffer detriment if the plaintiff's belief is falsified or expectation is not fulfilled;

(f) it would be unconscionable for the defendant to act inconsistently with the plaintiff's belief or expectation.

[271] The elements at (c), (d) and (e) above — reasonable reliance to the representee's detriment — are sometimes expressed as one element, but in this case it is helpful to examine each aspect separately.

---

66 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep 391 (HL) at 399. See also *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* HC Auckland CIV-2003-404-5143, 6 April 2005 [*Villages Pakuranga*] at [46], [49] and [50]–[54]; and Ben McFarlane "Estoppel" in John McGhee and Steven Elliott (eds) *Snell's Equity* (34th ed, Sweet & Maxwell, London, 2024) [*Snell's Equity*] at [12-024].

67 *Equity and Trusts in New Zealand*, above n 63, at 613–614; *Villages Pakuranga* at [46]; and *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

The representations relied on

[272] The primary representations relied on by the plaintiffs are:

(a) The Third Interim Agreement, dated 9 March 2017: "the parties agree that the payment of midwives should be in line with government equity principles, and free from systemic undervaluation".

(b) The Fourth Interim Agreement, dated 6 April 2017: "the co-design process and resulting funding model will be in line with the principle that equal pay has no element of gender-based differentiation and is free from systemic under-valuation, as outlined in the government's response to the Joint Working Group on Pay Equity Principles".

(c) The 2018 Settlement Agreement, dated 21 December 2018: "The Ministry hereby: … reaffirms its commitment to the Co-design principles"; "the Ministry agrees to a process to make a 'fair and reasonable' service price for Lead Maternity Carer midwives".

[273] The plaintiffs say those pleaded representations are supported by other representations, including public representations, made by the Minister and senior Crown officials at around the same time.

Is equitable estoppel available against the Crown?

[274] A preliminary question arises, before considering the usual elements of equitable estoppel. While the Crown acknowledges that estoppel may have a limited role to play in the public law context in cases involving individual rights where no broader public interests are engaged, it submits it will almost always be inappropriate where it would have the effect of sanctioning an ultra vires act, or interfering with a policy or political matter which affects the public generally.[68]

[275] The defendant says this is such a case. It concerns reforming the structure of how a workforce of public sector contractors are compensated and the apportioning of

---

[68] Citing *Equity and Trusts in New Zealand*, above n 63, at [19.2.5].

New Zealand's healthcare budget. In dealing with LMC midwives, officials and ministers were exercising public duties and obligations at the policy formation level. They needed to bear in mind the impact on users of the health system, who are entitled to equitable access and sustainable maternity and other health services and potential flow-on effects for other related contractor and employee workforce within the health system and more broadly. An agreement imposed by a court may have unintended consequences.[69] The Crown says an estoppel is inappropriate for that reason.

[276] The plaintiffs say that the position adopted by the Crown is incompatible with relevant legal principles on equitable estoppel and that the monetary and declaratory relief they seek in respect of this claim would neither prevent the Crown from making policy nor interfere with the political process regarding the funding and delivery of maternity services.

[277] The plaintiffs point to *Villages of New Zealand (Pakuranga) Ltd v Minister of Health* (*Villages Pakuranga*) as an example of the application of the doctrine of estoppel in a public law context.[70] In *Villages Pakuranga* the plaintiff (VONZ) operated a rest home and provided retirement accommodation, residential care and rest home services. VONZ claimed against the Ministry of Health for services provided in respect of six residents who qualified for subsidised care at its Pakuranga Park Village. VONZ's original funding contract had expired, as had four further extensions of the contracts implemented under the Notice.

[278] VONZ continued to provide services to the residents in its care while negotiating with successive public bodies (whose obligations had since been vested in the Ministry) to secure a service contract on agreed terms. The negotiations were unsuccessful.

[279] VONZ successfully claimed for equitable compensation based on promissory estoppel and restitutionary quantum meruit. In relation to the estoppel claim, Winkelmann J, as she then was, said:[71]

---

69 Citing *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (CA).
70 *Villages Pakuranga*, above n 66.
71 At [50].

> I am satisfied that there was an unequivocal representation that VONZ would be paid. The defendant made statements on a number of occasions to the effect that if no contract was reached as to price, then payment would be effected through a s 51 notice. The rates at which the notice would be issued were also clearly stated in correspondence and in particular in the letter of 21 April 1999.

[280] The defendant says *Villages Pakuranga* can be distinguished as it involved repeated, precise and clear representations about payment from a defined date, which is very different from the general commitment, unspecified as to timeframe and amount, alleged to have been made here.

[281] The defendant also distinguishes *Villages Pakuranga* as a case where Budget constraints were not a relevant factor. The representations were made pursuant to the funding authority's specific statutory role to arrange for payment for provision of health and disability services under the Health and Disability Services Act 1993, by way of contract or s 51 Notices (albeit within the terms of the funding agreement each authority had reached with the Crown).

Discussion

[282] As the defendant emphasises, decisions and actions of public bodies typically affect the public at large, while estoppel is a private law concept, concerned with adjusting rights and obligations within individual relationships.[72] But that does not mean that the Crown is not bound by the law of estoppel. The authors of *Hogg's Liability of the Crown* note that, while there are some dicta to the effect that the Crown is not bound by estoppel, "there is no good reason for this position, and it is opposed by the overwhelming weight of authority".[73]

[283] The starting point is s 3(2)(e) of the Crown Proceedings Act 1950 which provides:

---

72 *Equity and Trusts in New Zealand*, above n 63, at [19.2.5].

73 *Hogg's Liability of the Crown*, above n 12, at [13.2]. See also Anthony Mason "The Place of Estoppel in Public Law" in M Groves (ed) *Law and Government in Australia* (The Federation Press, Sydney, 2005) 160.

> **3 Claims enforceable by or against the Crown under this Act**
>
> (2) Subject to the provisions of this Act and any other Act, any person (whether a subject of [the Sovereign] or not) may enforce as of right, by civil proceedings taken against the Crown for that purpose in accordance with the provisions of this Act, any claim or demand against the Crown in respect of the following causes of action:
>
> …
>
> (e) any other cause of action in respect of which a petition of right would lie against the Crown at common law or in respect of which relief would be granted against the Crown in equity.

[284] Section 27(3) of the Bill of Rights also provides that persons have the right to bring civil proceedings against the Crown in the same way as civil proceedings between individuals.

[285] There are many instances where the Crown and other public bodies have been held to be subject to an estoppel. One such example is the decision of the High Court of Australia in *Commonwealth of Australia v Verwayen*.[74] In that case the Commonwealth of Australia was estopped from raising a limitation defence, in circumstances where assurances had been made in the past on behalf of the Commonwealth that the limitation period would not be raised.

[286] In some circumstances, where an estoppel would act to prevent a change in government policy, it cannot be invoked. In *Laker Airways*, an airline sought approval to operate a cheap passenger airline from London to New York, known as the Skytrain.[75] The Civil Aviation Authority approved the licence and the Secretary of State confirmed it. Before the Skytrain could commence operation, permission from the United States was also required. The United States Civil Aeronautics Boards recommended approval be granted, but there was a delay in it being signed by the President of the United States. In the meantime, Laker Airlines spent approximately £7 million on the Skytrain.

[287] During the period of the delay there was a change of government in the United Kingdom and the new Secretary of State announced a reversal of the policy, so as not

---

74 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394.

75 *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643, [1977] 2 All ER 182 (CA).

to permit competition on long haul scheduled services. The question that arose in that case was whether the government was estopped from withdrawing the designation of the plaintiffs for operations on the specified route. The Court of Appeal of England and Wales held that estoppel could not be invoked to hinder the development of government policy.[76] Lord Justice Lawton said:[77]

> Whatever representations the Secretary of State in office between 1972 and 1974 may have made to the plaintiffs he made them pursuant to his public duty and in good faith. If in 1976 his successor was of the opinion that the public interest required him to go back on those representations, he was duty-bound to go back on them. The fact that Laker Airways Ltd suffered loss as a result of the change is unfortunate: they have been the victims of a change of government policy. This often happens. Estoppel cannot be allowed to hinder the formation of government policy.

[288] This is not on its face a *Laker Airways* case: the plaintiffs are not seeking specific performance to implement a policy or political decision, or to prevent the Crown from implementing a different policy or political decision. They seek monetary and declaratory relief, which they say would neither prevent the Crown from making policy nor interfere with the political process regarding the delivery and funding of maternity services. *Laker* concerned a clear, and clearly articulated, policy change**.** Here the defendant does not point to a change in government policy per se. If it was a change of policy about how LMC midwives would be remunerated that was never communicated by the Crown. Indeed, it emphasised in submissions that it had not resiled from its commitment. Rather, the Crown says the "representations" were always subject to Cabinet approval of the requisite funding and in the context of budget constraints and, more generally, that the environment in which the parties were engaging shifted significantly, with the report of the HDSR and the subsequent COVID pandemic. As discussed later, that may be relevant to whether the representations relied on were later retracted, or whether continued reliance was reasonable, but it is not a bar to equitable estoppel per se.

[289] But nor is this case on all fours with *Villages Pakuranga*. In that case, after the expiry of VONZ's contract with various Health Funding Authorities, payment was procured by VONZ through statutory notices issued under s 51 of the Health and

---

[76] At 707.

[77] At 728. See also judgment of Roskill LJ in similar terms, at 709.

Disability Act until 31 May 1997. Between June 1997 and 31 October 2004, VONZ continued to provide these subsidised services to a small number of persons, without a s 51 notice or a contract providing for payment, while contractual negotiations as to price continued.

[290] The court held that there was an unequivocal representation that VONZ would be paid by way of s 51 notice.[78] Justice Winkelmann noted in particular three communications in which the relevant Funding Authority expressly noted, either an extension of the contract, or that it would pay for the cost of care incurred, including an explicit stipulation of the amount payable. The High Court found it was reasonable for VONZ to rely on this representation, emphasising the clarity of the representation. That reliance was only reasonable up until September 1999 at which point negotiations between the parties had broken down and, the court found, VONZ could no longer rely on an expectation of payment.[79]

[291] To my mind, a significant difference is that *Villages Pakuranga* concerned representations made pursuant to the Funding Authorities' specific statutory role to arrange for payment of the provision of health and disability services under the Health and Disability Act by way of contract or s 51 notices. No question of a change in government policy or Budget constraints arose.

[292] The defendant says the present case is more analogous to *Edubase*,[80] but in that case the Court's refusal to uphold an estoppel primarily turned on the conclusion that the language of the representation was not sufficiently clear and unequivocal, rather than the public law context.

[293] In my view, the decision of the New South Wales Court of Appeal in *Searle v Commonwealth of Australia* is of more assistance. In *Searle*, Bell CJ said:[81]

---

78 *Villages Pakuranga*, above n 66, at [50].
79 At [57]–[58].
80 *Edubase Ltd v Minister of Education* [2022] NZHC 795. An appeal against the High Court decision was allowed in 2024 (*Edubase Ltd v Minister of Education* [2024] NZCA 430 [*Edubase (CA)*] but Churchman J's findings on estoppel were not challenged.
81 *Searle*, above n 34, at [145].

> Where a contract is not specifically enforced or enforceable by decree or injunction, it is difficult to say that the contract effects a fetter on the exercise of an executive discretion unless an award of damages or potential award of damages in itself had or has that effect. In this context, questions of degree may need to be considered but the fettering of discretion by an otherwise intra vires contract would, in my opinion, need to be very significant indeed before a court should hold such a contract to be unenforceable as contrary to public policy, and thus precluding an action in damages.

[294] Chief Justice Bell's comment was made in the context of an award of damages for breach of contract, but I accept the plaintiffs' submission that it is consistent that, in the context of equitable estoppel, where representations made by the Crown are intra vires, equitable compensation should only be denied if such an award would itself involve a significant interference with the Crown's ability to make, adapt or implement the policy.

[295] To similar effect, in *Attorney-General (NSW) v Quin* Mason CJ said:[82]

> The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise the power… What I have just said does not deny the availability of estoppel against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion…

[296] The Crown raised the broad spectre of needing to reapportion New Zealand's healthcare budget if the Court were to find an estoppel. But, as the plaintiffs submitted, in every case where there is a monetary award against the Crown, it might be characterised as the Court compelling the Crown to transfer "limited government resources" to the plaintiff, at the expense of other public needs. Further, no evidence was led by the defendant establishing that an award of equitable compensation against it would significantly interfere with its ability to make and implement policy.

---

82 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 11.

Conversely, as Mason CJ noted in *Quin*, the public interest also encompasses justice to the individual, in this case LMC midwives.

[297] Accordingly, I conclude that, subject to the other elements of equitable estoppel being satisfied, there is no reason to rule out the possibility of the remedy being available against the Crown in the particular circumstances of this case.

Were the representations relied on clear and unequivocal?

[298] The defendant says that the representations pleaded by the plaintiffs are not "clear and unequivocal" or "precise and unambiguous",[83] as is required to found an estoppel. If a representation is capable of several different reasonable interpretations, at least one of which is inconsistent with the representation, estoppel will not arise.[84]

[299] The defendant says the representations relied on by the plaintiffs make normative statements as to how the funding model "should" be, and what "principles" it should involve. None of the statements communicate a specific representation as to how the funding model for LMC midwives was to be structured, at what level funding would be achieved, or by when a "fair and reasonable" service price could be achieved.

[300] In addition, the defendant says it is plain from each of the documents in which the representations appear that there are further steps before any new payment model is confirmed. The defendant says the representation cannot be contingent on further negotiation or agreement.[85] It says statements which contemplate further processes being carried out to determine a more definite position are not certain enough to found an estoppel.

---

83 *Māori Trustee v NB Hunt & Sons Ltd* [1986] 2 NZLR 641 (CA) at 655; *Low v Bouverie* [1891] 3 Ch 82 (CA) at 106; and *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL) at 756.

84 Citing *Snell's Equity*, above n 66, at [12-024].

85 The defendant cites *Māori Trustee*, above n 83, at 655, where the Court of Appeal said that to found an estoppel a representations must be "a representation of existing fact, not of future intention"; and *BDM Grange Ltd v Trimex Pty Ltd* [2017] NZCA 12, [2017] NZCCLR 11, where the Court of Appeal refused to find an estoppel on a matter being dealt with in the course of negotiations with the expectation a final agreement would follow: see [70]–[72].

[301] The defendant also refers to *Doig v Tower Insurance Ltd*, where the plaintiff homeowners alleged that Tower Insurance had represented to them, via email, that they would obtain the vendor's replacement insurance cover following purchase of an earthquake damaged house.[86] In fact, consistent with case law, the new owners would be eligible only for indemnity cover. The Court accepted that the email did not contain a sufficiently clear representation. It made a statement as to the "generic" approach Tower took to claims, and advised no "specifics" could be provided until Tower had received a deed of assignment.[87]

[302] In addition, the defendant says, the statements relied on by the plaintiffs refer to other confidential arrangements between the parties. For example, the Third Interim Agreement statement refers to continued mediation meetings and provides that the mediation remains confidential to the College and Ministry. Similarly, the 2018 Settlement Agreement statement relied on, advises that "some, but not all, of the matters agreed are recorded in the statement". The defendant says that is significant in assessing the reliance that group members could reasonably place on the public statements. It says any reasonable person reading this statement would understand they were not privy to the full terms and conditions contained in the 2018 Settlement Agreement.

[303] The Crown also argues that the first two representations relied upon were not clear and unequivocal because they were "made in the context of interim agreements which were superseded by final agreements".

[304] The defendant further says that there is no timeframe by which the goals and the representations are to be achieved. While the plaintiffs invite the court to infer a "reasonable time" (1 July 2020), to do so is to read in guarantees as to certainty and deliverability entirely absent from the statements themselves.

---

86 *Doig v Tower Insurance Ltd* [2019] NZCA 107, [2021] 2 NZLR 127.
87 At [11].

[305] Finally, the defendant says that the representations relied on by the plaintiffs have to be identified in their context. They are made against a backdrop where any commitment as to funding was subject to Budget appropriations that are subject to approval by the Cabinet (and eventually the legislature). This was known to both the College and the group members.

[306] The defendant relies on *Edubase Ltd v Minister of Education*,[88] where the Court considered whether a representation that the Ministry would contract with Edubase to provide early childhood education services during the COVID-19 pandemic at a certain price was sufficiently certain to found an estoppel. The Ministry had advised Edubase that it was "working with" a figure of $30.00 an hour, although that was still subject to Treasury approval. An eventual contract was set at a lower fee.

[307] The Court held it was not reasonable for Edubase's Director to assume that the payment would in fact be at $30.00 per hour. From the communications, he would have been aware that "the details had not been settled, and that the terms of the Scheme… still needed ministerial and political approval".[89] Statements referring to Treasury and Cabinet approval were "inconsistent with Edubase's claim that it acted on a clear and unequivocal representation".[90]

[308] The defendant says the same reasoning applies here. It was repeatedly made clear to the College (and by extension College members) that any funding decisions were a matter for Cabinet. Given that, any general statements as to levels of funding cannot be interpreted as sufficiently clear and unequivocal to found an estoppel.

[309] The plaintiffs in response say that the representations relied on, viewed in the relevant context, could lead a reasonable person to believe and expect that the Crown would remunerate LMC midwives fairly and reasonably, in line with Government pay equity principles, free from systemic undervaluation and free from any element of gender-based differentiations.

---

88 *Edubase*, above n 80.
89 At [174].
90 At [179].

[310] The plaintiffs also say a precise funding model is not pleaded as part of the representation. As to the absence of a timeframe, they submit that it is well-established that where the time for the performance of a promise is not specified, it is implied that the time will be a reasonable one.[91]

Discussion

[311] Estoppels have not arisen where the representation relied on was "ambiguous, overly general or merely a comforting sound".[92] But the assessment of whether the words used created an express or implied representation is objective, using the standard of the reasonable person in the position of the claimant,[93] and examines the circumstances in which the representation was made.[94] A representation does not need to be highly particularised to have this effect. A "general" representation can be "clear and unequivocal" in the relevant sense.

[312] The decision of the High Court of Australia in *Crown Melbourne Limited v Cosmopolitan Hotel (VIC) Pty Ltd* addresses this point. Chief Justice French and Kiefel and Bell JJ held that the "clear and unequivocal" requirement:[95]

> …does not mean that the words used may not be open to different constructions, but rather that they must be able to be understood in a particular sense by the person to whom the words are addressed. The sense in which they may be understood provides the basis for the assumption or expectation upon which the person to whom they are addressed acts. The words must be capable of misleading a reasonable person in the way that the person relying on the estoppel claims he or she has been misled.

[313] Context is vital. As the author of "Equitable Estoppel" in *Equity and Trusts in New Zealand* observes, "the mantra of a 'clear and unequivocal representation' understates equity's ability to deal with the circumstances of a particular case and may lead to confusion".[96] Lord Walker commented in the House of Lords' decision in *Thorner v Major* that the relevant assurance must be "clear enough" to justify the

---

91 Citing *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115 at 126–127; and *Scott v Rania* [1966] NZLR 527 at 534.

92 *Equity and Trusts in New Zealand*, above n 63, at [19.3.4].

93 *Sutherland v Lane*, above n 63, at [133], citing *Wilson Parking*, above n 67, at [47].

94 *Sutherland v Lane* at [133], citing *Wilson Parking* at [47] and [49].

95 *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26, (2016) 260 CLR 1 at [35].

96 *Equity and Trusts in New Zealand*, above n 63, at [19.3.4].

reliance and what amounts to sufficient clarity "is hugely dependent on context".[97] In the same case, Lord Neuberger said:[98]

> [I]t would be quite wrong to be unrealistically rigorous when applying the "clear and unambiguous" test. The court should not search for ambiguity or uncertainty, but should assess the question of clarity and certainty practically and sensibly, as well as contextually … at least normally, it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely.

[314] I think it is plain from the context, discussed in detail in relation to the first and second causes of action, that the parties did understand what the phrases "in line with government pay equity principles", "free from systemic undervaluation" and "free from any element of gender-based differentiation" meant. It is not a case of the representations being capable of several different reasonable interpretations. Similarly, as discussed elsewhere in this judgment, a "fair and reasonable" service price was an objective concept, well understood by the parties, and the subject of the Co-design report and the two PwC reports.

[315] The essence of the defendant's objection to the imposition of an estoppel is not that the representations are unclear or ambiguous, but rather that they are insufficiently detailed. The defendant says not only that the statements make only normative statements but also that the statements do not communicate a specific representation as to how the funding model for LMC midwives was to be structured, at what level funding should be achieved, or by when a fair and reasonable service price could be achieved.

[316] The focus of equitable estoppel is on whether a representation is capable of misleading a reasonable person. I accept the plaintiffs' submission that a representation does not need to be highly particularised to have this effect. A general representation may be sufficiently clear and unequivocal. As the author of *Equity and Trusts in Australia* notes:[99]

---

97 *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [56], cited in *Sutherland v Lane*, above n 63, at [133].

98 At [85].

99 G E Dal Pont *Equity and Trusts in Australia* (8th ed, Thomson Reuters, Sydney, 2023) at [10.130].

> Depending on context, clarity and lack of ambiguity are not always inconsistent with breadth and generality, as a statement expressed in general terms may nonetheless be clear.

[317] Nor is it fatal that the representation relates to future intention.[100] The authors of *Snell's Equity* note that "promissory estoppel may assist B where … B has relied on a belief as to A's future action".[101]

[318] The plaintiffs plead other representations, made by the Minister and others, in addition to those set out at [272] above. For example, on 20 September 2018, Minister Clark agreed that he was "committed to settling pay equity even if there's a large price tag, with the midwifery service and workforce". The defendant's response is that if the pleaded representations require further public representations for context, then they are unlikely to be sufficient to found an estoppel.

[319] I agree with the defendant that the other statements cannot, in and of themselves, found an estoppel. They are however relevant context. Rather than detracting from the representations relied on, those statements reinforce what the plaintiffs say they reasonably understood the representations to mean.

[320] I conclude that the representations relied on, when considered together and in the context of the parties' ongoing relationship, were "clear enough"[102] to justify the plaintiffs' reliance and to found an estoppel, subject to the other requirements discussed below. In context, the representations would have created or encouraged an expectation that the Ministry had made a commitment to payment for LMC midwives that would be consistent with pay equity principles, free from systemic undervaluation and free from any element of gender-based discrimination, and would work with the College in achieving that commitment.

Did the plaintiffs rely on the representations and was that reliance reasonable?

[321] The third element is whether the plaintiffs acted in reliance on the defendant's representations, in that the representations "materially influenced" the plaintiffs to

---

100 *Equity and Trusts in New Zealand*, above n 63, at [19.3.2].
101 *Snell's Equity*, above n 66, at [12-024].
102 *Thorner v Major*, above n 97, at [56], cited in *Sutherland v Lane*, above n 63, at [133].

alter their position. The fourth element (sometimes collapsed into the third) is that the plaintiffs' reliance was reasonable in the circumstances.[103] The reliance and the reasonableness of the reliance are to be considered from the perspective of the person to whom the representations were made.[104]

What was the reliance?

[322] The College pleads its reliance in the following terms:

(a) the College initially adjourned the 2015 judicial review proceedings;

(b) the College later discontinued the 2015 judicial review proceeding, after the College's National Committee approved that action in the light of the Crown's commitments in the 2017 Settlement Agreement (and the First to Fourth Interim Agreements that culminated in that latter agreement); and

(c) the College later refrained from suing the Crown for its admitted breach of the 2017 Settlement Agreement.

[323] The plaintiffs plead that the group members also relied on the representations in that they continued to provide New Zealand women with services as LMC midwives on the basis of the representations. The plaintiffs refer to group members having "delayed or foregone the opportunity to pursue different career opportunities".

[324] In response, the Crown says that none of the actions referred to above were done in reliance on the pleaded representations. It says that the College did not enter into the 2017 Settlement Agreement (and discontinue the judicial review proceeding) on the basis of representations as to pay equity. It did so on the basis of the bargain in the 2017 Agreement as a whole, including the six per cent increase in fees under the Notice. Similarly, the defendant says, the College did not give up its right to sue for breach of the "budget bid" aspects of the 2017 Settlement Agreement in reliance on

---

103 See *Villages Pakuranga*, above n 66, at [55]. See also *Equity and Trusts in New Zealand*, above n 63, at [19.2.2].

104 *Burrows Finn and Todd*, above n 56, at 147.

the Third and Fourth Interim Agreements. It did so as consideration for the process agreed in the 2018 Settlement Agreement.

[325] The defendant points to a number of the LMC midwives accepting during their evidence that there was no commitment by the Crown to fee increases. More generally, witnesses made comments about the time period which were inconsistent with the notion of a clear and unequivocable representation from the Ministry on which they could have relied.

[326] The Crown further says that the evidence given by individual midwives made clear that they prefer the flexibility and autonomy offered by LMC midwifery to, for example, practising as an employed case-loading midwife. Given that, it is hard to say that their motivations for remaining in LMC midwifery are solely driven by reliance on the pleaded representations.

Discussion

[327] While courts are sometimes reluctant to render equitable assistance to well-advised commercial parties with similar bargaining power dealing at arm's length,[105] that is not the situation here. Nor is it a situation where the plaintiffs took a "gamble" by choosing not to enter into a contract. As discussed earlier,[106] the College is a professional membership organisation representing midwives in New Zealand, including midwives working as LMC midwives. The Ministry of Health is the government's lead advisor on health priorities and policy. The Ministry was, at the time, responsible for overseeing the allocation and funding of health services at a national level. The College had a substantial history of engagement with the Ministry. The background to the parties' present dealings since 2015 has been of acknowledged systemic and historic undervaluation of LMC midwives. LMC midwives were, and are, in a much weaker bargaining position vis-ā-vis the Crown.

---

105 At [19.3.4(1)].
106 At [8] above.

[328] As the plaintiffs submit, and I accept, the only practical choice available to LMC midwives was to continue to work under the service fee paid to them under the Notice or not to work as LMC midwives.

[329] While, as the Crown argues, the representations were made in the context of interim agreements, the representations were not superseded. To the contrary, they were reaffirmed in subsequent agreements.

[330] Although the Crown repeatedly emphasised that College officials and individual LMC midwives must have been aware that the future funding depended on Ministerial and/or Cabinet approval, none of the representations relied on, or the agreements in which they are contained, are expressed to be subject to a future contingency.

[331] The representative nature of the College leads to an issue related to reliance. The defendant sought to individualise the question of reliance, drawing a distinction between alleged reliance on the representations by the College, on the one hand, and LMC midwives, on the other. For example, the Crown asserts that "different LMC midwives will have seen and placed reliance upon different material". Similarly, each individual group member will have different reasons for entering into and remaining in a career as a LMC midwife. The Crown also notes that College members were not party to the Agreements and did not have the necessary privity of contract to sue in contract in respect of those Agreements. It says it would be unusual if rights in restitution cut across that contract position.

[332] I accept the plaintiffs' submission that this is largely an artificial distinction. As the plaintiffs submit, the College was engaging with the Crown only on behalf of and solely for the benefit of LMC midwives.

[333] Representations made to the College in its representative capacity are, I accept, properly understood as representations made to its members. Those members (LMC midwives in particular) are self-employed. They do not have the collective bargaining rights of employed persons. Although the College as an incorporated society is a separate legal person, it exists principally to provide an efficient way for

members to advance (and protect) their collective interests. As the plaintiffs submit, in all of its dealings, the College acts either as agent for LMC midwives or in a capacity closely analogous to that of an agent.

[334] The Crown knew, or ought to have known, that the College acts for and on behalf of LMC midwives. I accept the plaintiffs' submission that the Crown must have intended for any representations it made to the College to reach LMC midwives. Accordingly, LMC midwives are to be treated as representees of the representations made by the Crown to the College.

[335] The consequence of that is that acts of reliance by the College, to the extent they were in substance done on behalf of and for the benefit of its members, should be treated as relevant to the LMC midwives' estoppel claim.

[336] Further, it is not necessary to show that the plaintiffs acted solely in reliance on the representations. It is sufficient to show that the representations materially influenced the plaintiffs to act as they did, such that it would be unconscionable for the representor to be able to depart from the representations.[107] It is plain that the promise of equitable payment, free from systemic undervaluation and encompassing fair and reasonable remuneration, was an enduring focus of the College's ongoing dealings with the Ministry throughout the relevant period. However, as discussed below, the requirement for representees to establish detriment, causally linked to the reliance, raises different questions for the College on the one hand, and individual LMC midwives on the other.

Was the reliance reasonable?

[337] The plaintiffs' reliance must have been "reasonable", judged from the perspective of a reasonable person in the position of the party claiming the estoppel.[108]

---

107 *Steria Ltd v Hutchinson* [2006] EWCA Civ 1551 at [117].

108 *Wilson Parking*, above n 67, at [47] and [50]; *Sutherland v Lane*, above n 63, at [133]; *College Rifles Rugby Union Football & Sports Club Inc v Minister of Lands* [2015] NZHC 2001 at [94].

[338] The Crown disputes that it was reasonable. It relies on authorities indicating that the closer the relationship between the representator and representee is to a commercial one, the less reasonable it will be for the representee to have relied on representations.[109]

[339] It also cites James Every-Palmer who says:[110]

> The closer the relationship is to a commercial transaction paradigm between two well-resourced and self-interested parties of equal bargaining strength dealing at arm's length, the more reasonable it is to expect their relationship to be governed by a contract. And the more reasonable it is to expect a contract to be entered into to protect a belief or expectation, the easier it is to infer that by not entering into a contract a gamble was being taken that the expectation would not be fulfilled.

[340] The Crown points to College communications to its members throughout this period which would have made them aware, at least at a high level, that funding decisions were for politicians, not Ministry officials. There were many cautions in those communications that further political or Cabinet approvals were necessary.

[341] The Crown also says reliance by the College was not reasonable given its substantial history of engagement with the Ministry, from which its leadership team must have understood that any increase in funding was subject to a successful Budget bid being made.

[342] The Crown says that the pleaded representations could not have conveyed certainty of outcome to group members. It would not have been reasonable for them to rely on statements of that nature when making career decisions. It also points to the evidence of a number of LMC midwives who accepted that there was no commitment by the Crown to fee increases.

[343] The plaintiffs submit that their reliance on the Crown's representations was reasonable because:

---

109 Citing *Austotel*, above n 69, at 585; *Masport Ltd v Morrison Industries Ltd* CA 362/92, 31 August 1993 at 15; and *Doig v Tower Insurance Ltd*, above n 86, at [35].

110 *Equity and Trusts in New Zealand*, above n 63, at [19.3.4(1)].

(a) The representations were made (and repeated) in written agreements with the Crown (including the legally binding 2017 and 2018 Settlement Agreements).

(b) These written agreements were entered into in response to extant litigation and/or threatened litigation. In settling the 2015 judicial review proceeding, the College (on behalf of its members) gave up the ability to have its claim for unlawful gender-based discrimination determined by the courts.

(c) In agreeing not to issue proceedings in response to the Crown's admitted breach of the 2017 Settlement Agreement, the College gave up its right to enforce the 2017 Settlement Agreement. The College and its members would not have agreed to forego that legal protection if not for the solemnity of the Crown's representations. The Crown has admitted that it did not fulfil its obligations under the 2017 Settlement Agreement and formally apologised for that breach.

(d) The Crown made repeated statements to LMC midwives reaffirming those written representations. These included public statements made available online on Crown websites, that remain available to this day. It also included statements from senior Ministry officials and the Minister of Health renewing the Crown's commitment to various matters that the representations relate to, and which were made against the backdrop of the Crown apologising to the profession for breaching its trust as a result of its admitted breach of the 2017 Settlement Agreement.

(e) From 16 November 2016 to the present, the plaintiffs have been assured that the Crown was committed to "work together [with the College] in good faith towards a fair and reasonable outcome". The plaintiffs say the commitment to working in good faith makes it even more reasonable for the plaintiffs to rely on the representations made by the Crown.

[344] The plaintiffs say their ongoing reliance on the representations remained reasonable, notwithstanding that the Crown failed to uphold its representations within a reasonable timeframe. They say the Crown has never resiled from its promise to pay LMC midwives a fair and reasonable remuneration.

[345] Nor, the plaintiffs say, have they stopped trying to resolve the issues in dispute. They have never walked away from seeking to hold the Crown to its promises. The College repeatedly expressed concerns to the Crown about whether it would meet its obligations (and in a timely manner). As noted above under the second cause of action, the Crown's response, on each occasion, was to reassure the College that these concerns were unwarranted and renew its commitments to its earlier promises.

[346] The Crown did, at a fairly late stage, suggest that the obligation to pay fair and reasonable pay would be phased in: by letter of 6 October 2020 to Alison Eddy, then the Chief Executive of the College, Dr Ashley Bloomfield renewed the commitment to ensuring fair and reasonable pay but said this was a "work in progress" and could not be "immediately resolved". The letter said:

> As you know, in December 2018, the Ministry of Health (the Ministry) made a public commitment to 'a process to ensure a 'fair and reasonable' service price for LMC midwives. This statement remains in the public domain on our website, and I assure you, it remains my commitment too.

[347] As the plaintiffs emphasise, Dr Bloomfield's letter was not a representation that fair and reasonable pay would not be implemented, only that the Crown might not be able to fulfil its obligation to meet its promise in a timely manner. Nor, the plaintiffs say, is it a representation that work performed after 1 July 2020 would not be fairly and reasonably remunerated.

[348] In opening, the defendant submitted that the Crown has not departed from any representation that the payment of LMC midwives should be free from systemic undervaluation, and free from any element of gender-based discrimination. It says the Crown has made substantial improvement to the service price payable to LMC midwives and will "no doubt" continue to do so, within fiscal constraints on the health budget.

[349] The plaintiffs say that the Crown's objection misunderstands equitable estoppel, which does not require that the defendant's representation be resiled from. Rather it is sufficient that the expectation created by the representation (and relied on by the plaintiff to its detriment) has not been fulfilled.[111]

Discussion

[350] As discussed above, the relationship between the parties is not a "commercial" relationship in the sense referred to in the authorities cited by the defendant. For example, *Austotel* involved what the court described as "two groupings of substantial commercial enterprises"[112] who were later described by the New Zealand Court of Appeal in *Masport* as "two substantial public companies".[113]

[351] While *Doig v Tower Insurance Ltd* concerned an insurance company and an insured party, the relevant representations were made by the insurance company to a "senior legal executive" and "experienced conveyancer",[114] who was acting for the insured. In any event, that decision turned on whether the representation was clear and unequivocal, not the reasonableness of reliance on it.

[352] The matters in question here were part of a relational engagement, rather than a single transaction. The representations were not informal and not made casually. They were made in formal legal documents, signed by the Ministry's legal counsel and were in response to extant legal proceedings. The representations were reiterated in public statements and commitments by the Minister and senior Crown officials.

[353] The Crown repeatedly emphasises in its submissions that the plaintiffs' reliance was not reasonable in light of the College leadership's awareness that Cabinet/Ministerial approval was ultimately necessary. But, as the plaintiffs submit, none of the Agreements reached between the parties containing the representations relied on were expressed as being contingent on those approvals.

---

111 *Thorner v Major*, above n 97.
112 *Austotel*, above n 69, at 585.
113 *Masport*, above n 109, at 13.
114 *Doig v Tower Insurance Ltd*, above n 86, at [37].

[354] The representations were provided against the backdrop of existing and later threatened litigation and as a means of resolving some of the issues arising from those disputes. In those circumstances, it was wholly reasonable for the plaintiffs to rely on the Crown's representations (at least until 1 July 2020, as discussed below). That is the case for both the College and individual LMC midwives on whose behalf the College was acting.

[355] The giving of sufficient notice of an intention to resile from a representation may make it unreasonable for the representee to continue to rely on it, but the notice must be a sufficiently clearly communicated correction or a withdrawal of the basis for an assumption. If the assumption has not been flagged in "sufficiently clear terms" continuing reliance on the assumed state of affairs may be reasonable. [115]

[356] While the Crown might have been able to avail itself of changing circumstances — a global pandemic, substantial structural change within the health sector — at no point did it expressly and clearly resile from the representations, even after it was apparent within the Ministry that the representations would not be fulfilled within a reasonable time.

[357] Nor can the incremental increases in remuneration under the Notice that the Crown points to amount to satisfaction, or part satisfaction, of any commitment to an amended system of payment; nor can it be viewed as a reason why the plaintiffs should have ceased to rely on the representations.

[358] As the plaintiffs submit, the Crown's internal shift of position on keeping its promises cannot avail it. For example, it would be unconscionable for the Crown to rely on its own refusal in 2019 to put up Budget bids that would meet the obligation of fair and reasonable pay in a timely manner.

Was continued reliance reasonable?

[359] The plaintiffs accept that a reasonable time was required for the promised changes to the remuneration of LMC midwives to be implemented. They say a

---

115 *Equity and Trusts in New Zealand*, above n 63, at [19.2.4(6)].

reasonable time would have been by 1 July 2020. The Crown's continuing representations, including in the 2018 Settlement Agreement, created an expectation of the implementation of a new national midwifery agreement by that date.

[360] The 2018 Settlement Agreement envisaged that the contract price in any such agreement would be fair and reasonable remuneration. The PwC report, quantifying fair and reasonable pay for a fulltime LMC midwife, was released in September 2019 and the Crown already had the Co-design Pricing Report. Both reports confirmed that fair and reasonable remuneration was significantly higher than remuneration paid under the Notice.

[361] Thus, by that point at the latest, the Crown knew what it had to pay to meet its representations and that was the date on which (the plaintiffs say) it was reasonable for the representations to have been fulfilled.

[362] And by 1 July 2020 almost 40 months had passed since the first relevant representation in the Third Interim Agreement on 9 March 2017. The plaintiffs say the inequity arose at that point.

[363] The Crown says it was not reasonable for the plaintiffs to continue to rely on the alleged representation during the period the loss is claimed for. Where a party has relied upon a promise or assurance but becomes aware that the other party intends to depart from it, the party must take reasonable steps to mitigate its position.[116] In *Villages Pakuranga*, Winkelmann J agreed with the proposition that it was unreasonable for VONZ to continue to rely on representations after the point that negotiations had broken down.[117]

[364] The Crown also submits it never made any representation that LMC midwives would be retrospectively compensated for any unpaid portion of a "fair and reasonable service price" after 1 July 2020 and it is not alleged that they did. The Crown has continued to pay LMC midwives under the statutory notice from 1 July 2020. It has never represented that it would retrospectively provide an uplift in pay from that date.

---

116 *Wolfe v Wolfe* [2021] NZHC 2878 at [89], citing *Equity and Trusts in New Zealand*, above n 63, at [19.2.2].

117 *Villages Pakuranga*, above n 66, at [57] and [58].

The Crown submits that there can be no loss from 1 July 2020, or from a time not long after that date.

Discussion

[365] The question here is whether, and if so, at what point, continued reliance was no longer reasonable. On the one hand, the Crown itself has emphasised that it has not resiled from the ultimate commitment to a fair and reasonable service price.[118]

[366] But I accept the Crown's submission that there is a tension between the plaintiffs' own evidence that it viewed the Crown as having retreated from its representations from 1 July 2020, with the plaintiffs discussing further legal action, and the claim that these representations were relied on by the plaintiffs beyond that date.

[367] Ms Eddy's evidence for the College was that in early July 2020 Associate Minister Genter called her to advise that, in the forthcoming Budget, the only funding going into the midwifery sector would be some further uplifts to fees under the Notice, rather than implementing a new national contract with a blended payment model. The plaintiffs' evidence also recorded that, after the Budget was announced, the College held a two-day National Board meeting which determined that there was no option left to it but legal action to enforce the Ministry's obligations.

[368] The Crown says that Ms Eddy's evidence demonstrates that from July 2020, the College had concluded that the Agreement had been breached and that legal action was necessary. The Crown also points to the evidence of Ms Pihema who said that, at the mediation on 3 November 2020 the College members felt that a further agreement was pointless and that "it was quite obvious that the Ministry could not tell us much about what would happen next in the maternity sector or commit to anything new".

---

[118] As evidenced by, for example, Dr Bloomfield's letter of 6 October 2020 to Ms Eddy in her capacity as Chief Executive of the College.

[369] The Crown's communications did step back from a commitment to a specific timeframe for the "implementation of "fair and reasonable" pay and began to emphasise incremental steps towards that goal — by way of example, increased payments for specific services under the Notice.[119]

[370] As at July 2020, the Crown had not (overtly) resiled from the commitment to fair and reasonable pay. But nor had it taken steps to, for example, directly address the gap between what the Co-design Pricing report and the PwC report said, on the one hand, and the amounts payable under the Notice. While the Crown had made incremental increases to the Notice payments, they were not part of a consistent and coordinated attempt to meet the terms of the representations.

[371] I accept that the plaintiffs were in a difficult position. They continued to attempt to hold the Crown to the representations – for example, Ms Eddy wrote to Dr Bloomfield on 11 September 2020, stating:

> The purpose of this letter is for the College to repeat, formally and on the record, its request that the Ministry, on behalf of the Crown, immediately and without delay agrees to pay LMC midwives fair and reasonable pay as defined in the two reports commissioned by the Ministry.

[372] In reality that communication appeared more like a necessary step before commencing this proceeding. While the plaintiffs might have wished otherwise, and might have retained some forlorn hopes of the Crown's compliance, on their own evidence I do not think that can be characterised as continued reliance in the sense required here. Dr Bloomfield's response of 6 October 2020 is referred to above.[120]

[373] The Crown says that there was no representation that LMC midwives would be retrospectively compensated for any unpaid portion for a fair and reasonable service price after 1 July 2020.

[374] In light of those two factors, the plaintiffs cannot maintain their claim that there was continuing reliance on the Crown's representations after 1 July 2020, such that equitable compensation is payable after that date.

---

119 For example, Dr Bloomfield's letter of 6 October 2020.
120 At [346].

[375] I have found that continued reliance by the plaintiffs on the Ministry's representations was not reasonable after 1 July 2020 (the date by which the plaintiffs expected a fair and reasonable service price would be paid) and there is no evidence of a commitment by the Crown to backdating before that date. It follows that the plaintiffs are not entitled to equitable compensation regardless of whether they can establish detriment.

[376] In case I am wrong on that point, and for completeness, I go on to assess the other elements required to establish an equitable estoppel.

Detriment

[377] The fifth element of promissory estoppel is that the plaintiffs would suffer detriment due to their reasonable reliance on the defendant's representation if the plaintiffs' beliefs were falsified or expectation was not fulfilled.

[378] The plaintiffs say the detriment to LMC midwives is that they have:

(a) delayed or foregone the opportunity to pursue different career opportunities; and/or

(b) not pursued legal, political or collective action (through the College as their representative) either of a different nature or at an earlier date.

[379] The Crown says there is no evidence of consequences of the detrimental reliance beyond any lost expectation itself and that the plaintiffs' expectation is, on the case claimed by them, seriously disproportionate to the detriment suffered. There is no evidence as to changes in behaviour or actions taken by LMC midwives in response to the alleged representations.

Discussion

[380] Detriment is not presumed from non-fulfilment of the representation[121] — it must be established independently and must be causally linked to reliance.

---

[121] *Creative Development Ltd v Chorus New Zealand Ltd* [2021] NZCA 178 at [106].

[381] Detriment may be constituted by changes or opportunities foregone in reliance on a representation. Detrimental reliance may take one of two forms. First, the party claiming the estoppel may have spent time, effort, or money in reliance on the belief or expectation in question which would not have been spent if the representation had not been made and which is rendered worthless if the belief or expectation is abandoned. Second, in reliance on the belief or expectation, the party claiming the estoppel may have foregone other opportunities to gain the benefit which will be lost (or avoid the detriment which will be suffered) if the belief or expectation is abandoned. In other words, the party alleging the estoppel may have decided not to take a different course of action which would have allowed him or her to secure the same expected benefit, or to avoid the detriment which will not be suffered, by some other means.[122]

[382] The representee bears the onus of establishing detriment. In general, evidence must be given that the failure to take an alternative course of action was caused by the belief or expectation in question.[123] Alleged detriment that is nothing more than the loss of a possibility, especially when its value cannot be quantified, rests almost entirely on speculation, and so should not be thrown on the representor. In *Je Maintiendrai Pty Ltd v Quaglia*, Cox J said it was insufficient for a promise simply to identify a number of alternative courses of action he or she *could* have pursued, but for the reliance on the representation, and maintain that these were the detriment.[124] The representee must establish that he or she *would* otherwise reasonably have adopted those alternatives. Conversely clear evidence of an opportunity forgone in reliance on a promise supports a finding of detriment.

[383] I accept that the College has detrimentally altered its position in reliance on the representations, in the specific ways set out at [378] above. Refraining from suing another party is an example of a forgone opportunity sufficient to find detrimental

---

122 See, for example, *Sutherland v Lane*, above n 63, at [138].

123 *Connor v Pukerau Store Ltd* [1981] 1 NZLR 384 at 386 (CA), citing *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 734–735.

124 *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101 at 121.

reliance.[125] In the sense that the College's sole purpose is as a vehicle to represent midwives, it is also the case that the members of the Group have, collectively, detrimentally altered their position in reliance on the representations.

[384] Individual midwives must have acted or abstained from acting over and above the disappointed expectation. While the individual plaintiffs (and other LMC midwives) gave evidence of continuing to provide midwifery services and of some delaying or foregoing the pursuit of different career opportunities, that evidence was of a general nature, about LMC midwives generally, rather than specific to any one of them. There was no specific evidence, for example, in relation to employment opportunities that were not pursued, in reliance on the representations. The evidence goes no further than showing detriment by way of non-fulfilment of, or departure from, the belief or expectation.[126]

[385] I conclude that the individual plaintiffs have not established that they suffered detriment causally related to their reliance on the representations.

Would it be unconscionable for the Crown to go back on its representations?

[386] The plaintiffs say it would be unconscionable for the Crown to undermine the expectations that its representations gave rise to in the plaintiffs, as:

(a) the Crown expressly and publicly agreed to work together with the College, as the representative body for LMC midwives, in "good faith towards a fair and reasonable outcome", since at least 16 November 2016, and against that background, the general history of broken promises is unconscionable;

(b) in addition to repeated commitments to pay fair and reasonable remuneration to LMC midwives, over the relevant period the Crown

---

125 *Equity and Trusts in New Zealand*, above n 63, at [19.2.4(2)(a)] and n 129 citing *O'Malley v Mutual Credit Corp Ltd* HC Christchurch AP112/91, 25 November 1991. This reliance will not be detrimental if the suit would have had no prospect of success (see *Bryant v Immers* DC Christchurch NP3802-98, 19 July 1999) but there is no indication of that being the case here.

126 *Doig*, above n 86, at [45].

has continuously reaffirmed the importance of a sustainable midwifery workforce and the centrality of LMC midwifery to New Zealand's primary maternity service (and health sector as a whole);

(c) the Crown has continued to benefit throughout the relevant period because LMC midwives provided leading midwifery services to New Zealand women, babies and whānau. In 2021, of women giving birth who had registered with an LMC, the vast majority received care from an LMC midwife. The plaintiffs say they have provided this care despite unfair and unreasonable pay and working conditions;

(d) the Crown should not be able to avoid legal proceedings in return for undertaking certain commitments that it then fails to meet; and

(e) while courts are sometimes reluctant to render equitable assistance to well-advised commercial parties with similar bargaining power dealing at arm's length, this is not the situation here. The only practical choice available to LMC midwives was to continue to work under the service fee paid to them under the Notice or not to work as an LMC midwife.

[387] In response, the defendant says that it is unusual in the estoppel context to plead that earlier interim agreements influenced one party's entry into a later contract (in this case, the 2018 Settlement Agreement). To the extent that these interim agreements are construed as a representation to agree a funding model free from systemic undervaluation and gender-based discrimination, it is analogous to a belief in an anticipated contract.

[388] Similarly, the defendant also says that it is rare for courts to recognise an estoppel, in the context of commercial parties, that would uphold a pre-contractual belief that a contract will ultimately be reached. Where there is an anticipated contract in a commercial context, but some of the terms have not yet been decided, courts will likely find that the parties intentionally stopped short of concluding the agreement.

[389] The defendant also relies on a significant change in circumstances — the COVID-19 pandemic and a major restructure of the health sector — since the pleaded representations to support its submission that departure from the representations is not unconscionable.

Discussion

[390] The overarching element of promissory estoppel is that it would be unconscionable for the defendant to undermine the belief or expectation that it has, by its representation, induced in the plaintiff.[127] What must be unconscionable is not the dealing per se between the parties (that is, an unconscionable transaction), but the representor's departure from the representation.[128] Unconscionable conduct rests on something that piques the conscience.[129]

[391] As Tipping J said, delivering the judgment of the Court of Appeal in *National Westminster Finance NZ Ltd v National Bank of NZ*:[130]

> The decisions of this Court … have emphasised the element of unconscionability which runs through all manifestations of estoppel. The broad rationale of estoppel, and this is not a test in itself, is to prevent a party from going back on his word (whether express or implied) when it would be unconscionable to do so.

[392] The concept of unconscionability is a complex one which attempts to strike a balance between freedom of action and the protection of reliance.[131] The Court of Appeal judgment in *Westland Savings Bank v Hancock* said:[132]

> On the one hand it is necessary for the concept of estoppel to remain flexible and not to be confined to any rigid formula; on the other hand there must be some test or principle so that those that those who have to consider the matter in advance of a decision by the Court can have a reasonable prospect of forecasting what the result will be.

---

127 See, for example, *Villages Pakuranga*, above n 66, at [46] and [59].
128 Dal Pont, above n 99, at [10.310].
129 At [10.320].
130 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (CA) at 549 (footnotes and citations omitted).
131 *Equity and Trusts in New Zealand*, above n 63, at [19.2.4(1)].
132 *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 at 36.

[393] Factors relevant to determining whether it is unconscionable for the representor to resile from the belief or expectation which it has created or encouraged include the reasonableness of the representee's reliance, the detriment which will be suffered, and the need to promote commercial certainty.[133]

[394] Unconscionable conduct is a function of what is proven as the representation, the reliance and the detriment, not a discrete ingredient independent of those elements.[134] The chief hallmarks of unconscionable conduct entail inducement, knowledge and intention on behalf of the representor.[135] It is proof of relevant detriment that raises the "equity" and ties it to the element of unconscionability.[136]

[395] As I have concluded, the representations were sufficiently clear and unambiguous that the plaintiffs' reliance (until 1 July 2020) was reasonable in the context of the parties' longstanding and continuing relationship. That relationship was not in the nature of a commercial relationship. The representations made were a key factor in inducing the College to abandon its legal proceedings and not commence further proceedings. As already discussed, while it may have been the case that the plaintiffs did not take the steps pleaded solely on the reliance on the representations, the representations materially influenced the plaintiffs to act as they did.

[396] The representations were made against a backdrop of broken promises by the Crown.

[397] As discussed earlier, the intervening circumstances of the COVID-19 pandemic and the health sector restructuring might have provided a proper ground on which the Crown could have advised the plaintiffs that it was withdrawing the representations, but it did not do so, at least not in sufficiently clear and unequivocal terms.

---

133 *Equity and Trusts in New Zealand*, above n 63, at [19.2.5(1)].

134 Dal Pont, above n 99, at [10.310]. See also Marcus Roberts "Equitable Estoppel in New Zealand: One Overarching Doctrine and its Limitations" [2020] NZ L Rev 567 at 592–593, where the author advocates for the approach that unconscionability is merely the conclusion that is reached by applying the other three elements of equitable estoppel, rather than itself being a substantive standard.

135 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428–429.

136 Dal Pont, above n 99, at [10.220].

[398] The defendant benefited from the plaintiffs' reliance on the representations: the legal proceedings against it (arising from previous Crown breaches) were withdrawn and the Crown continued to receive the benefit of the midwifery services provided by LMC midwives to New Zealand women, babies and their whānau.

[399] Had it been necessary to consider this requirement, I would have concluded it would be unconscionable for the Crown to be able to depart from the representations.

Conclusion on equitable estoppel

[400] Although the plaintiffs have established that the Crown's representations were sufficiently clear and unequivocal, in the particular context of the parties' ongoing relationship, they have not established ongoing reliance after 1 July 2020 (the date by which they expected payment of a fair and reasonable service price to have begun). Nor have they established that the Crown represented that payment would be backdated to before 1 July 2020.

[401] Accordingly, this cause of action must ultimately fail.

FOURTH CAUSE OF ACTION: RESTITUTIONARY QUANTUM MERUIT

[402] The plaintiffs claim for restitutionary quantum meruit based on "free acceptance". The plaintiffs' case is that the Crown knew (or ought to have known) that the services LMC midwives have provided since 1 July 2020 (the date from which the plaintiffs say the Crown was obliged to pay LMC midwives fair and reasonable remuneration for their work), which the Crown has freely accepted, were provided in the expectation of the payment of a fair and reasonable service price for those services, which has not been received.

[403] A restitutionary quantum meruit is an award of reasonable remuneration for services provided;[137] it literally means "what one deserves". Like an award of damages or equitable compensation, it is a form of monetary relief and not a cause of action. The plaintiffs must point to a recognised ground for such an award. The plaintiffs say that here, that ground is "free acceptance".

---

137 *Electrix Ltd v Fletcher Construction Co Ltd* (No 2) [2020] NZHC 918 at [73].

[404] In *Morning Star* the Court of Appeal said that a plaintiff is entitled to a restitutionary quantum meruit based upon free acceptance where:[138]

(a) the defendant asks the plaintiff to provide certain services, or freely accepts services provided by the plaintiff; and

(b) the request is "in circumstances where the defendant knows (or ought to know) that the plaintiff expects to be reimbursed for those services."

[405] More recently, the Court of Appeal in *Edubase* expressed the test as having three elements, with the first of the elements above split into two — that "the plaintiff has provided services to the defendant" and that "the defendant freely accepted, or at least acquiesced in the provision of the services."[139] That reformulation does not change the substance of the test.

[406] It is not in dispute that the Ministry freely accepted the plaintiffs' services. Although the benefit of the LMC midwifery services was directly received by the women, babies and whānau cared for by the plaintiffs, those services were also accepted by the Ministry. As was the case in *Villages Pakuranga* with regard to retirement home services provided by VONZ to elderly residents,[140] the Ministry desired, and continues to desire, that midwifery services be provided by the plaintiffs. The Crown has repeatedly acknowledged publicly that the "sustainability of LMC midwifery is central to the national primary maternity service."[141]

[407] The second element, that the Ministry knew or ought to have known that the plaintiffs expected to be reimbursed for those services, is contested. It is not in dispute that the plaintiffs expected to be reimbursed, in a general sense, and they were paid through the Notice. But the plaintiffs say that they expected to be paid for the services at a certain rate (one that is "fair and reasonable"), beyond the fees provided for in the Notice, which they did not receive. The Crown denies this.

---

138 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [50].
139 *Edubase (CA)*, above n 80, at [70].
140 *Villages Pakuranga*, above n 66, at [63].
141 See, for example, the Public Statement to Third Interim Agreement.

[408] The Crown also says the plaintiffs' claim for quantum meruit is "misconceived" because the Notice served as a clear regime, establishing the terms and conditions for the maternity services LMC midwives provide and the price at which they are paid. The Crown says that the Notice provides for a contract for services, so the services provided by the plaintiffs were already compensated. It further says that there is no basis on which LMC midwives could have expected additional payment for their services, and the services were not performed on the basis that a contract would eventuate. In this regard, the Crown's arguments resemble those made in relation to estoppel.

[409] I first consider the Crown's arguments against quantum meruit, before turning to consider whether the second element of the claim is satisfied.

The Crown's arguments against quantum meruit

[410] The defendant's primary argument against the claim for quantum meruit is that the Notice precludes it. It says that no claim in quantum meruit can arise where there is a subsisting contractual obligation governing the same subject matter.[142] In *Seton Contracting Co Ltd v Attorney General*, the High Court said:[143]

> If, in relation to the relevant subject matter, there is a valid and enforceable contract in force between the parties, then the contract and only the contract can speak: the rights and liabilities of the parties are regulated only be the contract: there is no room for quasi contractual rights [such as in quantum meruit].

[411] The defendant contends that LMC midwives "contracted" to provide their services under the Notice and have "claimed and been paid for them at the statutory rate". Since LMC midwives have provided their services in the relevant period under a separate, valid and enforceable contract under the Notice, they cannot receive a restitutionary quantum meruit.

[412] As the plaintiffs submit, the Notice is not a contract between the Crown and the midwife plaintiffs. The Notice is unilaterally imposed on LMC midwives. The

---

142 Citing *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; and *Triastra v Proprietors of Taharoa "C" Block* [2017] NZHC 1229.

143 *Seton Contracting* [1982] 2 NZLR 368 (HC) at 377.

Court of Appeal observed in *Hobson v Harding* in relation to a predecessor to the Notice, this "appears to deny any contractual status to the Notice".[144] It is not correct to suggest that LMC midwives, in continuing to provide their services under the Notice, have agreed to accept its remuneration rates and entered into a valid contract. The situation is distinguishable from that discussed in *Seton*.

[413] The defendant says that the plaintiffs' argument on this point is "semantic in nature". It says that although the Notice is not a contract in formal terms, this ignores that quantum meruit relates to whether services have been compensated for. In the relevant period, LMC midwives continued to provide services and be compensated for them under the longstanding arrangements as to how this would occur. It says that while the Notice arrangement subsists, and the plaintiffs continue claiming under it, there is no room for quantum meruit.

[414] The plaintiffs again rely on *Villages Pakuranga* and say that the mere fact LMC midwives have been paid something does not mean they are not entitled to a restitutionary quantum meruit. In that case, VONZ had received some amounts from or on account of the residents during the impugned period. Nevertheless, VONZ was entitled to quantum meruit, based on Winkelmann J's findings as to reasonable remuneration for the value of services provided.

[415] The plaintiffs also rely on *Chief Constable of Greater Manchester Police v Wigan Athletic AFC*, where the restitutionary award was quantified by calculating the difference between what was paid and what should have been paid.[145] They say that a restitutionary quantum meruit is available for the difference between what they have been paid and the fair and reasonable value of their services.

[416] There are some clear differences between the facts of those cases and this one. In *Villages Pakuranga*, the relevant notice had expired, and although VONZ received some payment for its services, it appears that these payments were made on an ad hoc basis. Here, the Notice remained in force, and the plaintiffs were paid regularly under

---

144 *Hobson v Harding* CA50/95, 12 December 1996 at 13.

145 *Chief Constable of Greater Manchester Police v Wigan Athletic AFC* [2007] EWHC 3095 (Ch), [2009] 1 WLR 1580.

it. In *Wigan Athletic*, in the disputed years there was no express agreement as to key ingredients of the payment formula, or agreement to pay a calculated sum in the manner of previous agreements.[146] Here, the Notice was sufficiently certain.

[417] However, I do not accept that the receipt of some compensation for work done makes a claim for quantum meruit unavailable. In *Electrix Ltd*, the defendant company paid the plaintiff company $21.6 million,[147] and Palmer J awarded approximately $7.47 million in quantum meruit.[148] I see no basis in law for the proposition put forward by the defendants. Prior compensation under the Notice does not, in itself, make quantum meruit unavailable. The very point of the Agreement was that midwives were to be paid at a rate over and above that provided for in the Notice ("fair and reasonable" remuneration). The Agreement did not "cover the same ground" as the Notice.[149] It is not a situation where the plaintiffs are indirectly seeking to enforce the Notice.

[418] The defendant cites *Villages Pakuranga* for the proposition that the courts are reluctant to intervene and grant relief to parties who are negotiating toward a contract, where that contract does not eventuate.[150]

[419] But, as the plaintiffs submit, that overstates the position. One of the more common contexts in which the ability to recover, via a restitutionary claim, remuneration for services provided is where services are provided in anticipation of a contract being concluded, which ultimately is not concluded.[151] In the paragraph cited by the defendant, Winkelmann J was referring to the court's reluctance to interfere where "parties to a commercial negotiation … are negotiating on an arms length basis". In the very next paragraph, her Honour held:

> [63] … VONZ and the defendant were not arms length commercial parties with freedom to move as to their negotiations. Although the model provided by the health reforms is a contracting model, the context within which these parties was operating was a longstanding relationship during which, pursuant to various contractual arrangements and s 51 notices, the plaintiff had

---

146 At [124].
147 *Electrix*, above n 137, at [95(a)].
148 At [129].
149 *Pavey*, above n 142, at 613–614.
150 *Villages Pakuranga*, above n 66, at [62], citing *Austotel*, above n 69, at 585.
151 At [72].

> provided health care services to elderly persons and had been paid for them. There was a pattern established of the two parties working together to provide continuity of accommodation and care to the residents of Pakuranga Park. Neither party desired that the elderly persons be upset or disrupted by the contractual machinations between them, and the administrative difficulties that the defendant was suffering. It was known by the defendant that VONZ was continuing to provide services in expectation that it would be paid, either pursuant to a contract or by use of a s 51 notice.

[420] Both the College and VONZ provided health care services to members of the public and wanted to continue providing those services despite any disputes with the Ministry. In the circumstances of *Villages Pakuranga*, Winkelmann J found the plaintiffs were entitled to a restitutionary quantum meruit where negotiations towards a contract were unsuccessful. Here, the fact a national midwifery agreement, including fair and reasonable remuneration, was never finalised does not preclude a claim for quantum meruit.

[421] Finally, the defendant says that *Villages Pakuranga* is distinguishable because there was no agreement in place for the provision of rest home services, as all such contracts had expired, the plaintiff was not paid at all, and the plaintiff was offered a precise price for its services. In contrast, the Notice was in place and in force, the plaintiffs were paid under the Notice, and the plaintiffs were not promised a quantifiable fair and reasonable service price for their work.

[422] As noted above, the plaintiffs in *Villages Pakuranga* did receive some payment for their services. I have also already held that the Notice does not preclude a claim for quantum meruit.

[423] I also do not accept that the lack of a precise price offered to LMC midwives for their services under the proposed national midwifery agreement means quantum meruit should not be awarded. The Court's task is to fix a reasonable price for the services. There is seldom just one price that meets the test for reasonableness, and the Court will often need to determine a reasonable price based on the facts.[152] If the reasonable price for the services is more than what was paid, the Court will be entitled to find this, even if that reasonable price was not determined ahead of the services being performed.

---

[152] See, for example, *Cassels v Body Corporate 86975* (2007) 8 NZCPR 740.

[424] The Crown points to the High Court decision in *Edubase*, where Churchman J refused to award a restitutionary quantum meruit because the plaintiff failed to establish that it had not received a "reasonable price" for the service performed, as it had received the market value of its services.[153] However, shortly before the conclusion of this hearing, the Court of Appeal allowed an appeal against that decision.[154] On appeal, Edubase successfully established a reasonable price for its services, and a quantum meruit was awarded.[155]

[425] Here, the criteria for "fair and reasonable" that the parties agreed to is discernible from the 2018 Settlement Agreement and the relevant contextual matrix. The Ministry had the benefit of the Co-design pricing report and reports from PwC assessing a fair and reasonable price, and by the end of 2019 had identified the "gap" that existed between the recommendations in those reports and the funding under the Notice. The plaintiffs had accepted that the range covered by those reports accurately reflected what amounts to fair and reasonable pay for LMC midwives.[156]

[426] Having rejected the defendant's submissions on this issue, I turn to consider whether the plaintiffs have made out the second element of the test.

Did the defendant know, or ought it have known, that the plaintiffs expected to be paid for their services at a fair and reasonable rate from 1 July 2020?

[427] The plaintiffs say that LMC midwives had an expectation that they would be paid for the services that they performed after 1 July 2020 and that payment would be at a fair and reasonable level for the services provided.

[428] The plaintiffs also say that the Crown knew, or ought to have known, that LMC midwives expected payment on a fair and reasonable basis for the services provided after 1 July 2020. As early as 16 November 2016, the Crown represented to the profession and the public that the Crown and College were "continuing to work together in good faith towards a fair and reasonable outcome". In the 2018 Settlement Agreement, the Crown promised to implement a national midwifery agreement by

---

153 *Edubase*, above n 80, at [214].
154 *Edubase* (CA), above n 80.
155 At [105] and [111]–[113].
156 The College formally indicated this in its 11 September 2020 letter to Dr Bloomfield.

1 July 2020, based on the Blended Payment Model. The central object of the Blended Payment Model was to ensure fair and reasonable remuneration for work done. The public statement noted that the Crown "agreed to a process to ensure a 'fair and reasonable' service price for LMC midwives."

[429] The Crown has never resiled from its commitment to fair and reasonable pay, and the plaintiffs have never resiled from their position that they expect fair and reasonable pay. The Crown knew that the Notice fees fell below the PwC and Co-design recommendations for a fair and reasonable price.

[430] The defendant says there is no basis on which LMC midwives could have expected additional payment for their services, let alone any basis for the Crown to have actual or constructive knowledge that LMC midwives were expecting the additional payment. As discussed above in relation to estoppel, the defendant submits that the 2018 Settlement Agreement did not contain representations sufficient to establish an expectation on behalf of the LMC midwives to additional payment.

[431] The plaintiffs say that the fact that a national agreement, including a Blended Payment Model, had not yet been implemented as of 1 July 2020, did not mean they no longer had an expectation that it would be implemented and they would be paid accordingly.

Discussion

[432] I accept the plaintiffs' submission that the Crown would have known that the plaintiffs expected to be paid at a fair and reasonable service price within a reasonable period. As I have already found, the third substantive obligation the Ministry agreed to in the 2018 Settlement Agreement was that it would pay LMC midwives a fair and reasonable service price. That obligation is established through cls 2(c) and 6 of the Agreement. The Public Statement appended to the Agreement also said that the Ministry had agreed to a process to "ensure" a fair and reasonable service price for LMC midwives.

[433] Given the Crown agreed to pay LMC midwives a fair and reasonable service price, it must have known, or ought to have known, that LMC midwives would expect to be paid a fair and reasonable service price at some reasonable point in the future.

[434] The Crown also ought to have known that, at the time the Agreement was signed, the College expected that payment would be from 1 July 2020. That is because the Blended Payment Model was to be the basis for the national midwifery agreement which was to be implemented by July 2020 (at cl 2(c) of the 2018 Settlement Agreement).

[435] But that is not enough to establish a quantum meruit claim. The plaintiffs' claim is based on "free acceptance". Quantum meruit is established in that context where it would be unconscionable for the defendant to have accepted work from the plaintiffs without remunerating them. For a claim in quantum meruit to succeed, the defendant must have known, actually or constructively, that the plaintiffs carried out those services expecting reimbursement for them.

[436] As noted in *Morning Star*:[157]

> [50] …a plaintiff will be able to establish a quantum meruit claim where the defendant… freely accepts services provided by the plaintiff, in circumstances where the defendant knows (or ought to know) that the plaintiff expects to be reimbursed *for those services*…

[437] There must be a temporal link between the work done and the defendant's actual or constructive knowledge that the plaintiffs expected reimbursement for it. Without that knowledge at that time, any obligations on the Crown could not be imported through free acceptance of the services.

[438] On 11 September 2020, Ms Eddy wrote to Dr Bloomfield repeating, "formally and on the record", the College's request that the Ministry immediately and without delay agree to pay LMC midwives fair and reasonable pay. Relevantly, the letter recorded:

---

157 *Morning Star*, above n 138 (emphasis added).

> 7. It is already well-known by the Ministry that the College expects midwives to receive fair and reasonable pay as defined in [the September 2019 PwC report and the November 2017 Co-design pricing] reports. However, the College thinks that it is prudent to make this request again, in this formal manner, to avoid any possible doubt about the College's request.
>
> 8. … the College has concluded that the Crown is not prepared to pay fair and reasonable pay as defined in the two reports. Nonetheless, this further, formal request is being made.
>
> …
>
> 10. The College looks forward to receiving your response to this letter. If no response is received by the end of October 2020 the College will proceed on the basis that the Ministry is refusing to pay LMC midwives fair and reasonable pay…

[439] Dr Bloomfield's response, dated 6 October 2020, recorded:

> … the Ministry made a public commitment to 'a process to ensure a 'fair and reasonable' service price for LMC midwives'. This statement remains in the public domain on our website, and I assure you, it remains my commitment too.
>
> …
>
> We have made a clear commitment to 'fair and reasonable' service price within the context of overall system funding. However, as you will be aware, the Government and the health sector are under considerable financial pressure due to the unprecedented impacts of the COVID-19 pandemic. We all need to carefully manage the demands of sustaining and growing our health sector in the face of the significant financial challenge facing New Zealand. In this context I urge you to carefully consider your expectations for the immediate resolution of fair and reasonable remuneration and acknowledge this continues to be a work in progress.

[440] Dr Bloomfield's letter also referred to the Ministry's intention to "add an additional $21.25 million a year to the Notice appropriation, backdated to 1 July 2020".

[441] Those letters suggest that the expectation of both parties was that LMC midwives would be paid a fair and reasonable service price at some point in the future. The College was requesting that it happen immediately; the Ministry had a more gradual timeframe in mind.

[442] But those letters do not suggest that the College expected to be paid at that time a fair and reasonable service price for the services that were being provided, or that

the Ministry knew of such an expectation. The College may have expected, or at least requested, the Ministry to begin paying a fair and reasonable service price. But that does not mean that when LMC midwives carried out their services, they were expecting to be paid such a price for their services at that time.

[443] As noted above, the plaintiffs submit:

> It is no objection to the plaintiffs' restitutionary quantum meruit claim that, at the time when LMC midwives were providing the relevant services (i.e. services they have performed since 1 July 2020), LMC midwives did not expect to be paid a fair and reasonable rate *for those services*. Although the national agreement had not yet been implemented, LMC midwives expected to be fairly and reasonably remunerated for their work.

[444] It is unclear what that paragraph means. One possible interpretation is that the plaintiffs concede that LMC midwives did not expect to be paid a fair and reasonable rate for the services they performed after 1 July 2020. It may be that the plaintiffs mean that, *even if* LMC midwives did not expect to be paid a fair and reasonable rate for those services, it would not be an objection to their claim.

[445] If that is the case, I do not accept that submission. For a claim in quantum meruit to succeed, the defendant must have accepted services and known that the plaintiff expected to be reimbursed *for those services*. The defendant could not have actual or constructive knowledge that the plaintiffs expected to be paid a fair and reasonable rate for the services performed since 1 July 2020 if the plaintiffs did not in fact expect this.

[446] The more likely interpretation, consistent with the plaintiffs' overall submission, is that, while the plaintiffs did not expect to be paid a fair and reasonable rate for those services at the time, they expected that when a national agreement was finally implemented, the fair and reasonable service price would be backdated to 1 July 2020. The plaintiffs point to the Ministry's intention to backdate the additional $21.25 million to 1 July 2020.

[447] If the plaintiffs carried out the services in the expectation that they would, in the future, be retrospectively paid a fair and reasonable service price, as from 1 July 2020, this would satisfy the necessary temporal requirement.

[448] But the plaintiffs do not point to any evidence of such an expectation other than the relevant excerpt from Dr Bloomfield's 6 October 2020 letter. Nor is there anything in the midwife plaintiffs' evidence supporting the existence of such an expectation.

[449] The Crown submits that no representation of retrospective payment was made. And although Dr Bloomfield expressed the Ministry's intention to backdate an additional $21.25 million to 1 July 2020, that cannot by itself signal its intention to backdate a fair and reasonable service price.

[450] It follows that the evidence does not establish that the plaintiffs carried out the services from 1 July 2020 expecting fair and reasonable remuneration *for those services*, either at the time or retrospectively. Nor did the Ministry accept those services in the knowledge that the plaintiffs would expect fair and reasonable remuneration *for those services*.

[451] The plaintiffs' claim for quantum meruit must therefore fail.

FIFTH CAUSE OF ACTION: UNLAWFUL DISCRIMINATION ON THE BASIS OF GENDER

[452] LMC midwifery is, and always has been, an almost exclusively female-dominated occupation. As the Human Rights Tribunal of Ontario said in *Association of Ontario Midwives*,[158] "[m]idwifery is a profession imbued with gender".

[453] As noted at the beginning of this judgment, a "gender trifecta" arises because midwifery care is "provided by women, for women, in relation to women's reproductive health within a model of care that supports women's empowerment and choice",[159] in an area that was traditionally dominated by male physicians. On appeal in the *Ontario Midwives* case, the Ontario Court of Appeal said:[160]

---

158 *Association of Ontario Midwives (Discrimination)*, above n 1, at [275].

159 At [61] and [142].

160 *Ontario (Health) v Association of Ontario Midwives* 2022 ONCA 458 [*Association of Ontario Midwives (Appeal)*] at [13] citing *Centrale des syndicats du Québec v Quebec (Attorney General)* 2018 SCC 18, [2018] 1 SCR 522 at [34].

> … it is important to acknowledge that the midwife profession is the ultimate sex-segregated profession: women providing a service for women in relation to women's health. And with this confluence of factors at work, combined with the fact that "[o]ccupational segregation and low wages 'usually go hand in hand'" and that jobs that are considered "female jobs" are often undervalued, there was an obvious risk that midwives would be under-compensated because they are women".

[454] The plaintiffs' fifth cause of action is that the terms and conditions set by the Crown under the Notice unlawfully discriminate against LMC midwives in breach of s 19(1) of the Bill of Rights because:

(a) LMC midwives are treated differently based on their gender, as is demonstrated by the more beneficial treatment afforded to other historically male-dominated health sector professionals (obstetricians and general practitioners (GPs));

(b) the different treatment has materially disadvantaged LMC midwives, including financial detriment, a loss of economic autonomy, and loss of self-worth; and

(c) this prima facie discrimination has not been demonstrably justified by the Crown.

[455] The terms and conditions for LMC midwifery work, including remuneration, are set by the Crown through the Notice. The relevant versions of the Notice are:

(a) 2017 Notice (as amended) that was in force as at 27 March 2018 and any subsequent amendments to the 2017 Notice; and

(b) 2021 Notice and any subsequent amendments to the 2021 Notice.

[456] The Notice envisages that lead maternity care can be provided by a midwife, obstetrician, or GP obstetrician. Midwives provide the vast majority (over 95 per cent) of lead maternity care in New Zealand, followed by obstetricians (about four per cent) and GP obstetricians (only 0.1 per cent). The plaintiffs say that the restrictive nature of the Notice disproportionately disadvantages LMC midwives.

History of midwifery remuneration

[457] The expert evidence of Professor Gail Pacheco for the plaintiffs summarised the history of midwifery remuneration in New Zealand. Before the 1990s, self-employed community midwives were paid under the Domiciliary Maternity Benefit Schedule. GPs providing maternity services were paid under the Maternity Benefits Schedule 1989 (1989 Schedule). The Domiciliary Maternity Benefit Schedule had significantly lower rates than the 1989 Schedule.

[458] Following the enactment of the Nurses Amendment Act 1990 (NAA), self-employed community midwives were able to provide all maternity services for normal pregnancies and birth, independently of a medical practitioner. This meant that midwives could practise autonomously.

[459] There remained a tradition of shared care between midwives and GPs in relation to maternity services. Midwives provided the bulk of antenatal and labour care and almost all postnatal care; GPs provided some antenatal care and would typically attend the birth for an hour to an hour and half. The NAA allowed this shared care to continue by giving women the right to choose both a GP and a midwife to provide her maternity services if she wished.[161]

[460] Under the NAA, self-employed community midwives and GPs were remunerated in accordance with the 1989 Schedule. Professor Pacheco's evidence was that the 1989 Schedule structure favoured the practice style of GPs. The fee distribution in the Schedule was disproportionately weighted towards the services GPs were most likely to provide. For example, the fee for birth in the Schedule appears to have been valued highly in comparison with the antenatal, labour and postnatal services. Although midwives could claim a birth fee in some circumstances, the delivery of the baby was most associated with GPs, because under shared care arrangements the GP would typically attend for the birth.

[461] Although midwives could claim a birth fee if they provided that aspect of care, shared care practices meant that a GP might claim several birth fees for the same time

---

[161] Social Security Act 1964, s 106.

period, but a midwife might claim only one, because midwives were providing the bulk of labour care. Outside of labour care, the rest of the midwife's time was spent on the lower paid, and more time-consuming, services across the entire pregnancy. Typically, GPs did not provide those services.

[462] Overall, the weighting of fees towards the birth process meant that the services associated with GPs were valued highly, while the services more commonly associated with midwives were lesser valued.

[463] In 1992 the Minister of Health appointed the Maternity Benefits Tribunal.[162] One of the issues before the Tribunal was whether "the scale of Maternity Benefits [could] differentiate between fees for services provided by general practitioners or midwives and [whether] such a differentiation [should] be written into the schedule of fees".

[464] The Tribunal's 1993 Report found that GPs and midwives provided a maternity service that aims to achieve the same positive outcome (with different styles of practice) and that there was no difference in value between the two forms of service. The Tribunal concluded that there was "no reason to provide a differential fee schedule for midwives as opposed to medical practitioners". The Tribunal recommended an increase in the base/ordinary antenatal fee and also made recommendations about the structure of the fees. These included the introduction of a new hourly fee for the conduct of labour, distinct from the fixed birth fee, and retaining an hourly prolonged attendance fee claimable in special circumstances.

[465] In response to the Tribunal's recommendations, the Department of Health produced a final report for the Minster of Health (the 1993 Departmental Report). The 1993 Departmental Report recommended an increase of fees at a lower rate than that proposed by the Tribunal. The Department also recommended that the hourly fee for labour should be four times the antenatal base rate.

[466] In May 1993, the Minister of Health announced that a new schedule of fees would be released under the 1993 Maternity Benefits Schedule (the 1993 Schedule).

---

[162] Above n 6 and at [11].

[467] The effect of the 1993 Schedule was that the value of the birth fee continued to be weighted toward birth as the most valuable aspect of maternity service, in contrast to a lower value attached to the antenatal, labour and postnatal care more typically carried out by midwives, and in a more time-consuming manner than GPs, to the extent that GPs sometimes provided those services. In particular, the rates meant there was an effective hourly rate of $90.80 for labour compared to an effective hourly rate of $209.00 for delivery.

[468] Professor Pacheco's evidence was that the effect of the Minister's decision was that the structural problem under the 1989 Schedule remained in the 1993 Schedule. That is, GPs earned more for each hour of maternity work they carried out than did midwives. In Professor Pacheco's opinion there was clear gender-related pay inequity present in the 1993 Schedule.

[469] In Professor Pacheco's opinion, from at least 1993 through to 1996, the services of self-employed community midwives were undervalued relative to the value associated with the work of GPs who provided comparable maternity services.

[470] Professor Pacheco's evidence was that the structural pay inequity that she observes in the history of midwife remuneration was also present in the capped funding model introduced through the 1996 Notice. The 1996 Notice retained many of the pay imbalances that favoured the services GPs typically provided, while leaving traditionally midwife-led aspects of care undervalued. However, the LMC model of care introduced alongside the new funding model made maternity services less lucrative for GPs and they began to exit the maternity workforce in favour of other medical services. As a result, midwives were exposed to the overall undervaluation because they did not have the option of working in different areas of practice.

[471] Professor Pacheco's evidence, which I accept, is that the inequity present in the 1996 Notice has continued to the present day. In her view, this inequity does not appear to have been corrected in subsequent Notices. She refers to the expert evidence for the plaintiffs from James Mellsop, an economist. Mr Mellsop's evidence is that the price for midwifery-led maternity services in 2023 remains substantially similar to the price set under the 1996 Notice and has not kept pace with price or wage inflation.

Professor Pacheco's view is that this strongly suggests the current price "remains infected by the historical undervaluation evident in 1996, which reflected gender-related inequity".

[472] The Crown disputes that any inequity has translated through to the present day. It relies on the expert evidence of Kieran Murray. Mr Murray is an economist working in the fields of economic analysis of public policy, regulation, markets and competition analysis, and has from time to time been appointed as an expert lay member of the High Court under the Commerce Act 1986. Mr Murray's evidence is that actual payments to LMC midwives have been maintained in real terms when compared to 1996, and have increased significantly in real terms since 2014, whether assessed relative to the rate of inflation, or to salaries and wages as measured by the indices used by Professor Pacheco.

[473] In my view that does not make a difference to the central theme of Professor Pacheco's evidence, which focuses more on the weighting of tasks than the absolute amount LMC midwives are paid. Payments to LMC midwives having kept pace with inflation does not address any inequity if the 1996 Notice was inequitable to begin with.

The test for unlawful discrimination

[474] The test for unlawful discrimination is found in the two-step analysis settled by the Full Court of the Court of Appeal in *Ministry of Health v Atkinson*.[163]

[475] The *Atkinson* framework was recently applied in *J v Attorney-General* as follows:[164]

> (a) Is there differential treatment or effects as between persons or groups in analogous or comparable situations ("the comparator group") on the basis of a prohibited ground of discrimination?

---

163 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

164 *J v Attorney-General* [2023] NZCA 660, at [104]. Although the Supreme Court partially allowed an appeal against that decision (*J v Attorney-General* [2025] NZSC 103), the Court of Appeal's approach to the *Atkinson* test was not challenged (see [226] per Winkelmann CJ).

(b) If there is, has it resulted in a material disadvantage for the person or group differentiated against?

(c) If it has resulted in material disadvantage, can the discrimination be justified under s 5 of the Bill of Rights?

[476] The onus of proof to establish the first two elements is on the plaintiffs. It is then for the Crown to justify the discrimination.

[477] Establishing prima facie discrimination requires only that a plaintiff prove they have been treated differently from a comparator group on the basis of a prohibited ground and that the different treatment resulted in material disadvantage.[165] Value judgements about the nature of the discrimination and questions about the purpose or justification of a policy are not relevant to the existence of prima facie discrimination. These inquiries should occur at the s 5 stage.[166] As Butler and Butler argue, "entertaining such issues at the stage of identifying the appropriate comparison may risk prematurely justifying discriminatory treatment before it can be subject to thorough scrutiny under s 5".[167]

[478] The Crown emphasises the limits of the s 19 inquiry. It is not enough, it says, for the plaintiffs to identify that midwives may be subject to general societal norms which undervalue women. Nor does a public law actor infringe s 19 by failing to adopt "positive discrimination" measures under s 19(2).

[479] I am not persuaded that is what is happening here. Once the Crown steps into an area and regulates the position, then discrimination analysis is relevant. As the United Nations Human Rights Committee (UNHRC) stated in *General Comment 18 on Non-Discrimination*, art 26 of the International Covenant on Civil and

---

165 Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.10.25].
166 At [17.9.15]–[17.9.16] and [17.10.24].
167 At [17.10.24].

Political Rights (ICCPR) "prohibits discrimination in law or in fact in any field *regulated* and protected by public authorities".[168]

[480] Here the Crown has, through the Notice, regulated the terms and conditions on which lead maternity care can be provided in New Zealand. As a s 3 Bill of Rights actor, the Crown must therefore ensure that its decision-making complies with the legal standards set out in the Bill of Rights, including the right to freedom from discrimination.

Difference in treatment

[481] The first step in *Atkinson* requires a determination of whether:

(a) there is differential treatment or effects; and

(b) that differential treatment is on the basis of gender.

Comparator analysis

[482] Butler and Butler state:[169]

> Inherent in the notion of "discrimination" is that one group of persons (or an individual) has been treated differently from another group (or individual, as the case may be). Consequently, any claim of discrimination involves comparison – a comparison between the treatment to which the complainant (or the group of which he or she is a member) has been (or is threatened to be) subjected on the one hand, and the treatment to which some other person (or group of persons) has been (or is threatened to be) subjected.

[483] "Comparator analysis" is one tool used by the court to test whether a "person or group is being treated differently to another person or group in comparable circumstances",[170] on the basis of a prohibited ground.

---

168 See United Nations Human Rights Committee *General Comment No 18: Non-discrimination* (10 November 1989) at [12]. See also *Zwaan-de Vries v Netherlands* UN Doc CCPR/C/29/D/182/1984 (9 April 1987) at [12.3] ("[article 26 of the ICCPR] derives from the principle of equal protection of the law without discrimination… which prohibits discrimination in law or in practice *in any field regulated and protected by public authorities*" (emphasis added)).

169 Butler and Butler, above n 165, at [17.10.1] (footnotes and citations omitted).

170 *Atkinson*, above n 163, at [60].

[484] The New Zealand courts have not developed a specific methodology for how to ascertain the appropriate comparator. As Elias CJ and Blanchard J said in *Air New Zealand Ltd v McAlister*:[171]

> … [the] task of a Court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue, taking full account of all facets of the scheme, including particularly any defences made available to the person against whom discrimination is alleged. A comparator which is appropriate in one setting may produce a completely inapt result in another. It will certainly do so if it effectively deprives part of the statutory scheme of its operation.

[485] The comparator exercise is "simply a tool"[172] and is not to be treated "as a formula".[173] The exercise involves a comparison with a group "whose treatment is *logically relevant* to the person or group alleging discrimination".[174] A comparator may be a real person or a hypothetical person. It is not necessary to fix a single conclusive comparator.[175] The exercise must not become "circular", producing an "inevitable answer" favourable to the Crown.[176] And, finally, the comparator exercise should take its proper place in the overall discrimination inquiry with it being important that the exercise does not "effectively cut out the inquiry into potential discriminatory action too soon".[177]

[486] The plaintiffs' witness, Professor Pacheco, is an expert on pay gaps and pay equity. Her evidence is derived from that context but applied in this case to the s 19 Bill of Rights context. Professor Pacheco's evidence was that the usual process to examine pay equity concerns is to compare pay levels (and potentially also pay trajectory) between the treatment occupation and a comparator occupation that has similar skills, tasks, responsibilities, and working conditions. Because the treatment occupation is often female-dominated, it is not appropriate to compare men and women within that same occupation. Instead, the goal is to find a male-dominated

---

171 *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [34].

172 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 (*CPAG*) at [51].

173 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [121].

174 *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [126] citing *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 573 (emphasis added).

175 *Ngaronoa*, above n 173, at [121].

176 *Atkinson*, above n 163, at [67]. See also *Ngaronoa* at [121] — comparators should not be "overly refined by building into the comparators the contested assumptions, thereby neutralising the comparator exercise".

177 *CPAG*, above n 172, at [48].

comparator occupation which is not subject to historic or continuing sex-based undervaluation. In comparing the two occupations, one should assess both remuneration and other factors dictating labour market power, including rights to renegotiate pay.

[487] Professor Pacheco's unchallenged evidence was that historically male-dominated occupations are appropriate comparators, even though they may be gender-neutral or consist of a female majority today. That is because historically male-dominated occupations are unlikely to have experienced sex-based discrimination historically and this will continue to be reflected in the valuing of their work and the remuneration they receive in the present day.[178]

[488] As the Supreme Court of Canada said in *Withler v Canada (Attorney-General)*, sometimes the essence of a claimant's unlawful discrimination claim is that "in light of their distinct needs and circumstances, no one is like them for the purposes of comparison".[179] There are no other health sector roles in New Zealand that are exclusively undertaken by women, for women, and about women's reproductive health.

[489] Even so, the comparator occupation should offer a close approximation for the treatment occupation. Professor Pacheco's evidence was that it is appropriate to choose comparators from the same sector because they will face similar institutional features and are likely to have similar skills.

[490] Comparators are more likely to be found domestically, rather than internationally, because the latter requires an appreciation of the particular economic context and social and political institutional frameworks in that jurisdiction. Appropriate comparators can change over time.

---

178 See also *Association of Ontario Midwives (Discrimination)*, above n 1, where Community Health Clinic (CHC) physicians (an historically male-dominated profession) was accepted as an appropriate comparator for the female-dominated self-employed midwifery profession, for the purposes of a gender discrimination claim under a human rights instrument.

179 *Withler v Canada (Attorney-General)* [2011] 1 SCR 396 at [59].

[491] With that in mind, the comparator groups put forward by the plaintiffs are two parallel, historically male-dominated health sector occupations: obstetricians and GPs. The Crown accepts that obstetricians and GPs are historically male-dominated occupations in New Zealand but, as discussed below, does not accept they are appropriate comparators.

[492] The historical male dominance of these professions is reflected in the New Zealand Medical Council Medical Workforce Report 2011, cited by Dr Peter Moodie (a Crown expert). It records the proportion of female GPs as being only 13 per cent in 1980, increasing to 38 per cent by 2000 and to around 44 per cent in 2009–2011.[180] It further records the proportion of female obstetricians and gynaecologists as being only 10 per cent in 1980, increasing to 29 per cent by 2000 and to between 38 and 54 per cent in 2009–2011.[181]

[493] The plaintiffs make a "cross-profession" comparison, within the health sector,[182] focusing on the Crown as the single funder of other health professionals in the same health sector and its decision-making in respect of the Notice (for LMC midwives and obstetricians) and the PHO Services Agreement between each Primary Health Organisation (PHO) and Te Whatu Ora | Health New Zealand (PHO Services Agreement) for GPs.

[494] The plaintiffs submit that obstetricians and midwives share an overlapping scope of practice — they can both provide lead maternity care for "straightforward" pregnancies.[183] The overlapping scope of practice is reinforced by the Notice, which envisages that lead maternity care can be provided by a midwife, an obstetrician, and a GP obstetrician. It is uncontested that there are no, or very few, GP obstetricians

---

180 Medical Council of New Zealand *The New Zealand Medical Workforce in 2011*, Table 13.

181 Table 13.

182 See for example *Association of Ontario Midwives (Appeal)*, above n 160, where the Ontario Court of Appeal compared the position of self-employed community midwives with Community Health Clinic physicians. See also Case C-236/98 *Jämställdhetsombudsmannen v Örebro Iäns Landsting* [2000] ECR I-2189. A claim was brought before the Court of Justice of the European Union on behalf of two midwives, alleging that their pay was lower than that of male clinical technicians, even though both professionals performed work of equal value. The Court did not express any concern at the cross-profession comparison.

183 The term "straightforward" is used to distinguish between maternity care that can be provided by midwives and obstetricians alike, and maternity care that would require obstetrician care under Te Whatu Ora | Health New Zealand *Guidelines for Consultation with Obstetric and Related Medical Services* (March 2023) [Referral Guidelines].

providing lead maternity care. That means that in reality the Notice envisages lead maternity care being provided by midwives and obstetricians.[184]

[495] The plaintiffs say they do not seek to draw points of comparison for the purpose of demonstrating functional equivalence of LMC midwifery with the obstetrics and general practice professions. Rather the comparisons are to show that persons working in each of those historically male-dominated professions are afforded structural benefits and protections that are not afforded to the female LMC midwifery workforce, even where the different professions are undertaking work of equal value.

[496] Professor Pacheco's evidence was that, in straightforward cases, obstetricians and LMC midwives are performing a service of equal value, as they both achieve the same positive outcome — "a safe and successful pregnancy". In cross-examination the Crown's obstetrician expert, Dr John Tait, agreed that the care provided in straightforward cases was the "same regardless of whether the LMC was a midwife or an obstetrician". Dr Tait also agreed that both are seeking for the pregnant woman the same outcome, namely a safe and successful pregnancy.

[497] One of the Crown's criticisms of the choice of comparator groups is that both obstetricians and GPs are majority women. The New Zealand Medical Council Medical Workforce Report 2023 records the proportion of female GPs at 54 per cent, and that of female obstetricians and gynaecologists at 73 per cent.[185] The Crown says it is not aware of any other case under s 19 of the Bill of Rights where the comparator group shared the same protected characteristic. The Crown also points to this factor as a reason why the differential treatment of obstetricians and midwives under the Notice is not on the basis of gender. That is discussed further below.

[498] I do not think the Crown's objection undermines the choice of comparator groups. As noted above, both obstetricians and GPs have historically been male-dominated occupations and, as discussed, Professor Pacheco's evidence was that the lack of historical sex-based discrimination in such occupations will likely continue

---

[184] Of the people who registered with a lead maternity carer in 2022, 95.6 per cent chose an LMC midwife. Only 4.2 per cent chose an obstetrician and only 0.1 per cent chose a GP.

[185] Medical Council of New Zealand *The New Zealand Medical Workforce in 2023*, Table 18.

to be reflected in the valuing of their work and the remuneration they receive in the present day.

[499] Professor Patsy Armstrong gave expert evidence for the plaintiffs. Professor Armstrong is a Distinguished Research Professor Emeritus of Sociology and Professor Emeritus in Women's Studies at York University, Toronto, Canada, and a Fellow of the Royal Society of Canada, with extensive experience in the fields of social policy, gender, healthcare and work. Professor Armstrong's evidence was consistent with Professor Pacheco's evidence. As she explained, "men have traditionally been and remain to this day at the top of the health care gendered hierarchy", while women have continued to provide the majority of daily care. Professor Armstrong's evidence was that the "legacy of this division of labour remains, even though some men have moved into nursing and more women have moved into medicine". Historically male-dominated professions can be an appropriate comparator for the female-dominated self-employed midwifery profession for the purposes of a gender discrimination claim under a human rights instrument, such as the Bill of Rights.[186]

[500] While the Crown was critical of the plaintiffs' choice of comparator groups, it did not put forward an alternative comparator, other than a suggestion in the expert evidence of Merilyn Brieseman, a remuneration consultancy manager, that employed midwives might be an appropriate comparator group, given they had recently concluded a pay equity settlement.

[501] I accept Professor Pacheco's evidence that the fact of a recent pay equity settlement does not make employed midwives (a female-dominated profession, likely subject to historical undervaluation) an appropriate comparator, because it cannot be assumed that a single pay equity settlement has corrected all aspects of historical and gender-based inequity, particularly since the settlement represented a negotiated position. Use of employed midwives as a comparator would, I accept, risk importing systemic gender-based undervaluation of that profession into an analysis of the appropriate terms and conditions for LMC midwives.

---

[186] See, for example, the *Association of Ontario Midwives* proceedings, above n 1.

[502] Similarly, the other potential comparator identified in the Co-design Pricing Report and the PwC report — nurse practitioners — is not an appropriate comparator because, as a female-dominated profession, they too may have been subject to historical undervaluation.

[503] The Crown also relies on the evidence of Ms Brieseman that two jobs of the same size could be paid quite differently, reflecting additional factors in the market, the functions of the job, or individual characteristics, rather than being based on gender. But the example given by Ms Brieseman of a not-for-profit organisation as an employer who cannot afford to pay as much as the private sector is not relevant here, where the Crown funds both midwives and obstetricians and GPs. I accept that differential treatment might be based on grounds other than gender and that may be relevant later in the exercise, but it does not render the plaintiffs' comparators inapt.

[504] While the Crown accepts that the plaintiffs do not need to identify a mirror comparator, it says the comparator must be more than a roughly analogous occupation and must be selected with reference to the specific structural features pleaded. The Crown says the plaintiffs have selected comparators by reference to funding structures, rather than the nature of their work, which means the plaintiffs are in effect inviting the Court to compare parallel service commissioning processes, and ask whether one workforce is better off than the other, and then infer that each group's relative position is attributable to gender.

[505] I accept there is no exact comparator for LMC midwives. But that is not fatal to the exercise. Both the Supreme Court of Canada, and, subsequently, the New Zealand Court of Appeal, have explicitly rejected a requirement for a comparator in exactly the same circumstances as the claimant group save only for the allegedly discriminatory factor (a "mirror" comparator approach).[187] As the Supreme Court of Canada said, "[it] can become a search for sameness, rather than a search for disadvantage, … occluding the real issue".[188]

---

187 *Withler*, above n 179, at [57]; and *Atkinson*, above n 163, at [60].
188 *Withler* at [57].

[506] For the reasons set out above, I accept that the comparators chosen by the plaintiffs — obstetricians providing straightforward lead maternity care and GPs providing non-maternity services — are appropriate comparators. They are both in the health sector and are historically male-dominated occupations in New Zealand. Obstetricians and LMC midwives share an overlapping scope of practice. On Professor Pacheco's evidence, which I accept, GPs providing non-maternity services can be said to have sufficiently similar skills, responsibilities and other attributes to those of LMC midwives to be an appropriate, albeit not perfect, comparator. I do not think the Crown's characterisation of the comparator exercise the plaintiffs seek is correct. While it is necessary to look at the funding structures to determine whether the comparator professions are afforded structural benefits and protections that are not afforded to the LMC midwifery profession, even where undertaking work of equal value, is on the ground of gender, the comparison is not of the funding structures per se.

Differential treatment

[507] When the appropriate comparator(s) has/have been identified, the employment conditions between the comparator and treatment occupations can be analysed. In the plaintiffs' submission, that inquiry should not be strictly limited to "remuneration", but should also compare rights of negotiation or ability to leverage the market conditions to create bargaining power.

[508] The plaintiffs plead that the 2007 and 2021 Notices create a monopsony relationship between the Crown and LMC midwives that restricts the autonomy midwives would otherwise enjoy as self-employed practitioners. They say the systemic undervaluation of midwives is crystallised in the Notice. That monopsony relationship includes that:

(a) LMC midwives have no legally enforceable right to negotiate or renegotiate terms and conditions of work, including remuneration;

(b) they have no express guarantee of a fair and reasonable standard of remuneration;

(c) they have been paid less than fair and reasonable remuneration;

(d) the Notices prevent LMC midwives charging a co-payment for their services, effectively imposing a cap on their income.

Differential treatment between LMC midwives and obstetricians

[509] As discussed above, while the Notice envisages that lead maternity care can be provided by a midwife, an obstetrician, and a GP obstetrician, there are no or very few GP obstetricians providing lead maternity care. That means that in practice, at the time this claim was heard, the Notice envisaged lead maternity care being provided by midwives and obstetricians. Of that the vast majority of lead maternity care is provided by LMC midwives.

[510] As is also discussed above, the plaintiffs say that there is an overlapping scope of practice between obstetricians and midwives because both provide lead maternity care for straightforward pregnancies.[189] Obstetricians and LMC midwives are, when providing lead maternity care for straightforward cases, performing a service of equal value, as they both achieve the same positive outcome — "a safe and successful pregnancy" — albeit by virtue of different styles of practice.

[511] The plaintiffs say the effect of the Notice is that LMC midwives are limited to payment on terms unilaterally set by the Crown under the Notice (which is funded by the Crown, at its discretion), but the ability of the comparator profession to obtain remuneration for work of equal value is not constrained in the same way. In particular, the Notice:

(a) expressly prohibits LMC midwives from supplementing their income by charging a co-payment for maternity services provided under the Notice; but

---

189 As the plaintiffs explained, the term "straightforward" is used to distinguish between maternity care that can be provided by midwives and obstetricians alike, and maternity care that would require obstetrician care under the Referral Guidelines, above n 183.

(b) expressly permits obstetricians to supplement their income by charging a co-payment for maternity services provided under the Notice.

[512] This is a clear difference in treatment between LMC midwives and obstetricians.

[513] The Crown accepts that the co-payment aspect of the Notice treats obstetricians and midwives differently, but it says those different rules are not on the basis of gender. This is discussed further below.

[514] I accept that on its face there is differential treatment between obstetricians and LMC midwives providing lead maternity care in straightforward cases, in the manner described above.

Differential treatment between LMC midwives and GPs

[515] The plaintiffs refer to the legal entitlements provided by the Crown to GPs through the PHO Services Agreement, between each PHO and Health New Zealand/ Te Whatu Ora, which is funded by the Crown, and the PHO Services Agreement Amendment Protocol (PSAAP Protocol), which is incorporated by reference into the PHO Services Agreement.

[516] The Crown says that it is incorrect to conflate PHOs and GPs, as the PHO structure encapsulates a range of primary health workers, including both GPs and other clinical staff such as practice nurses. But I accept that the comparison with the PHO Services Agreement is appropriate. It is the agreement that regulates GPs in New Zealand and, as the plaintiffs submit, it is unreal to suggest that GPs are not a focal point of any given general practice.

[517] The two key differences between GPs and LMC midwives identified by the plaintiffs are the entitlement to negotiate payment rates (including for Nationally Consistent Services) and, where such negotiation occurs, the baseline guarantee that payment rates will be fair and reasonable.

[518] The Crown's primary position is that there is no differential treatment — the PHO Services funding structure is too different from the Notice.

[519] The Crown argues that it is artificial to compare two entirely differently structured funding arrangements only on the basis of the particular components identified by the plaintiffs, and it is not possible to divorce the particular terms identified in the PHO Services Agreement "from the benefits and burdens of the agreement as a whole."

Right to negotiate

[520] The PSAAP Group is a group established in accordance with the PSAAP Protocol to consider and, as the plaintiffs emphasise, make decisions and recommendations on proposals to vary the PHO Services Agreement. As already noted, the PHO Services Agreement is the agreement that regulates GPs in New Zealand. The PSAAP Group comprises representatives from each PHO, each DHB (now Health New Zealand/Te Whatu Ora), up to two Contracted Providers and up to two representatives of the Ministry. The PSAAP Group appoints a PSAAP Negotiation Team "with the mandate from the constituents to negotiate a substantive proposal". The PSAAP Group and the PSAAP Negotiation Team are able to make "binding decisions", including decisions on substantive proposals, which can include a proposal to renegotiate the substantive sections of the PHO Services Agreement. These decisions will be binding on all parties and the variation decided upon incorporated into the PHO Services Agreement. The PSAAP Group is a standing group.

[521] The plaintiffs say that it is clear from a review of the PSAAP Protocol that GPs have, via their PHO or Contracted Provider representatives, a right to regularly review and negotiate the terms and conditions of their work, including the negotiation of substantive sections of the PHO Services Agreement and payment rates (including for Nationally Consistent Services). And where such negotiation occurs, the baseline guarantee is that payment rates will be fair and reasonable.

[522] In contrast to GPs, the LMC midwifery profession does not have any legal entitlement to negotiate the terms and conditions of the Notice.

[523] The relevant point emphasised by the plaintiffs is the existence of the legal entitlement to negotiate and an express guarantee of fair and reasonable pay, which LMC midwives do not have. The fact that the entitlement is given effect as part of a broader contractual structure does not cut across the existence of that legal entitlement. LMC midwives are not pleading that they are entitled to the PHO Services Agreement.

[524] The Crown in response points to those consultation rights which it says are available to LMC midwives under cls A10 and A11 of the Notice.

[525] Clause A10 sets out a process for amending the Notice (excluding amendments that consist only of fee increases). Under cl A10(2) the Ministry must notify the College, among others, of a proposal to amend, revoke or replace the Notice and set a timeframe for consultation. Clause A10(6) provides that if, after consultation, the Ministry proposes to proceed, it will give every maternity provider one month's notice.

[526] Clause A11 provides a streamlined process for amendments, consisting of only fee increases. It requires notification of the proposal, but not consultation.

[527] I am satisfied that those clauses of the Notice do not provide enforceable rights to negotiate the terms and conditions of work. At most, they provide limited rights of consultation in respect of only one type of amendment, being a cl A10 amendment, where there is a proposal to amend the Notice that does not consist solely of a fee increase, revoke the Notice or issue a replacement Notice. Nor is there any ability for LMC midwives to initiate consultation.

Ensuring fair and reasonable payment

[528] As to ensuring fair and reasonable payment rates, cl B.25(1) of the PHO Services Agreement provides:

> (i) Subject to subclause (2), this Agreement will be reviewed by the PSAAP Group through a national review process that considers proposals to vary the PHO Services Agreement, in accordance with the PSAAP Protocol. The review will, amongst other matters, ensure that payment rates are fair and reasonable.

[529] The plaintiffs say this is a guarantee to those who are able to access the benefits of the PHO Services Agreement, including GPs, that there is a mechanism in place that will ensure that their pay is "fair and reasonable". The plaintiffs contrast that with the Notice, which contains no reference to fair and reasonable remuneration, let alone a mechanism to "ensure" fair and reasonable remuneration.

[530] The Crown says that the language of cl B.25 means only that the PSAAP Group will consider what payment rates it considers to be fair. It also argues that a later clause (cl F.21(1)) constrains the impact of the assurance of fair and reasonable payment rates contained in cl B.25(2) because, under cl F.21(1), it is the Ministry that prescribes the funding available to PHOs for Nationally Consistent Services; there is no guarantee that the funding envelope prescribed by the Ministry will be fair and reasonable. Accordingly, the Crown says that the only role left for the PSAAP Group would be to negotiate how to allocate that prescribed funding in a fair and reasonable manner.

[531] The Crown says that although the parties record the government's intention to "regularly adjust the amounts payable ... to maintain the value of those payments", that is not a certainty. It also points to the use of the "fair and reasonable" language elsewhere in the Agreement, used to describe the need for "low and reduced costs", in the context of the need to ensure that funding is reflected in costs that are "fair and reasonable to patients and providers". The Crown also relies on the evidence of Dr Moodie that, in fact, the PHO Services Agreement has not ensured that payment rates to GPs are fair and reasonable.

[532] I agree with the plaintiffs that whether the Crown has in fact provided the funding to ensure its guarantee of fair and reasonable pay in the PHO Services Agreement, and/or GPs (through PHOs) have sought to enforce that requirement against the Crown, is a matter for those parties. The salient point is that GPs have such a guarantee, whereas LMC midwives do not have any such guarantee.

[533] I also accept the plaintiffs' submission that cl B.25(1), on its face, requires the PSAAP Group, when undertaking the national review process, to "*ensure* that payment

rates are fair and reasonable". I do not think that this meaning is undercut by the use of the phrase "fair and reasonable" in a different way in a different context.

[534] Further, I accept that cl F.21 provides only one way in which payment rates are determined under the PHO Services Agreement.

[535] For example, PHOs and their Contracted Providers (which would include GPs) are expressly permitted to charge persons for funded health services, as a means of supplementing Crown funding. The plaintiffs say that this is an important means by which GPs are able to supplement the income provided by Crown funding for provision of those services. This is made clear by cl F.22(2) which permits GPs to charge for services that are "funded in part by the DHB (unless expressly agreed otherwise)".

[536] Nor has the Crown met the burden of establishing its assertion that GPs are afforded better structural benefits on the basis that they have greater burdens imposed on them as a quid pro quo under the PHO Services Agreement, compared to the burdens imposed on LMC midwives under the Notice.

[537] I accept that on its face there is differential treatment between GPs and LMC midwives, in the respects described above.

"On the ground of gender"

[538] The plaintiffs say that the differences in treatment set out in the previous section of this judgment are "on the ground" of gender.[190]

[539] The focus is on the effect of the measures; the fact that the Crown did not intend to discriminate does not mean that discrimination has not occurred.[191]

[540] "On the ground of" does not impose a high causal threshold. In the Supreme Court decision in *Air New Zealand Ltd v McAlister*, Tipping J rejected an

---

190 New Zealand Bill of Rights Act 1990, s 19(1); and Human Rights Act 1993, s 21(1)(a).

191 See *Atkinson*, above n 163, at [132]: "Measures may of course be introduced with the best of intentions but nonetheless, on analysis, comprise prima facie discrimination".

articulation of the test that imposed "too strong a link between the outcome and the prohibited ground".[192] In that case the Court posed the test as whether the prohibited ground is a "material ingredient"[193] or "material factor".[194]

[541] The Court of Appeal in *CPAG* also recognised that there can be multiple drivers of differential treatment: "the existence of another criterion which may render the person ineligible for assistance does not of itself mean there may not be discrimination on a prohibited ground".[195] The prohibited ground must be a "material ingredient".

The Notice

[542] It is undisputed that more than 95 per cent of LMC care under the Notice is undertaken by midwives, who are in turn almost exclusively female. While obstetricians and GPs are now majority female professions, the plaintiffs say this is beside the point. GPs do not in fact provide lead maternity care services under the Notice and are therefore not subject to the Notice's "cap". And, as explained above, obstetricians are expressly excluded from this constraint.

[543] The Crown accepts that the co-payment aspect of the Notice treats obstetricians and midwives differently, but it says the different treatment is not on the basis of gender.

[544] It says the presence of large numbers of people with the protected characteristic who do not suffer the pleaded disadvantage is an indicator that the reasons for that different treatment are not a proxy for gender. Dr Tait's evidence was that as at 2022, 66 per cent of Fellows of the Royal Australasian and New Zealand College of Obstetricians and Gynaecologists were women. The figure for all doctors working in obstetrics and gynaecology is higher — 73.5 per cent as at 2023.

[545] The Crown says that the defining characteristic of each group, obstetricians and LMC midwives, is not their gender, but rather their scope of practice. The

---

192 *McAlister*, above n 171, at [48]–[50].
193 At [49] per Tipping J.
194 At [40] per Elias CJ, Blanchard and Wilson JJ.
195 *CPAG*, above n 172, at [64].

co-payment is drawn along skill lines, rather than gender lines, reflecting the substantial further skill and experience an obstetrician has. That is evidenced, the Crown says, by the fact that when it was first put in place it drew a distinction between the two (then) male-dominated professions (obstetricians and GPs). The co-payment pre-dates the NAA which allowed midwives to claim under the precursor to the Notice. The Maternity Benefits Schedule to the Social Security Act 1964, effective from 1 August 1989, provides that:

> (a) the fees set out in this Schedule shall be accepted by medical practitioners in full settlement except that recognised specialists are permitted to make an extra charge to patients.

[546] Dr Tait said: "…there are aspects of maternity care which can only be provided by obstetricians. In summary, whether working as an LMC or in a hospital setting, an obstetrician has the skill set to manage all of maternity, from the uncomplicated through to the very complicated".

[547] Further, Dr Tait's evidence was that some hospital-based obstetricians who do not have Fellowship of the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (FRANZCOG) status also claim under the Notice. When they do so, they are not permitted to charge a co-payment. This is a clear signal, the Crown says, that the defining line is the skill and expertise which a fully qualified specialist has.

[548] Even accepting Dr Tait's evidence that obstetricians' training provides them with additional skills that LMC midwives do not have, I am not persuaded that is a complete or adequate explanation for why, in the case of straightforward cases, obstetricians and LMC midwives are treated differently under the Notice. As Professor Pacheco said in her evidence, it is not the "entirety of the skillset" held by obstetricians that is the appropriate focus when assessing what is agreed by the witnesses for both parties to be the equal value added by LMC midwives in straightforward cases.

[549] The Crown's position seems at least in part to be a continued reflection of the weighting of tasks under the Notice, that Professor Pacheco assessed had been perpetuated under the 1993 Schedule and is still reflected in the Notice. It is contrary

to the evidence of Professor Pacheco for the plaintiffs, which Dr Tait accepted, that in straightforward cases obstetricians and LMC midwives provide a service of equal value. Although the Crown submits that, notwithstanding that evidence, obstetricians will bring their additional skill and judgement to bear, even when dealing with straightforward matters, no evidence was called to support that proposition.

[550] I conclude that the differential treatment between obstetricians and LMC midwives, when it comes to straightforward cases, cannot be solely explained by a difference in skill and training; gender remains a material factor in the different treatment of obstetricians and LMC midwives under the Notice.

PHO Services Agreement

[551] The plaintiffs say the Crown's decision not to offer negotiation rights and the guarantee of fair and reasonable remuneration to LMC midwives affects a far greater number of women than men, because LMC midwives are almost exclusively female.

[552] The Crown says there is no causal link between gender and a contractual negotiation mechanism. The PSAAP Group exercises the negotiation clause on behalf of all primary care workers within their remit, including historically female professions such as nurses. Other female-dominated professions, such as teachers, also have rights of renegotiation. It also points to the fact employed midwives can access collective bargaining processes. It says it is "therefore unsound to conclude that the reason for the differences in funding structure are explicable on the basis of gender alone."

[553] But that does not, in my view, adequately address the question of whether the differential treatment is on the ground of gender. The plaintiffs do not have to prove that gender is the only, or even the predominant, factor in the differential treatment.

[554] Professor Pacheco's evidence was that "where the key difference between the treatment and comparator occupations is that one is female-dominated, and the other is not, then the presence of gender-related inequity is likely (regardless of intent)".

[555] It is relevant that the Crown has, on multiple occasions in the past, recognised that LMC midwifery is affected by systemic and historic gender-based undervaluation. The parties have agreed, and formally recorded in various agreement since at least August 2016, that the modular structure and payment system in the Notice is inadequate.[196] Dr Jane's evidence was that there "was talk among officials" as early as 2013 about the inadequacy of the Notice. The College expressly challenged the inadequacies of the Notice in the 2015 judicial review,[197] on the basis of gender-based discrimination.

[556] I accept that the differences in treatment discussed above are "on the ground" of gender, in the sense that gender is a material factor.

Material disadvantage

[557] Under the second step of *Atkinson*, the court must consider whether the differential treatment "when viewed in context… imposes a material disadvantage on the person or group differentiated against".[198] "Material disadvantage" is substantially the same as asking if there is "real" or "more than trivial disadvantage".[199]

[558] The plaintiffs say that the material disadvantage imposed on LMC midwives by the differential treatment is in the form of financial detriment, lack of autonomy and a lack of self-worth.

Financial detriment

[559] Financial detriment can constitute "material disadvantage".[200] In *Atkinson*, the Court of Appeal said that, depending on the context, missing out on "several dollars on one side of the equation may well make a real difference to the claimant group".[201]

---

196 First Interim Agreement, cl 1.
197 See [4] above.
198 *Atkinson*, above n 163, at [109].
199 At [136].
200 See, for example, *CPAG*, above n 172, at [67]–[75].
201 *Atkinson*, above n 163, at [126].

Notice

[560] The plaintiffs say that LMC midwives receive a remuneration under the Notice that is less than fair and reasonable remuneration for their work. The plaintiffs submit that the Crown's own Budget bids make clear that the Crown knew that the existing funding under the Notice in 2020 was around $100 million per annum below the fair and reasonable service price determined by PwC (and used by the Crown in their development of Budget materials). Even after the introduction of the 2021 Notice, it is clear from the Budget 2022 bid submitted by the Ministry that the funding levels under the Notice remained well below the Crown's own fair and reasonable remuneration benchmark.

[561] The plaintiffs say LMC midwives are the only health sector profession completely reliant on the terms and conditions of the Notice to ensure the continued viability of their work in the health sector. It is the lack of any legal entitlement to avoid and/or address the effect of the terms and conditions imposed on LMC midwives by the Crown through the Notice that results in financial detriment to LMC midwives. By comparison with GPs, they have no ability to actively influence their remuneration or their conditions and scope of work. It is the absence of these structural rights, in combination, that the plaintiffs say leads to financial detriment. The fact that LMC midwives have their income capped even though they are (in straightforward cases) providing the same care as obstetricians, constitutes further financial detriment.

[562] The Crown concedes that, if the co-payment represents differential treatment on the basis of gender, there is resulting disadvantage to LMC midwives compared with obstetricians providing lead maternity care in straightforward cases. But it says there is no causal connection between the absence of the co-payment and the lack of a fair and reasonable service price. The latter could be achieved by, for example, adjusting the price paid for each module under the Notice.

[563] I do not accept that submission. A key part of the plaintiffs' argument is that their different treatment, on the basis of gender, arises because the Notice restricts their autonomy by unilaterally capping what LMC midwives can be paid; it is only midwives who are totally reliant on the terms and conditions, including remuneration,

under the Notice. An obstetrician's ability to charge a co-payment means they can be paid more for the same work as an LMC midwife. That in itself means LMC midwives are subject to a material, financial disadvantage. While the removal of the cap might not in itself result in fair and reasonable remuneration, or be the only means by which the discrimination could be remedied, addressing the cap would go some way to addressing the lack of fair and reasonable remuneration. There is therefore a causal connection.

[564] The plaintiffs point to the reasons GPs have chosen not to provide lead maternity services, even though they can do so under the Notice, and notwithstanding the acknowledged workforce shortages in the maternity sector. As discussed above, following the introduction of the 1996 Notice which introduced the LMC model and the capped modular payment structure, significant numbers of GPs began to exit the provision of primary maternity services due to what they saw as the "financial unsustainability" of the new model. It is implicit, the plaintiffs say, that financial detriment is a reason for GPs' behaviour.

PHO Services Agreement

[565] In response to the plaintiffs' submission regarding financial detriment, the Crown says that the PSAAP does not provide an unfettered "right to negotiate". As above, it says that the Ministry ultimately determines the available funding, depending on what is secured in the Budget. It submits that the PSAAP's input is not dissimilar to the College's ability to provide input on new modules under the Notice, on how funding is to be applied across existing modules.

[566] The Crown further says that, in reality, the College enjoys direct and meaningful consultation with the Ministry, even if this is not mandatory. Dr Jane's evidence was that the College has been consulted on all fee amendments since 2016. The Crown says that the College has exerted genuine influence through these processes, which Dr Jane described as "unique" compared to other professional bodies.

[567] The role of the PSAAP is discussed above. As I have already concluded, the PHO Services Agreement and the PSAAP Protocol do offer defined advantages to GPs in terms of a right to negotiate, in comparison with LMC midwives.

[568] I acknowledge that the history of this proceeding shows that the College is an effective advocate for LMC midwives. But that cannot be equated with a right to negotiate the terms and conditions on which LMC midwives will provide their services. LMC midwives do not have such a right.

[569] In conclusion, I accept that the plaintiffs have suffered material disadvantage by way of financial detriment, including through not being afforded the same structural benefits enjoyed by obstetricians (under the Notice) and GPs (under the PHO Services Agreement).

Lack of autonomy

[570] A lack of economic autonomy can also constitute material disadvantage. In *CPAG* a lack of "comparable gain" (being precluded from receiving an in-work tax credit) was held to be a relevant material disadvantage.[202]

[571] The plaintiffs say that LMC midwives suffer additional material disadvantage in the form of lack of autonomy, by virtue of the Notice framework. Professor Pacheco's view was that the Notice "locks" them into a self-employment model without any of the economic autonomy that is typically associated with self-employment. Those not subject to the Notice have a comparable gain of greater economic autonomy.

[572] In response, the Crown says LMC midwives are not locked into self-employment — they could become employed midwives, who are not subject to the Notice. Further, LMC midwives enjoy many aspects of self-employment, including flexibility to select their caseload and schedule their routine appointments, the ability to choose how and with whom they structure their practice, and the right to deduct business expenses for tax purposes.

---

202 *CPAG*, above n 172, at [72].

[573] The plaintiffs dispute the Crown's assertion that they have flexibility in their role. The evidence from a number of LMC midwives was that they must be on call 24/7, unless they have organised someone to cover for them. For example, Ms Hiskemuller's evidence was that she is on-call and must be contactable every hour of every day, given that women can go into labour or have pregnancy-related emergencies at any time. It is the on-call requirement that makes it possible to provide continuity of care on an urgent basis. In order to go "off-call" she must ensure that there is another LMC midwife who can step in for her and be available for the whole time she (Ms Hiskemuller) is unavailable. This means that even where Ms Hiskemuller will be unavailable for only a few hours — for example, for a family event or a sports match — she must ensure another LMC midwife is available or, as sometimes occurs, simply miss such events. Similarly, she gave evidence of giving up sporting and other recreational activities because of the practical difficulties of ensuring cover.

[574] As Ms Hiskemuller said, being on call also means the LMC midwife needs to have access to a car at all times, have home birth equipment in the car at all times, and have a fully charged cell phone. An LMC midwife cannot travel spontaneously; holidays must be organised well in advance.

[575] I accept that the unique nature of the LMC midwives' role, providing continuity of care, means that they have very limited flexibility in terms of managing their time and being able to draw a distinction between work and personal time.

[576] I accept, as individual LMC midwives did in their evidence, that there are some advantages to being an LMC midwife, which may for some individuals outweigh the disadvantages. And, as the defendant emphasises, LMC midwives have "autonomy" to leave the profession. But I do not accept that those factors are an answer to the plaintiffs' position that, as LMC midwives, they are subject to the unilaterally imposed Notice, completely reliant on the terms and conditions of the Notice, and with no enforceable rights to negotiate changes to the Notice.

[577] I conclude that the plaintiffs have established that they suffer material disadvantage through that lack of autonomy.

Lack of self-worth and sense of value

[578] The plaintiffs say there are downstream consequences for LMC midwives in terms of their self-worth, sense of value, standing in the community, quality of life and family livelihoods. In the *Association of Ontario Midwives* proceedings, the Human Rights Tribunal awarded $7,500 per midwife as compensation for injury to dignity for violation of the inherent right to be free from discrimination and as a result of being unlawfully discriminated against by the Canadian Government on the basis of their gender.[203]

[579] The Crown does not directly address this submission.

[580] I accept the plaintiffs' evidence as to their own perception. Objectively too, it follows that acknowledged inadequate pay, together with structural disadvantages, and an inability to change this, could lead to a situation where LMC midwives feel a lack of self-worth and sense of value.

[581] Overall, I accept that the financial disadvantage resulting from the inability of LMC midwives to impose a co-payment, together with the lack of bargaining power and the lack of any means to require the Crown to negotiate to increase the service price and any guarantee as to a fair and reasonable service price, together with impact on quality of life, sense of value and self-worth, amounts to material disadvantage arising from their differential treatment.

Is the limit on rights demonstrably justified?

[582] Any limitation on the right to be free from discrimination must be "demonstrably justified".[204]

[583] In *Attorney-General v Chisnall*, the Supreme Court emphasised that it is for the party defending any limits on rights to justify the limits as reasonable.[205]

---

203 *Association of Ontario Midwives v Ontario (Health and Long-term Care)* 2020 HRTO 165 [*Association of Ontario Midwives (Damages)*] at [176].

204 New Zealand Bill of Rights Act, s 5.

205 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [181]–[182].

[584] In *Make It 16 Inc v Attorney-General*, the Supreme Court observed that in some cases evidence relevant to the reasonableness of the limit may not be required or may be minimal.[206] Such a situation might arise where a limitation on a right is well-recognised either in the relevant international instruments or common law, or it may be the case that the justification for the limitation is plain on the face of relevant legislation. Neither of those situations apply here.

[585] Instead, the Crown must justify the limitations on LMC midwives' right to freedom from discrimination on the basis of gender.

[586] The justifications advanced by the Crown are:

(a) in relation to the co-payment, neither of the alternatives of permitting midwives to charge a co-payment or removing an obstetrician's right to charge a co-payment, would "produce good outcomes"; and

(b) in relation to the rights afforded under the PHO Services Agreement, LMC midwives' historical preference was not to be part of the PHO structure.

Co-payment

[587] The Crown emphasises that the absence of a co-payment is the way the Crown provides free maternity services for pregnant people and their whānau. It notes the plaintiffs' express disavowal of any support for the LMC midwives gaining a right to charge a co-payment.

[588] The Crown submits that removing an obstetrician's right to charge a co-payment would not alter the practical position for LMC midwives; the disadvantages for New Zealand women of removing the co-payment[207] would not be offset by a corresponding benefit to LMC midwives. It says the material disadvantage is therefore a justified limit.

---

206 *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [45], cited at [186] of the Court's decision in *Chisnall*.

207 The evidence was that approximately five per cent of care to pregnant people is provided by obstetricians.

[589] However, the Crown artificially frames the choices available to it to meet the material disadvantage inherent in the co-payment. As noted above, LMC midwives focus on the effect of differential treatment. They do not plead that they are entitled to the right to charge a co-payment per se, but rather to fair and reasonable remuneration. That can be given effect by other means. The Crown does not address other tools for dealing with fair and reasonable remuneration as a whole.

[590] The plaintiffs accept that provision of free maternity care is undoubtedly a sufficiently important objective, and that there is a rational connection between prohibiting the primary LMC provider from charging a co-payment for lead maternity care and achieving that objective.

[591] But, as the plaintiffs submit, the Crown has not provided a cogent justification for why capping LMC midwifery income impairs the human rights of LMC midwives as little as possible to achieve that objective. The plaintiffs suggest, and I accept, that another way of achieving that objective would be for the service price payable to LMC midwives to be increased so they could be equally remunerated with obstetricians for the same work, but with the additional funds paid by the Crown.

[592] The plaintiffs also emphasise Professor Armstrong's evidence that for the Government to know what constitutes fair and reasonable remuneration for LMC midwives but nevertheless choose not to implement that remuneration is "to knowingly perpetuate discrimination". While intention has no role in the discrimination analysis, it is relevant to justification[208] and the plaintiffs submit that the converse must be true — if the Crown knowingly fails to address gender-based discrimination, that can be relevant to the question of justification.

[593] The Crown must be entitled to pursue its longstanding policy of providing free maternity care to New Zealanders. But it must implement that policy in a non-discriminatory manner. As outlined above, the effect of the co-payment is that LMC midwives suffer financial detriment compared with obstetricians when providing the same services. That discrimination, on the basis of gender, will only be demonstrably justified when there are no other less rights-intrusive alternatives for

---

[208] Butler and Butler, above n 165, at [17.13.2].

achieving free maternity care for New Zealanders. The Crown has not established that that is the position in this case.

PHO Services Agreement

[594] The Crown says that the decision to keep LMC midwives out of the PHO structure was made in deference to LMC midwives' stated preference.

[595] However, Dr Jane, on whose evidence the Crown relied in support of this submission, accepted in cross-examination that a "direct line" cannot be drawn between historical matters in the period 1990–2016 and the current Notice. Dr Jane also accepted that the positions taken by the College historically have to be understood in context. The substance of Ms Guilliland's evidence for the plaintiffs was that from the late 1990s to 2015 the College resisted changing the contracting model for LMC midwives and being subsumed within PHOs for two key reasons.

[596] First, the College was conscious that PHOs were set up primarily for GPs and practice nurses and it was therefore concerned about the possibility of midwifery care being "medicalised". Similarly, the College was conscious that midwifery was a relatively small workforce and therefore did not tend to be prioritised in multi-disciplinary discussions.

[597] Second, Ms Guilliland's evidence was that the timing and context was not "conducive to a woman's profession starting at that point". The College felt that because the Notice was issued pursuant to legislation it "was the only guarantee we [midwives] had at that time that [they] had some sort of ability to influence …". It was only in 1990 that the NAA permitted midwives to provide autonomous maternity services without supervision. Accordingly, the plaintiffs say, it is readily understandable why for much of that earlier period the College held on to the Notice. As Ms Guilliland said, "it was the only thing we did have".

[598] Nor, the plaintiffs say, can an historical description of the period from 1990-2016 provide an explanation for the present position, where the Bill of Rights claim is limited to the effect of regulatory measures adopted and/or applied by the Crown from 27 March 2018 onwards.

[599] In any event, the plaintiffs say that the Crown has not provided any explanation or justification for why it could not provide LMC midwives with enforceable negotiation rights and a guarantee of fair and reasonable remuneration, absent their inclusion in PHOs.

[600] The plaintiffs say — and I agree — that it is disingenuous for the Crown to suggest that it is the LMC midwives' "preference to remain self-employed" that means they have not been provided with negotiation rights. The Crown can, and does, provide enforceable negotiation rights to other self-employed health sector professionals such as GPs under the PHO Services Agreement and PSAAP Protocol. Under s 88 of the NZPHDA and s 94 of the Pae Ora (Healthy Futures) Act 2022, the Crown has a broad discretion to give notice of any terms and conditions it wishes to.

[601] On the evidence before the Court, I am not satisfied that the justifications advanced by the Crown, and discussed above, are sufficient to meet the requirements of s 5.

Relief

[602] The plaintiffs say that to address the harm that has resulted from the Crown's breach, an "effective remedy"[209] must put LMC midwives in the position they would have been in if the unlawful discriminatory act had not been committed.

[603] They seek Bill of Rights damages, representing the difference between the fees they have received under the relevant Notice for the six years before 27 March 2024 (when the claim was filed) and a fair and reasonable service price. Finally, they seek declarations in relation to the Crown's issuing of the 2007 and 2021 Notices.

[604] The Crown disputes that damages are an appropriate remedy. It says the plaintiffs have provided very little evidence going to the considerations relevant to the exercise of the discretion to award Bill of Rights damages. It says the plaintiffs may not have provided a factual basis to conclude that they have suffered any loss at all. At best, there is uncertainty as to the quantum of alleged loss. The Crown also relies

---

209 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].

on Blanchard J's comment in *Taunoa* that Bill of Rights damages should be "moderate".[210]

[605] Further, the Crown points to public interest factors which it says weigh strongly against an award of damages. It says that if a breach of s 19 is found, a declaration would be a more appropriate form of relief.

"Effective remedy"

[606] The Bill of Rights itself does not explicitly provide for any relief or remedy where a right has been breached. However, in the Court of Appeal's landmark decision in *Baigent's Case*, Cooke P recognised that the courts would "fail in [their] duty" to protect and to promote human rights and fundamental freedoms in New Zealand (as required by paragraph (a) of the Long Title to the Bill of Rights), if the courts failed to provide an "effective remedy" for breaches of the Bill of Rights, including a compensation remedy where appropriate".[211]

[607] The phrase "effective remedy" in art 2(3) of the ICCPR (on which the Supreme Court has based its development of the remedial jurisdiction) has a well understood meaning. The UNHRC has issued its guidance on the meaning of, among other things, the undertaking in art 2(3)(a) of the ICCPR in *General Comment No 31*.[212] It provides:

> … States Parties [must] make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. …

Discretion

[608] Because Bill of Rights damages are a public law remedy they are a matter of discretion, not right. Butler and Butler list the following factors as relevant to an

---

210 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [265].

211 *Baigent's Case*, above n 209, at 676 per Cooke P.

212 United Nations Human Rights Committee *General Comment No 31* UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at [16].

assessment of whether Bill of Rights damages should be awarded and in what amount:[213]

(a) the nature of the actor who committed the (alleged) breach;

(b) the nature of the right that has been breached;

(c) the circumstances and seriousness of the breach;

(d) the seriousness of the consequences of the breach;

(e) the nature of the damage or loss caused by the breach;

(f) the defendant's response to the breach;

(g) whether a non-monetary remedy (for example, a declaration) is adequate vindication in the circumstances;

(h) any relief awarded on a related cause of action;

(i) any public interest factors (deference; impact on the public purse; class of person affected by the breach);

(j) any applicable statutory rules providing immunity from liability, restricting the amount of Bill of Rights damages, or providing relief for all or part of the damages occasioned by the breach; and

(k) failure to mitigate damage, the plaintiff's (mis)conduct, and other disentitling factors.

[609] The discretionary factors that require specific consideration in this case are:

(a) the nature of the damage or loss caused;

---

213 Butler and Butler, above n 165, at [27.8.2].

(b) public interest factors;

(c) whether a declaration is an adequate remedy;

(d) the defendant's response to the breach; and

(e) any relief awarded on another cause of action.

Nature of the loss / Causation

[610] The Crown argues that Bill of Rights damages should not be awarded because there is no evidence that the alleged differential treatment has caused the loss claimed.

[611] The Crown says there is a disjunct between the way in which the plaintiffs frame their case (attributing the discrimination to the three structural features identified) and the relief claimed (a fair and reasonable service price). Even if the court agrees that unlawful discrimination is made out, the Crown says there is no causative link between that discrimination and the relief sought.

[612] The Crown also submits that the plaintiffs have brought no evidence that adopting the different arrangements that apply to obstetricians and GPs for LMC midwives would rectify their position. There is no evidence of what LMC midwives' income would be if they had a guarantee to a fair and reasonable service price and/or a right to negotiate and/or ability to impose a co-payment.

[613] On that basis, the Crown says the damages sought are not responsive to the right breached.

[614] As already discussed, the plaintiffs draw points of comparison between LMC midwives and the comparator groups to show that persons working in each of those historically male-dominated professions are afforded structural benefits and protections that are not afforded to the female LMC midwifery workforce, even where the different professions are undertaking work of equal value.

[615] The plaintiffs say they do not seek to establish factual equivalence with the comparator groups, but rather focus on the effect of the differential treatment. They say they are not seeking to have the obstetricians' right to charge a co-payment taken away, as the Crown suggests, or to exactly replicate the terms and conditions of service of obstetricians and/or GPs. They say the differential treatment could be remedied in other ways.

[616] But although the plaintiffs say the structural differences are illustrative only, at the same time, they seek to draw a direct line between the lack of those structural features and the lack of a fair and reasonable service price. This is clear from the terms of the declarations sought which are that, by issuing the 2007 and 2021 Notices, the Crown unlawfully discriminated against LMC midwives, on the basis of their sex and in breach of s 19 of the Bill of Rights, because the Notices do not (a) guarantee a fair and reasonable standard of remuneration; (b) provide for fair and reasonable remuneration; and (c) provide a legally enforceable right to negotiate and renegotiate their terms and conditions of work, including remuneration.

[617] The Crown points to the discussion of causation in three Court of Appeal cases: *Attorney-General v Putua*,[214] *Attorney-General v Fitzgerald*,[215] and *Thompson v Attorney-General*.[216] In the first two cases the claimant had been detained in prison for longer than was lawful. In *Thompson*, the claimant was detained for over 15 hours although the relevant sentence had been earlier cancelled.

[618] However, in all of those cases the examination of causation related to establishing an underlying breach of the relevant statutory obligation, rather than to a causative link between breach and damages. While the way the plaintiffs have formulated this claim puts causation in issue, those authorities are not directly relevant.

[619] The plaintiffs say the discriminatory conduct is the lack of autonomy arising from the unilateral imposition of the restrictive terms and conditions contained in the Notice. The discrimination is elucidated by the comparison with the structural features

---

214 *Attorney-General v Putua* [2024] NZCA 67, [2024] 2 NZLR 420.
215 *Attorney-General v Fitzgerald* [2024] NZCA 419.
216 *Thompson v Attorney-General* [2016] NZCA 215.

that relate to the comparator groups. While they ultimately seek payment of a fair and reasonable service price, it is not clear that that is the necessary or inevitable result of addressing the stated discrimination.

[620] The plaintiffs have not provided the Court with evidence that if the Crown had provided them with the features enjoyed by the comparator groups, they would then be paid a fair and reasonable service price. I agree with the defendant that the plaintiffs have failed to establish a causative link between the discrimination and the compensatory damages sought.

Public interest factors

[621] The Crown notes that the proceeding occurs in the context of healthcare policy and the funding of public healthcare, where significant trade-offs must be made. There could be significant consequences of ordering particular policy outcomes. The impact on the public purse would be orders of magnitude beyond any previous award of Bill of Rights damages. In opening, the Crown said that the Court should be slow to intervene for reasons of comity.

[622] As the Court of Appeal observed in *Kiwi Party Inc*, "the principle of comity… requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges."[217]

[623] In this context, where it is the Ministry's actions that are in issue, the issue is not a possible intrusion on Parliamentary privilege which might amount to a breach of s 11 of the Parliamentary Privilege Act 2014. Rather the defendant is invoking the broader principle that the separate branches of government (executive, legislative and judicial) exercise respect and restraint towards one another, recognising one another's independence, and do not improperly intrude into or impede the other's appropriate areas of responsibility.

---

[217] *Kiwi Party Inc v Attorney-General* [2020] NZCA 80, [2020] 2 NZLR 224 at [40], referring to the Parliamentary Privilege Act 2014, s 4(1)(b).

[624] While comity is not an automatic answer where the Crown has been found to have acted unlawfully, and nor is this a case of the court ordering particular policy outcomes as the Crown suggests, I acknowledge that public interest factors are relevant in this case.

[625] In my view Tipping J's observation in *Taunoa* that Bill of Rights damages should be "moderate", relied on by the defendant, does not provide any basis for introducing such a general presumption. The comment was expressly rejected by Elias CJ in her reasons in the same case.[218] The question is simply what remedy is necessary to address the particular breach of rights established in the particular case, while noting Cooke P's concern that an award of Bill of Rights damages should not be "extravagant".[219]

[626] Nevertheless, I do agree that public interest factors are significant in this case. As Miller J said in *Fitzgerald*, the effectiveness of a remedy may be gauged in part by the impact it has on the agency responsible for the breach.[220] While no evidence was called on the point, it is reasonable to assume that a substantial award of Bill of Rights damages, of the magnitude sought by the plaintiffs, would have a significant effect on the defendant. As Butler and Butler note,[221] because Bill of Rights damages are a public law remedy, a broad public policy consideration, such as the effect on the public purse of a damages award, can be relevant to the exercise of the discretion. That is not to say that it is necessarily a bar to such an award. As Butler and Butler also record, it has not been unusual for court decisions to have been made that have a very significant impact (real and potential) on the public purse.[222]

Is a declaration an adequate remedy?

[627] The Crown also says that damages are not necessary to ensure an effective remedy in this case. If a breach of s 19 is found, a declaration would be more appropriate relief. If discrimination exists, there would be a number of ways to resolve

---

218 See *Taunoa*, above n 210, at [109]: "with respect to those who think that damages for vindication of right must be "moderate", I do not think the adjective assists."

219 *Baigent's Case*, above n 209, at 678.

220 *Fitzgerald*, above n 215, at [147] and [156].

221 Butler and Butler, above n 165, at [27.14.2].

222 See, for example, *Equiticorp Industries Group Ltd v Attorney-General* [1996] 3 NZLR 690 (HC); *Priddle v ACC* (2007) 8 NZELC 98,558 (CA); and *Atkinson*, above n 163.

it, which could involve significant restructuring of contractual arrangements between the Crown and LMC midwives, including shifting to an employment model rather than a contracting model. The Crown argues that a declaration would enable the Crown to carefully consider what steps might be necessary to right the (complex) questions at issue.[223] There is no need for an award of damages to provide an incentive for any discrimination not to be repeated: the Crown has already been taking steps to remedy any breach and will resolve the problem if a declaration is made

[628] I find that submission somewhat cynical. The Crown has repeatedly acknowledged that LMC midwives do not receive a fair and reasonable service price. The parties have gone through detailed processes over a number of years to work out what is a fair and reasonable service price. The Crown has received the Co-design Pricing report, the PwC report and the PwC Extension work, relating to this very issue. As I have found, the Crown committed in the 2018 Settlement Agreement to implement a national midwifery agreement and pay a fair and reasonable service price by July 2020. Given its failure to do so, it is difficult to see what difference a "pause to consider" might make at this point.

[629] For the same reason as above, and given the history of these matters as recounted earlier in the judgment, I am sceptical of the Crown's submission that an award of damages is not necessary as an incentive to avoid repetition of the breach.

Defendant's response to the breach

[630] The Crown says its response to the alleged breach should be taken into account in the Court's decision on damages.

[631] The Crown relies on steps taken to increase funding for payments under the 2021 Notice, in a period of significant pressures on the health system, as a factor relevant to the exercise of the discretion. It says that payments to midwives had increased in real terms since 2014 at a greater rate than other wages and that is a "further signal that the structural features relied on by the plaintiffs have not resulted in financial detriment".

---

[223] Citing *Wallace v Chief Executive of the Department of Corrections* [2023] NZHC 2248 at [119].

[632] I have found that those steps taken by the Crown are not sufficient to meet its contractual obligations, but I accept they may have some limited relevance to the assessment of whether Bill of Rights damages should be awarded, in the sense they evidence some recognition that LMC midwives are not paid a fair and reasonable service price. However, as in relation to the first cause of action, minor changes to the structure of the Notice and some increases in payment rates do not address the acknowledged problem that the modular structure and payment system in the Notice was and is inadequate and not fit for purpose and, for the reasons discussed above, imposes a regime that discriminates against LMC midwives.

Relief in related causes of action

[633] As the defendant urges, Bill of Rights damages should not function as a substitute for contractual remedies in cases alleging breach of contract arising out of the same facts. To the extent there is any overlap the plaintiffs cannot have double recovery. In *Taunoa* Elias CJ said:[224]

> Where a plaintiff is compensated for injury under another cause of action, damages for vindication of the right should not result in a windfall to him. Bill of Rights Act damages in such cases should be limited to what is adequate to mark any additional wrong in the breach and, where appropriate, to deter future breaches.

[634] Here, while the plaintiffs do not seek Bill of Rights damages as a substitute for contractual remedies, and the claims relate to different though overlapping time periods, both claims in essence seek damages for the failure to pay a fair and reasonable service price, and both are calculated by reference to the difference between payments made under the Notice and a fair and reasonable service price.

[635] My finding that a breach of contract is established, with a consequential award of damages, tends to a conclusion that a substantial award of compensatory damages is not necessary to mark the additional breach under the Bill of Rights.

[636] In conclusion on compensatory damages, I have found that no causative link is established between the alleged breach and the quantum of damages sought. Given

---

224 *Taunoa*, above n 210, at [109].

the award of contract damages, the damages remedy sought here is not necessary to mark the additional breach. There would also likely be a substantial impact on the public purse.

[637] Having regard to those factors, I do not think the Court's discretion should be exercised to grant compensatory damages calculated on the difference between the fees received under the Notice for a period of six years before this claim was filed and a fair and reasonable service price.

Injury to dignity damages

[638] The plaintiffs have also sought an award of damages for each LMC midwife for injury to dignity, claiming that the discrimination has caused them material disadvantage, in the form of a lack of autonomy, self-worth and sense of value. They rely on the *Association of Ontario Midwives* proceedings.[225] In the Ontario proceedings, the Human Rights Tribunal of Ontario made an award of CAD 7,500 per midwife for injury to dignity, pursuant to a statutory provision which gave the Tribunal the discretion to direct the Canadian Government to pay compensation to a party whose rights were infringed for loss arising out of the infringement, including compensation for injury to dignity.[226]

[639] Having regard to Cooke P's instruction to give an "effective" remedy[227] and the conclusion in *Baigent's Case* that Bill of Rights compensation may include intangible harm such as distress and injured feelings,[228] it is open to the Court to award damages under this head.

[640] In *Taunoa*, Tipping J emphasised the dual purpose of Bill of Rights Act damages:[229]

> … when there is a breach of human rights there are two victims. … The interests of the [immediate victim] require the court to consider what, if any, compensation is due. But, because the breach also tends to undermine the rule

---

225 *Association of Ontario Midwives (Damages)*, above n 203, at [176].
226 At [161].
227 *Baigent's Case*, above n 209, at 676.
228 At 678 per Cooke P. See also *Dunlea v Attorney-General* [2000] 3 NZLR 136 at [63] per Thomas J; and *Taunoa*, above n 210, at [109] per Elias CJ.
229 *Taunoa* at [317].

> of law and societal norms, society as a whole becomes a victim too. Hence, the court must also consider what is necessary by way of vindication in order to protect society's interests in the observance of fundamental rights and freedoms.

[641] While I have found that the plaintiffs' claim for compensatory damages is not made out, a small award of damages for each LMC midwife is required to address the inherent loss of dignity suffered by virtue of the unlawful discrimination. As discussed below, such an award also serves to vindicate the public interest. In *Association of Ontario Midwives*, the Tribunal referred to the principles governing an award of compensation under this head. They included the objective seriousness of the conduct and the effect on the particular applicant as the primary elements.[230] Other relevant factors included the experience of humiliation, victimisation and hurt feelings, loss of self-respect, dignity, self-esteem and confidence, the vulnerability of the applicant and the seriousness, frequency and duration of the offensive treatment.[231]

[642] The closest New Zealand analogue is in the employment context. Sections 103 and 123 of the Employment Relations Act 2000 provide that if an employee has been discriminated against in their employment, the Employment Relations Authority or Employment Court can pay the employee compensation for humiliation, loss of dignity and/or injury to feelings. Awards in those contexts are specific to the loss of dignity of a particular individual.

[643] Those LMC midwives who appeared gave evidence that the LMC midwife role is, by its very nature, challenging – it involves being on-call, coupled with the need to always be accessible, the need to travel (particularly for rural midwives), the lack of monetary recognition of "after hours" work, and the clinical and emotional challenges of dealing with an increasingly diverse population, leading to more complex pregnancies. In that context, the loss of autonomy arising from the unilateral imposition of the Notice, and the inability to negotiate change, have, I accept, had a negative impact on their sense of value and self-worth.

[644] As in the Ontario case, evidence from the representative plaintiffs could provide a sufficient basis for an order for all LMC midwives in the Group.

---

230 *Association of Ontario Midwives (Damages)*, above n 203, at [162].
231 At [163] citing *Sanford v Koop* 2005 HRTO 53.

[645] I therefore accept that damages for injury to dignity are appropriate. On the evidence before me, I consider an amount of $1,000 per midwife is an appropriate remedy (together with the declaration discussed below).

[646] As to the second purpose of Bill of Rights damages, both the Canadian and New Zealand Supreme Courts have cited the South African decision of *Fose v Minister of Safety & Security* as providing a good working definition of the word vindication:[232]

> Deterrence speaks for itself as an object. But the idea of vindication … calls for some elaboration. One of the ordinary meanings which 'to vindicate" bears, the aptest now so it seems to me, is "to defend against encroachment or interference". Society has an interest in the defence that is required here. Violations of constitutionally protected rights harm not only their particular victims, but society as a whole too. That is so because, unless they are adequately remedied, they will impair public confidence and diminish public faith in the efficacy of the protection, and for a good reason too since one invasion discounted may well lead to another. The importance of the two goals is obvious and does not need to be laboured. How they are best attained is the question.

[647] The award to each LMC midwife would also serve this vindicatory purpose.

Declarations

[648] The plaintiffs seek declarations that by issuing the 2007 and 2021 Notices the Crown unlawfully discriminated against LMC midwives, on the basis of their sex and in breach of s 19 of the Bill of Rights, because the Notices do not guarantee a fair and reasonable standard of remuneration; do not provide for fair and reasonable remuneration; do not provide a legally enforceable right to negotiate and renegotiate their terms and conditions of work, including remuneration.

[649] As with the discussion above in relation to damages, I do not think the plaintiffs have established the necessary link between the alleged discrimination and the terms of the declarations sought. I therefore decline to grant declarations in those terms.

---

[232] *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 1012 at [82] (citations omitted) cited in *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 SCR 28 at [28]; and *Taunoa*, above n 210, at [253] per Blanchard J. See Geoff McLay "Damages under the New Zealand Bill of Rights Act 1990" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) at [4.4.2].

[650] The plaintiffs also seek such other declaratory relief as the Court considers just and appropriate. I make the following declaration:

> By issuing the 2007 and 2021 Notices the Crown unlawfully discriminated against LMC midwives on the basis of their sex in breach of s 19 of the New Zealand Bill of Rights Act 1990, because the Notices unilaterally impose restrictive terms and conditions that are not imposed on obstetricians providing straightforward lead maternity care and GPs providing non-maternity services.

REMEDIES

[651] I have found for the plaintiffs in respect of the two contractual causes of action and unlawful discrimination in breach of the Bill of Rights. Remedies in relation to the Bill of Rights are discussed above. This section of the judgment discusses the relief available to the plaintiffs for the first and second causes of action.

[652] The plaintiffs seek declarations in respect of each of the successful causes of action. They also seek damages representing the difference between what LMC midwives were paid under the Notice and what they would have received under a "fair and reasonable service price", since 1 July 2020.

[653] The "fair and reasonable service price" concept underpins the plaintiffs' claims for relief for the contractual causes of action. Before discussing what is a fair and reasonable service price, I first consider the principles applicable to damages for contractual breach.

[654] The plaintiffs' causes of action are not alternative — they say success on one does not preclude success on another — but acknowledge that the monetary remedies are alternative in the sense that they do not seek to recover more than once for the same loss.

Contractual breach — loss and damages principles

[655] The general principle is that a plaintiff who has suffered damage that is not too remote must, as far as money can do so, be restored to the position they would have

been in had the breach of contract not occurred.[233] The damage must have flowed from the breach.[234]

[656] The possible heads of loss may be summarised as a restitution interest (the right to restoration of a valuable benefit conferred on the other party, to prevent unjust enrichment), a reliance interest (the right to compensation for loss due to steps taken by the innocent party in reliance on the existence of the contract) and an expectation interest (the right to compensation for loss of the bargain, the object being to financially restore the innocent party to the position which he or she would have occupied had the contract been performed).[235]

[657] As Todd and Barber note, there is no need to adhere to a single approach in assessing damages,[236] subject to the rule that the plaintiff cannot recover more than once for the same loss.[237] Expectation losses and reliance losses do not reflect discrete and independent rights, but are simply emanations of the fundamental rule that contract damages exist in order to replicate the position the plaintiff would be in had the contract been kept.[238]

[658] The usual date for the assessment of the loss is the time at which the contract was broken.[239]

Causation of loss

[659] Usually the burden of proof falls on the claimant as to the amount of the loss and its causation. It is a question of fact in general terms.[240] Once the claimant has put forward the evidence reasonably available to it, if the defendant seeks to show that

---

233 *Robinson v Harman* (1848) 1 Exch 850, 154 ER 363.

234 *Burrows, Finn and Todd*, above n 56, at 822.

235 *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 (HC) at 86 citing LL Fuller and William R Perdue "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52.

236 *Burrows, Finn and Todd*, above n 56, at 824 citing *Ti Leaf Productions Ltd v Baikie* (2001) 7 NZBLC 103,464 (CA).

237 At 825 citing *Herbison v Papakura Video Ltd (No 2)* [1987] 2 NZLR 720 (HC).

238 At 824–825 citing *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm), [2011] 1 Lloyd's Rep 47. See also *Kempton Holdings Ltd v StraitNZ Freight Forwarding Ltd* [2023] NZHC 688 at [113].

239 At 835 citing *Jackson v Royal Bank of Scotland plc* [2005] UKHL 3, [2005] 1 WLR 377.

240 Adam Kramer *The Law of Contract Damages* (4th ed, Sweet & Maxwell, London, 2025) at [20:4].

the losses were less or different it must do so on the balance of probabilities.[241] At that point, and assuming there is some evidence to support its finding, it is for the court to make a "reasonable assessment".[242]

[660] The plaintiffs have sought damages on an expectation basis. The Crown says that to establish causation of loss the plaintiffs need to show what they would have been paid under the alternative payment structure contended for. That is, they would need to show what the service specifications would have been, the price for each service, how business costs would have been compensated, what the LMC midwives would have claimed under each service specification, and how any contingencies should have been accounted for.

[661] However, the Crown says, a true counterfactual has not been established. The National Midwifery Agreement did not come into existence and the blended payment model was not fully realised. Accordingly, there is no evidence as to what the contents of the agreement would have been — or how the blended payment model would have operated. The Crown says the plaintiffs are asking the Court to fill in the blanks.

[662] I first address the cases relied on by the Crown to argue that the plaintiffs have not provided an adequate basis for their expectation losses. Those authorities are inapt in this situation. *Commonwealth v Amman* was concerned with loss of a chance;[243] *McRae v Commonwealth* concerned a contract for salvage of a wrecked oil tanker (with oil on board) that was found not to exist.[244] The case involved an attempt to value the expectation loss of the tanker. These are very different scenarios from this case where the parties had been engaging since 2016 for a national midwifery agreement, with prolonged and detailed work as to the contents of the agreement.

[663] Nor do I accept that the Crown can rely on the plaintiffs' inability to prove the particulars referred to above to refute damages claim when that inability arises from the Crown's own breaches. In that situation, as Kramer notes, there is authority for a presumption that uncertainties are resolved against the defendant so as to give the

---

241 *Ti Leaf Productions Ltd*, above n 236.
242 Kramer, above n 240, at [20:5].
243 *Commonwealth of Australia v Amman Aviation Pty Ltd* 104 ALR 1 (HCA).
244 *McRae v Commonwealth Disposals Commission* 84 CLR 377.

claimant a "fair wind".[245] The burden is to an extent reversed so that it falls on the defendant to prove that the loss would not have occurred but for the breach.

Quantum of loss

[664] The Crown also suggests there is "tolerable uncertainty" as to the quantum of loss and suggests that the plaintiffs may not have provided a factual basis to conclude there was any loss at all. It cites *Capita* for the proposition that the Court "cannot conjure facts out of thin air".[246]

[665] As discussed above, the general rule that the burden lies on the plaintiff to prove its case applies to proof of loss just as it does to the other elements of the plaintiff's cause of action. But, as the authorities make clear, where the loss is not capable of precise calculation, the Court is entitled to make reasonable assumptions.

[666] The attempt to estimate what benefit a plaintiff has lost as a result of the defendant's breach of contract or other wrong can sometimes involve considerable uncertainty. Where, as here, the court is invited to assess counterfactuals, "the scope for argument is practically limitless, depending, as it must, on a range of necessarily hypothetical assumptions".[247] In light of this, the plaintiffs say, it would be unrealistic to expect precise calculations of loss.[248] The plaintiffs note that the *Capita* decision, relied on by the defendant, supports the submission that, where breaches of duty are established, absence of complete evidence as to loss will not result in the court finding that no loss had been established.

[667] I accept that it is sufficient that the onus of proof of loss is satisfied in a broad and pragmatic way.[249] As Leggatt J said in *Yam Seng*:[250]

---

245 Kramer, above n 240, at [20:7]. See also *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321 at [188] discussed at [667] below, as to calculation of loss.

246 *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (a firm)* [2012] EWCA Civ 1417 at [80] per Moore-Bick LJ.

247 *Yan v Mainzeal Property and Construction Ltd (in Liq)* [2023] NZSC 113, [2023] 1 NZLR 296 at [309].

248 At [309].

249 *OHL Ltd v Johns* [2021] NZHC 77 at [57] and [59].

250 *Yam Seng Pte Ltd*, above n 245, at [188] cited by Cooke J in *Chief Executive of the Department of Corrections v Fujitsu New Zealand Ltd* [2023] NZHC 3598, at [238].

> … On the one hand, the general rule that the burden lies on the claimant to prove its case applies to proof of loss just as it does to the other elements of the claimant's cause of action. But on the other hand, the attempt to estimate what benefit the claimant has lost as a result of the defendant's breach of contract or other wrong can sometimes involve considerable uncertainty, and courts will do the best they can not to allow difficulty of estimation to deprive the claimant of a remedy, particularly where that difficulty is itself the result of the defendant's wrongdoing, As Vaughan Williams LJ said in *Chaplin v Hicks* [1911] 2 KB 786 at 792: "the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract.." Accordingly the court will attempt so far as it reasonably can to assess the claimant's loss even where precise calculation is impossible. The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties.

[668] It is for the court to assess damages as best it can on the available evidence.[251] The standard demanded:[252]

> …can seldom be that of certainty. Even when it is said that the damage must be proved with reasonable certainty, the word "reasonable" is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount.

[669] Here, the Court is able to assess the loss on the basis of the concept of a notional single fulltime equivalent (FTE) LMC midwife, which was how the parties themselves had approached the question of a fair and reasonable service price. The Crown acknowledges that a fair and reasonable service price is an objective and accepted concept and I accept that the caseload information put forward by the plaintiffs provides an adequate proxy.

Negotiation?

[670] Before discussing what is a fair and reasonable service price, I address the Crown's argument that a fair and reasonable price was ultimately intended to be a product of a negotiation, which was not concluded. That is not borne out by the facts. There was an agreed process and machinery to determine a price, rather than a

---

[251] *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649 at [38] per Lady Hale P and Lord Wilson, Lord Reed and Lord Carnwath SCJJ.

[252] James Edelman (ed) *McGregor on Damages* (22nd ed, Sweet & Maxwell, London, 2024), at [11-002] (citations omitted).

"negotiation". As discussed elsewhere in this judgment, PwC's report (received and used by the Ministry) is described as its "assessment of fair and reasonable pay for an LMC midwife". It refers to the Ministry as having "agreed a process to formulate a "fair and reasonable service price for [LMC midwives]" and notes challenges in "determining" the fair and reasonable pay for the role. Further, in October 2019, the New Spending Initiative Summary referred to the "fair and reasonable" rate "independently arrived at" by PwC and a 2020 document from the Ministry to the Minister's office refers to "fair and reasonable" remuneration "as outlined in the PwC report".

[671] The Crown relies on *Edubase*, which concerned a claim for quantum meruit, in relation to the difficulties in determining an objective market value for services in the context of government procurement.[253] That case concerned setting a price for childminding services which were different from the services delivered by ECE providers. The evidence included that about the 31 other participants in the market to provide childcare services for the children of essential workers during the COVID-19 lockdown. Edubase was one of the specified education entities allowed to open.

[672] As Churchman J said in that case, the Ministry [of Education] was responding to a "sudden and unique event. Government policy was being hastily developed. There was no prior experience or established practice to draw on".[254] As described above, that is very far from the facts of the present case.

[673] Further, as also noted above, the Court of Appeal overturned the High Court's findings in this respect and concluded it was possible to determine a fair and reasonable price in the circumstances.[255]

"Fair and reasonable service price"

[674] The plaintiffs invite the Court to identify a "fair and reasonable service price" by reference to an income level to which they say a notional single FTE LMC midwife is entitled. The plaintiffs then ask the court to pro-rate that income level to quantify

---

253 *Edubase*, above n 80.
254 At [197].
255 *Edubase (CA)*, above n 80, at [105].

the losses of the individual plaintiffs and (at the second phase of this proceeding) the members of the represented class of LMC midwives.

[675] The plaintiffs say that a "fair and reasonable" service price is an objective standard recognised as such by the parties, as illustrated by the evidence of Ms Brooking in cross-examination, where she accepted that fair and reasonable price is a term used in the health sector, as a concept, rather than a quantum, which allows one to understand what is necessary to work out the appropriate quantum. This approach was used in contracting arrangements with health work forces. It is a standard that can be legally enforced.

[676] In further support of their submission that "fair and reasonable" was understood by the Crown as an objective standard, the plaintiffs refer to the PwC report which was received and approved by the Ministry and described its "assessment of fair and reasonable pay for an LMC midwife", referred to the Ministry as having "agreed a process to formulate a "fair and reasonable" service price for [LMC midwives]" and noted challenges "determining the fair and reasonable pay for the role".

[677] The plaintiffs note that the October 2019 New Spending Initiative Summary, provided by the Ministry to Health Ministers, refers to the "fair and reasonable" rate "independently arrived at" by PwC.

[678] The plaintiffs also refer to a document headed "Notes on Midwife pay, the Settlement Agreement and Budget 2020 — Budget Sensitive", from the Ministry to the Minister's office. It refers to possible alternative budget bids and notes: "The full bid ($332/4y) was calculated to achieve fair and reasonable remuneration for community midwives as outlined in the PwC report by year four".

[679] Further, in cross-examination Dr Bloomfield acknowledged that it was implicit in the Crown's use of the PwC information that the Ministry considered it to be reasonable.

[680] The plaintiffs' pleadings list a number of factors that, they say, inform the determination of the fair and reasonable price. These factors are taken from the 2018 Settlement Agreement (in relation to the first and second causes of action) and the representations made by the Ministry (in relation to the third and fourth causes of action). In relation to the discrimination cause of action they inform the remedy necessary to respond to the effects of the unlawful discrimination.

[681] Those factors are:

(a) free from systemic and historic undervaluation;

(b) determined with reference to components (including both structural and quantum components) of the Ministry's agreements with pharmacy and general practitioners as agreed comparators;

(c) determined with reference to information drawn from appropriate comparator jurisdictions;

(d) provides for the operating costs of LMC midwives approximate to the real costs of service;

(e) recognises and remunerates LMC midwives for their 24/7 on call requirements, additional to remuneration for the base service provided;

(f) prevents perverse financial incentives for unsafe caseloads and for selective booking of uncomplicated cases only;

(g) supports the sustainability and safety of the workforce through sufficient recruitment, retention and balanced workforce distribution;

(h) supports freedom of choice and free service to New Zealand women;

(i) supports a universal, responsive, and autonomous offering to women;

(j) supports partnership, community centricity and continuity of care as the model of care; and

(k) supports midwives to provide a high quality of professional service.

[682] The Crown says that the notional single FTE LMC midwife put forward by the plaintiffs in order to establish a fair and reasonable service price is a stylised estimate only. It says that there is no empirical data before the court on the actual hours either the representative plaintiffs, or any other LMC midwife, work to derive their incomes. Further the recommendations in the Co-design Report (based on the notional one FTE) were only part of a negotiation process that was never completed. For those reasons, it says the court should not get to the point of needing to analyse the plaintiffs' case as to a "fair and reasonable price".

[683] The plaintiffs on the other hand submit that the Court may approach damages in a "broad and pragmatic" way:[256]

> The exercise required is not about the Court reaching an immaculate or absolute value, but about reaching the most likely figure on the basis of the evidence it has heard. That evidence may well not be perfect, indeed it is unlikely ever to be so.

[684] I accept that an assessment of what is fair and reasonable remuneration does not require a detailed examination of each of the factors listed in the plaintiffs' third amended statement of claim (listed above) as the defendant argues. Rather, it is a distillation of those factors. The comments made by Miller J in the Court of Appeal decision in *Cassells v Body Corporate* 86975, while relating to the assessment of claims under a quantum meruit, are apt.[257] That is, the Court must sometimes proceed without the level of information that would allow an exact calculation and instead as a matter of impression. The court's task is to fix a reasonable price for the services. It is inherent in such a standard that there is seldom just one price that meets the test of reasonableness. The court is also frequently called upon to exercise judgment on imperfect information.

---

256 *Capita*, above n 246, at [43(i)] per Gross LJ.
257 *Cassels v Body Corporate*, above n 152, at [50].

[685] The College and the Ministry have sought to determine a "fair and reasonable" service price on a number of occasions. That background, adverted to in earlier parts of the judgment, is relevant to the work undertaken by the plaintiffs' experts to assess what is fair and reasonable. It is summarised below.

Terminology

[686] The various assessments of a fair and reasonable service price refer to "caseload", "births" and "straightforward cases". These terms are explained at the outset.

[687] Dr Jane's evidence for the defendant was that "caseload" "most usually refers to all the women a midwife might care for over a year, even those who potentially had a miscarriage, a termination of pregnancy, who moved away before, during or after they gave birth". It means "women cared for" but is sometimes used interchangeably with "births".

[688] An LMC midwife's caseload will be higher than her "births" if she provides partial courses of care, or if she registers a woman who has a miscarriage or moves away. Dr Jane's evidence was that "caseload" is generally higher than births on an individual basis.

[689] Further, an LMC midwife's workload may be higher than her "caseload" suggests if she is caring for women with higher needs or with more complex pregnancies (or other conditions).

[690] As I will come to, the Co-design Project recommended an FTE caseload of 40, based on a mix of straightforward and complex cases. The Crown did not call evidence to challenge that conclusion.

[691] The first time the Co-design assumptions were challenged as part of this proceeding was in Mr Murray's presentation, although he too purported to rely on the Co-design's recommendation caseload in selecting his 40–50 band.

[692] Although the Crown did call Jill Lane, a member of the Co-design Steering Group within the Ministry, to give evidence, it did not call any witnesses who were Ministry members of the Co-design Project Team, who might have addressed Mr Murray's challenge. Laura Ross was one of the Ministry representatives on the Co-design Project Team. Dr Jane confirmed that Ms Ross held a significant amount of knowledge about the Co-design Project and that Dr Jane had relied on her as a source of information about the project. However, Ms Ross was not called to give evidence, as might have been expected given Mr Murray's evidence. No other Ministry witness suggested there was any disagreement with the Co-design Project's recommendations. Nor were any of the College representatives on the Co-design Project team cross-examined on that conclusion.

[693] I infer that such evidence might not have assisted the Crown on this point.

[694] The Co-design hours and caseload assumptions were included in the PwC analysis, having been provided to PwC by Dr Jane.

[695] The plaintiffs' damages claim uses the mixed 40 case caseload (I note that PwC's "FTE" assumption uses 45 as the midpoint of 40–50).

[696] While a "straightforward" 45-caseload is used in Mr Mellsop's intertemporal benchmarking, it is not relied on by the plaintiffs as the "caseload". The hours assumed under the Co-design are the same whether a caseload of 40 (mixed) or 45 (straightforward) is assumed.

Co-design Pricing Model Report

[697] The Co-design Project was established in March 2017, while mediation between the parties was still ongoing. The Project is described in some detail at [43]–[58] above, but for ease of reference some details are repeated here.

[698] The first Project meeting was held in March 2017 and the parties agreed a series of "funding model principles" and "Co-design principles" to guide their work.

[699] The joint Co-design Project Team gave health sector stakeholders the opportunity to consult on the development of the model and the Team's recommendations were informed by work done with, and advice received from, external remuneration experts, Crown public service experts (such as the State Services Commission), and midwifery experts.

[700] The Co-design Project Team used multiple methodologies to establish the likely range within which remuneration should sit. That approach was reviewed and approved by the State Services Commission and the Ministry Steering Group in September 2017.

[701] The methodologies used by the Co-design Project Team included historic pricing adjusted for inflation and significant scope change and pricing of comparable jobs.

[702] The Co-design Pricing Model Report, one of the three reports produced by the Co-design Project, recommended that fair and reasonable remuneration for an LMC midwife was $170,000 per FTE, plus an allowance of $30,000 per annum in recognition of 24/7 hour on-call obligations (including on the basis of comparisons with other health sector professionals) and compensation of operating/business costs of $41,000 per annum. That resulted in a total service price of approximately $241,000 per annum for a full-time LMC midwife.

[703] The Co-design Project Team recommended setting one FTE as an average of 54 hours per case and an average caseload of 40 women per year (excluding on-call and urgent call outs).

[704] The intention of the Co-design Project Team was that the pricing analysis would form part of the Blended Payment Model (recommended by the Co-design Payment Model Report), which included a payment structure that would enable midwives to claim compensation (additional modules) for extra time spent with families who need it.

[705] In November 2017, the joint Co-design Project Team presented these three reports to the Ministry Steering Group. The presentation was accompanied by a PowerPoint entitled Co-Design Presentation. Following the presentation, the joint Co-design Project Team finalised the written reports of each model and submitted them to the Ministry Steering Group on 5 December 2017.

[706] Although the Co-design Pricing Model Report was agreed by all members of the joint Ministry-College Co-design Project Team, its recommendations were not accepted by the Ministry. The evidence from the plaintiffs' witnesses was that the Ministry Steering Group was initially positive about the recommendations made during the Co-design Project Team's presentation but then reacted negatively to the recommended fair and reasonable remuneration for LMC midwives. Evidence for the Crown was that the cost figures "came as a surprise" to the Steering Group. The Steering Group recommended to the Ministry's ELT that the Co-design Report recommendations should not be accepted.

[707] As noted, the Crown did not call any evidence from Ministry members of the Co-design Project team.

[708] The 2017 Settlement Agreement had provided that the Ministry would prepare a bid for the 2018 Budget that reflected the findings of the Co-design process. The Budget announced on 17 May 2018 did not do so. The undisputed evidence for the College was that the Ministry did not tell the College in advance of the Budget announcement that the Co-design Project would not be progressed or supported.

[709] The Crown criticises the plaintiffs' reliance on the Co-design Pricing Report, describing it as "reflect[ing] the preferences of service providers" and emphasising that its recommendations were not accepted by the Crown and it was never adopted — it merely formed part of a policy development process.

[710] Hannah Cameron, a Ministry staff member at the time and member of the Co-Design Project Steering Group, gave evidence for the Crown about why the Ministry did not recommend to the Minister that the recommendations of the Report be implemented as a whole. Those included some "unaddressed questions" about how

midwifery fits with other services used by women, embedding of the status quo where midwives were on call 24/7, how to provide for business costs while midwives remained self-employed, and the costs associated with the proposed model. The total cost of implementing the proposed service price was calculated at $353 million, which would have required an increase of $237 million above funding levels at the time (or a 304 per cent increase).

[711] The Crown also says there was no evidential basis for the notional or hypothetical "one FTE" income, as derived from the Co-design Pricing Report. It says that the report does not provide the underlying information supporting its conclusions as to matters such as caseloads and hours worked. While the Crown accepts that the Report's recommendations provide some useful information and analysis, it says the court should not accept the following aspects of the Report's analysis:

(a) its assumptions about average caseloads and hours worked;

(b) its comparator analysis with other occupations; and

(c) its estimates of operating costs.

[712] The plaintiffs do not assert that the Co-design Pricing Report is binding but say that, along with the other information referred to below, it informs the Court's assessment of what is fair and reasonable. The Crown submissions acknowledge that it does not say the report is "flawed" and it also acknowledges that the report has informed further policy development.

PwC report

[713] In May 2019 the Ministry commissioned PwC to "assist in developing a service price for community midwifery". PwC had available to it the Co-design reports.

[714] After considering key documents and interviewing LMC midwives, PwC developed "themes and observations" regarding the role of an LMC midwife and then worked with the Ministry and the College to identify appropriate comparator roles.

[715] Once comparators had been identified, PwC sourced comparator data from publicly available information and carried out a "comparator benchmarking" exercise with the remuneration of an LMC midwife.

[716] In September 2019, PwC presented their report, "Fair and Reasonable Pay for an LMC Midwife" to the Ministry. PwC concluded that a fair and reasonable service price for a full-time LMC midwife was in the range of $163,500–$170,500 excluding business costs. PwC did not define a full-time FTE precisely but proceeded on the basis of a caseload of 40–50 cases per year.

[717] The defendant acknowledges that the PwC report informed early iterations of the 2020 Budget bid. Dr Bloomfield's evidence was that it was used as a "benchmark" in the preparation of early 2020 Budget documents.

PwC Extension Work

[718] Subsequently, in October 2019, at the Ministry's request PwC undertook further work which involved modelling its 2019 assessment of a fair and reasonable price for the purpose of Budget 2020 (the PwC Extension Work).

[719] The PwC Extension Work revised the earlier analysis and concluded that $167,000 excluding GST was a fair and reasonable service price as at 2019 and $170,340 excluding GST as at 2020. Each of these figures excluded business costs, which PwC estimated at $25,990 for 2019 and $26,510 for July 2020 respectively.

[720] The Crown submits that, as with the Co-design Pricing Model Report, neither the PwC Report nor PwC Extension Work were accepted by Cabinet, so it is not bound by that work. Again, that is not what the plaintiffs argue. The Extension Work was later used in preparing the New Spending Initiative Summary, the December 2019 Cabinet paper, as a "fair and reasonable rate independently arrived at". As with the Co-design report, the PwC work appropriately informs the Court's assessment of what is a fair and reasonable service price.

Plaintiffs' expert witnesses

[721] In addition to the Co-design Pricing Model Report and the PwC Reports, the plaintiffs' expert witnesses employed a range of approaches to determining what is "fair and reasonable". Mr Mellsop utilised the "benchmarking" approach — both intertemporal and a comparison with Ontario midwives — and Dr Richard Meade, Professor Ricardo Scarpa and Associate Professor Peter Tait applied a discrete choice model (DCM) approach.

[722] I discuss each of these, and the Crown criticism of that evidence, in turn.

Mr Mellsop

[723] Mr Mellsop gave expert evidence for the plaintiffs. Mr Mellsop is the Senior Managing Director of NERA Economic Consulting. His expertise includes determining the appropriate price to be paid for a service, including prices that are "fair and reasonable", using techniques including benchmarking, in a variety of public and private contexts.

[724] Before discussing the two benchmarking exercises undertaken by Mr Mellsop it is necessary to set out the economic framework adopted by Mr Mellsop and the Crown criticism of that framework.

[725] Mr Mellsop approaches the benchmarking exercise through the opportunity cost framework. For a price to be "fair and reasonable" it must be at least as high as the opportunity costs of the seller (here, LMC midwives) and no higher than the value (willingness to pay) the buyer (here, the Crown) receives.

[726] Opportunity cost is the value that is placed on the next best alternative that is foregone by making a particular choice. For a person who chooses LMC midwifery over other roles, a key value that is foregone is the income that could otherwise have been earned in the person's next best employment choice after LMC midwifery. Since LMC midwifery places constraints on the midwives' leisure time (as already discussed, an LMC midwife operates on an on-call basis, rather than with fixed work

hours), the opportunity cost also includes the value that the midwife places on the foregone leisure time.

[727] Relevant to Mr Mellsop's framework was the historic, sunk costs incurred by an LMC midwife in specialised midwifery training (for example, 4,800 hours of study). In addition, an LMC midwife must incur ongoing training costs, including annual skills refreshers and recertification every three years. In Mr Mellsop's opinion, for a price to be fair and reasonable, these costs should also be reflected in the LMC midwives' opportunity cost. The level of risk taken on by LMC midwives is also a component of their opportunity costs.

[728] Mr Mellsop concluded that the Crown has significant bargaining power over LMC midwives. Consistent with that, he concluded there was evidence to suggest that LMC midwives are being paid less than their opportunity costs.

[729] Professor Deborah Cobb-Clark and Mr Murray responded to Mr Mellsop's evidence. Professor Cobb-Clark is Deputy Head of School (Research) and Professor of Applied Economics in the School of Economics at the University of Sydney, with a PhD in Economics from the University of Michigan in 1990 with specialisations in labour economics and economic demography. Mr Murray's experience and expertise is described above in the discussion of the history of midwifery remuneration.

[730] Both Professor Cobb-Clark and Mr Murray agreed with Mr Mellsop's conceptual framework that a fair and reasonable service price would lie between the opportunity cost to LMC midwives in providing the service, and the willingness of the government to pay for those services. But they dispute that the Crown retains all the bargaining power in relation to LMC midwives and that the Crown's bargaining power has allowed it to force prices to or below opportunity cost.

[731] As to bargaining power, the Crown points to the evidence from former ministers, senior officials and senior members of the College about their engagement and what the defendant says are "significant" increases brought about by the changes to the 2021 Notice, notwithstanding the COVID-19 pandemic and the consequent

pressure on New Zealand's health system. It says that those improvements support Professor Cobb-Clark's view that LMC midwives hold at least some bargaining power.

[732] Mr Murray pointed to evidence of increases to the number of practising midwives, relative to births, and the lack of any empirical evidence suggesting midwives are either leaving the profession or not training to become LMC midwives. In his opinion this suggests they are being paid at least their opportunity cost, with any increase likely exceeding the Crown's willingness to pay.

[733] Mr Murray's evidence suggested increases above the level of inflation between 2014 and 2023. On that basis, the Crown says the court can be confident both that LMC midwives are paid at least their opportunity cost and that the government's willingness or ability to pay likely sits close to or at that level.

[734] In the Crown submission, the question of whether the current price should be higher does not mean the current price is not fair and reasonable. Further, higher prices will turn on the government's willingness or ability to pay more. The Crown emphasises the political and financial constraints that affect its willingness or ability to pay a "fair and reasonable" service price. The evidence of Dr Bloomfield, Dr Clark, Mr Welsh and Dr Moodie noted that there is simply not enough money to fund everything a government may wish to fund. The Crown says that is borne out by the pattern of ongoing negotiations between the College and Crown.

[735] I accept that political and financial constraints will be an important consideration for the Crown. But those constraints do not go to the prior question of what a fair and reasonable service price *is*. The Crown accepted it as a recognised concept. Both the Co-design project and the PwC work were premised on there being a fair and reasonable service price for the LMC midwife role which could be objectively determined. What the Crown does once a fair and reasonable service price has been identified is a separate question. In the context of a contractual agreement, as here, those options may be constrained.

[736] Neither party provided empirical market analysis of the extent of the bargaining power held by each. But Professor Cobb-Clark's view as to the extent of the bargaining power held by LMC midwives is at odds with the other evidence. While there is no doubt that the College is an effective advocate for its members, it is clear that the Crown has significant bargaining power over LMC midwives. Most significant, and as already discussed, is the unilateral nature of the Notice: it sets out the terms and conditions on which the Crown will make payment to LMC midwives for their services. In accepting payment, LMC midwives are "deemed" to have accepted the terms and conditions in the Notice. LMC midwives do not have employee entitlements such as the right to a bargaining agent, the right to strike or to bring grievances to the Employment Relations Authority or the Employment Court. Further, as also discussed earlier in this judgment, LMC midwives are precluded from adding a surcharge to the payments under the Notice or otherwise supplementing the payment they receive from the Crown.

[737] As a separate, but related, point the plaintiffs say, and I agree, that the use of comparators ensures that the price is not extravagant and that it takes account of the public health context.

Intertemporal benchmarking

[738] Mr Mellsop carried out his own "intertemporal" and "comparator" benchmarking exercises. In both cases Mr Mellsop used a full-time caseload of 45 straightforward cases (or 2,160 hours) a year, based on the Co-design Report findings.

[739] Mr Mellsop's intertemporal benchmarking exercise involved taking the income available to a full-time midwife in 1996 and adjusting the value of that payment across time, to see what the equivalent price would be in 2020. Mr Mellsop used indexes to adjust for quality and adjusted for what he estimated to be the increased hours required for each case, based on Co-design findings. Mr Mellsop assumed that an FTE workload in 1996 was 1,688 hours, and an FTE workload in 2020 was 2,160 hours. Accordingly, he multiplied his indexed values by 1.28 (2,160 divided by 1,688).

[740] Through this exercise, Mr Mellsop assessed fair and reasonable pay, including an equivalent allowance for business and operating costs to 1996, and concluded a range between $153,906–$190,224 total pay or $118,407–$136,683 take home pay.

[741] Mr Mellsop noted that the 1996 price was subject to historic and systemic undervaluation. If the price in 1996 was less than fair and reasonable, an equivalent in today's dollars would also be less than fair and reasonable. Professor Pacheco concluded that there was likely to be gender-related pay inequity in the 1996 Notice.

[742] The Crown's approach to Mr Mellsop's intertemporal benchmarking is to focus on actual pay, particularly increases resulting from changes to the 2021 Notice. Overall, the Crown says the court can be confident that actual payments to LMC midwives have been maintained in real terms when compared to 1996 and have increased significantly in real terms since 2014, whether assessed relative to the rate of inflation, or to salaries and wages as measured by the indexes utilised by Mr Mellsop.

[743] Mr Murray's primary criticism of Mr Mellsop's intertemporal benchmarking exercise was that it does not model how LMC midwives are actually paid because Mr Mellsop does not rely on actual claims data and does not account for the significant changes to the structure of the Notice since 1996.

[744] However, Mr Mellsop:

(a) was benchmarking to 2020 to set a fair and reasonable price as at that date, before the 2021 Notice was in force. Prior to 2020, most funding was for straightforward cases;

(b) was following a service through over time and comparing apples with apples. He could not compare a 2021 service to a 1996 service;

(c) was not saying anything about actual incomes of midwives in 2020 or whether actual prices have increased in real terms. Mr Mellsop

attempted to determine a fair and reasonable price on a basis that could be tracked through time to estimate a fair price

[745] Mr Murray was also critical of Mr Mellsop's scaling of index values by 1.28, which Mr Murray described as "an assumption without empirical support" as there is no reliable measure of *actual* hours worked in 1996 compared to 2020.

[746] To calculate "take home pay" — that is, the income available to midwives after meeting business costs — Mr Mellsop assumed midwives incur costs equal to 30 per cent of their income. Mr Murray's assessment of actual cost data in the tax return analysis ranged between 14 per cent and 24 per cent. Mr Mellsop accepted he had no reason to disagree with this assessment.

Comparator benchmarking (Ontario)

[747] In this exercise, Mr Mellsop used the income of Ontario community midwives as a benchmark for fair and reasonable income for LMC midwives in New Zealand. The exercise benchmarked LMC midwives against prices for services that have a similar opportunity cost. The plaintiffs say that this type of analysis is expressly contemplated by cl 6(f) of the 2018 Settlement Agreement.[258]

[748] Associate Professor Vicki van Wagner, a Canadian midwife and academic, gave unchallenged evidence for the plaintiffs on the extent of similarity between Ontario community midwives and New Zealand LMC midwives. Dr van Wagner's evidence was that:

(a) the education requirements, scope of practice and competencies are broadly consistent;

(b) LMC/community midwives are autonomous (that is, self-governing, within publicly funded healthcare systems) primary care providers in both New Zealand and Canada;

---

[258] Clause 6(f) provides "The Ministry agrees to a process to make a "fair and reasonable" service price for Lead Maternity Care midwives. The process is: …(f) Information from other jurisdictions may be used to assist with determining fair and reasonable service price as required".

(c) LMC/community midwives follow the continuity of care model by providing 24/7 on-call care throughout pregnancy, through to birth and continuing up to six weeks postpartum; and

(d) in both New Zealand and Canada midwives follow a "partnership model" which includes an holistic approach to childbirth, continuity of care, informed choice, including as to birth place, and culturally safe and appropriate care.

[749] In Dr van Wagner's view, New Zealand's self-employed midwife model and the Ontario community midwifery model are among the closest comparators in the world.

[750] The plaintiffs also say that, because the funding arrangements for community midwives in Ontario flow directly from the pay equity proceedings in that jurisdiction, the court can have reasonable confidence that the benchmarking exercise would not bake in systemic undervaluation.

[751] Under his comparator benchmarking exercise, Mr Mellsop found a "take home pay" range for Ontario community midwives of 142,615 NZD (for a Fee Level 1 Midwife) to 190,985 NZD (for a Fee Level 6 Midwife).[259] The take home pay does not include any operational fees.

[752] Mr Mellsop initially put forward an "ON 45" assessment. This is based on the Ontario Funding and Practice Model, but applies Mr Mellsop's New Zealand FTE assumption of 2,160 hours per year. An Ontario midwife working 2,160 hours per year would work on average 45 cases of 48 hours each (based on Ontario caseloads, but similar to the Co-design assumptions).

[753] Mr Murray was critical of Mr Mellsop's comparison with Ontario community midwives. His first criticism was that it was a construct rather than an accurate representation of what Ontario-based community midwives are paid for the work they

---

[259] The Purchasing Power Parity exchange rate used by Mr Mellsop, as assessed on 4 September 2023 by the Organisation for Economic Co-operation and Development, was 1.00 CAD = 1.1848 NZD.

undertake (a hypothetical where paid under a New Zealand structure) and did not reflect the contractual arrangements under which Ontario community midwives were actually paid. In his view it had the effect of overstating the payment made to Ontario midwife practices by multiplying the operational fee component for each course of care by 45, whereas the payment is in reality calculated on 40 cases of care.

[754] Mr Mellsop accordingly revised his approach with the "ON 40-40" approach. "ON 40-40" uses the Ontario funded model FTE basis, of 40 births per year as a primary midwife and 40 as a secondary midwife. The plaintiffs say both caseload assumptions are legitimate and can be taken into account as relevant benchmarks. Mr Mellsop's evidence was that the relevant pay is similar under both caseload assumptions.

[755] As to business expenses, Ontario midwives are funded via their practice groups, for various operational expenses. This "operational fee" is about 20 per cent of each billable course of care (BCC) and is used to cover things like rent, salaries of receptionists, bookkeepers, accountants, cleaning staff and what the plaintiffs refer to as "consumables". They receive additional funding for travel ($8,000 per annum for Level 6), secondary help, liability insurance, clinical equipment and administrative support for small practice groups. The travel allowance is based on the "actual costs associated with travel [and parking] within the Practice Group Service Area".[260]

[756] Mr Mellsop included the "operational fee" in his "Total Pay", but expressed caution. He did not include the additional funding, describing his approach as conservative. The plaintiffs say that while the possibility that Ontario midwives incur expenses beyond those funded cannot be ruled out, the overlap between what is funded in Ontario and the nature of the expenses LMC midwives incur in New Zealand supports Mr Mellsop's view that his approach is conservative.

[757] Mr Murray was also critical of the Ontario comparator approach to taxes and benefits. Mr Mellsop included funded benefits in his income calculation on the basis that they were taxable as income and "additional" to the benefits provided by the government to citizens on a universal basis. The plaintiffs say this approach is

[260] Sch D of the 2020 Ontario Midwifery Services Agreement.

orthodox — benefits are commonly controlled for when comparing employed workforces to contractors. Mr Murray however proposed a 20 per cent deduction on the basis that there was some overlap in some cases with New Zealand government-funded costs.

[758] Alternatively, Mr Murray suggested an inquiry into all the government benefits received by Ontario midwives (universal and "additional" benefits) and New Zealand LMC midwives (universal benefits only) and adding the value of those benefits to the respective total incomes.

[759] I accept Mr Mellsop's evidence on this point that the additional "benefits" received by Ontario midwives are in fact added to their incomes for tax purposes and are therefore different from the universal benefits received in New Zealand, such as free healthcare, which would not be added to an LMC midwife's income statement.

[760] As to the health and social services wages comparison, Mr Murray's evidence suggested that, as at 2022, purchasing power parity (PPP)-adjusted wages were higher in Canada than in New Zealand on average. Mr Mellsop's view was that it was appropriate to compare to the average weekly earnings indices for the health and social services industry in New Zealand and Ontario (PPP-adjusted) and that no adjustment was necessary as generally PPP-adjusted wages in the health and social services industry in Ontario were not higher than in New Zealand on average.

[761] The plaintiffs say that in the context of a benchmarking exercise where Mr Mellsop has been cautious and made appropriate concessions, there is no reason to further adjust or discount the ON 45 and 40-40 benchmarking estimates.

[762] Mr Mellsop ultimately suggests that a fair and reasonable service price for New Zealand midwives taking this approach would be $190,985, if the costs incurred by New Zealand midwives are assumed to be within the 14–24 per cent of income range indicated by the tax data.

Dr Meade, Professor Scarpa and Associate Professor Tait — Discrete choice model

[763] Drs Meade, Peter Tait and Scarpa provided evidence as a "panel". Dr Meade is the Principal Economist for Cognitus Economic Insight (an economic consultancy and research practice), an Adjunct Associate Professor of Economics at Griffiths University and a Senior Research Fellow at Auckland University of Technology. Among other things, Dr Meade is an expert in empirical and theoretical work using discrete choice analysis in non-market valuation. His PhD research and multiple other studies he has completed or co-authored have applied discrete choice modelling.

[764] The plaintiffs say that the discrete choice model (DCM) is a useful complement to Mr Mellsop's benchmarking analysis: it provides an objective statistical analysis for assessing subjective preferences and is based on an economic foundation.

[765] Dr Meade used two frameworks to assess "fair and reasonable pay". In doing so he relied on the expertise of Associate Professor Tait, an economist specialising in environmental economics and economic valuation methods, who designed the survey questionnaire, and Professor Scarpa, an economist specialising in the micro-econometrics of survey data with applications in regulatory and public economics. The two frameworks used by Dr Meade were:

(a) the "General Practice Comparison Approach", under which he assessed the income levels that GPs would require if they faced job attributes comparable to those of LMC midwives; and

(b) the "Midwifery Workforce Shortfall Reduction Approach", under which Dr Meade assessed the income levels of practising midwives (including LMC midwives) to reduce the current midwifery workforce shortfall to a level comparable with other health sector workforces.

[766] To implement each of these frameworks, Dr Meade and his associates used "discrete choice models" obtained by using surveys to present a sample of GPs and LMC midwives with a series of stated choice experiments in which they are asked to choose their preferred job when presented with a series of alternative job profiles.

[767] Dr Meade's evidence was that a fair and reasonable service price for an FTE LMC midwife as of July 2020 is in the range of $180,000–$185,000, after any tax-deductible expenses. Dr Meade described this range as "conservative" because higher ranges are indicated using pro-rated FTE incomes. Dr Meade treated one FTE as being an LMC midwife working 41–50 hours per week. He differentiated between urban and rural settings, recognising that fair and reasonable pay may vary materially.

[768] Both Dr Bronwyn Croxson (the Chief Economist at the Ministry) and Mr Murray were critical of the use of discrete choice modelling as a tool to set prices in a labour market dispute. In submissions, counsel for the Crown suggested that the court could conclude that the evidence was not substantially helpful on the basis it is the wrong tool for the job.[261] As Mr Murray said, the use of DCM in this case is to "shoehorn" a tool used for one purpose (identifying preferences of people who are not midwives) to a case which calls for evidence about a separate issue, being the identification of a price that sits within the bounds of LMC midwives' willingness to accept and the Crown's willingness to pay for LMC midwifery services. That criticism is made of both the GP survey and the midwifery shortfall approaches.

[769] In relation to the GP Survey Approach, Dr Meade surveyed a sample of GPs to measure the values those GPs attach to attributes of work done by midwives. Dr Meade says he chose GPs because, amongst other reasons, they are not exclusively female, historically delivered babies and have similar business models.

[770] In response, Mr Murray's evidence was that, as a matter of logic and economics, a DCM cannot provide insight into the values of a different population to the one surveyed. The results reported by Dr Scarpa show that GPs and midwives showed very different preferences. Mr Murray's evidence was that is explicable on the basis midwives have chosen a different career to GPs and can reasonably be expected to attach different values to attributes of their job than GPs.

---

[261] Citing *Lundy v R* [2013] UKPC 28 at [138]; *Lundy v R* [2018] NZCA 410 at [238]–[241]; and *Attorney-General v Stratboss Kiwifruit Limited* [2020] NZCA 98, [2020] 3 NZLR 247 at [491]–[499]. Those cases apply the factors listed by the Supreme Court of the United States in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) in dealing with novel scientific theories and techniques.

[771] Mr Murray's evidence was that that practice owner/partner category of GPs was likely to be dissimilar to LMC midwives because of their business structures, which involve deriving income from running a business, in addition to supplying GP services. He suggests that the attributes of the midwife job such as being on-call and not having work support could reasonably be expected to be much more disruptive to a GP managing a busy practice, than to a midwife who has organised to make "house calls".

[772] Professor Cobb-Clark also identified issues with the DCM. She was critical of the sample size of GPs as not being representative of the New Zealand GP population. The respondents self-selected into the survey and response rates were low. There was an oversampling of practice owners/partners and under-sampling of employees/long-term contractors. There was no indication that the midwives who participated in the workshop designing the survey were excluded from the final sample. Professor Cobb-Clark also noted that there was an explicit reference to being on-call before participants began the survey, which may have caused a "framing" issue. She says the issues she identified are potential sources of bias. Professor Cobb-Clark was also critical of the lack of control for GPs' increased scope of practice.

[773] Further, Professor Cobb-Clark was critical of the fact that a statistical test was performed to demonstrate the representativeness of the midwives sample, but no equivalent test was performed to demonstrate the representativeness of the GP sample.

[774] Overall, the Crown suggests that the court cannot be confident in the representativeness of the survey and the precision of Dr Meade's estimate of a fair and reasonable service price.

[775] The plaintiffs note in response that the GPs showed similar preferences to midwives. The GP comparison approach provides an objective estimation of how a group likely not to be influenced by systemic discrimination values the job profile of a midwife. The Midwifery Shortfall Approach provides a price that would get midwives to return to the workforce.

Plaintiffs' conclusion on expert reports

[776] The plaintiffs say that the figures canvassed in the reports referred to above represent the findings of five discrete exercises to quantify a "fair and reasonable service" for LMC midwives.

[777] The Co-design analysis and the PwC Report both involved collaboration between the College and the Ministry. The resulting analyses have never been disclaimed by the Ministry. On the contrary, the plaintiffs say the evidence showed that the Ministry appear to accept PwC's findings as an appropriate quantification of the objective standard in the 2018 Settlement Agreement.

[778] At no time has the Ministry presented its own figure for a "fair and reasonable service price".

[779] Accordingly, the plaintiffs say that the Court may determine a fair and reasonable price in line with one of the approaches outlined above or may determine that a fair and reasonable service price falls somewhere between the figures set out above. The plaintiffs say that the clustering of results across all five exercises should give the Court significant comfort that it is appropriate to rely on the analysis offered by the plaintiffs.

Conclusion on fair and reasonable service price

[780] I have found that it is possible for the Court to conclude a fair and reasonable service price for LMC midwives, having regard to the expert evidence before the court. I have concluded as follows.

[781] A total of 2,160 hours for one FTE is appropriate. This figure was initially determined by the Co-design Project team on the basis that a fulltime worker would on average work 42 hours per week.

[782] The Co-design Project team found that 48 hours of care was best practice for a straightforward case. However, it is unlikely that any LMC midwife will have a caseload comprising 100 per cent straightforward cases. 54 hours per case is

appropriate to take account of that. That gives rise to an average caseload of 40 cases. I note that PwC adopted a range of 40 and in Ontario it is 40 courses of care, with 48 hours per course of care.

[783] As the plaintiffs submitted, the Court may approach damages in a "broad and pragmatic" way:[262]

> The exercise required is not about the Court reaching an immaculate or absolute value, but about reaching the most likely figure on the basis of the evidence it has heard. That evidence may well not be perfect, indeed it is unlikely ever to be so.

[784] All of the approaches put forward by the plaintiffs have provided assistance to the Court. As noted above under each approach, pre-tax take home pay, as calculated in July 2020 dollars is as follows:

(a) Co-design Pricing Report: $200,000.

(b) PwC: $163,500–$170,500.

(c) PwC Extension Work: $170,340.

(d) Intertemporal benchmarking: $118,407–$136,683.

(e) Ontario PPP benchmarking: $190,985.

(f) DCM: $180,000–$185,000.

[785] I have found the Co-design project and PwC approaches most helpful. They both involved collaboration between the parties and both pre-dated this litigation. I am encouraged that the other approaches taken by the expert witnesses produce figures that are broadly consistent with those calculations.

---

262 *Capita*, above n 246, at [43(i)] per Gross LJ.

[786] My task is to determine a fair and reasonable service price based on the facts before me. I adopt the PwC (and PwC Extension Work) analysis. The figures produced in the PwC Extension Work were treated by the Ministry as a quantified value for the "fair and reasonable" standard in Budget 2020 documents. As noted earlier, that does not mean PwC's analysis is binding on the parties, but that context makes it the best approximation of what is fair and reasonable here. In my view it is intuitive that a fair and reasonable service price would be somewhat higher than that calculated using the intertemporal approach, which has historic gender bias "baked in", and somewhat lower than that calculated with the other approaches, such as DCM.

[787] As at 1 July 2020, fair and reasonable take home pay for an LMC midwife working 1.0 FTE was $170,340. Mr Mellsop's brief of evidence provides a mechanism for adjusting prices intertemporally (whether forwards or backwards). For the years from 2020 to 2024/2025, the plaintiffs consider it appropriate to adjust prices based on the Labour Cost Index (LCI).

[788] As calculated by the plaintiffs, adjusted using the LCI, fair and reasonable take home pay was $200,275.59 in July 2023, and $206,946.03 in July 2024.

Individual plaintiffs' damages claims

[789] Having established that the plaintiffs are entitled to a fair and reasonable service price and how that is to be calculated, I turn to address what that means for individual LMC midwives. This "Phase 1" hearing determines the loss suffered by the representative plaintiffs only. The plaintiffs have provided financial and other information for the relevant years for Ms Hermann and Ms Hiskemuller.

[790] The plaintiffs say it is the Crown's breach of its obligations under the 2018 Settlement Agreement that means services have continued to be provided under the Notice, including by the two representative plaintiffs. For both, damages are sought in an amount representing the difference between the fees they received under the Notice since 1 July 2020 and a fair and reasonable service price (or such alternative sum as the Court thinks appropriate).

[791] At the outset, I record the Crown's overarching position, as above, that the plaintiffs have not established a true counterfactual. The national midwifery agreement never came into existence and the blended payment model was not fully realised. The Crown says the plaintiffs have not provided evidence as to what the contents of the agreement would have been, nor how the blended payment model would have operated. Details about fee levels for modules, the intended on-call and operating costs, the levels of additional time, travel and incentive payments remain at large.

[792] The plaintiffs' response is that the fact that a service price should ultimately have been applied to different modules (and other components) under a blended payment model does not prevent the Court from awarding damages to the plaintiffs on another basis, by making "reasonable assumptions which err if anything on the side of generosity to the claimant".

[793] The Crown's position is that the notional "1 FTE" does not provide a sufficient evidential basis to establish the plaintiffs' loss. It says there is an absence of evidence before the Court to establish that there is a "1 FTE" caseload or that a particular number of hours are typically required to meet such a caseload. There is no way of knowing how many hours any LMC midwife actually worked in relation to any particular case or in a year.

[794] The plaintiffs say, and I accept, that the concept of an FTE, by reference to caseload, was how the parties had approached the question of a fair and reasonable service price. There was nothing conceptually wrong with assessing damages on that basis, based on the best available evidence. The plaintiffs say that their (assumed or actual) caseload information provides an adequate proxy, as discussed below.

[795] I adopt the steps proposed by the plaintiffs to assess damages for each of Ms Hermann and Ms Hiskemuller:

(a) identify the "headline" price and adjust it for each financial year;

(b) determine the caseload of each plaintiff for each year, including by reference to a proxy as appropriate;

(c) convert the caseload to an FTE;

(d) apply the headline price to the FTE caseload for the relevant year;

(e) make an adjustment for business costs (and an on-call allowance if necessary).

Headline price

[796] As discussed above, I have adopted the headline price from the PwC report as at September 2019.

Date adjustment

[797] The headline price is to be adjusted to reflect the value as at 1 July 2020. The headline price as at 1 July 2020 is then to be adjusted to reflect the value as a 1 July for each subsequent year (this is the approach taken in the PwC Extension Report).

[798] I accept it is appropriate to apply the LCI when adjusting the headline price. The LCI measures changes in salary and wage rates for a fixed quantity and quality of labour input. The Ministry and Health New Zealand have used the LCI when preparing budget bids and funding recommendations. Clare Perry, who held various senior roles within the Ministry in the relevant time period and was a member of the Co-design Steering Group, confirmed that LCI is used at the Ministry.

Caseload

[799] Wayne Robertson is the Executive Director of the Midwifery and Maternity Providers Organisation (MMPO) which is a wholly-owned subsidiary of the New Zealand College of Midwives. One of the key services MMPO provides to LMC midwives is assistance with claiming fees under the Notice. Mr Robertson's

evidence was that, as a result of MMPO's work on behalf of, and frequent interactions with, LMC midwives, it holds a significant amount of data and knowledge about how the Notice works in practice and a detailed institutional knowledge of the claims made under the Notice.

[800] Mr Robertson was also the College's Project Manager for the Co-design Project and led the workstream on preparation of the Co-design Pricing Report, with Laura Ross on behalf of the Ministry.

Assumed caseload

[801] Mr Robertson's evidence included claims data for Ms Hiskemuller and Ms Hermann, prepared and submitted on their behalf by MMPO. Mr Robertson prepared an estimate of the annual caseloads for each of Ms Hiskemuller and Ms Hermann by dividing the total value of their claims under the Notice (excluding GST) by the total payment that would be received under the Notice for one straightforward full continuity of midwifery care pregnancy, to calculate the number of straightforward cases for that year (Assumed Caseload).

[802] The Crown submits that the "factual" in respect of the two representative plaintiffs is not established by the evidence. Mr Robertson's analysis expresses Ms Hiskemuller's and Ms Hermann's workload as a percentage of that undertaken by the notional "1 FTE" (but does not state the value of one straightforward case adopted for his analysis). But, the Crown says, that analysis assumes all women go through to birth, and does not include partial courses of care. It may therefore overstate earnings. Not all cases are straightforward. There is no "1 FTE" caseload or a particular number of hours required to meet such a caseload. There is an absence of evidence before the Court about the representative plaintiffs' actual caseload — how many hours they spent to derive their income — and the connection between that and their income (as returned to Inland Revenue). The Court does not know exactly what work the representative plaintiffs performed to generate that income. Similarly, the Crown says, the evidence of other individual midwives demonstrates the variability of their work, their approach to practice and the incomes they derive.

[803] The Crown is also critical of the fact that Mr Robertson used notice claims data extracted from the MMPO database, which was then used to establish the representative plaintiffs' incomes. Ms Hermann did provide her caseload information from MMPO and that information could have been connected to her actual income, but was not in Mr Robertson's analysis.

Actual births; average births

[804] In response to the Crown's criticism of Mr Robertson's approach, the plaintiffs say there is more than one way to approach the calculation on the available evidence. If the Court considers that there may be better available evidence, that is something that could be addressed as part of the Phase 2 process. Further, while the representative plaintiffs are not statistically representative (and were not intended to be) they have comparatively "straightforward" caseloads, which reduces complexity in the calculation.

[805] The plaintiffs also put forward two other options for determining Ms Hiskemuller and Ms Hermann's annual caseloads: births or average births. Each of them provided details of the total number of births they claimed for. The number of births for each year is for the period 1 April to 31 March, which does not directly correlate with the headline prices which are for the year 1 July to 30 June. The parties' experts agreed that a midwife would often have a caseload above their number of births.

[806] Alternatively, it is possible to calculate the average number of births per month and then calculate the total average number of births for the 1 July to 30 June period.

[807] The plaintiffs' submissions summarised these caseload proxies. All three lead to similar results. For example, for the year beginning 1 July 2020, Ms Hiskemuller's caseload was 27.2, 25 and 28.23 under the three methods respectively.

Discussion

[808] I agree with the Crown that Ms Hiskemuller and Ms Hermann are not "representative" in the sense of caseload. There is no "standard" caseload for an LMC midwife. But one FTE is a proxy for a representative LMC midwife, and that is clear from the Co-design project, in which the Ministry participated. The Co-design work utilised the concept of "1 FTE" and that was carried forward into the PwC reports which were commissioned by the Crown. It is self-serving for the Crown now to disavow the concept.

[809] Plainly there is no one, perfect method for calculating the difference between what an individual plaintiff actually earned and what they would have earned if they had received a fair and reasonable service price. Mr Robertson's analysis appears to have merit because it allows for services additional to a full course of care to be captured. But his calculations require use of a figure representing "the total payment received under the Notice for one straightforward full continuity of midwifery care pregnancy." The Notice does not provide such a figure and, as the Crown notes, Mr Robertson has not disclosed the value he has used. That value is also not discernible from his calculations.[263] In the absence of such certainty, I cannot see how other midwives could use Mr Robertson's method to calculate their assumed caseload.

[810] As noted above, a midwife will often have a caseload above their number of births. But in the absence of another suitable proxy, I adopt total births for the purposes of calculating individual damage claims. I accept the plaintiffs' submission that it is possible to mitigate against the disparity between claim year (beginning 1 April) and headline price year (beginning 1 July) by calculating the average number of births per month and then calculating the total average number of births for the 1 July to 30 June period.

---

[263] The value used appears to differ between his calculations for Ms Hiskemuller and Ms Hermann for the same time periods. For example, it is not clear how the amount claimed by Ms Hiskemuller in the year ending 30 June 2021 works out to an estimated annual caseload of 27.2, whereas the amount claimed by Ms Hermann for the same year works out to an estimated annual caseload of 42.7. Those figures are not directly proportionate. I record that the actual amounts claimed by the second and third plaintiffs is personal information which it is not necessary to disclose in this public judgment. Accordingly the actual claims figure for Ms Hermann is redacted at [814] below.

FTE equivalence / Application of caseload to FTE

[811] The plaintiffs submit that the appropriate division of the total 2,160 hours for one FTE would be 40 cases consisting of 54 hours each, which would be consistent with the Co-design Project recommendations. It would also reflect that a caseload is likely to comprise both straightforward and non-straightforward cases. The plaintiffs say that, while a division of 45 cases comprising 48 hours each, or a mid-point of 42.5 cases consisting of 51 hours each might be appropriate, it would risk not adequately reflecting the true extent of care provided by one FTE.

[812] I have adopted the midpoint of PwC's range, being 45 cases.

[813] The example provided by the plaintiffs for Ms Hermann demonstrates the application of this step:

	1 FTE	Total caseload (using births)	Proportion of 1 FTE
Ms Hermann, year beginning 1 July 2020	45 cases	39	86.67%

Apply the headline price to the FTE caseload

[814] The FTE percentage is then applied to the fair and reasonable price as determined above. In the case of Ms Hermann that is demonstrated as follows:

	Fair and reasonable price (as at 1 July 2020)	FTE adjusted (x 86.67%)	Actual claims	Difference
Ms Hermann, year beginning 1 July 2020	$170,340	$147,125.53	$[redacted]	$[redacted]

Business costs

[815] The parties intended that the blended payment model would pay operational costs throughout the year. The PwC report and the PwC Extension report recognised that business costs would be on top of the fair and reasonable service price.

[816] The parties disagree on how costs should be estimated. While reserving their position in relation to Phase 2 of the proceeding, the plaintiffs propose in relation to Ms Hiskemuller and Ms Hermann that the court adopt either 20 per cent of claims (based on Mr Murray's estimate) or actual expenses.

[817] I accept that 20 per cent of claims is an appropriate measure.

On-call allowance

[818] An allowance for being on call is included in PwC's headline price.

Conclusion re representative plaintiffs' damages

[819] Accordingly, I conclude that the two representative plaintiffs are entitled to damages to be calculated by adopting the following steps:

(a) identify caseload using actual births, averaged by month to estimate the births in a year beginning with 1 July;

(b) ascertain what proportion that caseload is of 1 FTE (45 courses of care; 45 births for this exercise);

(c) adjust the fair and reasonable price for that calendar year (as adjusted by LCI from the 1 July 2020 figure of $170,340) by proportion of FTE;

(d) deduct the total of actual claims made under the Notice from the FTE-adjusted fair and reasonable price to ascertain the difference;

(e) add 20 percent of claims amount to cover business costs.[264]

[820] It will be for the plaintiffs to carry out the calculations referred to above and submit the amounts as calculated to the Court and the defendant.

Declarations

[821] The plaintiffs have sought declarations in respect of each of the causes of action in which they have been successful.

[822] The Court has a discretion, under s 10 of the Declaratory Judgments Act 1908 or under its inherent jurisdiction, whether to make declarations.

[823] The Crown's position is that, leaving aside the Bill of Rights claim, it would be inappropriate for the Court to exercise its discretion to make any of the declarations sought by the plaintiffs. That position appears to be advanced on the basis that to issue declarations would in effect be to say that the Government made wrong decisions, in a context where the Court necessarily does not have knowledge of the competing issues in the health sector and beyond. A declaration or declarations would, the Crown says, have undesirable flow-on effects and unintended consequences.

[824] I do not accept that is the case. The issues put before the Court by the plaintiffs were plainly justiciable questions, rather than political matters where no legal rights arise. While the Crown strove to attribute the relevant decisions to Ministers or Cabinet and thus, in its submission, beyond the Court's remit, its opaque presentation of the case did not make out that argument. The declarations I make below do not go to political decisions made by the Crown but rather to its legal obligations, assumed by contract, and (in the case of the Bill of Rights) imposed by legislation.

[825] As to alternative remedies, while I have granted monetary remedies in respect of the first and fifth causes of action, in my view declarations are also important to vindicate the plaintiffs' legal rights and to underline the importance of the Crown

---

[264] The plaintiffs have reserved their position regarding the calculation of business costs to any Phase 2 hearing.

adhering to its legal obligations, particularly given the context of a necessarily ongoing relationship between the College and the Ministry.

First cause of action – Breach of 2018 Settlement Agreement

[826] I grant the following declarations:

(a) that the Ministry failed to implement the national midwifery agreement by 1 July 2020 in breach of the 2018 Settlement Agreement;

(b) that the Ministry has failed to pay LMC midwives a fair and reasonable service price in breach of the 2018 Settlement Agreement;

(c) that the Ministry failed to provide LMC midwives with the ability to renegotiate fees paid to them on an annual basis from 1 July 2020 onwards.

Second cause of action – breach of obligations to take all necessary steps under the 2018 Settlement Agreement

[827] I grant the following declarations:

(a) that the Ministry breached its obligations under the 2018 Settlement Agreement to take all necessary steps to fulfil the terms of the parties' agreement;

(b) that the Ministry breached its obligations to work together with the New Zealand College of Midwives in good faith to fulfil the parties' commitments under the 2018 Settlement Agreement.

Fifth cause of action – unlawful discrimination under s 19 New Zealand Bill of Rights Act 1990

[828] As recorded above, I make the following declaration in respect of the discrimination claim:

(a) By issuing the 2007 and 2021 Notices the Crown unlawfully discriminated against LMC midwives on the basis of their sex in breach of s 19 of the New Zealand Bill of Rights Act 1990, because the Notices unilaterally impose restrictive terms and conditions that are not imposed on obstetricians providing straightforward lead maternity care and GPs providing non-maternity services.

ORDERS

[829] In summary, I make the following orders:

(a) an award of compensatory damages to each of the second and third plaintiffs, Ms Hiskemuller and Ms Hermann, to be calculated in accordance with the steps set out at [819] above, together with interest under s 10 of the Interest on Money Claims Act 2016 from the date of judgment to the date that payment is made to the second and third plaintiffs in full;

(b) an award of injury to dignity damages in the sum of $1,000 for each of the second and third plaintiffs; and

(c) the declarations set out at paragraphs [826]–[828] above.

THE CROWN'S CONDUCT OF THE LITIGATION

[830] The Crown acknowledges the "difficult and valuable work" undertaken by LMC midwives, but the history leading up to this proceeding in fact indicates a rather cavalier approach by the Crown — entering into agreements to avoid legal liability and then choosing not to, or failing to, meet its obligations under those agreements.

[831] In closing submissions, the Crown said that "matters relating to the design, funding structure, and, ultimately, income levels of LMC midwives are better addressed through engagement with elected officials and orthodox policy processes, rather than through litigation".

[832] That suggestion is disingenuous in light of the history of this matter where the College repeatedly attempted to do just that, only to have the Crown renege on its commitments.

[833] It is also at odds with the manner in which the Crown conducted the litigation. Examples of this include attempting to raise "constitutional" impediments to the Court's scrutiny or by suggesting — four years after the event — that the Crown representative who signed the 2018 Settlement Agreement did not have authority to do so.

[834] I have also recorded earlier the Crown's failure to call witnesses, such as the Hon Andrew Little, Mr Knipe, Ms Roberts and Mr Hefford, who could have shed light on who made certain key decisions, when and for what reason. That failure contributed to the opaque nature of the Crown case. In the absence of that evidence the Court was effectively invited to infer that decisions were made by the Minister(s) or Cabinet and therefore beyond the Court's purview. The lack of that evidence also did a disservice to those officials who did give evidence.

COSTS

[835] As to costs, while I have not found for the plaintiffs in all causes of action, in substance they have been successful in this proceeding. The defendant is the unsuccessful party for the purpose of costs. I can signal that if the parties are unable to reach agreement the factors discussed under the previous heading will be relevant to the exercise of the Court's discretion in awarding costs.

[836] The Court understands that a litigation funder is involved, which may necessitate an application for non-party costs.

NEXT STEPS

[837] By consent the Court directed in advance of the hearing that it would address the common questions of fact and law identified in the pleadings and the claims of the first and second, representative, plaintiffs, including any loss suffered by them and, following the Court's judgment, would reserve leave for either party to seek further

directions from the Court for the determination of the claims of each of the group members, including the loss (if any) suffered by each of those group members (the Phase 2 issues).

[838] Accordingly, leave is now reserved in those terms.

[839] Leave is also reserved for any party to seek further directions from the Court.

[840] The parties were given an opportunity to clarify the status of material referred to in the judgment and previously the subject of confidentiality orders, to make any factual corrections to the judgment and to comment on the terms of a declaration to be issued by the Court, before public release of the judgment. The judgment reflects the parties' responses and corrects some minor errors, pursuant to r 11.10 of the High Court Rules 2016. The delivery time of the judgment for the purpose of r 11.5 of the High Court Rules and r 29(3) of the Court of Appeal (Civil) Rules 2005 is 26 March 2026.

Gwyn J

Solicitors:
Tompkins Wake, Wellington for Plaintiffs
Meredith Connell, Wellington for Defendant