IN THE SUPREME COURT OF NEW ZEALAND SC 65/2008

BETWEEN **VECTOR GAS LIMITED**

Appellant

AND **BAY OF PLENTY ENERGY LIMITED**

Respondent

Hearing:	23 June 2009
Court:	Blanchard J Tipping J McGrath J Wilson J Gault J
Appearances:	J E Hodder SC with K Cornege for the Appellant H N McIntosh with K F M Wevers for the Respondent

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CIVIL APPEAL

MR HODDER QC:

As the Court pleases, I appear with my learned friend Ms Cornege for the appellant.

BLANCHARD J:

Yes, thank you Mr Hodder.

MR McINTOSH:

As Your Honours please, my name is McIntosh, I appear with Ms Wevers for the respondent.

BLANCHARD J:

Thank you Mr McIntosh. Mr Hodder, before we begin, members of the Bench have got a minor concern about the fact that both you and Mr McIntosh are appearing in this case, yet the letters are at least nominally in your names. Is that really appropriate and was this question raised below?

MR HODDER QC:

The answer to the second question is no and we could say the answer to the first question yes, the point hasn't been taken by anybody up to this stage.

BLANCHARD J:

Well, it did strike me and other Judges that technically, it looks a little odd, that you're really going to be putting up arguments about material that you appear to be the authors of.

MR HODDER QC:

Well as I say, counsel haven't felt difficulty to this point and nor have the Courts below. I understand that at one level my name and I think my learned friend's name appear on the Chapman Tripp and Russell McVeagh letters on behalf of the respective clients. I'm not sure that any of the arguments turn on the subjective views of the person writing the letter, obviously that isn't part of the case for either party.

BLANCHARD J:

Yes, well no doubt that's correct. I mean, in the circumstances, we're not disposed to call the hearing off and ask you to go away and get independent counsel but we do think that it's a matter that should have been considered.

MR HODDER QC:

I note what the Court says. My friend can speak for himself but that's a matter that I have discussed with my client in the past in relation to this matter and I am here on –

BLANCHARD J:

All right, well I am addressing these remarks to you. Mr McIntosh has got the luxury of not being at the pulpit, as it were, at the moment. All right, well let's proceed.

MR HODDER QC:

In terms of the way in which the argument is to proceed, as I understand it, I don't think it makes any difference and I'd be disappointed if the Court felt it couldn't have confidence in the submissions of either counsel on the basis of names appearing on that correspondence but I don't think I can take it any further.

BLANCHARD J:

All right, thank you.

MR HODDER QC:

If the Court pleases, there are probably two levels at which this case might be considered, depending on the level of abstraction one takes. The case that I will be presenting on behalf of the appellant is that this is largely a case of error correction, that the Court of Appeal went wrong because it failed to read the critical part of the sequence of correspondence. Had it done so, it could not have reached the decision it did and the High Court's judgment on this particular topic would have been upheld. As I apprehend the case more for the respondent, there is a suggestion that this gets into some of the jurisprudence on the approach to interpretation of contracts in more detail and some passing doubt is cast on, for example, the dictionary exception, so I'll have to address that as part of the submissions I make and implicit in that is the question of the *Prenn* proposition in relation to prior negotiations as to whether and how far, that bears upon the matter that we have to be concerned with.

In case it needs to be clarified, can I say that in terms of the parties, the appellant has been referred to consistently in the Courts below as NGC, as it

was at all times when this was going on and indeed all these events I believe occurred before Vector acquired what was Natural Gas Corporation, NGC and there won't be doubt from the Courts reading of the papers that BoPE is an integral part of the Todd organisation and I think there are occasional documents where the word "Todd" has been used instead of the word "BoPE" but that's the nature of the players that we are concerned with.

Appreciating the Court has had the opportunity to read the written synopses for both parties, can I say, by reference to the case on appeal which is mercifully short in this case, that the position as set out in the grounds of appeal on page 2 in the case on appeal, where there's a notice of application, little has changed in the way that I apprehend the case from the grounds that are set out in 1.1 to 1.6 of this document.

So, we say that the Court of Appeal failed to recognise the phrase "$6.50 per gigajoule" as one that the parties have given their own meaning which was an energial gas only meaning. They artificially excluded from consideration the bulk of the relevant prior correspondence and we would say the critical part of the prior correspondence, disregarded the context insofar as the only other options for BoPE which is the acronym by which the respondent has been consistently referred to, where cessation of gas supply or the giving of an undertaking as to market related damages.

The fourth point is that the Court of Appeal gave weight to a reputational speculation that NGC might not have pressed for a market price for its interim arrangement, that speculation wasn't supported by pleading or evidence, or even submission until final reply on the Court of Appeal and it's inherently implausible and the end result, we say, is an unjust result where NGC is at least $4.6 million worse off than if it had simply gone through the process of allowing BoPE to seek and in all likelihood obtain interim injunction, to maintain the status quo. The end result, we say, using the language of Lord Diplock in the *Antaios* is to flout business common sense. All of those points are underpinning the submissions which are advanced today on behalf of the appellant. Then turning to page 5, the approved ground of appeal for which

leave was granted in this case, encapsulates, we think, those points, was the Court of Appeal correct to reverse the High Court's interpretation of what the sum of $6.50 related to in the contract between the parties?

So for completeness, in the pleadings we find the actual pleading by way of a counter-claim by NGC is at page 27 of the case on appeal, at paragraph 11. The Court will recall that this was a case where the claim was brought by BoPE seeking to find that the termination notice given by NGC was invalid. The counter-claim by NGC was based on the defence that the termination notice was indeed valid, as was found in the Courts below and further, that there was money owning which is what this counter-claim relates to. So that's the pleading that the counter-claim was based on, that that was the effect of the agreement.

In the event, 11.2, in the event that the defendant's termination was held valid, then there would be payable the gas only price of $6.50 plus posted charges for transmission networks cost, less sums already paid, plus interest on the balance at the interest rates provided for in the original gas supply agreement. The defence to that claim is effectively found at page 22 of the case on appeal in paragraph 4, in particular 4.2. So these were the pleaded disputed was, nothing was significantly changed since then. Just to explain why the defence is to be found there, rather than after the counter-claim, this is the counter-claim that was filed by leave at trial, that's referred to in the High Court's judgment at paragraph 114. That is a document that starts at page 25.

Now, if it's convenient, what we are doing in effect is defending the High Court's decision and in relation to that, we are concerned with the decision of the Court. It's as it commences at page 62 on the case of appeal. So the first part of the judgment with the termination of the liturgy point, the second part deals with the interim agreement point and the discussion of that starts at paragraph 112. For our purposes, we believe it's convenient because we'll be coming back to the correspondence to discuss it in more detail, to be picked up from where the High Court finished discussing the

correspondence which is at paragraph 121, where it cites Mr Bullock's evidence and I'll have the Court directed to that later on. Mr Bullock's evidence was unchallenged, that the unbundling of the price was consistent with the way NGC priced virtually all of its contracts in 2001 onwards.

The Industrial Business Unit purchased transmission and networks services provided by other companies, including companies owned by NGC for use by its customers. So his unit provided gas, transmission network services had to come from somewhere else, including a separate NGC subsidiary, the total package was what was then sold to customers. The prices, he says offered in a letter of 28 September 2004, reflected a discount in market prices at that time. The lack of Maui legacy gas or guaranteed ROFA gas meant the prices have increased to around $6 to $7.50 per gigajoule, exclusive of transportation costs.

The Court will appreciate that this whole case arose because of a Maui redetermination which meant that the entitlement of NGC to Maui gas had been drastically cut back. ROFA was right of first refusal gas which was, I don't need to get into the details but it was an aspect of gas that came out of negotiations in something called the Strawman agreement, that followed the Maui redetermination and a great deal of disputation that followed the Maui redetermination. The point that's being made in the evidence is that the price at this stage, as far as NGC was concerned, was $6 to $7.50, plus transportation.

Then the last part from Mr Bullock's evidence quoted is, for the last three months of 2004 which is a time when the negotiations between the parties on the interim agreement took place, NGC had negotiated 15 new customer contracts with a weighted average gas energy price, i.e. excluding transmission, at $6.68 per gigajoule and that was the starting price. NGC included significant step increases in those contracts and the future selling price of Parekura gas which was expected to be in the range of $7.50 and $9 per gigajoule. I don't think it's ever been in doubt between the parties, that Parekura gas was going to be coming on in increasing quantities and would

influence the market price for gas. So, the Court goes on to talk about what that means, a bundled price of $6.50 which is what BoPE has been contending for, equates to a gas energy price of $4.64, with a transmission component to Edgecumbe which is where this gas was always going, of $1.86 per gigajoule.

NGC discloses transmission network charges to BoPE, current transmission prices are public and at all times have been posted on NGC's website. Under the original agreement at the time of termination, BoPE was paying was paying $5.55 per gigajoule, bundled, i.e. $3.69 per gigajoule of gas energy. That increased to $5.80 by the end of the contract. The average paid was between $5.71, bundled, or $3.85 per gigajoule of gas energy. The bundled price of $6.50 would have led to gas energy being supplied at well under market price at the time. That's the evidence that's quoted.

He then summarises the financial consequences in paragraph 123 and the difference at that time was calculated at around $3.26 million. The number is now, as I say, around $4.6 million. Paragraph 124, Mr Hall, who was and is in-house counsel for Todd and for BoPE, was cross-examined carefully by Mr Hodder about industrial knowledge of prices. He accepted NGC its original offer of $6.50 equated to a market price in October 2004. He accepted also, that the industry then drew a distinction between gas energy and delivered gas prices. Sometimes under the BoPE agreement of 1995, both are bundled in the delivered price. In other contracts, those costs are charged separately. He acknowledged that BoPE would normally pay for the cost of transmitting gas to Edgecumbe. In my recollection, none of that was challenged in the Court of Appeal. I don't understand it would be challenged now.

At 125, the Court discusses the factual matrix as it perceives it. There had been an intention, a notice of intention to terminate, BoPE had sought an indulgence in the form of the interim agreement which would secure its supply until the dispute was resolved. NGC offered two options which I'll come back to by reference to the correspondence and so what was left for agreement was appropriate transmission. At 126, in all subsequent correspondence,

including the letters which constitute the interim agreement, the parties by their solicitors, referred throughout to a gas price of $6.50 per gigajoule. Both counsel directed detailed argument to support competing meanings, was it a price for gas energy alone, or was it a bundled price, including transmission costs? To the extent that one needs ambiguity, that we say, captures the sense of the ambiguity in the phrase "$6.50 per gigajoule".

He then goes on to go back to repeat some of the referenced evidence at 127 and at 128 which we say is where and 129, where His Honour in the High Court was working his way towards business common sense, the Court accepts the proposition that it was inherently unlikely that NGC would have agreed to an interim arrangement whereby BoPE was placed in a better position than it would have been if it lost its challenge to the validity of NGC's notice. Then goes on and explains how that calculation works out. Then 129, "With express reference to the *Antaios*, the result contended for by BoPE cannot be logically treated as an expression of the party's common intention, unless no other interpretation is reasonably open. The law does not require that an agreement be construed in a way contrary to business common sense".

At 130 he says, "I am satisfied that all relevant times that parties were referring to an unbundled or gas energy price of $6.50, excluding transmission prices". Then goes on through discussion, down to 132, "This construction does not cause any difficulties in implementation. It can only be assumed that a meeting on appropriate transmission capacity levels was unnecessary, in view of the fact that NGC actually supplied all BoPE's gas requirements, that NGC provided metering equipment, given its ability to identify the quantities delivered and fixing NGC's transmission cost will be simply a mechanical exercise". I add there that when we get to the correspondence, you'll see the proposal was that those things be passed on at cost. There's no suggestion that the NGC unit supplying this gas was, in turn, going to clip the ticket in relation to the transmission cost itself.

TIPPING J:

According to the High Court, how were the transmission costs going to become chargeable to BoPE? Were they liable in contract, or were they liable on some quantum meruit sort of basis, or how, if the price was gas energy only and the transmission issue had been parked, as it were?

MR HODDER QC:

Then it would have been on the basis that they were incorporated. The issue was always whether it was a bundled price, including transmission, or whether it was a gas energy price only, with transmission to be supplied as part of the contract but as a separate item.

TIPPING J:

As part of the one single contract, you say it's implicit?

MR HODDER QC:

Yes.

TIPPING J:

That the energy costs, sorry, the transmission costs would be paid for at cost, as part of the total contract?

MR HODDER QC:

Yes. The basic proposition that the appellants are advancing, as they did in all the Courts below, is that $6.50 per gigajoule was the shorthand expression the parties used to describe "$6.50 per gigajoule, plus transmission at cost".

BLANCHARD J:

Yes but that doesn't quite answer the question you're being asked which assumes that you get to that point, we accept that argument from you.

MR HODDER QC:

Then that's what the contract means. Transmission at cost is a price.

BLANCHARD J:

Yes Mr Hodder, if you just let me finish. The point you're being asked about is how the transmission costs, assuming that they're a separate, extra item, are to be fixed. Is it some kind of quantum meruit, or is there a formula somewhere which enables that simply to be worked out?

MR HODDER QC:

The posted terms that are referred to in some of the evidence I've just taken the Court to in the judgment, that these things are on a website, these transmission costs are on a website and so that was the basis, the point of reference, if that is the question.

BLANCHARD J:

Are you saying that when, as Justice Tipping puts it, the transmission costs were parked and that's in accordance with your side of the case –

MR HODDER QC:

Yes.

BLANCHARD J:

That they were parked on the basis that they would simply then be a reference to the posted prices from NGC transmission?

MR HODDER QC:

Yes, the standard prices that NGC Transmission was charging for that link which were in themselves posted prices according to the evidence on a website.

BLANCHARD J:

I see.

TIPPING J:

But that's not, well I'm jumping ahead but I just signal that that's not what the letter of 28 September says, is it? That said you would have to have a chat

about this, meet to discuss what the transmission and metering arrangements will be.

MR HODDER QC:

I think it's picked up in the question of volume later on.

TIPPING J:

All right, I don't want to jump ahead but I signal that for myself I see this as a pretty important issue.

MR HODDER QC:

I'll come back to it as we go through the correspondence if I may.

TIPPING J:

You've got to, somehow or another, show that your opponents are bound in contract to pay the transmission costs at an amount that the contract identifies or a formula, or that they are bound under some other legal principle, don't you?

MR HODDER QC:

Yes and we say the formula "at cost" is not a difficult concept in this environment, that's the argument.

TIPPING J:

I see, okay.

MR HODDER QC:

Again, I stress, "at cost" is easier in the sense that it isn't a cost that was going to be, as it were, dictated by NGC Energy or NGC Gas itself, it was already being specified to the world by NGC Transmission.

TIPPING J:

So the obligation to pay "at cost" is a contractual term?

MR HODDER QC:

Yes.

BLANCHARD J:

Why then did that letter say, "We have not included transportation and metering rates in this proposal" and give us a reason for doing that, timing constraints. If it is, as you're now suggesting, wouldn't it have been very easy simply to refer to NGC Transmission's posted transmission costs?

MR HODDER QC:

The answer is it probably would have been. I can't explain why it doesn't say that. I'm referring to the evidence the Court heard at trial as to what was available and I'll come back to that from Mr Bullock's evidence directly.

TIPPING J:

It suggests, with respect, that something other than the simple "at cost" formula was at least a possibility because they had to meet to discuss it. So, it was not clear at that stage how it was going to be worked through and you are no doubt going to be able to show us, if your plan is to succeed, how it became clear later?

MR HODDER QC:

Yes, I propose to combat that as I come through the –

TIPPING J:

I just wanted to flag it Mr Hodder as something that needs, for my part, attention.

MR HODDER QC:

I have no magic rabbits in relation to the process. The proposition is simply that although at the time that letter the Court's referring to, I think at page 260 of the case on appeal refers to a further enquiry about what that actually meant in terms of transportation and metering. The evidence that was given

at trial and accepted was that “at cost” was clearly identifiable by reference to the posted prices.

TIPPING J:

That’s why I want you to demonstrate to me how “at cost”, payment “at cost”, became a contractual term in the light of the fact that in the letter of 28 September it clearly wasn’t?

MR HODDER QC:

The point that I was referring to there Sir, is simply the second paragraph of that letter in the second of last sentence, where it says “at cost”.

TIPPING J:

Yes but apparently it couldn’t be identified, that wasn’t good enough because otherwise there would have been no need to get together –

MR HODDER QC:

The distinction, as I say, I’d like to come back to this later on but the distinction is between the concept “at cost” and what the cost actually was. The concept of “at cost” is clearly in that paragraph. What it actually was, was the question they were going to come back to.

TIPPING J:

All right.

WILSON J:

The final words at the paragraph of the letter at page 260 indicate that posted pricing would be no more than one factor to be taken into account.

MR HODDER QC:

There were issues about metering equipment referred to, “appropriate transmission capacity levels, metering equipment would need to be agreed at the same time as the gas agreement.” I agree that’s all in relation to that. This letter is, in part, contemplating the full longer term agreement and, in

part, it contemplated at that stage there might be new terms, not simply adopting the GSA terms.

TIPPING J:

That's something you're going to come to because I think this is crucial.

MR HODDER QC:

I'm grateful for the Court's indication. Now, I'd taken the Court through the core part of the High Court's reasoning. There was no suggestion in the High Court that the prior correspondent should be disregarded in any sense. Indeed, the way in which the case unfolded was that the evidence was adduced first on behalf of BoPE and BoPE gave evidence of the full sequence of correspondence and that was introduced in Mr Hall's brief of evidence and we find the correspondence referred to, for example, at paragraph 215 of the case on appeal. Mr Hall's brief of evidence commences at page 198 and he goes through and describes a range of aspects of the events that led up to the dispute. In particular, at page 215 or thereabouts, 213, he starts talking about the interim agreement and refers to the meetings. By the time we get to page 216, 217, he's addressing the correspondence which is we say central to the issue in this case.

So, no suggestion this was inadmissible or somehow or other improper, it was advanced by BoPE, referred to by both parties. No suggestion was raised in the High Court that there was something improper about referring to this material. No suggestion was raised in the submissions in the Court of Appeal, in writing before the Court of Appeal hearing. There was discussion in the oral argument about constraints but up to that point, there was no issue that there was anything problematic about this correspondence, or that it should somehow be disregarded.

Now, if the Court pleases, what I wanted to do was then take you to the evidence from Mr Bullock which starts at page 183 of 182 of the case on appeal.

BLANCHARD J:

I wonder whether that's not putting the cart before the horse. You're really meeting an argument from Mr McIntosh, well you have to meet an argument from Mr McIntosh, that it's not permissible to go back beyond, I think he's saying the letter of 15 October. Isn't that an appropriate starting point for you to rebut that argument, if you can?

MR HODDER QC:

I appreciate, well I think that's the argument, although the argument is not completely clear as to whether that's impermissible or just cautious.

BLANCHARD J:

Well, that's what I thought it was.

MR HODDER QC:

I thought the idea was caution rather than impermissible. I will be dealing with it but I was proposing to give you the factual background by reference to the evidence before turning to the authorities and then picking up the pointers to why it isn't impermissible to look at the material that leads up to a letter, or the letter of the 15th of October. If I can anticipate what I'm going to say and which is not going to be a surprise to the Court, what I'm going to say is that this is part of the factual matrix and it also is relevant to the dictionary exception proposition. We say both of those are well recognised without any need to sort of stretch with any discomfort what is said in *Prenn v Simmonds* and has been largely followed since.

TIPPING J:

I have no difficulty whatever with the proposition that you can look at the correspondence. The difficulty I have is with the view of the Court of Appeal that you bring down an axe at some point in the correspondence and deprive yourself of looking at it all.

MR HODDER QC:

Sir, on that point, you're anticipating perhaps – we'll not need to hear greatly from me on that because that's our proposition as well. The Court denied itself the benefit of the correspondence at the earlier stage. So, the question is more, we say, what does that correspondence mean which is a point Your Honour has already put to me but to stop arbitrarily in the middle of the sequence of correspondence, as we say the Court of Appeal did, with respect, is an unhelpful way of approaching the issues.

TIPPING J:

I don't know that *Prenn v Simmonds* requires that once you've had a peep, it must be a limited peep, so to speak.

MR HODDER QC:

No Sir, there's nothing in *Prenn v Simmonds* that says that. It also goes to the more general proposition about attempting to find a commercial interpretation of the relevant language that we're concerned with which is $6.50 per gigajoule.

TIPPING J:

The Court of Appeal's rationale seemed to be that there was here a sort of pause and a new, in a sense, a new proposal or a change of tack if you like, as to the way the matter was to be – from a composite settlement to an interim.

MR HODDER QC:

Correct.

TIPPING J:

So the argument against you has to be that that is something that brings down the shutter if you like, on what took place previously which seems to me at least at first blush, to be somewhat artificial.

MR HODDER QC:

Well it's our position as well I have recorded cites, the Court of Appeal cites *Prenn v Simmonds* for its proposition.

TIPPING J:

Well that's all they cite.

MR HODDER QC:

But *Prenn v Simmonds* doesn't say that, I'll come to *Prenn v Simmonds,* it simply doesn't say that you –

TIPPING J:

I know I'm jumping ahead but I'm trying to be helpful in sort of focussing you on what seemed to be – I'd need to hear what Mr McIntosh says in support of the Court of Appeal before troubling you on the point.

MR HODDER QC:

Well I'm grateful Sir.

TIPPING J;

That's just my view Mr Hodder, at the moment.

MR HODDER QC:

Justice Blanchard was encouraging me to move to this letter of 15 October, I had hoped to simply explain the factual matrix which we contend for, is identified and evidence given on, uncontested evidence given to Mr Bullock about the market conditions which go to explain what the rest of it, the correspondence –

TIPPING J:

Is this to support the view that the opposite, the view that commended itself to the Court of Appeal is commercially quite unrealistic?

MR HODDER QC:

Yes.

TIPPING J:

That's where that fits in.

MR HODDER QC:

It is. And that both parties were operating in the situation where they knew what the market parameters were and that the proposition contended for now by BoPE, or subsequently by BoPE simply has no relationship to that. So it has no relationship in the appellant's submission to the market circumstances and the propositions that are given for any party, let alone both parties, would agree to something that bore no relationship to the market circumstances, don't stand up to scrutiny and that's really the reputation factor point which we say is an utter make-wave.

BLANCHARD J:

I share Justice Tipping's view, that if you are going to look at the correspondence you can't possibly stop halfway through because the letter of 5 October is obviously in response to the letter of 28 September and you can't separate one from another but if I correctly understood the argument that was in the written submission for your opponent, it seemed to be that the contract is expressed in the letter of 15 October and you can't go back before that. That's what I'm asking you to address.

MR HODDER QC:

And we say that's wrong, as a matter of law.

BLANCHARD J:

I'm not suggesting that I necessarily agree with that.

MR HODDER QC:

I was going to address it by reference to the law, that the prior correspondence is part of the factual matrix, in some cases, one might only

get from a prior correspondence statements of subjective aspirations and we accept that you couldn't refer to that but in this case we say the correspondence isn't that. The correspondence is identifying genuine factual matrix as well as demonstrating the dictionary exception, to use the phrase, from the *Karen Oltmann* which is also relevant in this case.

So anticipating where I come to on the legal submissions, we say that the process of interpretation, I'm sorry to state the obvious to the Court, has inevitably got two parts. One has to of course look carefully at the text but one cannot stop looking at the text, one also has to go in and look at the factual matrix. Here the factual matrix is best identified, primarily identified, by that prior sequence of correspondence. There is every reason to look at it and insofar as there might be a suggestion from the *Prenn v Simmonds* authority, that you cannot look at prior negotiations, we say that is subject to the exceptions about where it identifies a factual matrix and where it identifies a dictionary use that the parties have adopted for their own purposes. That's effectively the answer of the proposition that we would advance but I will come to the cases as we go through.

As I understand, just to take the point one stage further, a stage I understand the submissions for BoPE to say the 15 October letter that has relied on the Chapman Tripp letter is completely unambiguous and therefore one doesn't go anywhere else. We can test that proposition as well, both on the premise that we say it is ambiguous and secondly even if it isn't, that the requirement for ambiguity is not a pre-requisite to look at the factual background which in this case we say includes the correspondence that precedes it.

WILSON J:

You say even with an unambiguous document, you can still look at the factual background?

MR HODDER QC:

Yes, I'll come to authority for that, I might advise that as a radical proposition myself, it's implicit in what Lord Hoffmann says in *Investors Compensation* and I think it's other authorities as well that accept that.

McGRATH J:

The real issue may be though whether the text of the 15 October letter allows the factual matrix to have any particular influence in ascertaining its meaning.

MR HODDER QC:

That's the argument that's put forward by BoPE, as I understand it and we say that you have a phrase which could mean one of two things there which is the $6.50 per gigajoule, to find out what that means. Our friends say, you look as it were, horizontally to see what's in the Gas Supply Agreement. We say that doesn't help you on the relevant issue, we say you actually look horizontally, I suppose you might describe it, perhaps as vertically, to look at the prior correspondence which explains what that language means.

BLANCHARD J:

I suppose you're helped by the phrase that appears in paragraph 3 of that letter, "without prejudice to its position." It's a bit hard to understand what it is that is then being said, if you don't know what that position was. In other words, what it is that's being compromised.

MR HODDER QC:

Yes. Well we will say and we have said in the written submissions that the Court of Appeal deprived itself of a number of things that were relevant by starting at a later stage and particularly if you start with this letter itself, you know next to nothing about the dispute that gave rise to the agreement which is classic factual matrix.

BLANCHARD J:

Yes, that's the point I'm making.

WILSON J:

Isn't the contrary argument Mr Hodder, to be found in the words in paragraph 2 of the 15 October letter, "For the avoidance of doubt, the terms of the proposal are set out in full below"? Given that wording, weren't Russell McVeagh and their client entitled to take the view that the proposal was set out in the letter and there was therefore, no reason to go outside the letter?

MR HODDER QC:

The shortest answer to Your Honour's point is that the terms are the same terms that parties have been using throughout, recording an agreement they'd already reached in the correspondence sometime earlier with a particular use of the phrase and that's the nature of the dictionary exception. Perhaps it's easier just to deal with this point as we come through, rather than later, so can I just pick up the sequence of correspondence and take the Court through it.

Let's start, if we may, with the letter at page 253 of the case, the 17 September BoPE letter. That tells us two critical things on behalf of BoPE. Firstly, it says, three, firstly, "we don't accept the termination notice", so the end of the first set of ABC, "Accordingly, BoPE will shortly file a proceeding in the High Court challenging the purported termination and seeking specific performance", so there's going to be litigation. The next proposition comes at about A2, "We can't obtain gas from any alternative source", that has some relevance to a minor point that's made in the written submissions for BoPE. Therefore, they're talking about the supply of gas for the period until the current contract expires which means we started talking about interim arrangement and that's confirmed at the end of that letter at the paragraph beginning, "Consequently, left with little choice unless you're going to supply the contract under the existing contract, then we're going to need to know about the substantive proceeding being determined and we will apply for an interim injunction."

So this doesn't go beyond where the previous meeting had taken it to but picking up the correspondence there, we know there's an interim injunction in

the offering and this is the correspondence being conducted between in-house counsel and reasonably senior executives on both sides of this exercise. They well know, as everybody in the courtroom knows, that an interim injunction exercise is going to have regard to the unavailability of gas somewhere else and that it's going to have to be required if there's an application to be accompanied by an undertaking as to damages and damages will be the difference between what they could have got on the market and what they were programmed in the contract. All of that is clear.

So the next letter is at 255, rejects the proposition that there's grounds for an interim injunction at the bottom of that page, it says there's a commercial solution available. Over the page, doubts whether or not BoPE can't obtain gas from an alternative supplier and says they don't intend to provide. That then gives rise to the letter of 24 September which is the first of what we say are perhaps the three core letters in this exercise. So this is BoPE's reply saying, well, the second part of the first page, beginning "As to NGC's apparent willingness to supply non-Maui gas to BoPE…", we're calling all this previous discussion because Maui gas was in short supply, "…you say you can't give a definite price until we know the quantities and length of term. In response, we require the same amount of gas and we want to require that gas for the remainder of the supplier term, i.e. until 30 June 2006.

So without prejudice to BoPE's position on the termination and assuming that BoPE would accept NGC's standard terms for industrial customers, please advise a price upon which NGC would supply gas to BoPE as above." So this says, all right, let's just for a moment think about the possibility that we don't have an interim injunction, that the current agreement is replaced by a new agreement, what are the terms for it?

That's when you get the letter of 28 September on page 259, the response says, second paragraph, "We can advise that NGC Energy is pleased to offer non-Maui specific supply. The offer under NGC Energy current standard terms and conditions provides two term pricing options or transportation of

metering pass through at cost. Basic details of the offer are outlined below" and the option 1 is $6.50 per gigajoule for gas energy, option 2 is a two-part tariff depending on the date, one lower, one higher. Adjustments of PPI and over the page, as the Courts will be drawn attention, "Due to timing constraints and the variation of the original contract, MDQ and your actual requirements, we haven't included transportation and metering costs. Appropriate transmission capacity levels and the provision of metering equipment would need to be agreed at the same time as new gas supply agreement. If the offer is acceptable, we should meet to discuss what the transmission and metering arrangements will be. Likely to take into account historical usage and transmission posted pricing." So that's NGC saying "what we want for a new contract is $6.50 plus transmission at cost." I'm using transmission again, as the short hand for transmission and metering parts were at cost.

TIPPING J:
And this isn't an interim proposal, it's a –

MR HODDER QC:
That's a full proposal.

TIPPING J:
Full proposal, to resolve the whole matter?

MR HODDER QC:
It will resolve the whole thing and nobody's going to have to go to Court if that's accepted. And then what we suspect is, or what we suggest is perhaps the key letter which again is one the Court of Appeal deprived itself of the benefit of, at this point is where Russell McVeagh enters the correspondence line.

Paragraph 3, "Todd's grateful for the offer of new terms, can't accept them because of the severity of the price discrepancy which they indicate." All right, so that tells us it's too high for a full contract replacement, we're just not going

to swap the old contract price which is much lower, for this one which is much higher. "And we note that Todd doesn't accept the termination and we will be issuing a proceedings." So litigation is clearly on contract.

Four, "The issue therefore arises to supply of gas for BoPE pending the termination of litigation. In that regard, we record the parties' positions as follows: NGC has, by your letter, confirmed A(a), it has sufficient gas available, B(b), the sale price of the gas in question, i.e. $6.50 per gigajoule thereby quantifying the loss of NGC perceives either party will suffer depending on the outcome of the litigation." Now we say that subparagraph or sub-sub-subparagraph is pivotal because what it says is, "Okay, we understand what's going on here, there is going to have to be an arrangement pending trial of our acclaimed challenge of the termination. You have identified in your previous letter the $6.50 per gigajoule, what it is that you're likely to suffer loss on, what you're likely to have the benefit of if you succeed. And that $6.50 per gigajoule, quantifying the loss that NGC perceives either party will suffer, you say is clearly the phrase that comes from the previous letter, i.e. $6.50 per gigajoule with transportation and metering passed through at cost." It can't mean anything else. There can't be any suggestion that by a price which is something other than NGC has offered in the previous letter, that's the figure that NGC has identified as a figure that's relevant to loss or damage –

TIPPING J:

Are you saying that if it didn't include transmission and metering, it wouldn't quantify the loss?

MR HODDER QC:

Exactly Sir.

WILSON J:

So in the Courts below, what was BoPE's position as to whether or not the $6.50 figure in the 5 October letter included transmission costs?

MR HODDER QC:

I think it was disputed but I can't recall the precise line of argument. So what we need to do then is go over the page and see that BoPE on the other hand which says "B1, we cannot currently source an equivalent alternative supply of gas." Now, obviously that would be a very powerful argument in favour of an interim injunction if that was correct. Then goes on to five, "In these circumstances, it would seem the best course for the parties in lieu of Todd having to apply for interim injunctive relief, would be for NGC to undertake, without prejudice to its position, to simply to continue to supply gas on the basis of the existing 95 agreement, pending the termination of proceedings." So what they are doing is identifying the best course for both parties and we say that's a perfectly respectable proposition. BoPE to undertake to file the proceeding promptly. In the event that BoPE is unsuccessful or withdraws, pay NGC on demand for each gigajoule supply of the difference between the agreement price and $6.50 or the current market price, whichever is the lower, plus interest."

So there's that $6.50 and that $6.50 is the $6.50 which is referred to on a previous page and we say that $6.50 is also the same $6.50 that was referred to two pages earlier than that. And we say it's reinforced by the words in parentheses, "or the current market price, whichever is the lower." So at one level, you might have a fluctuating market price which would be harder to calculate but it's a market price, or it's $6.50 which is a proxy for the market price which has already been identified as such back at page 259.

BLANCHARD J:

Could the market price be an unbundled price?

MR HODDER QC:

Yes, well that's partly where I was coming to the evidence from Mr Bullock which I will get back to but that's what we'll get to, the answer is yes. Then the final letter which really comes to this point is at 263 –

TIPPING J:

Just before you move on, is there some significance in the alternative little BB, in that this was a proposal to replace the gas, if you like, to provide NGC with an equivalent amount of gas and it was to be transmitted to market, in other words, in this situation, presumably to get it to market, BoPE would have to pay those costs? So on the alternative, they were actually contemplating that they had the – it's not the same transmission but it's consistent with the fact as an alternative, that the transmission costs were to be for their account.

MR HODDER QC:

I think there's no dispute that they were always going to be paying transmission costs, the only question was –

TIPPING J:

On that alternative?

MR HODDER QC:

It's in that alternative, although nobody's focused on that subparagraph very much.

TIPPING J:

I'm just trying to look at everything, any clues that one can find, if you like, in this rather unfortunate situation but –

MR HODDER QC:

Mr Hall, in his evidence, accepted that BoPE would be paying for transmission, the only question is how the price was set, whether it was a bundled price or not.

TIPPING J:

If AA didn't include $6.50 plus transmission, the alternative was distinctly more costly to BoPE than the other way around, if you like.

MR HODDER QC:

It looks like that, I agree Sir.

TIPPING J:

Which doesn't make much logic.

MR HODDER QC:

I agree with that too.

BLANCHARD J:

Yes, that strongly suggests that the $6.50 is plus transmission costs.

MR HODDER QC:

We say that the $6.50 gives you the line of sequence, gives it to you but I accept that BB also contains additional reference to the idea that transmission is an additional cost. But the point I want to come to in the evidence, everyone understands that transmission is a separate cost, the only question is whether by some unusual set of circumstances, NGC has undercharged for it.

TIPPING J:

Well I think, if I may come back to it Mr Hodder, you agreed but for me anyway, I flag that on the previous page, 4a1BB, lawyers do have a talent for incredible, sort of, numerations, don't they but never mind that, the sale price of the gas in question, et cetera, thereby quantifying the loss. Now, if that's an honest statement, it can't be other than plus transmission because otherwise, it doesn't quantify the loss.

MR HODDER QC:

Correct, nor does it refer back to the letter and say, if everyone goes back 4A, NGC has, by your letter noted above, i.e. the 28th September letter we've been looking at, quantify the loss.

TIPPING J:

Because the terms, the market terms now being gas energy price plus transmission, what you people could have got, had you not supplying would have been the two.

MR HODDER QC:

Yes.

TIPPING J:

So unless you add transmission in here, as I say, I'm repeating myself, I know. It doesn't quantify the loss.

MR HODDER QC:

Correct. That's been our point.

TIPPING J:

Well, that's the underlying point but here, it is in bold relief, if you like.

MR HODDER QC:

Yes and again, we say the Court of Appeal fell into major error because it did not look at this letter in its analysis.

TIPPING J:

Well, that's another point.

MR HODDER QC:

So then the question arises, well, why do we finish up with a 15 October letter simply saying it's $6.50 per gigajoule? And part of the answer, we suggest, comes from a letter at page 263 which is the Chapmann Tripp reply to the Russell McVeagh letter. And at paragraph 2.2, it specifies what's happening pending the termination of the proceeding and uses the same language that's used on the previous page. "In the event that BoPE is unsuccessful or withdraws, it will be NGC on demand for each gigajoule supplied, the difference between the price set out in the agreement of $6.50 per gigajoule,

plus interest". What it removes is the all the current price option which is, if you like, the floating, as opposed to the fixed. It adopts the exact language from paragraph 5(b)(a)(a) on the previous page.

TIPPING J:

And you say that, of course, it then has the same meaning?

MR HODDER QC:

Yes. At that point we have an agreement. Nothing changes after this. This is the point where the price is agreed. All that happens is that this formulation is carried through the balance of the correspondence, including the 15 October Chapman Tripp letter. That's why we say this is a very good example of why the Court recognises that whether parties use a particular phrase in a way which might be a specialist or technical meaning, we would say here, classically, it's a shorthand, to use a colloquial phrase, then the shorthand has to be understood when you come to the final document.

So when we get to the 15 October letter, we have the proposition that says, "For the avoidance of doubt, the terms and proposals set out in full below", what is going on is there's a collection of the propositions from this letter and from the subsequent letter which adds some additional terms and some other bits and pieces from the discussions and records them all. But what it's doing is recording what's effectively agreed on the letter on page 263. "You, Russell McVeagh for BoPE, have given us two option for the interim arrangement, in your paragraph 5 on the 5th of October. We, on behalf of NGC, are accepting one of those options which is the fixed price under 5(b)(a)(a)". And then if we go over the page to –

BLANCHARD J:

Well, not quite because there's also a rejection of the current market price, whichever is the lower.

MR HODDER QC:

But that's an alternative Sir.

BLANCHARD J:

Yes.

MR HODDER QC:

So that there are, well, I understand Your Honour's point. I've actually been reading the possibility that (a)(a) gives two options. One is $6.50, or the current market price, that can be read as separately or together. I think Your Honour is reading them together and saying it's the lesser of

BLANCHARD J:

And you're picking up part of it?

MR HODDER QC:

Yes, that's fair.

BLANCHARD J:

And saying that's what we'll take, so you're making a counter-offer?

MR HODDER QC:

That's fair. I must say, I had been reading it more in terms of being two alternatives in (a)(a) but I think Your Honour's reading is probably sounder. So we are accepting, it is a counter-offer but we are accepting the basic premise but removing the fluctuating element, by the time we get to 263.

BLANCHARD J:

And you're rejecting (b)(b)?

MR HODDER QC:

Yes.

BLANCHARD J:

For what that's worth.

MR HODDER QC:

Yes and then over the page, 264. "We see the difference between the price of the gas supply agreement at $6.50 in paragraph 2, BoPE accepts". So that's the first letter on 15 October. So in terms of the commercial reality of the situation, this entire sequence of correspondence is on a common understanding, we would say undisputedly a common understanding, that starts with the letter of 28 September on page 259, "What is the market price that we, NGC, could get for this gas? What do we want for it?" And the answer is, "You want $6.50 plus transmission et cetera at cost". Russell McVeagh come back and said, "Well, okay, you've told us that. You've quantified the loss in the event we have to get to that issue under interim injunction regime. How about we come up with an arrangement where you pay $6.50 or the current market price, whichever is the lower?"

Then 8 October says, "Well, let's just stick to $6.50 and keep it simple". On 15 October, Russell McVeagh says, "Yes". All that happens in the next letter is to record that in the same terms that the parties have been using pretty consistently on page 262, 263 and 264, that $6.50 is a shorthand for something approximating a market price, being $6.50 plus transmission at cost. And that was the proposition that the High Court accepted and that is the proposition that the Court of Appeal was unable to accept. Now, if the Court pleases, I believe there is still some advantage in going back to Mr Bullock's evidence which is to be found commencing at page 182 of the case on appeal. And what Mr Bullock says, he explains that he's the divisional manager of gas sales for Vector –

TIPPING J:

I'm sorry Mr Hodder, I was limping along behind. Can you give me that page number again?

MR HODDER QC:

Page 182 of the case on appeal Sir. Paragraph 1, he identifies his position, he's the divisional manager of gas sales for Vector. Held that position since March 2006, when Vector acquired NGC's assets. Prior to that, he was

employed by NGC as a manager of business sales. Sets out his background and I can take the Court, I think, to a limited number of paragraphs. Paragraph 6, he explains he's responsible for acquiring gas from NGC's wholesale division and selling it to a number of different medium to large industrial and commercial users.

NGC's larger customers are supplied directly by the wholesale division. So we have a number of divisions identified within the NGC framework. One is the wholesale division, one is his industrial gas sales division. There is also, as we'll see, we'll come to the metering proposition. Paragraph 7, he says, "The customer's own manager will require transportation services to enable the gas to flow from Taranaki to their premises. We therefore purchase transmission and network services from Vector, PowerCo and Wanganui Gas and metering services from Contact, NGC Metering and PowerCo and on-sell these to our customers, whether separately or as part of a bundled package". Then, if we move on to paragraph 62 or thereabouts, we come back to the offer circumstances at page 193 of the case on appeal.

You'll see the heading just above 61 of interim agreement, paragraph 62, he commences by referring to the letter of 28 September 2004, "NGC offered BoPE a non Maui-specific supply of gas to Edgecumbe. The offer was made on NGC's standard terms and conditions, provided two pricing term options. The first option applying for the original term of the agreement, that as to 30 June 2006 and included a price for gas energy of $6.50. The other option applied for an extended term to 2007, with differential pricing. The prices in both offers were exclusive of transport and metering cost, in contrast to BoPE's original supply agreement.

This unbundling of the price was consistent with the way NGC priced virtually all of its contracts in 2001 onwards. The industrial business unit purchases transmission and network services provided by other companies, including companies owned by NGC, for use by its customers". I'd expect that to be known by Mr Hall, as someone involved in all aspects of Todd Energy's business. At 65, "The prices offered in the letter of 28 September reflected a

discount to market prices at that time. The lack of Maui legacy gas or guaranteed ROTA gas meant that prices had increased around $6 to $7.50 per gigajoule, exclusive of transportation costs." Then 66 is the recent contracts which I read to you earlier, when it was quoted in the High Court judgment. Then the line indicates paragraphs which, in the High Court, Justice Harrison declined to read. So, picking it up at 77 and 78, you get Mr Bullock's evidence, "A bundle price of $6.50 equates to a gas energy price of $4.64 with a transmission component of $1.86. NGC discloses transmission network charges to BoPE, current transmission prices are public and have at all times been posted on NGC's website. Under the original agreement at the time of termination BoPE paid a total of $5.55 per gigajoule or $3.69 per gas energy. This increased by $5.80 by the end of the contract."

Then at 83, "The following table sets out the amount of gas supplied, the amount for which BoPE has been invoiced and the amount that would be due to NGC if BoPE is unsuccessful." Then the table is set out and the table is reasonably self-explanatory but the critical number is the 4.682 million dollar figure at the bottom, in the middle. It then goes on to explain that in words in paragraph 84, "The offer in the letter of 28 September would have led to a difference in price of roughly 4.7 million for the period ending on 30 June 2006 when transmission cost excluded the difference is roughly 1.4 million, less than a third of the increase under the original offer."

TIPPING J:

What is the crucial point you reply on this evidence for Mr Hodder?

MR HODDER QC:

That in the industry, there's a limited number of players in the industry, there are several points we rely on. In part, we rely on the fact that bundled prices were no longer common, so it points out that in 2001 they changed their way of dealing with contracts and that current transmission prices, he says in paragraph 77, "...are public and have at all times been posted on NGC's website."

GAULT J:

Can I ask you about that Mr Hodder. From the correspondence there seemed to be no clear indication of the source of the gas for this interim supply, whether it would have been Maui gas or gas from some other source. Nor is it clear which of these transmission companies would be transmitting the gas from its source. So, what would it be on the website that would give you the transmission costs?

MR HODDER QC:

My understanding and I might want to check the evidence of this Sir, is that it was NGC's own gas pipeline was going to be transmitting this through to Edgecumbe.

GAULT J:

That wasn't what the evidence was, was it? That they sub-contracted transmission to these various other companies –

MR HODDER QC:

Including the NGC company –

GAULT J:

– the statement that it was "at cost" presumably, was "at cost" to NGC?

MR HODDER QC:

Yes. My recollection and I need to check the evidence, is that NGC Transmission, not NGC Energy, would be supplying the transmission element. So, it would be an armslength relationship between NGC Energy which was doing this deal and NGC Transmission which had the posted prices. So, when the reference in paragraph 77, that would be a reference to what NCG Transmission, with a capital T, puts on it's website, not what NGC Energy puts on a website.

GAULT J:

They would presumably post a rate of pricing rather than actual prices because it depends where it came from I assume?

MR HODDER QC:

There may be some errors, I'll check with my learned junior, if I may, of the break but my recollection is that the tariff because there's only a limited number of pipelines, the tariffs are measured from place to place. It's a bit like a railway timetable, you can figure out where to get from A to B, or F to G, by reference to it. So this was, at that point, known to be going from Taranaki and was going to get to the Bay of Plenty.

TIPPING J:

According to this table on 197, the difference, it was something – in other words, the transmission component of the 4.6 was about 3.3?

MR HODDER QC:

Yes.

TIPPING J:

Is there evidence as to where that comes from, as to how one validates or vouches for that?

MR HODDER QC:

I don't know that there is direct evidence of that and certainly not in this case on appeal –

TIPPING J:

That is presumably the "at cost" figure?

MR HODDER QC:

Yes, yes.

TIPPING J:

Justice Harrison didn't really get into this, did he? Was that because there wasn't really any dispute, that if it was to include transmission, that figure was accepted?

MR HODDER QC:

Yes, I just –

TIPPING J:

Because there's no discussion about, of quantum if you like, on the premise that transmission had to be paid in addition which led me to think that the reason for that was probably that it was not in dispute on that hypothesis?

MR HODDER QC:

Sir can I just, at 83 of the case on appeal, you'll see the sealed order. The sealed order referred at 1.2 to the defendant's, "...posted charges, transmission and network costs associated with the delivery of such gas." Now, the judgment sum was calculated between the parties by reference to the table back at page 197 we've been looking at, plus interest, without difficulty. There had been a dispute about the calculation of it. The sum was paid over originally by BoPE, then paid back again after the Court of Appeal judgment with appropriate interest adjustments. There has never been an issue about calculating the transmission, et cetera. So, Your Honour's quite right, Justice Harrison didn't have to deal with the issue in any detail.

I'll make enquiries as to whether there was specific evidence in some of the other materials that haven't been burdening the case on appeal here about the tariff and post –

TIPPING J:

Clearly there wasn't, at the time of the trial in the High Court, a precise agreement because the Judge had to specify it as a formula?

MR HODDER QC:

Correct but there was no –

TIPPING J:

But you say the formula was self-fulfilling, if you like?

MR HODDER QC:

Yes and no challenge to any of Mr Bullock's evidence on these topics.

TIPPING J:

Right. Okay, thank you.

MR HODDER QC:

Your Honours, I was going to then turn to the sequence of correspondence. I've largely done that and I think I have – if we go back to 263, probably I should pick up and deal in a bit more detail the next two stages.

We say that to find out what $6.50 means, or $6.50 per gigajoule means, the answer is to be found in pages 259 to 263. When we get to 263, the Court of Appeal said in paragraph 91, this is a wholly new proposal and, with respect, that's an unhelpful categorisation. It is the development of the proposal which the parties have been discussing and in particular, it's a development of a proposal that comes from BoPE in the previous page. As was discussed a few minutes ago, it is that proposal except it takes out the fluctuating option and leaves it at $6.50. The idea that this is, for the first time, that there's ever been an offer about an interim arrangement, nobody's ever talked about an interim arrangement before, isn't a categorisation of what's going on.

There's a proposal for an interim arrangement put forward by BoPE in the previous page, 262, 263 there's a modification of it, that proposal is put forward by NGC. With respect, there's no justification for saying, this is a new proposal that entitles us not to look at what comes before because then we

have no idea what $6.50 per gigajoule means in paragraph 2.2 of this letter on page 263.

As I mentioned before, over the page, a week later is the Russell McVeagh letter which says BoPE accepts that proposal which is not that surprising given it reflects, very largely, what was in the letter from Russell McVeagh back on the 5th of October. But, it says, "We've got a couple of other minor matters which we don't think are contentious. Firstly, let's make sure that the discontinuous from the settlement isn't somehow caught up by that, well that's perfectly sensible. Secondly, we'd like to be able to terminate on seven days' notice." They were under pressure from Fonterra, "could have some conferring promptly" and they get a prompt conferral, it comes a matter of hours later which says, "We agree to the suggested amendments…", that is to say 2(a) and (b) from page 264 and for the avoidance of doubt, the terms proposed are set out in full below" and those proposals accumulate the various propositions.

TIPPING J:

So the Court of Appeal put the divide between the letter of –

MR HODDER QC:

At 263, they said is the starting point, they didn't go back before 263.

TIPPING J:

The letter of 8 October, they started with the letter of 8 October?

MR HODDER QC:

That's what they say at paragraph 91.

TIPPING J:

Paragraph 91, yes but of course, that, with respect, that letter is a reply.

MR HODDER QC:

Yes, yes.

TIPPING J:

To a proposal made by BoPE.

MR HODDER QC:

By BoPE, yes.

TIPPING J:

So they're putting that divide between the proposal and the reply?

MR HODDER QC:

Yes and again, no justification in *Prenn v Simmonds* for that either.

TIPPING J:

Well you wouldn't have thought there ever would be.

MR HODDER QC:

No. So the letter of 15 October on page 265 is accumulating the various bits and pieces that are traversed elsewhere, so it says "Yes, we'll be supplying you for the balance of the term on the terms of the old agreement, i.e. the status quo." Nothing surprising about that and then it says, "We'll undertake to file a proceeding before 31 October. In the end, if we're unsuccessful, et cetera cetera, then there'll be a payment which is the difference between the price in the agreement, at $6.50 per gigajoule which is the wording that we find back on page 263, affecting the wording on page 262" and then it makes clear that there is no issue about discontinuance, over the page which is the point that Russell McVeagh's earlier letter that day had raised. It also, in paragraph 4, reflects the other point that Russell McVeagh had raised earlier in the day about termination on seven days notice.

So all the points that had been discussed by the parties are in this 15 October letter but the issue is what does that point mean, can you just look at it in a vacuum and say it uses the word $6.50 and therefore it must mean $6.50 in

New Zealand currency, end of story? We say at the very least, there's an ambiguity whether it was bundled or –

TIPPING J:

Wouldn't, as what we would call in the Will context, a latent ambiguity because on its face, it's not patent but it's actually latent because it's capable in context of meaning one thing or it's meaning two things? It probably doesn't matter, Mr Hodder but –

MR HODDER QC:

Probably an argument that it's – I think there's a respectable argument that it's patent as well as latent.

TIPPING J:

Well if you simply look at it on its face, $6.50 per gigajoule would tend to lead you pretty strongly to the view that it meant on your premises but when you get beneath the surface, so to speak, you see it's not as simple as that at all.

MR HODDER QC:

I understand that, I think the argument will be put the other way, as though it might be patent is that anybody in the industry would say the first question is, is this a bundled price or a separate price? And it doesn't tell us –

TIPPING J:

So there's a patent ambiguity in that respect?

MR HODDER QC:

Yes.

GAULT J:

Mr Hodder, as I understand it, one of the points being made for the contrary view in the respondent's submissions, is to invoke the other wording in this letter of the 15th of October, purports to set out in full the agreement and refers to the continuance of supply under the terms of the supply agreement and

refers in 3.2 to the other features of the supply agreement which presumably include price and draw the distinction with the $6.50 figure which is suggested, all other things being equal, the difference is between $6.50 and what the agreement says. You adverted to this very briefly before but I thought you said you would come back to it.

MR HODDER QC:

Well the argument against us is the one that says in the 1995 Gas Supply Agreement which is going to continue under these regimes, there is a number and the number got escalated and I think we've seen evidence was up to about $5.50 by the time this was going on and all you do is you take that $5.50 and take away from $6.50 and that's what the answer is, so we finish up with a much lower number.

That's the argument against us and it requires looking at $6.50 as meaning literally $6.50, it's an entirely literal approach but we say that you don't need to look at the Gas Supply Agreement terms for anything other than the fact that that's the maintenance of the status quo. What and there's no doubt what the price that's being paid under the Gas Supply Agreement is, the issue is, what is meant by $6.50 per gigajoule? Now, it may sound slightly tautologous but that's effectively where we are, that the $6.50 per gigajoule means a price, if it means an absolute price, that's if you can't go outside the balance of the phrase itself in its own terms, then the argument against us succeeds. If you ignore the context, is the way we would of course put it and do put it.

GAULT J:

You've got one context which is the terms and conditions set out in the supply agreement and you've got another context which you have been emphasising which is the background correspondence. Now that seems to be the clash here. The terms of the agreement are invoked twice in paragraph 3.2 of this letter, once in relation to the comparison of price and another with reference to the interest rate. So it does tend to invoke the terms and conditions of the agreement, save the difference in price. That's what I understand is the

argument against you and you haven't taken us to the supply agreement to tell us what that says.

MR HODDER QC:

Well, let me do that, again the short answer to Your Honour's point is that that's incomplete. Again, it's drawing a different kind of artificial barrier to the one the Court of Appeal did. If you say the context is limited to the 1995 Gas Supply Agreement, without regard to the way in which the parties have been using the language to get to this point, then one simply doesn't, with respect, get the full picture. We think they're approaching it. It's only when you take into account the full context, not excluding the Gas Supply Agreement, we don't have any need in our argument to exclude the Gas Supply Agreement and as Your Honours pointed out, we couldn't, it's referred to explicitly in the letter but it doesn't actually take us anywhere, we would say. So if we come to the Gas Supply Agreement, we find that at page 233, of the case on appeal, that's the 1995 one and it runs through until 242.

TIPPING J:

Well the previous terms was a bundled price.

MR HODDER QC:

Yes.

TIPPING J:

The other side are saying that it would therefore simply be a bundled price as a comparator but you say, well, that doesn't follow because that would be wholly inconsistent with the purpose of the interim agreement which was to replicate an undertaking as to damages.

MR HODDER QC:

That's the first point. So that's kind of the common sense point, why would you and the second point is, it's not the way they use that phrase in the correspondence. So both points, we say, are reinforced with each other.

There's no doubt that when we come down to page 234, over to page 234, we have there the basic terms, the term is going to commence on a defined commencement date which is on page 237, of 1 July 1995, identifies the premises as being Bay Milk Products at Edgecumbe, that's again clause 8 on page 237 and then coming back to the term, it's 132 months which takes it through to 2006, identifies the contract quantity and then defines prices in terms of a unit component and a tax component and a unit component is described as $4.70 per gigajoule and that's a bundled price, there's no doubt about that.

McGRATH J:
I thought there was a definition of point of supply?

MR HODDER QC:
There is.

McGRATH J:
Where?

MR HODDER QC:
The point of supply is at the factory.

McGRATH J:
I appreciate that but I'm just looking for the term.

TIPPING J:
Page 242, two thirds of the way down, in the right hand column.

McGRATH J:
Thank you.

TIPPING J:
And of course, under the old contract, you had to deliver it to the point of supply?

MR HODDER QC:

Yes.

TIPPING J:

So that's what they're saying, isn't it?

MR HODDER QC:

We still do.

TIPPING J:

You still do but you had to deliver it free of cost to that point.

MR HODDER QC:

Well, free, it depends on how far $4.70 picked up the cost of it but there was no doubt it was a bundled price and we were to deliver to the block valve on the premises at Edgecumbe and that continued to be the case, it was always the obligation to deliver to Edgecumbe, there was no point in delivering anywhere else. The point that was being made in the correspondence was the unit price, if we can use that phrase from page 234, would henceforth be not the PPI increase $4.70 but $6.50 plus transmission et cetera at cost. No change in the delivery obligation but as I say, there would be no point in having a change to delivery obligation but it had to be delivered. That would be organised by NGC Energy and as I say, I'll check but I believe through NGC transmission and the cost would be passed on, as part of the price.

TIPPING J:

You really have to show this as a dictionary, don't you?

MR HODDER QC:

Yes. It's factual matrix.

TIPPING J:

Well, however you characterise it, Mr Hodder, you have to show, either through factual matrix or through trade custom or through something or other, that what, to the lay eye looks like a delivered price is actually a price plus cost of delivery.

MR HODDER QC:

It comes close to that. We have to show that $6.50 per gigajoule means something to the parties. The question is, what does it mean?

WILSON J:

You could argue in the alternative, don't you, it would flout commercial common sense not to give it that interpretation.

MR HODDER QC:

Yes. All the submissions led up to those two strands. As a matter of commercial common sense, in the context of an interim injunction where the alternative was going to be a market-related damages figure of, we succeeded as we did, on the termination point, why on earth would you give away four million dollars? It just doesn't make sense, when this is a deal which was put forward in the original Russell McVeagh letter as something to suit both parties and NGC agreed. And the second is that –

BLANCHARD J:

It was a deal that was going to quantify the loss?

MR HODDER QC:

Yes, yes. Now, I mean, there's a variety of ways of dressing it up and we have attempted to do so in lots of words in the submissions but those two points come down to the heart of it. Business common sense on the one hand and a dictionary on the other. They're both perfectly, not just legitimate, they're essential aspects of modern contract interpretation. So what I was going to go on to do, if it's convenient to the Court, was then, I'll touch briefly on the Court of Appeal, then I'll go to the law, then come back to the

Court of Appeal, if I may. So the complaint against the Court of Appeal's judgment which I'll develop in more detail later, is they disregarded the 28 September NGC letter and the 5 October Russell McVeagh letter and we say that was just a fundamental error. As a consequence of that, there was no appreciation about the interim injunction context for this arrangement which becomes absolutely clear from the 5 October Russell McVeagh letter.

The same line of reasoning, we say, led to a disregard of the market price, or the opportunity cost, of this gas, which, in turn, leads to the business common sense problem. And classically, by ignoring the 28 September and the 5 October Russell McVeagh letters, they completely missed the dictionary point. And as I'll come to, the inherent implausibility point is answered by a reference to reputational damage and I'll come back to that. Now, there's a question of how much the Court wants to hear from me on the law. But what I was proposing to do and I'm happy to be stopped, is to take the Court through some of the principles that can be found in the line of cases that begins with *Prenn v Simmonds* and ends with this Court's decision in *Gibbons Holdings Ltd v Wholesale Distributors Ltd*. I was going to refer to the *Prenn*, to *Karen Oltmann*, to the *Antaios*, to *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*, to *Investors Compensation Scheme Ltd v West Bromwich Building Society* and to *Gibbons*.

Now, we say those lines of cases establish some relatively basic propositions. Perhaps the most contentious one is that *Prenn v Simmonds* does not provide an absolute bar in looking at prior negotiations. It's a qualified, cautionary approach. It doesn't say you can't look at them. *Karen Oltmann* makes it perfectly clear that the dictionary exception is one that makes sense in the light of the *Prenn v Simmonds* arrangements. The *Antaios*, as the Court knows, is Lord Diplock's famous "mustn't flout business common sense" proposition. *Mannai* talks about the need for a commercial interpretation. *Investors Compensation* is the modern sort of tablet of stone on some of this stuff but again, recognises that firstly, the factual background is important, secondly, it says the limits of *Prenn v Simmonds* are somewhat unclear and it is always focused on business common sense.

Then this Court's decision in *Gibbons Holdings*, is, again, focused on business common sense. In this Court, two of the members of whom are in this Court, considered the literal meaning in that contract which had been one that found favour with Justice Chambers in the Court of Appeal but having regard to the circumstances and asking the question, why would the parties do this, does it make business common sense? Came to the view that before the question of post-contract conduct was considered, the contract meant what the majority, or what the entire Court found it meant. So that's the potted version.

Now, I'm happy, the Court may not want to hear from me at all on these cases but that's the line of cases that I propose to refer to and I was also going to draw the Court's attention to one other case which is the decision of the Court of Sessions which illustrates quite nicely how regard to the previous communing of parties identifies the factual matrix and bears on the interpretation of relevant contracts and phrases in contracts and again, another case where the literal interpretation was overturned, by having regard to the business purpose of the contract. So, Your Honours, it's getting close to the part where you would normally take an adjournment and I'm happy to commence on that legal survey after the adjournment, if that is convenient to the Court.

BLANCHARD J:

Yes Mr Hodder, that is convenient. We'll take 15 minutes.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.47 AM

BLANCHARD J:

Mr Hodder, we think we're pretty familiar with the cases that you've gone through, although it may be helpful for us to be taken to the Scottish case, in view of what you've said about it.

MR HODDER QC:

Thank you Sir. Before I do that, can I get my learned junior to distribute the case but in response to some of the questions that Your Honours had this morning. My enquiries suggest that no copy of the posted terms was put before the High Court in evidence and it was dealt with simply by way of Mr Bullock's evidence. There are two aspects of the evidence that may be relevant to assist the Court, that I didn't take the Court to before the adjournment and perhaps it's convenient if I do that now. If that is convenient, can I invite the Court to turn to page 155 of the case on appeal.

If the Court will recall, I took it to Mr Bullock's brief of evidence which he read and he gave some evidence-in-chief before he was cross-examined and that's what we find on pages 155 and 156. If we pick it up from about line 17 and again, the Court may recall that that chart which I explained earlier today, was the basis of the calculation which in turn is found at page 197 of the case on appeal. If you just hold 155 as well but just to explain what we're talking about again. You'll recall that at page 197 there is a table which featured as part of Mr Bullock's evidence which is what finishes up with a 4.6 million dollar versus 1.4 million dollar bottom line.

BLANCHARD J:

I'm wondering whether this is actually necessary. I appreciate it's in response to some questions from the bench but it did emerge subsequently but there was no difficulty about quantifying the transmission charges when it came to paying the judgment.

MR HODDER QC:

Correct. Well, can I just leave that with the Court. What I would like the Court to refer to, if it wants to check this point further, is the evidence on page 155 from line 17 through to the next page, page 156 down to line 15. There's a discussion there about the independence of the NGC Transmission arm, the fact that these are posted terms, the fact that these are always paid by retailers. It's just saying, "...at armslength by the retailers to the wholesaler transmitter." Then, for completeness, can I also invite the Court to refer to page 119 which is where Mr Hall for BoPE, was being cross-examined and the relevant lines there are about lines 26 down to line 34, page 119, lines 24 to 34.

MR McGRATH:

Sorry, could you just give me the page again?

MR HODDER QC:

Page 119 Sir. If the Court has gone to that page, you'll see there's a reference about a question being better put to Mr Tweedie. The question was put to Mr Tweedie, who was another witness for BoPE. Mr Tweedie said, I don't know, that's not my area of gas. So, we had no definitive answer from the BoPE side on that but that was the position. As I say, there was no contesting of what Mr Bullock said either in his brief of evidence or what he said at page 155 to 156 in relation to that.

If it pleases Your Honours, I was going to then mention the *Bank of Scotland* case as an example of, some of the other cases in practice, so if the Court has a copy of the *Bank of Scotland* case. I will confess, I don't profess to understand every phrase that crops up out of Scottish legal practice and their own linguistics but I'm quite taken by the phrase communings which is apparently what the Scottish use to describe negotiations and that crops up as we come down to it.

So, this is an appellant decision. The Court comprises a Lord President, Lord Rodger before his departure for London, together with Lord Kirkwood

and Lord Caplan. The facts of the case are identified adequately on the first page in the headnote at C and D. The bank entered into a loan stock deed with the Dunedin Property Investment Company, the clause of which provided that, "The borrower had a right on giving six months' notice to repurchase or purchase the stock which would bring the loan to an end but subject to the bank being fully reimbursed were all costs, charges and expenses incurred by it in connection with the stock." Now, that quoted bit is what's called condition 3 in the discussion of the judgments. The loan was for the duration of 10 years, I think about 10 million pounds, at a fixed rate of interest, "In order to protect itself against interest fluctuations, the bank entered into a swap contract with a foreign bank. Notice was given to the bank pursuant of the contract to purchase the debenture stock which terminated the loan. The bank thereafter sought payment of a breakage charge which it was obliged to pay to the foreign bank for prematurely terminated the swap agreement" which was about 900,000 pounds and argued, "That was a cost incurred 'in connection with' the stock in terms of the contract." So, "in connection with" was the phrase that was up for analysis.

At first instance, it was held that the break fee, the swap break fee, was not covered by the clause and couldn't be recovered by the bank. On appeal, that decision was set aside unanimously by the three Judges of the Court and they used different approaches to get there. The first judgment of the Lord President starts at page 658, sets out condition 3 in full at page 659 at B and C. The quotation mark just covers those few lines there, the quotation. Then the discussion of the issue that is concerned about is whether this falls within that phrase. The phrase is in connection with, it starts in Lord Rodger's judgment at page 661 and His Lordship refers to the fact that they were referred to a number of authorities, makes mention of investors compensation at 661 B and says, for his part, he's content to follow Lord Steyn's guidance from *Mannai* that, "Interpreting a commercial document of this kind, the Court should apply the commercially sensible construction of the condition in question." He then goes on to refer to Lord Mustill's speech in *Charter Reinsurance* which is a plain meaning analysis which he goes on to give for the balance of the paragraph and concludes that he begins, as

Lord Rodger begins, “Not by enquiring into the state of knowledge of the parties but by asking himself what’s the ordinary meaning of the words ‘in connection with’ in condition 3.”

We can then move over to page 664. There’s a long discussion about the interpretation that his Lordship places but in fact he does have regard, at 664 B, to the evidence, as he says, “As the evidence showed, the policy of the bank was that they would not enter into a commitment with this client without taking steps to try to ensure the transaction was profitable. That’s not only entirely understandable but equally importantly, it’s what the position actually was.” Then critically he notes at D, “As counsel for the borrower expressed that except the bank wouldn’t have entered into their swap contract if it had not been for the loan stock deal. To put the matter the other way round, without the swap agreement there would have been no loan.” Now that comes from the evidence but what that leads Lord Rodger to on the next page, at 665 B, C and D, is to say, “I concluded from the language that this break fee is a charge within condition 3.” Then he says, slightly puzzlingly perhaps at D, “I have reached this view as to the constructional condition 3 by asking what is the ordinary meaning of the words used by the parties and without considering the background of the matrix of facts.” When in fact he has, back on page 664 but that’s what he says.

Then he goes on to discuss *Prenn v Simmonds*, “It’s trite that one can go and enquire beyond the language and see what the circumstances were with reference to which the words were used and the object appearing from those circumstances which the person using them had in view.” He cites *Prenn v Simmonds* and some Scottish cases, “As these authorities demonstrate,” he says in the next paragraph at F, “the rule which excludes evidence of prior communings as an aide to interpretation of a concluded contract is well established and salutary. The rationale of the rule shows however, that it has no application of the evidence of the parties discussions as being considered not an order to provide a gloss on the terms of the contract but rather to establish the parties knowledge of the circumstances with reference to which they use the words in the contract.” Now, I think this

case demonstrates, as does the case before this Court now, that that line can be a little difficult to draw sometimes. He says, “For that reason, I’m satisfied it appropriate for Lord Ordinary to take into account the evidence about what was said in the meeting in June in order to establish irrelevant circumstances in which the words of condition 3 were used.”

So, the evidence that’s being referred to in this case are two prior meetings between the borrower and the bank. The nature of the evidence that’s being considered is then discussed at the top of page 666. It is summarised conveniently in the short paragraph at 666 E, “The conclusion of the Lord Ordinary as to what was discussed at the meeting shows that both parties were aware that the bank would borrow the funds which they required to subscribe for the loan stock. The parties were also aware that the bank intended to hedge the transaction but they were not aware that hedge would take the form of a swap. It’s also clear that the parties were aware that if Dunedin redeemed the loan stock prematurely there would be a cost of an uncertain amount associated with the hedge.” Then Lord Rodger finishes at 667 at C and D, towards the end of D, “In the circumstances, it appears to me, the commercially sensible construction of the condition is that it covers the cost incurred by the bank when they terminated the swap contract.”

So, Lord Rodger has started off with the words but with some help from the evidence, then gone on to consider what was said at these meetings and then come up with a commercially sensible construction which confirms his original textual interpretation. To that extent, his approach is in a minority in this case because Lord Kirkwood says, at the top of page 670, in that paragraph, “If our task had been to construe condition 3 in vacuo, without reference to any of the surrounding circumstances established by the evidence, it would in my view, have been difficult to draw the conclusion at the cost of breaking interest rates what agreement was a cost charge or expense incurred by the bank in connection with the stock.” So the literal thing, he’s against the bank.

Then he goes on to refer to *Reardon v Smith* at 670 B, some other cases through D and E and then *Investors Compensation,* E and F and then in the

paragraph beginning just after G, “it is legitimate to look at the surrounding circumstances in order to ascertain what was the intention of the parties expressed in the words “used” as they were with regard to the particular circumstances and facts with regard to which they were used.” We say that formulation is appropriate for here.

Then he goes to on to discuss the nature of the surrounding circumstances. “It’s clear on the authorities that evidence of prior negotiations that evidence of a subjective intent of either of the parties would not be admissible. However, the Court can have regard to facts which both parties would have had in mind and neither the other had in mind at the time when the contract was made. The limits to be placed on the evidence of surrounding circumstances which will be admissible in any particular case may be difficult to define.” And some of the evidence might have gone too far, he suggests, in this case. But in the first part of that paragraph at H, we see the formulation he is referring to by reference to the *Scottish Power* case again captures well the nature of the task the court’s embarked upon here.

Then his Lordship goes on and discusses the surrounding circumstances at the bottom of 671 and comes to his conclusion at 673D and E. “In my opinion, the evidence is established”, he says, just after D, “that there was a substantial relationship in a practical business sense between the loan stock and the brokerage cost which was incurred on early termination of the interest rate swap agreement.” He goes on to find that that is the case.

Now, Lord Caplan has the same approach and at 676 E and again, the Court might think this strikes some resonance, at 676 E, Lord Caplan says, “I agree that drafting a clause 3 is somewhat maladroit, it could readily have been given a meaning that was clear beyond peradventure. Indeed if I had to construe it entirely on its own terms without reference to any background circumstances, I may well have had difficulty in giving the clause the construction the pursuers, i.e. the bank, urge upon me. However, I consider that there was a background to this agreement which was very pertinent.” Then, “It is perhaps fortunate that recent authority has given important

guidance on the interpretation of commercial contracts. The emphasis of these authorities is placed on the desirability of arriving at a common sense practical construction, likely to reflect what the parties must be taken to have meant." And we are content to submit this case to that test and I invite the Court to do so and again the language carries on, "Formal language is less important than an attempt to extract from the language all the parties must in all the circumstances have intended, I am certainly not suggesting that plain words should be ignored but equally it is not useful or sensible to struggle with contorted semantic exercises if it is perfectly obvious what reasonable or informed business people must have meant if they were hoping to achieve a workable and intelligent result."

Then discusses *Prenn v Simmonds*, on the next page he discusses *Investors Compensation* and *Mannai*. At 679 E, he comes back to, in effect, *Prenn v Simmonds* and says, "It was argued that the Court could not derive any help and construction with the pre-contract discussions. These were the nature of negotiations were superseded by the final loan stock agreement." That was a submission. "Attempt was made to gain support from this from the analyses of Lord Wilberforce and Lord Hoffmann which I have already referred to. However I do not think Their Lordships were trying to exclude from a construction process, communications which themselves bear on the factual matrix against which the parties were contracting. What, of course, cannot be prayed in aid are pre-contract communications which reflect the parties aspirations and intentions of the time they were made."

He goes on to find, as do the others, that the bank succeeds, that this particular break free is within the condition 3 language. The process the Court's gone through, with respect, is a useful exercise of the way in which the Court, contemporary Court goes through by reference to not only the textual language which at least two of the Judges thought was against the bank here but the tide was turned as it were, by reference to the background circumstances which included the meetings and what was conveyed at the meetings that preceded the final contract. Insofar as this discussion about the *Prenn v Simmonds* authority which I won't take the Court to, there is

discussion of the fact that what *Prenn v Simmonds* is particularly concerned about, is parties giving evidence and saying, "this is what I meant", in a contract phrase. It isn't part of the argument for the appellant to say, this is what NGC meant therefore that matters, what we're saying is, what a reasonable person looking at this chain of correspondence would believe the parties were agreeing to.

So if the Court pleases, that is all I wish to say about the *Bank of Scotland*. I should say, the *Bank of Scotland* is referred to in the Lewison text, as are a number of the other cases that both parties have cited. The number of cases that weren't in our original bundle are in my learned friend's bundle, that one wasn't and it seemed to be to be a particularly useful illustration of where we are.

Can I say there's nothing new about that, although the Court probably doesn't need it, the Court of Appeal's decision in *Potter v Potter* which I think Justice McGrath may have sat on, refers to an earlier case of Justice Richmond's called *Eastman* in 1962 New Zealand Law Reports which goes through an almost identical process –

TIPPING J:
Eastman v Boess?

MR HODDER QC:
That's correct Sir.

TIPPING J:
That's the one?

MR HODDER QC:
Yes. A very similar approach to what is undertaken by the Scottish Judges in the *Bank of Scotland* case. This is set out in our written submissions in various places but we say that in the modern commercial contract interpretation, business common sense is the touchstone, words are not

considered in isolation and the interpretation process, as *Bank of Scotland* illustrates, has two phases to it. The first phase is to look at the language, the second phase is to look at the background circumstances. It's not complete until both components or both phases have been completed. No ambiguity is required, that is in part of *Investors Compensation*, where Lord Hoffman says, "Not only does it resolve ambiguities, it may show that the language is completely wrong but that is still part of the interpretation process." And then the dictionary exception is well-established, indeed and again I'm not sure how far this Court pays attention to extra-judicial statements but I do come across a proposition from Lord Bingham in a speech where he said the rule in *The Karen Oltmann* has never been questioned as knowledge.

That's in an article in the Edinburgh Law Review of 2008. We have copies here if the Court is particularly interested in it, it's a useful, short discussion of contract interpretation but I doubt it tells the Court anything it doesn't already know but it's available if it would likely be of assistance but the reference is 12 Edinburgh Law Review at 374 if it's of any interest.

Then really, the last part of what I wanted to do in terms of the submissions for the appellant, is to take the Court back to the Court of Appeal's decision and to section 6 of our written synopsis on page 19, where we go through and analyse what the Court of Appeal's reasoning was on a paragraph by paragraph basis and with a couple of elaborations I might make.

BLANCHARD J:

I don't know that you need to go through that in detail because you've done it pretty thoroughly in that part of your submissions which we've read.

MR HODDER QC:

In that case, can I perhaps speed the process up and say that the primary proposition that may require another note or two from me is that in 6.16(c) and (d). You'll see that we say, "NGC have not come hastily or lightly to its decision to terminate and that BoPE and its parent Todd, were not among NGC's favourite customers and litigation was always anticipated." Now, my

learned friend's submissions suggest that there was a business common sense to this proposition, this is the reputation point that the Court of Appeal found some weight for and in their submissions, there's some reference to the idea that there were lots of benefits for NGC in this process.

TIPPING J:

Was this the subject of any evidence in the High Court? In chief or cross-examination, the reputational reason for discounting what you might otherwise have got in an undertaking as to damages?

MR HODDER QC:

There was one document which isn't in the case on appeal but was before the Courts below which did touch on the point which I do want to put in evidence but there was no cross-examination of any NGC witnesses about this point. If I can just give the Court this document.

TIPPING J:

This was in evidence in the High Court, was it?

MR HODDER QC:

Yes, this is a copy that comes from the Court of Appeal case on appeal Sir, page 830 is the case on appeal reference. Now, this was a report that Mr Bullock refers to in his evidence at page 189 of the case on appeal for this Court. So page 189 at paragraph 39 is where this report's referred to. So you'll see a reference to the original common bundle of documents, 3/1067 is the High Court reference. This is the version in the Court of Appeal. I mentioned to the Court that the sections from paragraphs 31 to 39 explain the context in which NGC decided to terminate the BoPE agreement.

I won't read them to the Court but that's what leads up to this recommendation made by Mr Bullock to Mr Hazeldine, who is a very senior relevant operating officer in NGC at the time. And it sets out the reasons for the decision to terminate the agreement and you may recall that the notice to terminate the agreement was given in early August of 2004. This report is dated 23 July

2004. And there is a discussion of the key risks on page 832. First there's legal challenge through courts, BoPE, almost certain, for my purposes, of the consequences and comments are of no direct relevance. They're of interest, in that sense but not of relevance. So the fact was that a possible legal challenge was understood as being almost inevitable in terms of taking a decision to BoPE. Adverse publicity, as far as he could see, the likelihood was low, very small number of customers affected, et cetera, et cetera. Damage to ability to sell to industrial market, low.

Then it goes on to discuss the question of affecting Fonterra. And then action triggering customers to alternatives, low. Todd takes unrelated but vindictive action affecting NGC, moderate to high. And then on the next page, 833, customer-specific issues about BoPE. BoPE have made it frequently clear they would rather be purchasing gas from a Todd owned Nova Gas at NGC. In addition, they regularly exceed their MDQ and refuse to pay overruns. No long-term customer relationship issues that require preserving and due to their size, an alternative offer for non-Maui gas is not appropriate. They will challenge vigorously our ability to invoke the clause.

So we say that was the evidence that was before the Court and which explains paragraphs 6.16(c) and (d) of our synopsis. In the face of that, we say that the suggestions in the Court of Appeal and elaborated a little more in our learned friend's submission at, I think it was the 6, the BoPE written synopsis from pages 21 and 22, under the heading "The interim agreement is not an affront to business common sense". And we say that the elements there do not justify the heading that's been used, particularly having regard to the only evidence which is that document I've just taken the Court to. There was no other evidence at all. The proposition that there would be a lower price because of reputation factors was not put to any NGC witness at trial.

WILSON J:

I must say, Mr Hodder, I have some difficulty in following this argument for the respondent, given there was going to be litigation over termination, anyway.

MR HODDER QC:

Correct.

WILSON J:

What additional damage was caused by having the interim position in dispute isn't apparent to me.

MR HODDER QC:

Well, that's, we have difficulty as well Sir, with respect. Sir, if I could just briefly respond to these at this stage, at 617 the submission for BoPE is that it's not for BoPE to establish that the words have a sensible commercial goal. Well, that's a side step. It doesn't address the issue. Then 618 goes through and says, "There are a number of reasons why it wasn't an affront to business common sense. The first was that the price under the GSA was for $5.55 and that was going to increase to $6.50 for up to two years, therefore NGC was going to be better off by 55 cents a gigajoule".

That doesn't help us in relation to quantifying damages for the interim injunction purposes which was the alternative and it is, in a sense, a non sequitur. By agreeing interim terms, NGC was avoiding having interim terms imposed on it by a Court. Well, the worst a Court could do was say, "Carry on supplying gas", on the basis of the undertaking as that damages which BoPE would have been required to give. The next proposition said, "Defuse immediate tension, increasing prospects that litigation could be settled". Well, it wasn't much evidence about the level of tension as opposed to the difference of views but the litigation could always be settled. And then it says, "Although NGC is dismissive of the reputational matters referred to by the Court of Appeal, NGC repeatedly relied on such considerations as being an obvious constraint on its use of its powerful right of termination under the standard terms".

Now, to some extent, there's some force in that point, in one sense, that NGC, being in the game of supplying gas, wasn't going to go terminating customers at random, or on a large scale. That's not what was going on here. What

Mr Bullock's evidence that I've pointed to but not taken the Court to, shows is they went through a very careful consideration and came to the view that one or two of their contracts should go, as part of their attempt to recover from the Maui redetermination. But that doesn't go anywhere towards this proposition and the answer to the reputational matters concerned is given by the ranking low in the table in the document that I've taken the Court to today, in the actual report as to how NGC reached its decision. And that's the answer that undoubtedly would have been given, had the question been put at trial. And then (e), the point is the interim agreement will only last for two years.

It didn't flout common sense to agree $6.50 when the price would only have applied for two years. But we know that this adds up to millions of dollars. It doesn't make common sense to give away that sort of money which NGC was well aware of, in terms of its knowledge of the market and opportunity cost. And particularly, to a client that wasn't the most-loved client. And then (f), it says, "Indeed, the interim agreement was a two petajoule agreement for which NGC faced competition. NGC may obviously have preferred to have a guaranteed buyer at $6.50". But the sequence of correspondence we went through this morning has Russell McVeagh and NGC saying, "There is no alternative. We have to get the gas from you, that's why we're going to go to Court".

So, with respect to my learned friend, in these submissions, they do not identify anything which justifies a business common sense proposition which supports the interpretation to which they contend. And likewise, insofar as the Court of Appeal says, "There is some force in the reputational matter" at paragraph 93. The Court says, "There is force in BoPE's contention that reputational matters come into play here. We respectfully say that it is difficult to identify any such force". So if the Court pleases, those are, really, the submissions for NGC in relation to this matter. Perhaps the last thing I should do is come back to a point that Justice Tipping raised about whether the "at cost" point is covered. I'm not sure I can add very much to what I said which is that "at cost" was in the letter of 28 September as being part of the proposal put forward.

TIPPING J:

My mind was more addressed to quantum in that question which has been discussed, provisionally, anyway. The fact that the parties have agreed it puts my mind at rest on that point.

MR HODDER QC:

Well, those are my three points Sir. "At cost" is the actual phrase used in the NGC letter. The evidence is that there were posted terms available to people and the table which is what evidence is in Mr Bullock's evidence, is a table that formed the basis of the numbers paid out pursuant of the judgment. So if there are any questions from the Court, those are the submissions for the appellant.

MR McINTOSH:

If Your Honours please, just to summarise if I may, the essence of BoPE's case in response. What BoPE says is that on a complete analysis, looking at all the information available which I will go through, it appears that NGC apparently realised after the event, seeing its lawyers correspondence reaching the agreement, that an additional payment which it had wanted, had been left out, simply left out. Not wanting to admit that, would have seeked to have it put back in, it has consistently tried to say instead, that the agreement that was reached can be interpreted to include that clause.

What BoPE says in response to that, is that the rules of interpretation are indeed wide but they cannot be stretched as far as is being required by NGC, to simply write in a whole new term that had been left out.

BLANCHARD J:

Are you saying a mistake was made and there should have been a proceeding for rectification?

MR McINTOSH:

Yes Sir, so it appears.

BLANCHARD J:

It's not a very attractive response.

MR McINTOSH:

Well Sir, that's what the Court of Appeal concluded as well. When we have a look at the sequence of correspondence, we'll have to see that that is the reality of the situation, as unattractive as it is. Let me say Sir, if we are talking about a rectification situation, then we need to be intellectually honest and vigilant that we don't mix the two, we don't treat what is essentially a rectification situation as being an exercise of interpretation.

TIPPING J:

You're not saying, as I understand you, that this is a case for rectification but that if it is anything, it is more a case for rectification than interpretation, is that what you're saying?

MR McINTOSH:

Indeed Sir, that's been accepted by NGC throughout and noted in the judgments and the submissions. The next point we're going to say Sir, Your Honours, even on an analysis we see that there is no common agreement or understanding as to the actual words used that would allow the interpretation that's being sought. So that we accept that the dictionary argument at law, is most certainly available and should be carefully examined but we say that when we do examine it, we find that actually it cannot be relied upon as has occurred, for example, in the recent *Proforce* decisions which we can come too. To finish the summary, we say that the Court of Appeal in the way it approached this matter, was ultimately right in the conclusion that it came to.

TIPPING J:

By use of the word "ultimately", are you signalling some discomfort with that reasoning?

MR McINTOSH:

I think we have to face the facts Sir and I think the Court of Appeal did and it went through, can I just flag, that it went through all the correspondence, it didn't actually exclude anything from its consideration but that was the conclusion they came to and that is –

TIPPING J:

I thought they said they would start, although they might have narrated some earlier stuff, that they were going to start for the interpretation analysis as of a halfway point?

MR McINTOSH:

Sir, it may be helpful just to briefly look at it. The chronology began at 103 of the case on appeal. In fact that chronology traverses all of the communications between the parties and then the lawyers. It carries on through to paragraph 87.

TIPPING J:

Yes but isn't the crucial point 91?

MR McINTOSH:

At 91 Sir, you're right, yes. Then Sir, over at 95 they say, "Even if the parties pre-contractual negotiations are relevant there are difficulties." They then look at 28 September, 5 October, as being the key letters which my friend's case relies upon. Just on that point Your Honours, with respect, Justice McGrath put the point succinctly when he said, "It's not that you exclude it from consideration, it's really the extent to which it should, or can in the circumstances, inform the Court in interpreting the words of the contract that are actually used."

TIPPING J:

Prima facie, if you are looking at an acceptance, you would surely read that with the offer. The Court of Appeal appears, on its first view, to have brought

the screen down between the offer and the acceptance which seems rather odd?

MR McINTOSH:

As I'll come to Sir, in my analysis of the matter, that is what we are bound to do and in the circumstances of this case, so in fact, what they did was appropriate. While the Court of Appeal didn't state it, in my submission, the difficulty they faced which they flagged, is that you end up interpreting the earlier correspondence which is a separate exercise and inevitably you end up weighing up or considering what are the subjective intentions of the parties revealed in those earlier letters which you can do Your Honours, if we were undertaking a process of rectification but not if we are interpretation.

GAULT J:

It's pretty hard to draw a line, isn't it, when you must have to guard – you're looking at a commercial contract to its commercial purpose, mustn't you?

MR McINTOSH:

Sir, I absolutely agree with that and it is our case that this Court can look at all of those letters and in fact we invite it to do so, in fact I will be going through all of those letters in support of BoPE's case. I endorse the reasons given by my friend, they go to the factual matrix. They are also – we cannot avoid looking at those letters in order to resolve the question of the dictionary meaning in this case because that is where the alleged dictionary meaning is revealed.

So, that's a summary Your Honours. Just before I now start through it, just one small point which I'd just like to raise is that my friend's submissions were that in Justice Harrison's judgment which he took you to at page 69 of the case on appeal, the Judge determined that Mr Hall had accepted that $6.50 plus transmission was a market price and my friend said that he didn't understand that to have been challenged subsequently. It was in fact challenged Your Honours, it was paragraph 8 of the notice of appeal which immediately followed, that's at page 80. I don't need to take Your Honours to

it but I just wanted to record that that was challenged. Just recently, my friend took you to the transcript and in particular page 119, as to what the market price was. If I could also note for Your Honours paragraphs 126 and 127, sorry, pages 126 and 127 of Mr Hamish Tweedie's evidence where he was cross-examined about market price. He made it very clear that the whole thing of price for gas, price for transmission and price for both, was very much dependent on the market sector and the particular circumstances.

If I could just refer to paragraph 10 of page 126, he was asked, "So could there be two market prices, one a market price for energy without transmission and one including those components?" The answer was, "Yes and everywhere in between those two. I think it needs to be clear that transmission prices aren't a one size fits all, various shippers / retailers will have different shipping prices or transmission prices depending on the portfolio at the time and then negotiating leverage with pipeline companies at the time." Then, echoing a question that was put this morning, "It will depend on place to place where the gas might be coming from." Mr Hamish Tweedie, responsible for gas sales for the Todd Group.

So in my submission Sir, Your Honours, the appropriate place to start is the letter of the 15th of October. We know this from various prior decisions that in difficult circumstances like this, ultimately that is where we must start with the words actually used and the final contract actually reached. The *WEL Energy* case tells us that and as does the recent Australian decision in *Euphoric Pty Ltd v Ryledar Pty Ltd* as set out in my submissions in the case book, we don't look at the context and then see if we can make the words fit it, we look at the words first and then we go back and cross-check against the context.

Now, what the Court of Appeal did, is it also started with that but it then came to the conclusion that, of course, as my friend had said, the earlier letter of the 15th, the Russell McVeagh letter and the one to which it replied which was the Chapman Tripp letter of the 8th of October, those three letters can properly be read together. In other words, the final letter, if you like, of the 15th, really

only incorporates the terms from those two, so they are appropriately treated as a whole.

TIPPING J:

But how can you read 8 October without reference to 5 October?

MR McINTOSH:

You can Sir because this is Chapman Tripp entering the arena for the first time.

TIPPING J:

"We refer to your letter to NGC dated 5 October."

MR McINTOSH:

Exactly.

TIPPING J:

So it's a reference back, so it's, in effect, incorporated.

MR McINTOSH:

With respect Sir, my argument is it isn't. It's simply a reference back. Just about every lawyer's letter will start with a reference back to a last communication.

TIPPING J:

Well there's a point to that. It's building out of that letter.

MR McINTOSH:

In my submission Sir, what's happened is there has been a letter sent from the lawyers to the other client, so the 5th of October letter is from Russell McVeagh to NGC.

TIPPING J:

Yes.

MR McINTOSH:

That's been handed then over to Chapman Tripp and they enter, so that will be the obvious sentence –

TIPPING J:

But they're replying to that letter, aren't they? I mean, I find this extremely hard to understand the merit of this.

MR McINTOSH:

Sir, I'm just talking about a starting point, we will go back. I want to be absolutely clear, we're just talking about a starting point and what we need to look at first.

TIPPING J:

Well even as a starting point, it seems artificial to exclude the letter to which the first letter in your sequence is a reply.

MR McINTOSH:

Well, Sir, what we know is that this letter does not accept this offer, so what the Court of Appeal said, well this is a new proposal which, with respect, it is and this is the one that –

TIPPING J:

No, it's an acceptance of the proposal that's been put out with some variations, if you like because it doesn't accept parts of it, it excludes other parts of it but I better let you continue but for myself, I regard this as an extremely artificial starting point, if you're trying to drive a clear wedge between the letter of 5 October and that of 8 October.

WILSON J:

Sorry, is the related point, Mr McIntosh, are you seeking to draw a distinction between the letter written by a corporate general counsel in contrast to its external lawyers?

MR McINTOSH:

No, Your Honour. The point being, this letter does not refer back to the proposal.

BLANCHARD J:

Sorry, I don't follow that.

TIPPING J:

"We refer to your letter."

BLANCHARD J:

It's in the first sentence.

MR McINTOSH:

It says, "We refer to your letter in its entirety." What we're saying is, there's no obvious adoption, in my submission, of that particular proposal. What comes back is the lawyer saying, "This is what my client will do in the circumstances."

TIPPING J:

But it's a response to a proposal made on behalf of BoPE. You can't read one without the other.

MR McINTOSH:

Your Honour, I'm just talking about a starting point, I'm not trying to exclude –

BLANCHARD J:

Like my brother Tipping, I don't understand this.

MR McINTOSH:

Simply Sir, at some point, we have to find what the contract is. That is what all the authorities show, ultimately, you must go back to the contract.

BLANCHARD J:

Well, perhaps you'd be better to stick with the letter of the 15th of October.

MR McINTOSH:

I'm happy to do that Sir.

BLANCHARD J:

I think that's where the confusion is creeping in.

MR McINTOSH:

And as we've seen, Your Honours, what we have is now two major law firms and in the words of the *Air New Zealand v Nippon* case, major parties with skilled advisors, what they're doing is they're writing a contract between them in correspondence, it's comparatively short, in fact, it's very short and they're not operating under any undue constraints of incredible urgency or novelty or complexity. That letter then says, "For the avoidance of doubt, the terms of the proposal are set out in full", points that Your Honours have already noted. In my submission Sir, based on the authorities, there must be a strong presumption faced with words like that, that this is going to tell us the answer. This is going to give us all that we need. Because not only does it use those words but it actually builds on the previous correspondence and says, "Now we're going to make sure we've captured it exactly."

GAULT J:

It can't be read on its own, can it, it refers, for example, to BoPE's proceeding, it must be referring back to the proceeding, threatened proceeding that's been discussed in the previous correspondence.

MR McINTOSH:

No difficulty Your Honour with the fact that it may refer to previous facts or events. And what's clear also, is that it's going to be on the terms of the agreement for supply of gas. And as we've seen from this morning, that agreement is absolutely clear. It's referred to several times and the point of supply is going to be at the BoPE plant, or at the Edgecumbe plant, in fact.

And it talks about, for each gigajoule of gas supplied, on the terms of the GSA which must mean, on its face, supplied, delivered. Now, just on that, if we then go back, that is exactly the same principle that's referred to in paragraph 2 of Chapman Tripp's letter of the 8th of October and then it's restated in the one over the page at 264, the Russell McVeagh reply of the 15th, it's restated very clearly, "With reference to the proposal for interim supply and NGC's requirement that the amount payable on failure or discontinuance will be the difference between the price under the Gas Supply Agreement and $6.50 –

TIPPING J:

Would you accept this much, that the way it's expressed in the letter of 15 October from Chapman Tripp is unlikely to have a different meaning from that expressed in the letter of 8 October?

MR McINTOSH:

Correct.

TIPPING J:

Right, so really it turns on what is meant by the letter of 8 October which itself, you need to go back to the letter, at least to the letter of 5 October.

MR McINTOSH:

And let us do so Sir. Now, to do that, we have to go back of course to the letter that that's replying to which is to the 28th.

WILSON J:

Just in terms of that 28 September letter, do you accept Mr McIntosh, that that letter was referring to $6.50 as the price for gas energy rather than delivered gas?

MR McINTOSH:

The 28th Sir?

WILSON J:

Yes.

MR McINTOSH:

Yes.

WILSON J:

So at what subsequent point do you say that the basis of pricing changed from gas energy to delivered gas?

MR McINTOSH:

Sir, I'll make a comment before I answer that question and the comment is the issue that arises over the page which is that the two things about this extra cost head of transmission. First, it's not just transmission on the face of this 28th September letter. It is transportation and metering. Appropriate transmission capacity levels and the provision of metering equipment will need to be agreed and Your Honours have really had a careful look at this. This signals, one, there are a range, or there are several, at least, potential additional costs. Two, there needs to be a negotiation about them, they're not agreed. Three, the obviously, or, in my submission, strong inference is, they're flexible. They must be flexible.

GAULT J:

That would seem to be referring to what they would have to settle if they agreed upon this permanent arrangement. As regards the temporary arrangement, of course the delivery costs would be the same as they had prior to that, wouldn't they?

MR McINTOSH:

Well, to answer that point, Your Honour, what BoPE could have done, if we look at the next page, the Russell McVeagh letter, in paragraph 2, "While grateful for the offer of new terms, can't accept them because of the severity of the price discrepancy" which they indicate. And will shortly

issue proceedings. The issue arises to supply in the meantime, it could have just said, without prejudice, BoPE will accept those terms of your 28 September letter.

GAULT J:

I don't follow because one was a proposal for a permanent arrangement and the other is.

MR McINTOSH:

The proposal, Your Honour, the first proposal was for gas for the remainder of the term.

TIPPING J:

But that would have settled everything, if it had been accepted.

MR McINTOSH:

If it had been accepted.

TIPPING J:

Yes.

MR McINTOSH:

BoPE could have said, we can't accept it as a permanent solution but we will accept it and sue you anyway. Because that is, in fact, what is now being presented as what the original deal was.

GAULT J:

Can I come back to my question. At what point in the sequence is the basis of change?

MR McINTOSH:

It's just over the page at paragraph 5. This is where it first arises.

BLANCHARD J:

So at paragraph 5, it has a different meaning from the meaning in paragraph 4?

MR McINTOSH:

Well, paragraph 5 says, we offer that you continue to supply gas on the basis of the agreement, this is 5(a). This is where it first arises and this is the departure.

TIPPING J:

Well, I think my brother must be right, mustn't he, that as a recital in 4, it means one thing, as a proposal in 5, it means something else.

BLANCHARD J:

And look at the context in 5. The reference to current market price as an alternative and then and this is Justice Tipping's point, the further alternative of returning the gas with BoPE obviously having to bear transmission costs to do that.

MR McINTOSH:

With respect Sir, what this shows is that this is an offer made in what is a fluid situation.

BLANCHARD J:

We're talking about the context in which the words $6.50 are used in paragraph 5. And I think you're conceding that on your argument it has a different meaning from the meaning in paragraph 4. That, in itself, is unlikely and it's made even more unlikely by the internal context in paragraph 5 which Justice Tipping and I have been drawing to your attention.

MR McINTOSH:

That context, Your Honour, is that NGC has flexibility in its gas price and it has gas price in its delivery. They are part of the same entity, just separate divisions.

BLANCHARD J:

I am afraid that I don't follow that argument.

MR McINTOSH:

What it says is that you continue to supply under the agreement, deliver it to us, we will pay you on demand if you use for each gigajoule that you've supplied the difference between $6.50 or the market price, whichever is the lower. So what's put out there immediately is BoPE saying I'm going to get the lowest terms I can out of this interim arrangement. Because remember, BoPE will be looking for the lowest price. It's facing a significant increase.

BLANCHARD J:

Well, why did it offer the alternative in paragraph (b)(b)?

MR McINTOSH:

Because potentially Sir, it too will have, through being part of the Todd group, have flexibility on its own gas supply and its own transmission. So in fact, on the face of it, Justice Tipping's point appears to be a strong one, in that there's going to be a payment for transmission, therefore, transmission must always be plus. But the point is, BoPE, if it takes this option, can control. Because if it pays transmission, it may actually get a very low gas price. Equally, it may have a high gas price but it may be able to control the transmission at that end.

WILSON J:

I missed your answer to the earlier question, so can I be clear. Do you accept that in your argument, $6.50 as it appears on the first page of the 5 October letter represents a different basis of pricing from the same figure as it appears on the second page?

MR McINTOSH:

Yes Sir and that's because of 5(a). So, in my submission, there has been no continuous agreement and I'll need to develop that, so perhaps I'll come back

to it. But I'll just flag that my argument will be that there is no agreement on, first of all, a payment for transmission. It was first put up in the 28th of September. It was rejected on a permanent basis. It was not accepted on an interim basis. And then an alternative basis for transmission was posited. So the first thing, there's no agreement, anywhere, that we can find in the correspondence, to pay transmission in addition. Never mooted, never agreed. Well, mooted and not agreed.

GAULT J:

Could I ask you to deal in that context with the content of this letter which appears to be addressing interim injunction circumstances of quantifying a loss and making a limited term provisional arrangement, pending the outcome of proceedings. How could it be quantifying loss in respect of paragraph 4 but not in respect of paragraph 5?

MR McINTOSH:

What's being said is that the injunction case against you is going to be quite strong, in 4. What's being said here is here is our opening bid for an interim arrangement. Foreshadowing, obviously and I'll need to come on to this in terms of commercial common sense, foreshadowing, of course, the possibility that an interim arrangement may become a permanent one. So what happens and this is where I diverge quite significantly from my friend, the purpose of this correspondence and the agreement finally reached, is not to replicate the terms of an interim injunction. If the parties had intended to do that, they would have written, they would have used different language.

They could have done it very formally, in terms of a draft order by consent, or instead of a draft order, they could have put in their correspondence or a document the same sort of terms but to give Your Honours a flavour, it would have said the words of undertakings as to damages, i.e. plus any other costs that NGC may suffer or incur as a result, or during the course of this interim agreement. It didn't. What it did, the parties chose another course which was to give themselves certainty, to cap exactly what it was, to quantify what –

TIPPING J:

It's a little interesting that paragraph 5 is actually couched in terms of cross-undertaking. It seems to suggest to me, it's a somewhat unusual way of expressing it, it doesn't have direct application to a sort of pseudo or surrogate injunction concept.

MR McINTOSH:

Certainly Sir, it was in lieu of and that's what it says but it didn't seek to replicate it and the parties would have had their own reasons –

TIPPING J:

Why on earth would one party not want to replicate it, I mean, I just find it very difficult to conceive of why the person terminating here would, for the purposes of interim settlement, accept something significantly less than what they would get almost automatically had it been left to go to Court. I know this is trespassing into the commercial common sense area but you are really inviting that question.

MR McINTOSH:

Perhaps it would be useful Your Honour to trespass straight into it. My friend took the Court to my submissions before. Now, I must preface this with the warnings from the authorities that it is not for me, or not for BoPE in the circumstances, to plumb the depths or reasonings behind what the other party is doing, what their motivations are. They will have motivations. BoPE's motivations, as we've said, are to get the lowest possible terms they can get away with. On its face, five is a very aggressive opening bid for terms.

TIPPING J:

It is if it's read, somewhat unnaturally, as conveying a different idea from that conveyed in the previous page but I don't know that anyone is likely to take that view. I mean, that really is a bit sleight of hand.

MR McINTOSH:

Your Honour, it may be appropriate here, instead of going to the common sense which I will do but to actually look at the dictionary that's being alleged because what's being alleged is $6.50 meant gas only plus transmission and ever afterwards it was used in that sense. That has to be the allegation. As signalled in my written submission –

BLANCHARD J:

Or $6.50, with transmission questions put to one side, to be determined later?

MR McINTOSH:

Yes, it could be that Sir. First of all, that's what it appears to be when it's first mooted in the 28th of September letter.

TIPPING J:

And in paragraph 4 of the 5th of October letter which I think we've established that that is the position because it's in the nature of a recital.

MR McINTOSH:

That paragraph 4 doesn't refer to transportation metering at all because it's an unknown.

BLANCHARD J:

It purports to be summarising the effect of the letter of 28 September as an offer.

TIPPING J:

Otherwise, it can't honestly be said to be quantifying the loss.

WILSON J:

It says quite clearly, "NGC has by your letter noted above." It couldn't be clearer than that, could it?

MR McINTOSH:

No, indeed Sir, this is my point about the fact that this is pointing out that this party has just said it's got gas at this price. So, in circumstances where injunction relief may be necessary in the immediate term, this is recording that there's going to be a strong prima facie case. This doesn't refer to anything about something that hasn't yet been agreed, it didn't need to. My point, this is the first part of the dictionary. The second part of the dictionary at paragraph 4, simply doesn't refer to transmission at all.

WILSON J:

Doesn't it, by clear implication, refer to transmission because it's recording what NGC had stated in their letter which hadn't referred to transmission?

MR McINTOSH:

What it's saying Your Honour, is that you have to an extent, or at a minimum, identified, crystallised, quantified, your gas loss.

TIPPING J:

How can you quantify the loss without bringing in transmission costs?

MR McINTOSH:

This is the point Your Honour. These are flexible, they're subject to negotiation, they could have actually been anything.

TIPPING J:

You're purporting, Russell McVeagh is purporting in this letter, at this point to be summarising the letter of the 28th of September.

MR McINTOSH:

For the purposes of the injunction threat Sir, it's not a full summary of it. It's simply saying, that's what this shows but this is not, in my submission, part of the dictionary of negotiations.

TIPPING J:

At least it is a reference back to what was said in the earlier letter and as such, can only be perceived as being $6.50 with the transmission either being at large or at cost. That much you accept, as I understand it?

MR McINTOSH:

Have to, yes, absolutely.

TIPPING J:

Right. So it necessarily follows then that when the same expression is used on the next page in paragraph 5 it was, according to your submission, intended to have a materially different connotation?

MR McINTOSH:

Yes Sir, for two reasons. One –

TIPPING J:

Before you go onto the reasons, the proposition is correct, is it, that it was intended by the author of this letter and this is where we get into some strife, to have a materially different meaning from the same expression on the first page? That has to be your argument.

MR McINTOSH:

That has to be the argument Sir but leaving aside the strife, that actually highlights the very danger, in my submission, that is signalled in the authorities about why we don't reverse engineer to look at the negotiations between the parties because we may have to end up interpreting them.

TIPPING J:

If we're looking at it for dictionary purposes, that's exactly what you do.

MR McINTOSH:

And Sir, we are –

TIPPING J:

I want you to accept, or not, clearly that it does have, according to your submission, a materially different meaning on the second page as against the first?

MR McINTOSH:

That's right Sir.

TIPPING J:

Right, thank you. Now you're perfectly free to tell us what the reasons are, in your submission.

MR McINTOSH:

Thank you Sir. That is because of 5(a) which removed the plus transmission. It simply removed the plus transmission –

TIPPING J:

You mean the words "on the basis of the agreement", signalled?

MR McINTOSH:

Correct.

BLANCHARD J:

It's an exceedingly subtle way of doing it.

MR McINTOSH:

Sir, with respect, this was war.

BLANCHARD J:

This was what?

MR McINTOSH:

War and this is going to be –

TIPPING J:

Are you saying this was a trap?

MR McINTOSH:

Sir, unless I was the actual author –

BLANCHARD J:

It's in your name Mr McIntosh.

MR McINTOSH:

At no point were any of the solicitors involved asked to give evidence about any of this.

TIPPING J:

Never mind that but are you saying in effect, it was a subtle trap?

MR McINTOSH:

A subtle trap Your Honour, not at all –

TIPPING J:

People were supposed, the recipient of this, was supposed to understand that $6.50 was used in a different sense, on account of the words "on the basis of the agreement".

MR McINTOSH:

Yes Sir and in fact that's what they came back with and because BoPE and NGC knew that NGC had full flexibility as to its gas price and as to its transmission price.

TIPPING J:

It seems a very oblique way of doing it, if that was the purpose, rather than coming out and saying quite simply and directly, this $6.50 that we're now referring to, is a transmission inclusive price.

MR McINTOSH:

The point was Sir, over the page –

TIPPING J:

It was war, so you want to lead them into a trap?

MR McINTOSH:

There was express rejection of those terms of $6.50 –

BLANCHARD J:

For the purpose of a final settlement?

MR McINTOSH:

This is my point Sir. The letter then didn't go on to say however, we would accept them without prejudice to our right to sue. That's all that we'd need to say. However, we will accept them without prejudice to our right to sue. NGC could have come back and said okay, that's fine.

TIPPING J:

Is the submission, that the recipient of this letter should have appreciated that the $6.50 was being used in a materially different sense on account of the words "on the basis of the agreement"?

MR McINTOSH:

In my submission Sir, I'm not sure that's a fair question to me. I'll answer it if you insist that I do but –

TIPPING J:

Why is it not a fair question?

MR McINTOSH:

Because what we're actually trying to do is follow an alleged dictionary meaning, follow it through its various uses.

TIPPING J:

If you don't want to answer, I will not insist. I'm just fairly putting to you what I think is a problem that you may have in your argument, at least from my perspective. If you don't want to answer it, that's your choice.

MR McINTOSH:

In my submission, where it says, you will supply "on the basis of the agreement" which is something that's taken place for eight years and is fully understood and it can be assumed, from the recipient which is NGC, not Chapman Tripp, that they know exactly about those last eight years, that that's not a trap, that is something they could understand immediately. The alternative, as Your Honour put it, is to say we won't pay transmission. The effect is exactly the same.

TIPPING J:

That is what was intended in your submission and that's what would have objectively been derived from the reference to "on the basis of the agreement"?

MR McINTOSH:

My submission is that the $6.50 in this paragraph now has a different meaning.

TIPPING J:

And it's signalled by those words?

MR McINTOSH:

It's signalled and that signal is the one carried through Your Honour.

TIPPING J:

Yes, I understand the submission, thank you.

MR McINTOSH:

The second reason that it's a different thing, is because it's not $6.50, there's another formulation now which is the current market price whichever is the lower. That's a different formulation and it's a bid.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.16 PM

MR McINTOSH:

If Your Honours please, just before lunch we were part way through an analysis of the various instances that the word $6.50 had appeared in the negotiations in our search for whether or not there was a common understanding of what that term meant, or if it meant $6.50 plus transmission. Your Honours, we came on to that conversation, or discussion, just before lunch, perhaps a little bit more quickly than I'd intended and I will continue where I was but I'd just like to make three brief points to give context, important context to this particular analysis.

The first point is this. There was discussion this morning about patent and latent ambiguities on the face of the 15 October contract. Now, in my submission, in response to my friend, the presence of the words $6.50 per gigajoule, in the context of that letter which has all terms in full, incorporates the GSA, cannot be a patent ambiguity. It's not an ambiguity. All it could possibly raise as a potential interest or question in the mind of a reasonable person, if that was so far divergent from a possible price, that someone might ask a question. For example, if a reasonable person knew the gas price was $20 or $50 per gigajoule and here was a deal for $6.50, a question might be asked. But it would be a question only. It's not an ambiguity and here we know that we're not talking about those kind of parameters. We're talking about something like $6.50 as opposed to $8.50, just for working purposes. It's probably less than $8.50. In those circumstances, there's no patent ambiguity on the face of that document.

Now, Justice Gault asked about a latent ambiguity. If you drill down, would it be possible of bearing that meaning, and, Your Honour's aware of my argument from just before lunch, that even that latent ambiguity is removed by the incorporation of the GSA and point of supply because by incorporating that, the parties have decided to do away with the words "plus transmission". They've incorporated their transmission. Now, to demonstrate that, we test that by saying if this agreement had said $8.50 instead of $6.50, there wouldn't be anything. There would be no patent or latent ambiguity. The agreement would be fully operable. So the fact that we're simply talking about a figure in that agreement shows the point that the parties have chosen to express it this way. And if it said $8.50, then NGC wouldn't be complaining. So the structure of the agreement that was reached is fine. There's nothing wrong with it. It is simply the figure that is causing contention, if Your Honours see my point. Because if it had been $8.50, then NGC would have had what it alleges that it really wanted and it could account to its transmission division for the extra two dollars for transmission but then we wouldn't be in this Court if it said $8.50.

Now, the reason I want to raise that point, Your Honours, is because of the test which really starts out this dictionary inquiry and that is from the *Karen Oltmann* case in my friend's bundle of authorities. I would, very briefly, like to refer to that case at their tab 5, page 712. It's in the second column, Justice Kerr of 712 at the well-known paragraph, "I think that in such cases, the principle can be stated as follows. If a contract contains words which, in their context, are fairly capable of bearing more than one meaning and it is alleged", et cetera, et cetera, "Then it's permissible to go and look". Just dealing with that first point Your Honours, in my submission, the words in their context are not capable of bearing more than one meaning. So in my submission –

TIPPING J:

It's important, isn't it, that the words in their context be brought to account here. It's not just the words are incapable but the words in their context are not fairly capable.

MR McINTOSH:

Certainly Sir but my point is, where, on this agreement, the parties have decided to incorporate the terms of the GSA which include transmission, then they're not capable, any more. Because this is the $8.50 point. If it was $8.50, we wouldn't say for a minute they were not capable of bearing the other meaning.

WILSON J:

Can you say, too, that the word "supplied" supports your argument, as implying delivery and not just sale?

MR McINTOSH:

Yes Sir because it's not purchased, it's supplied and that's been repeated through. So that's the first important point of context. The next ones can be a little quicker. The second is the instruction we received from the *Air New Zealand v Nippon* case which I've set out in my submissions and Your Honours will be familiar with it. I don't need to take you to it, rather than just to read out the Court of Appeal's dictum at page 255. And that's at paragraph 625 of my submissions. But it will be very familiar to Your Honours. "This was a major commercial transaction, with skilled advisors representing the parties. In that situation, we consider strong and unequivocal evidence is to be expected to warrant an inference of a common understanding that was not expressly recorded".

So if the common understanding is that at $6.50 plus transmission, whatever that might be, that hasn't been recorded, so we need to be finding strong and unequivocal evidence in our submission, in our analysis of this dictionary meaning. The third point, before we continue, is the context and I'll come back to this in my next topic after the analysis which is the business common sense issue. In my submission, this arrangement that comes into existence at paragraph 5 of the Russell McVeagh letter of the 5th, as I said this morning, is not replicating an injunction. It is, in fact, a gas deal. Why is it not replicating an injunction? Because, as I submitted this morning, it doesn't use the

terminology of an undertaking as to damages. For example, as we saw, all costs incurred.

GAULT J:

Isn't there a bit of difficulty with that submission when the paragraph, as I recall, starts out with "In lieu of an interim injunction"?

MR McINTOSH:

Well, that was to be my second point Sir. If we look at that. What it actually says, "In lieu of having to apply for injunctive relief." Now, that might be a fine point but in my submission, we know that this is a different thing. Now, this is a putative gas deal because, as I said this morning, if we'd simply wanted to accept that the terms that were going, then BoPE could have simply said, without prejudice, we will take those terms and reserve our right to sue. And we know that that must be available because that is what NGC is now alleging was available. So this is different. And perhaps to finish the point, an injunction wouldn't last for two years. An injunction would probably have been granted, or, at least, BoPE was threatening and believing and making strong representations that would be granted but it wouldn't be granted for two years. It would be granted for such time as BoPE needed to mitigate its position, to switch to an alternative supplier, or switch to alternative fuel.

BLANCHARD J:

Why wouldn't an interim injunction have lasted if the proceeding was determined?

MR McINTOSH:

Oh, if the proceeding had been determined within time, within that period. But an injunction, on its face, Your Honours, may well have said for a period of three months, or until such time as BoPE had mitigated or obliged to do so.

BLANCHARD J:

Why would it say the latter? It strikes me as unlikely that an interim injunctive relief would take that form because it's interim until the case can be heard.

MR McINTOSH:

In my submission, BoPE would have to show that at all stages.

BLANCHARD J:

Really?

MR McINTOSH:

Well, for so long as it could obtain alternative supply or alternative fuel, it would be obliged to mitigate. So BoPE couldn't be, it might be sure of getting immediate relief, to keep the gas flowing on the day but it might actually well be time-bound.

BLANCHARD J:

Well, you've probably seen more of these than I have but it just strikes me as an unlikely way that it would be worded.

MR McINTOSH:

Well Sir, that is my submission of the context and there was, I know the Court was interested as to why there would be this change and whether it was some kind of subtlety or sleight of hand. In my submission, in context, what's actually happening is a gas deal because this provides an opportunity for BoPE to have gas for the next two years. It also provides an opportunity and we'll come on to this, for NGC to sell the gas to this party. So those are my points in context.

TIPPING J:

But the 5(a) is undertaking without prejudice to continue to supply on the basis of the agreement, pending determination of the proceeding. Isn't that exactly what the interim injunction would, with leave, reserve to apply?

BLANCHARD J:

And it's a very strange gas deal when, after the event, the price can change, depends on who wins a Court case. I really don't think there's much in this argument, Mr McIntosh, with respect.

MR McINTOSH:

Well, I'll come back to it, Your Honour, if I might, as part of the commercial common sense topic. But in my submission, by the time we come to paragraph 5, the $6.50 is no longer, if it ever had that meaning of $6.50 plus transmission, it is now just a number. Transmission is part of the deal.

TIPPING J:

But it obviously had that meaning in the 28th September, as I thought we'd established before lunch, didn't we?

MR McINTOSH:

Well Sir, that was the meaning that was intended by NGC.

TIPPING J:

Yes.

MR McINTOSH:

Here, it is changed. It is now supply is included. It's $6.50 but it may not even be $6.50. It may actually be a lower amount. So the $6.50 has now taken on a different meaning. It has mutated. And then, if we turn to the next letter at page 263, it changes again. Yes, transmission's going to be included but we're not interested in any floating amount, we want to crystallise the figure at $6.50. Now, at this point, given what BoPE had said about market and given the response which says $6.50, with no reference to market, what that means is that figure could have been anything. NGC could have come back at $7, $8, anything, in its offer. It didn't, it came back at $6.50 with no reference to transmission or any other costs, including metering which we saw as a live cost and is expressly on the basis of the GSA which must be supply.

WILSON J:

Mr McIntosh, to put the figures that you gave before around the other way, do you accept what I understand to be the appellant's submission that $6.50 delivered equates approximately to $4.60 for energy price?

MR McINTOSH:

Unequivocally yes and no, Sir. It does on their analysis but that assumes the posted terms and it's a very important part of BoPE's case that no figure for transmission was ever agreed.

WILSON J:

What would your figure be, if I put the question this way, what energy price figure do you say would equate to a $6.50 delivered price?

MR McINTOSH:

Sir, that's the very point. BoPE doesn't know but it does know that NGC has complete flexibility about how it accounts. It can have a high –

BLANCHARD J:

If BoPE doesn't know, how did BoPE work out what to pay over when it lost in the High Court?

MR McINTOSH:

BoPE was told what to pay over, Your Honour, it was told to pay at the posted terms.

BLANCHARD J:

Right.

WILSON J:

Well at posted terms, can I ask my question again, assuming posted terms, what energy price figure equates to $6.50 delivered price?

MR McINTOSH:

It would be the price that you gave.

WILSON J:

$4.64?

MR McINTOSH:

Yes Sir.

WILSON J:

So does it follow from that that when Chapman Tripp referred, in the 8 October letter, to a price of $6.50 per gigajoule, they were effectively referring to an energy price of somewhere around $4.60?

MR McINTOSH:

With respect Sir, I can't accept that because that must be to accept the posted terms as being the figure but there's never been any agreement to pay the posted terms. So it could – a party like NGC, like any gas seller, can provide a bundle price or an unbundled price, it can choose, it has the flexibility and BoPE knew that. And there's no secret about that because a discussion was invited that said "We'll need to talk about these things and we'll take into account historic usage."

WILSON J:

Let me ask this, using your own earlier figure of $8.50 as a comparator, doing the arithmetic the other day, about what price do we come down to from $6.50?

MR McINTOSH:

It is your figure.

WILSON J:

$4.60, yes.

MR McINTOSH:

Now, so in my submission, in the 8 October letter, the meaning of $6.50 has changed again. It's still now inclusive of delivery but it's now become a fixed price. Now, a week later, there's the Russell McVeagh reply which we've looked at before at 2.64, it states it absolutely clearly, this will be the difference. Now, what this means is the parties, the NGC party has said, "I take your alternative basis of contracting and I want to do this with it, I want to crystallise the figure." Now, I've said Your Honours, my next topic is the common sense and I'll come to that but they're saying, "We'll take the alternative basis, it's all inclusive and it's $6.50." BoPE says, "Let me restate that to you, we accept it, that's what we understand and we'd like these two extra terms." Then the letter comes back that says yes again, those are the terms. Now, there's no reference, as I said before, to keeping NGC whole, on any basis.

There's no stray costs, there's no transmission costs, there's nothing else to be determined. What this means is, this commercial party said, "I choose to crystallise my figure." Now, if it didn't and if it had made a mistake, that is not the recipient's problem. The recipient isn't to know that, there's no obligation on the recipient or its lawyer to go back and say, "Are you Sure?" "Do you understand?" "This seems low." "This seems good for me but I'm happy with that because I want a lower price and I'm going to be paying an extra million anyway." There's no obligation whatsoever, it's absolutely clear what's happening here.

TIPPING J:

Are you really submitting that the parties weren't at idem?

MR McINTOSH:

Well, at this time, this lawyer's correspondence shows they were at idem and we only find out later that apparently –

TIPPING J:

I mean, they weren't truly at idem, in other words, you're saying that your side was using the expression in one sense and the other side was using it in the other sense and neither realised the mismatch? That seems to be the way you've built up that last proposition.

MR McINTOSH:

And I'll come – can I just finish off my analysis very quickly Sir and then I'll come to that point.

TIPPING J:

Of course.

MR McINTOSH:

BoPE was the one who put the alternative basis, it wasn't the $6.50 plus transmission, it was a price including transmission. So when it comes back to BoPE in this form, BoPE is perfectly entitled to assume, "Okay, those are the terms on which we are now negotiating. Your price, $6.50, fixed, oh well, I don't get the benefit of any market movement downwards." BoPE goes back and says those two terms, are they acceptable and then we have the agreement.

Now, to answer Your Honour Justice Tipping's point, we'd then turn to 2.68 and this is the letter of 20 October. Now, in my submission Your Honours, this is a telling letter. Paragraph 1, there's been offer and acceptance. Paragraph 2, "It has been brought to our attention by NGC…" Now, it wasn't NGC who did this deal, it was its legal advisors. The natural inference is that this deal has been taken back to the client. We read on. "The terms of that proposal may be slightly misleading." Now, what that tells us, in my submission, is that the author of the letter who's been the author of the agreement reached in correspondence, is saying potentially, Your Honour, "I didn't appreciate something between me and my client." Now, I, or Russell McVeagh as a recipient of that, don't know the mistake, if it is a mistake, could have been an NGC side, or it could have been a Chapman Tripp side, Russell McVeagh can't know and it's not

Russell McVeagh's business but what that sentence tells you, first of all, is that there may have been a disconnect.

Secondly, the important thing about this letter, if we go to paragraph 4.2, we have a new (b). "Transportation charges at the then current posted prices on the basis of contracted…" now, that is a term that simply wasn't there and that, in my submission, shows the, if I can use the word damage or violence that has to be done by way of interpretation as opposed to implied term or rectification, that shows just how far apart we are from a process of interpretation. One, we have to actually read in words, two, we have to read in new words, three, we have to read in quite a few words. And they fundamentally are inconsistent with the basis of the deal which is on the terms of the GSA.

TIPPING J:

Are you saying, in effect, that they can't be heard to say that it was a dictionary meaning because their letter of 20 October is the antithesis?

MR McINTOSH:

That is exactly the point Sir, that if we're doing a dictionary analysis and we're doing it fairly, we look at this and this tells us there was no agreed dictionary meaning.

BLANCHARD J:

Except that the dictionary meaning could still be that $6.50 per gigajoule was not encompassing the transportation costs which were having to be agreed separately.

MR McINTOSH:

In my submission Sir, that's the first step but the second step which closes it off, is the reference back to the GSA because it didn't need to be resolved in any way because it was included.

BLANCHARD J:

This substantial evidence that you place and understandably place, on the GSA, is strictly the terms of supply. It's not directly, is it, the terms of the uplift if you're wrong on terminations. I mean, you may say that's a fine point but strictly speaking, that's the position, isn't it, it's directed to the terms at which the supply shall take place, not the true construction of the uplift, i.e. the extra that has to be paid if you're wrong on termination.

MR McINTOSH:

In the normal course Sir, yes because if it's just terms of supply, you might have an inquiry as to what other costs had been incurred. But not when the parties have said, this is the figure, this is the difference that we will pay you. Or beg your pardon, put it another way, we will pay you the difference between the GSA figure and $6.50 and that's per gigajoule supplied. And they left, they left absolutely –

TIPPING J:

They won't pay that in terms of the agreement because the agreement isn't directed to an interim uplift arrangement, in lieu of injunction. It's a point of some fineness but I don't think you can quite equate the term, Mr McIntosh. But the uplift price is not expressly linked with the GSA agreement, is it?

MR McINTOSH:

With respect Sir, 3.2 of the 15 October letter, "In the event that BoPE is unsuccessful and withdraws that proceeding, pay NGC on demand for each GJ supplied, the difference between the price set out in the agreement is escalated and $6.50 per gigajoule plus interest at the rate of the agreement". In my submission Sir, the door is closed because the chapeau of that paragraph makes it absolutely clear that the terms of the GSA will continue. And they leave no –

TIPPING J:

Well, I agree with you that that would be the normal, natural reading. But I don't think it absolutely shuts the door.

McGRATH J:

Mr McIntosh, can I just come back to the letter of 20th October and just ask you this, that putting aside the as per agreement for the moment, you're making a point about the, what you say are acknowledgements in paragraph 2, as to which you say run contrary to the dictionary argument of Mr Hodder. But isn't it possible that the term $6.50 per gigajoule could have been given an agreed meaning at the in-house counsel stage of the correspondence which was continued subsequently by NGC's solicitors, without their full understanding what the term meant but nevertheless, having the same meaning as had earlier been agreed?

MR McINTOSH:

That must be a possibility Sir but that means we have a mistake.

McGRATH J:

Well, I'm suggesting it's not a mistake. The principals started off and reached an agreement. The agent subsequently used the same language. It may not be fully familiar with exactly what had been agreed earlier with it, on your thesis as to what paragraph 2 means but it doesn't seem to me that that creates any mistake, necessarily.

MR McINTOSH:

Well, in that case Sir, what's happened is that the lawyer has picked up the $6.50 plus the GSA. She, if it's a she, it is in this case, has not picked up that it is $6.50 plus transmission.

McGRATH J:

Well, the writer of the letter may simply have used the term, for whatever it meant, it being the term that's being used throughout the correspondence.

MR McINTOSH:

Sir, I see the point but we're looking for a common understanding or agreement of what it meant. And in my submission, when we get the letter back from Chapmann Tripp, on the 8th of October, adopting the GSA and the

same approach, with a crystallised figure and changing the term, so it's a counter-proposal or offer.

McGRATH J:

Well, that's why I said let's put aside the GSA for the moment because I understand you've got a separate argument as per the GSA.

MR McINTOSH:

If the GSA has gone Sir, I think we're back in Justice Blanchard's question of, well, it could at least be at large. Even if it's been fixed, it maybe just wasn't agreed but in my submission, there's no correspondence which continues from the 28th of September letter which says we need to have a conversation, a discussion about what these would be. There's another point which is, we're looking at 4.2(b) of that letter, so not only is there no agreement on the posted prices but also, even this isn't a straight follow-through of the 28th of September letter which actually talked about transmission and another potential cost-head of metering charges. So the point is, Your Honours, this term, 4.2(b), nowhere can we find the necessary strong and unequivocal evidence of *Air New Zealand v Nippon*, that there was agreement that that's what (a) meant, (a) meant $6.50, gas plus (b). It's simply not there. Now, to re-state, there's no evidence in this agreement, in this correspondence, however many letters we look at, showing agreement by BoPE to pay transmission.

Point 2, we have a rejection of the plus transmission concept and an alternative basis put forward, bundled. Point 3, we know that that would work equally well and NGC could have been satisfied if the figure had been higher, apparently. But in any event, there's no agreement as to exactly what the transmission would be, what it would include and of those constituents, what they would be. And that just shows the difficulty of this exercise, when we're saying, well, I know we never agreed it and the most it was ever raised in earlier negotiations was we should have an agreement and it could be a variable figure. We didn't reach any agreement, so we'll now go with the posted terms. Over the page, at 270, Your Honours and this is obviously an

after-the-event letter but in my submission, it weighs equally in all of the analyses that we're doing. At 3(a), or paragraph 2, letter causes difficulty, BoPE considered that the deal was concluded, $6.50 per delivered, as the potential top-up limit.

BoPE believed this and didn't appreciate that NGC's interim offer contained any errors to price because, among other things, the comparison with the pricing approach under the agreement delivered price was stated several times in the correspondence between us, leading to the deal. Now, in my submission, if there's any dictionary here, it is a bundled price or a GSA. It came up, it was repeated and it was the dictionary meaning, if you like, that was actually used in the final. So, in my submission, to close then this topic of the dictionary, yes, it is possible to review all of the correspondence to see if there was a dictionary meaning but on the basis of the *Nippon* authority, it has to be strong and unequivocal and here, it is certainly not strong and in my submission, it's unequivocal the other way, in the end. It is simply not possible to say we can now interpret this in accordance with NGC's letter with the new 4.2(b) because we can see there's consistent, strong and unequivocal agreement on that.

To move to common sense because, on any basis, the Court needs to be satisfied that this is not going to lead to an absurdity or some kind of unworkable or monstrously unjust situation. The first thing we need to say about this particular analysis which is the common sense, is that in the circumstances of no ambiguity on the final terms reached, simplicity, clarity and completeness, it is not this Court's job or the lower Court's job, to ensure this made full commercial common sense, or the most commercial common sense, or the type of commercial common sense that NGC could or should have looked for. What I'm getting to Your Honours is, in fact, given that we know, in my submission, it's obvious it doesn't flout business common sense, it still works perfectly well, what the complaint is, is that NGC could have got some more dollars but that doesn't flout business common sense, that just comes under the heading of not as good a bargain as you wanted.

What we need to do is to cross-check, with respect and that is the test that is set out at this Court in *Pyne Gould Guinness* which is set out in my submissions and has been echoed several times in recent authorities, the notice of the cross-check, having got the meaning, $6.50 delivered, we just need to cross-check against the context to make sure. In doing so, we're not actually weighing up, we're just making sure that it doesn't lead to an absurd or ridiculous situation.

The other point Sir, as we know for example, the *City Alliance* case which was referred to in the submissions, is that it's not BoPE's job in reliance on the words that have been actually used between lawyers, to establish the full commerciality of this for NGC. It is not BoPE's job. With those few caveats, the first point is this, in my submission, this actually constituted a gas deal. NGC had an opportunity to actually move this gas. If it offered terms which were not absolute market, or as much as it could possibly get, there's a chance that BoPE would have stuck with these terms rather than seeking to end the agreement, find an alternative source and maintain its litigation.

TIPPING J:

There was an element of the carrot?

MR McINTOSH:

Element of the carrot. Now that's important because, come what may, they would have moved the gas if BoPE hung in there and they would have moved it for a good price. They knew they had flexibility on both gas price and transmission. Remember Your Honours, it's not the job of the Court to decide whether or not that was actually it because we simply can't know. The point is, it cannot be escaped that at a level like this, BoPE could well say, this is actually the best that we could possibly do, let's carry on with it and then NGC's moved its gas.

Secondly, NGC has crystallised its loss for the purposes of the litigation. It doesn't have to go afterwards and show, I won the substantive point and I can

prove that I would have moved X amount of gas to X number of customers at X price, it simply crystallised it, it gives it absolute certainty and removes a potential risk. Again, it's not my job to give any weight into that. The point is, it is a valid criterion that NGC may have taken into account.

WILSON J:

They'd be paying a very high price though for that advantage, wouldn't they?

MR McINTOSH:

Potentially but if you add it in to the first point Sir but we also now will never know what price might have been negotiated either for the transmission. The third point is the reputation. The way the matter came up was that NGC relied heavily, as it is reflected in the Court of Appeal's judgment, on reputation being a very important constraint on what was described as its nuclear power under the termination right in the GSA. The argument was made repeatedly that this is why the clause would only be used very sparingly because if NGC got a reputation for terminating all of its major clients just to raise the price, it might struggle in the market.

The point was simply made by counsel for BoPE in response, is well look, exactly the same point would apply, or could apply as a factor for NGC in considering how to handle this particular situation. Very important overall that Fonterra continues to get gas because Fonterra, in the grand scheme of things, is an important party. Secondly, how to manage the Todd BoPE problem. We know from this document that was handed up, that NGC was exactly thinking about these things and if I could ask Your Honours to look at 832. Here's the table of risks. Of course BoPE wasn't privy to this at the time, only subsequently privy but it is telling. First risk, legal challenge through Courts, BoPE almost certain.

Look at the comments and recommendations, "NGC's position is strong. The purpose of the legal challenge by customer is likely to be for negotiating purposes only." Two, adverse publicity. They've attributed low likelihood. They look at consequences and coverage and they say strategies to deal with

that, “Act with integrity and reasonableness, prepare for worse case publicity just in case.” Three, damage to sell into the industrial market. A careful analysis has gone on here –

WILSON J:

This was all in the context of litigation over termination wasn’t it, rather than a possible litigation at an interim stage?

MR McINTOSH:

Yes Sir but how they manage the entire situation, is something that they had in mind and if they could reach terms with Todd, that may encourage Todd back to the table for a longer term deal. We saw a sniff of that in the 28 October letter which said could I interest you in an extra year, for 2007, at a lower price of $6.20. The point I overlooked before Your Honours, talking about the commerciality, a figure of $6.20 has been out there just to show their flexibility of price which I was talking about.

WILSON J:

If NGC were very concerned about possible damage to their reputation from litigation, why didn’t they settle the underlying termination dispute and thereby avoid any need for any interim arrangement?

MR McINTOSH:

Sir, as we said in the submissions, agreeing to an interim deal like this might create a platform for there to be settlement of the major litigation with Todd. May be, may be not, we’re speculating but the point is, to say that reputation is not a relevant commercial factor, shows that the whole thing lacks all commercial common sense, is simply not available. It is impossible to say that there is no commercial common sense in this arrangement for BoPE when we look at all the factors. We don’t know, we can’t weight them but that’s why all the authorities warn against the Court saying, we can judge this ourselves, we can discount these factors and choose these factors and decide.

TIPPING J:

If NGC had been weighing up the pros and cons of an interim agreement as opposed to submitting to an injunction, with an undertaking as to damages, are you suggesting that they would have been so worse off in submitting to the injunction with an undertaking as to damages that it was worth giving up what has turned out to be $4.6 million and at the time, could reasonably have been estimated broadly in that sort of area, one would have thought.

MR McINTOSH:

Sir, with respect, it was $3.2 at the time.

TIPPING J:

All right, well whatever the precise figure was.

MR McINTOSH:

But that was at posted terms, so that would have been, in my submission –

TIPPING J:

The common sense thing bites with me on the basis that if one takes the view and I know you resist this but if one takes the view that this was a sort of surrogate injunction arrangement with the undertakings in contract in place of the undertakings as to damages, they were giving away a great deal against what they could have reasonably estimated to be the likely damages in return for what? Just not having Court proceedings issued which were going to be issued anyway in relation to termination.

MR McINTOSH:

Sir, we have to take your question and the enquiry I think in the right spirit but why didn't, if I may ask the question back but rhetorically, why didn't NGC just go for the injunction?

TIPPING J:

Well because they thought they were getting the equivalent, I think is the immediately obvious response.

MR McINTOSH:

With respect Sir, that is, in my submission that is simply not open.

BLANCHARD J:

I don't understand why it isn't open.

MR McINTOSH:

But it wouldn't have been drafted in these terms, Sir.

BLANCHARD J:

Why?

WILSON J:

The effect would have been the same though, wouldn't it?

MR McINTOSH:

Because they would have included –

TIPPING J:

Well they thought that's what they were getting. That's the whole problem in this case, as you've actually almost accepted that that's what they thought they were doing but they made a mistake and you want it not to be a mistake and you want it to be a mistake because you can't normally remedy mistakes by interpretation but there's clearly a mistake here, if you're right, on interpretation.

MR McINTOSH:

Sir, that was the conclusion that the Court of Appeal came to.

TIPPING J:

Well I would have thought, with respect, it was pretty obvious. If you're right on interpretation, a serious error has been made as to the way in which this

interim agreement was drafted from NGC's point of view and one highly beneficial to BoPE.

MR McINTOSH:

Yes Sir but this is our problem, as unpalatable as that may be, we have to be disciplined in the way we approach it.

TIPPING J:

I totally agree with that. All I'm saying is, when you're talking about commercial common sense which is rather divorced from strict rules of constriction, surely the mistake they made was that they thought they were getting in contract what they would have got had there been an undertaking. Which is no more than –

MR McINTOSH:

Well I'm not sure that is the case Sir but I'm certainly prepared to accept that they thought they were going to be getting plus transmission.

TIPPING J:

Yes, well that's the point, yes.

MR McINTOSH:

But my point Sir is plus transmission is not everything they would get on an undertaking. An undertaking would be everything.

TIPPING J:

All right but I don't want to dispute that but the essence of it surely is that they – if you're right on interpretation, they have given up what they would have got and perhaps more on an undertaking.

MR McINTOSH:

If they had given up, that's right Sir.

TIPPING J:

That's the commercial common sense of it. It may be that it's intractable Mr McIntosh but that's the long and the short of it from the commercial point of view.

MR McINTOSH:

Well, in my submission Sir, the commercial common sense point is actually not going to help us because as a matter of interpretation –

TIPPING J:

Well, you're entitled to say that but if you're addressing commercial common sense, I just wanted to identify the reality of what was going on commercially here, if you're right on your interpretation argument.

MR McINTOSH:

Yes Sir. If I could turn to the *City Alliance* case, tab 3 of my bundle, it's also in the submissions Sir and it's page 237 paragraph 13 and this is a point which I've made earlier, in my view, the Judge fell into error in principle, it's not for a party who relies on the words "actually used", i.e. BoPE, to establish that those words affect a sensible commercial purpose, it should be assumed as a starting point, the purpose, the parties understood. BoPE is entitled to understand reasonably what comes back and not to know what NGC is up to. F, the line after F, "before the Court can introduce words which the parties have not used, it is necessary to be satisfied, 1, that the words actually used produce a result which is so commercially nonsensical, the parties could not have intended it."

TIPPING J:

Yes, it's a very high test.

MR McINTOSH:

It's a very high test.

TIPPING J:

I'll accept that immediately.

MR McINTOSH:

I have given Your Honour – so what this tells us is you can actually do it. You can actually put words into a contract that simply aren't there as a matter of interpretation and you can delete them but this is the height of the test. Now, I have given Your Honours three potential reasons, not whether they're right, not whether they outweigh the balance but whether BoPE, when it encounters the correspondence from Chapman Tripp, is entitled to say, "Well, that's a good deal for us, we want lower prices, these guys might have something behind it, we might expect to hear from them later" but we are unable to say, interpretation now allows us to write in a paragraph 4.2B which appeared a few days later.

WILSON J:

Mr McIntosh, just assume please for the purposes of answering this question, that contrary to the arguments you have been putting to us, NGC would be some millions of dollars worse off under the interim agreement construed as you suggest than it would have been under an undertaking. On that hypothesis, would you accept that your construction would be an affront to commercial common sense?

MR McINTOSH:

Can I make two points Sir?

WILSON J:

Yes.

MR McINTOSH:

First, it depends how many millions, quite seriously Sir because if we're talking within a range of $6.50 or $7.00 or $7.50, we're actually in a zone

where, in terms of *City Alliance*, paragraph 17, it could be a bad bargain. But a bad bargain of itself doesn't flout business common sense, it's just a bad bargain and this is the significance, Your Honours, of the dollar figure. It's just a dollar figure. No one can say this agreement doesn't make sense. But my second point Sir, in response, is that, had they just done that, gone for the undertaking, BoPE could have departed within three months. BoPE's posturing about "I can't get other gas and I'm going to get an injunction" and those threats which are quite obvious, commercial threats being made, whether or not their lawyers are able to substantiate those threats, if it came to that, we won't know but BoPE would have departed. Or it could be reasonably expected that BoPE would have departed after three or six months and NGC –

BLANCHARD J:

Didn't BoPE give itself the right to depart under the terms of the –

MR McINTOSH:

It did Sir.

BLANCHARD J:

So what's the strength of the point you're making?

MR McINTOSH:

Well if the deal was a reasonable one for BoPE, BoPE wouldn't depart. BoPE would take it and may not even pursue its litigation, ultimately. It might but it might not, it might come to the end of the two years and say, "Actually, I won't pursue this because I actually got a reasonable deal in the circumstances", particularly if the parties are having a commercial conversation about what happens after that. Now, obviously Your Honour, I'm speculating, entirely about all of these things but we'll need to put ourselves in the position of BoPE when it gets back a letter, $6.50 delivered or lower market price of the gas and it comes back saying, $6.50 delivered.

Another point, Your Honours, this has come slightly out of sequence but is significant and is flagged in the submissions, under the GSA, the parties negotiated a commercial risk allocation as between them and that was the risk of transmission price. They said that risk will be with NGC and that's fine and they were happy with that for eight years. The term that is now sought to be interpreted in as being NGC's intention puts that risk the other way. In my submission, the Court needs to be aware of the significance of that, accepting that the parties, despite the clear words used to the contrary, have re-allocated the risk, have switched it the other way and have switched it to an unknown which is whatever the posted terms may be.

Now, the circumstances we're in are not uncommon. Not exactly these ones, obviously but parties have been in not dissimilar situations and I'd like very briefly to look at three authorities. And the first is the *Euphoria v Ryledar* case at tab 5 of my bundle. And the page appears to be the fourth one and it's paragraph 31. Can I ask Your Honours, just noting above 31, the sentence about we don't need to have ambiguity which we're very comfortable with. But if I could ask Your Honours just to take note of 31 through to the start of 34.

BLANCHARD J:

It's really 33 that you're wanting to rely on, isn't it?

MR McINTOSH:

It is indeed Sir and the point is, the words $6.50 per gigajoule supplied on the terms of the GSA, to use these words, "No stretch of language or syntax will bear the new term at 4.2(b) in the 20 October letter." No stretch of language or syntax will allow those words to bear that. That's the first authority. The second is the *Chartwell* case. Oh, I should say that this was Justice Palmer in the Supreme Court of New South Wales but he was upheld on appeal and the appeal judgment is subsequent in the bundle.

Then if we could go to *Chartbrook* at tab 2. Now, this particular case, Your Honours, a very recent decision from the English Court of Appeal. It is on

appeal, as I understand it, to the House of Lords. It concerned the term, as we can see in the headnote, the contract involved contained a term that entitled Chartbrook, as the complainant, to an additional residential payment which they call the ARP and what was in issue here was the interpretation of that particular clause, exactly how it was to be interpreted. The clause is set out at page 390 and it says, "additional resident payment", it's the last third of the page, Your Honours, "Means 23.4% of the price achieved for each residential unit in excess of the minimum guaranteed residential unit value, less the cost and incentives" and the parties were in dispute about what that meant. Chartbrook said, "We would get a minimum, or the minimum guaranteed residential unit value in this particular development and then we would get 23.4% of the amount above".

Persimmon interpreted that the other way and said, "No, you get the greater of the two, you get either 23.4% or the minimum, whichever's greater." The difference can be seen, clearly, Your Honours because it can be quite an initially difficult thing to understand but it's set out in the next pages, 391 and 392, what difference it gave. Some four million pounds. You see in *Chartbrook*'s case at 2 on the top of 392, it has the minimum guaranteed sums and then it has the excess of 19 and then 23.4%, yielding the, my maths is inadequate, Your Honours, it's about 3.6 million pounds but a very significant amount. The first judgment is by Lord Justice Lawrence Collins. He actually found in favour of Persimmon on an interpretation of the words. The other two judges, Lord Justices Tuckey and Rimer, came to the other conclusion and they found on a matter of interpretation in favour of Chartbrook. However, all three judges confirmed that the private dictionary meaning which Persimmon was pursuing, that it you looked at the correspondence, it showed that that's what the parties had intended, that the uplift would be, or the ARP would be the greater of the minimum payment, or 23.4% of sales, had been agreed, had a private dictionary meaning through correspondence.

In the judgement of Lord Justice Lawrence Collins, at page 407, he refers to, in paragraph 98, the conclusions of the lower Court, was that the

Karen Oltmann principle wouldn't extend to a case in which the word or phrase or clause itself had been the subject of express definition in the contract. Now, in the event, Lord Justice Collins disagreed with that but he found, as a matter of fact, that there was insufficient agreement or common understanding revealed on the communications to give rise to the alleged private dictionary and that is at 132. At paragraph 132 on page 415, second sentence, “But I do not consider that this is a case for the application of the private dictionary or agreed basis exceptions because the pre-contract negotiations do not establish a sufficiently clear evidential basis for them. There is no possible basis for a private dictionary approach and to look for an agreed basis in the correspondence and oral negotiations would be to eliminate any distinction between construction and rectification”.

If we turn please Your Honours to page 423 and paragraph 183, at the top of the page. This is the judgment of Lord Justice Rimer, starting, “There is nothing unclear, uncertain or ambiguous about that.” “That” being the definition just over the page ARP. “It is clear, certain and unambiguous and its arithmetic is straight forward.” At 148, “Persimmon is asking for the definition to be read, as if it were drafted thus, ARP means...” and then what he does is he inserts words. “That language, that change of language, fundamentally distorts the meaning and arithmetic of the definition.” So, that is why Lord Justice Rimer found against Persimmon in terms of pure interpretation. Then at 187, there’s a discussion of the pre-contract negotiations, “He rejects any suggestion that it’s a case in which a legitimate is part of the construction to have recourse for them, basic rule they’re out of bounds.”

Then picking up at line H, “To the extent that any inroads into it may legitimately be made, I have not be persuaded that any have been made good in this case. If and to the extent that recourse can be legitimately be had to prior negotiations to unearth any use by the parties of a private dictionary said to be explanatory in the contractual language, I agree with Lawrence Collins LJ ‘no scope’. I also agree with him, there’d be no justification for an attempt to vote the course of negotiations for the limited

purpose of indentifying an agreed basis for the transaction. Persimmon's purpose in going into the archaeology, the transaction is not to derive assistance in the interpretation for which there is no need."

Just pausing there Your Honours, we say, this is my point before, there is no need in this NGC BoPE case to do it because the agreement works. It may be a good bargain for BoPE, although BoPE still has to pay an extra million plus and it may be a bad bargain for NGC but that doesn't mean that we have to go into it and with the prior correspondence, there's no need. This is the important line, "It is to seduce the Court into accepting that the parties subjective intentions with regard to the ARP calculation were different from what the ARP definition in the agreement actually provides and then to invite the interpretation of that definition away, that's in line with the alleged intentions. In short, the bid is to have recourse to the negotiations for the purpose of rectifying the ARP definition under the guise of interpretation."

Then 188, "Perhaps the most that can be said on the issue of construction is, that looking at land values at 2001, the contract terms seem improbable ones for Persimmon to have signed up to. If so, the explanation is either 1) that it made a bad bargain, or 2) that it may have made a sensible one but the written agreement recorded it wrongly. If the former, Persimmon is stuck with its bargain and it's not the Court's function to reform it." With respect Your Honours, that's what the Court of Appeal has come to in this particular case. Picking up again, "If the latter, Persimmon may have a claim to have the agreement rectified."

If I could just briefly, before we leave this case, look at the judgment of Lord Justice Tuckey at the foot of the page. At 194, "Short of a good claim for rectification, I do not think it is possible to make such radical changes to the clear words used in the agreement by invoking the forces of commercial good sense and hints from other parts of the agreement that Chartbrook would not inevitably have been entitled to ARP. They are simply not up to the major interpretive task for which Persimmon invokes them." In my submission Your Honours, the extent is not obvious, it is exactly what we have here.

There is simply no scope to introduce a clause of the extent and nature of 4.2(b).

The last reference Your Honours, is *Alexiou* case at my tab 1, also a recent decision, 2007 decision of their Lordships. In this context, the debate was over the interpretation of a consent order that had been made in relation to sale and purchase contract for shares. If I could just note at page 10, paragraph 15, "In the opinion of the board, the construction is balanced on behalf of Messrs Alexious and Ferguson is sound and both the answers given by Mr Campbell are unsound. The first answer falls foul of the principle vouched by such compelling authorities as *Prenn* and *Investors*. The evidence of prior negotiations not leading to any antecedent agreement is inadmissible to construe a contract." In my submission Sir, this is an important statement, 2007, of where the law is. In my submission, the 28 September letter from NGC to BoPE did not lead to an antecedent agreement.

Then, if I could look Your Honours, at paragraph 17. This is a rejection of a dictionary argument on the facts, "It's well established that in construction evidence is admissible to show the parties if you use terms bearing a special technical meaning but the parties have, in the consent order, used no language bearing a special or technical meaning." In my submission, $6.50 per gigajoule, bears no special or technical meaning. "Mr Campbell was seeking to show the true effect of the order, valuations provisionally agreed should be treated as settled." Then the sentence, "Since however, this is not a meaning which can be derived from construction of the order, his real argument must be that the order does not reflect the full agreement made between the parties. That is not how the case has been put and if so, would be a claim for rectification, not a claim based on construction. It is inappropriate for the board to rule on the merits of a rectification claim which hasn't been advanced, although it would have faced obvious difficulties."

I can finish Your Honours, subject to any questions you might have, with the conclusion from my written submissions. Where a contract, in most cases

that we're facing, where a contract is sought to be read in light of external material, the Court starts with an agreement that is unclear and so it looks to the external material to find clarity. In this case, we're starting with an agreement that's very clear and NGC is trying to find an ambiguity by reference to external material that is itself ambiguous.

The agreement, interim agreement, was reached between two sophisticated commercial parties, each of whom had legal representation at a time when they were in dispute. The crucial matter requiring agreement was price. That was the only point, by that stage, that was an issue. In such circumstances, the onus has to be on each party to ensure the written terms accurately record the agreement. The difficulty for NGC is that, Chapman Tripp as its agent, clearly agreed to the terms that BoPE contends apply and shared a common understanding of those terms with BoPE at the crucial point.

There was a meeting of the minds and it may be that NGC, as distinct from Chapman Tripp, didn't want to agree to those terms, or wanted another one in there. But its subjective desires at this point are irrelevant, it's bound by the actions of its agent. And as I've just identified, Your Honours, in *Euphoric*, *Chartbrook*, *Alexiou*, in the further recent case of *Contract Pacific Ltd v Commissioner of Inland Revenue*, what's being required by NGC here is actually rectification in the guise of interpretation. So unless Your Honours.

BLANCHARD J:

Yes, thank you, Mr McIntosh. Mr Hodder, do you wish to be heard in reply?

MR HODDER QC:

Just briefly Sir, as I suspect is now evident to the Court, the core construction issue appears to have been narrowed down to the words, "On the basis of the agreement" on page 262 of the case on appeal. So what, as I understand the argument that is being put forward by my friend, is, when we look at paragraph 5 of this letter which I think he accepts and introduces what follows in terms of the sequence of correspondence, through to the 15 October Chapman Tripp letter, what the reader of this is to take is that that word, those

words, “On the basis of the agreement” take away the issue of transmission and then the words that come down in (b)2(a)(a) deal only with the gas price and nothing else and that that reference to $6.50 bears no relationship to the $6.50 that appears in paragraph 4, where it was used to identify the quantification of the loss that might be suffered.

Therefore, the argument is that the $6.50 on page 262 cannot be related back to the $6.50 on page 259 which is undoubtedly $6.50 plus transmission, et cetera. We say, as the Court would expect, that’s an extraordinarily difficult argument to sustain, when paragraph 4 on page 261 clearly purports to say what NGC’s position was by reference back to the previous letter and introduces $6.50 in the context of an interim injunction potential and then goes on to explain what an alternative to an interim injunction regime might be that both parties would find in their best course, in paragraph 5 on 262.

So, continuing to supply gas on the basis of the agreement is, as I think His Honour Justice Tipping focused on, is simply to maintain the status quo as to the terms of getting the gas there, all these terms that apply risk and whatever else might be associated with it. The $6.50, in our submission, in (b)2(a)(a) is the same $6.50 on the previous page and on two pages back. Now, Your Honours, there’s no additional number of words is going to, I fear, assist you further on the issue. The issue is clearly identified. I understand it now not to be an issue that if Your Honours come to the view that I am right on that proposition, then that $6.50 has been carried forward as a shorthand all the way through to the 15 October letter.

Now, my learned friend has said, at various stages, that NGC had complete discretion over price and transmission. But I did take you to the evidence of Mr Bullock before lunch, who explained in his evidence, uncontested, that it dealt at arm’s length with NGC transmission. NGC transmission put up the price, NGC Energy was required to pay it. In the absence of any other evidence, we say that’s sound and the repeated proposition that NGC had complete flexibility, NGC Energy which was doing this deal, had complete flexibility on price and transmission components, simply isn’t consistent with

the evidence. Now, you were taken, you were referred to the evidence of Mr Tweedie and I had pointed, I've mentioned Mr Tweedie just in passing.

Can I invite the Court, without taking you to it now, to the extent that Mr Tweedie's evidence is relevant, to note the transcript which is found in the case on appeal at page 126. From lines 33 down to 127 at 22, where Mr Tweedie is explaining that he doesn't actually know whether there's a market price or not because this isn't his field. But then goes on to say that he is aware that transmission network charges are posted. That's the effect of those, that bottom half of 126 and top half of 127. Now, the test on the law in this circumstance, I had not heard the phrase before that "this was war" which my learned friend used. But what that tells us, with respect, is that we then go back to what the objective approach that the Court is going to take is and that can be found, among other places, in the *Mannai* case which the Court is familiar with. But in particular, rather than the concept that this might be something exceedingly subtle, or alternatively, or additionally, was some sort of trap, that is not what the law is looking for.

According to Lord Steyn and this is if the Court follows this, in our bundle at tab 2, at page 771, Lord Steyn says, in the well-known phrase, "The law generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are, therefore, interpreted in the way in which a reasonable commercial person would construe them and the standard of a reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language".

With respect, it is only through what can only be generously called a nicety of language that my learned friend's submissions deal with the juxtaposition of paragraphs 4 and 5 of the Russell McVeagh letter of 5 October. Now, my learned friend said, well, what if the price had been $8.50, would we be here? Well, we would be, if $8.50 had appeared in the 28 September letter and in the letters that followed because they were the ones that were identified and had it been supported by the evidence from Mr Bullock, to show that

that was the price, exclusive of damages. But apart from that, the example tells us nothing.

The point that, the reason that this case has been pursued is because of the relationship between the $6.50 from the sequence of correspondence from 28 September through to 8 October, not because of its intrinsic merits as such. Now, I'm not sure that the Court is overly troubled by this but the proposition of the injunction wouldn't last for two years. I note that the trial took place in 2007, after the original arrangement had expired, with gas being supplied during that period. That may say something about the speed of the High Court's fixtures arrangements but it doesn't say anything to us today that this injunction wasn't intended, or this arrangement wasn't likely to last for at least the duration of the balance of the contract.

Now, my learned friend has been putting it to you that there are two options in here and I think they've also been mentioned by one of the Court, that either there is a mistake made by NGC and therefore this would be a rectification issue, or there is a contract. Now, our position has been that there is a clear contract and the contract is as we have contended for but the Court will recall that we did get leave to file an amended statement of claim that said, if for some reason the parties hadn't reached a price on transmission, then we'd claim for a quantum meruit. That's in the amended pleading that's in the case on appeal. That wasn't dealt with in the High Court because the High Court found in favour of the matter on the basis of contract.

Pleading remains alive as it were and it wasn't dealt with in the Court of Appeal because the Court of Appeal took a different view entirely and I'm not wanting to emphasise the point, I'm simply saying that that option was covered in a pleadings as being an alternative if in fact there was an agreement but our position remains that there was an agreement and the terms were that $6.50 meant, as we have said, $6.50 plus transmission costs.

Now, there are a range of cases, the Court's been favoured with about 40 different authorities. I don't know that there's much point in me spending

time replying to the three that have been mentioned by my learned friend. I note that in the last of those which is the Privy Council decision, what the applicant was seeking was to say that the phrase "fair market value" actually had a floor to it which was, to some extent, the reverse of what we're talking about perhaps but it was a difficult proposition. If the Court is going to look at that judgment, you'll see that particular terms were set out in some detail in what was a consent order which said specifically, there should be a valuation at fair market value and it was the attempt to put a gloss on the phrase "fair market value" that was an issue there and some considerable distance from this particular case.

In the other cases, with respect, they don't apount to anything more than applications of the general principles that can be found from the more established authorities *Prenn* and *Mannai* and *Investors Compensation*. It maybe that there is some tension between what *Investors Compensation* says and what these cases are actually deciding, in the sense that *Investors Compensation* clearly contemplates the possibility. I may as well turn to the point, "That *Investors Compensation* clearly contemplates the possibility that there will be a relatively radical change to the language." It's not my submission that this is required in this case but if the Court has *Investors Compensation* which is tab 1 of our bundle, then the famous propositions in Lord Hoffmann's judgment are to be found at page 912 of the Weekly Law Reports, starting at paragraph (h), "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

I stress that the case being advanced for NGC doesn't say, what did NGC have in mind and it doesn't matter what BoPE had in mind, the Court, under these regimes, puts itself into the place of, as it were, almost a bystander saying, we know all of these parties know and we look at what they've done and we come up with a commercial construction. We say, if a Court does that, its gets the same view as the High Court did.

It's the next point, the next two points which become relevant. "After referring to the matrix of fact at 2, then proposition 3 says the law excludes, from the admissible background, the previous negotiations of the parties, admissible only an action of rectification. The law makes this distinction for reasons of practical policy, the boundaries of this exception are in some respects unclear." That's a point that's picked up in several of the subsequent authorities, including the *Bank of Scotland* case I took the Court too.

Then it's the next one, just below "marginal note C" in proposition 4, "The background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even, as occasionally happens in ordinary life, to conclude that the parties must, for whatever reason, have used the wrong words or syntax." Now, I simply mention that to say that that is the proposition which has been well endorsed by a variety of cases. To some extent, as I looked at the authorities my friend was taking you to in his last three, there's a degree of tension between what Lord Hoffmann contemplates is going on there and what the Court may have been doing in those cases on the particular facts of *Euphoric* and *Chartbrook*. Then point 5, we say is utterly critical on this case and Hoffmann's last point is the reason that this appeal has been pursued, that we are indeed flouting business common sense and the various encounters between counsel and the Court thus far, have identified the Court's well seized of the parameters of that possibility of business common sense.

Your Honours, unless there is anything else I can say, those are all the points I wanted to make in brief reply.

BLANCHARD J:

Mr Hodder, just to clarify one point. If, for sake of argument, we were with you generally on your case but came to the conclusion that there hadn't actually been a necessary agreement on transmission costs, are you suggesting that the matter would have to go back to the High Court?

MR HODDER:

We would say that on the evidence that the Court has, there's enough to establish that the quantum meruit is exactly the same price as the posted terms. So the evidence of Mr –

BLANCHARD J:

But if we're not satisfied as to that?

MR HODDER:

Then we would have to go back on that question.

BLANCHARD J:

Thank you. Thank you counsel. We will take time to consider our decision.

COURT ADJOURNS: 3.46 PM