IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA483/2018
[2020] NZCA 113

BETWEEN	BATHURST RESOURCES LIMITED First Appellant	
	BULLER COAL LIMITED Second Appellant	
AND	L&M COAL HOLDINGS LIMITED Respondent	

Hearing:	21–23 August 2019; further submissions 27 and 30 August 2019
Court:	Kós P, Gilbert and Goddard JJ
Counsel:	J E Hodder QC, R J Gordon and D P MacKenzie for Appellants A R Galbraith QC, D R Kalderimis and D P Neild for Respondent
Judgment:	24 April 2020 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs for a complex appeal on a band B basis plus usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Kós P)

[1] Bathurst acquired coal mining rights on the West Coast of New Zealand's South Island from L&M. Part of the purchase price was deferred. Two performance payments, each of US$40 million, were payable when 25,000 tonnes, and then one million tonnes, of coal had been shipped from the permit areas.

[2] Although more than 50,000 tonnes of coal have now been mined by Bathurst from the permit areas, it says this does not trigger the first performance payment obligation. It says the coal has not been "shipped" from the permit areas.

[3] Moreover, Bathurst has now mothballed the mining operation. It is focusing on mining opportunities elsewhere. It accepts liability to pay royalties to L&M on any coal mined and sold, although nothing now is being mined and little is being sold. But it denies any present liability for the first performance payment. It says cl 3.10 of the sale agreement enables it to postpone that payment so long as it pays royalties, at a higher 10 per cent rate, on the coal it sells.

[4] L&M issued proceedings in December 2016. It sought a declaration that the first performance payment was due and owing, and an order that Bathurst pay US$40 million to L&M, together with interest and costs.

[5] Dobson J held in favour of L&M.[1] Bathurst appeals.

Issues on appeal

[6] Three issues arise on appeal:

(a) What is the correct meaning of "shipped from the Permit Areas" in cl 3.4 of the sale agreement?

(b) What is the true effect of cl 3.10 of the same agreement?

(c) Should a term be implied requiring Bathurst to undertake substantive continuing levels of production?

Background

[7] L&M is a company incorporated under Belize law. Its principal business office is in Hong Kong. It is effectively governed by its founder, Mr Geoff Loudon, a New Zealand-based geologist and investor in mineral resources. Bathurst is

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1 *L&M Coal Holdings Ltd v Bathurst Resources Ltd* [2018] NZHC 2127 [High Court judgment].

a company incorporated under New Zealand law. Its registered office is in Wellington. It has interests in the mining of natural resources, including coal. It is listed on the Australian stock exchange. Between September 2010 and July 2015 it was listed also on the New Zealand exchange.

[8] Between 2003 and 2009, L&M acquired two coal exploration permits on the Denniston and Stockton Plateaus. They covered about 22,000 hectares. Coal mining had been conducted on these plateaus since the late 19th century. From 1960 permits to explore and mine resources in the area were held by the Crown's State Coal Mines, and subsequently the state-owned enterprise, Solid Energy. These permits were relinquished by Solid Energy at the end of the 20th century.

[9] The Escarpment Mine on the Denniston Plateau was "seen as the most attractive development project, with the prospect of progressing to mine in the Deep Creek area relatively nearby" at a later stage.[2] It was anticipated mining would be undertaken by open cast techniques. Open cast mining involves stripping away overburden to reveal seams of coal, extracting that coal, and then reinstating the area by reforming the mining area using the displaced overburden.

[10] In 2008 L&M sought to sell these exploration permits, along with an extant application for a mining permit on one of the blocks. In August 2009, Bathurst expressed interest. In December 2009 Bathurst made a formal offer, at a conditional consideration of US$110 million. In February 2010 a binding letter of intent was executed. At the time the market for coal was buoyant. The letter of intent was negotiated by Mr Loudon for L&M, and Mr Hamish Bohannan, the then-CEO of Bathurst.

[11] The transaction was structured as a sale of all shares in an L&M subsidiary, L&M Coal Ltd, which owned the relevant permits and rights to the application.[3]

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2 High Court judgment, above n 1, at [25].

3 This company subsequently changed its name to Buller Coal Ltd, the second defendant in L&M's proceedings, and second appellant in this appeal.

[12] The principal contract in issue, the sale agreement, was executed in June 2010. Those provisions particularly relevant are set out in the following section of this judgment. But they were summarised by Dobson J in these terms:[4]

> - Payment of a non-refundable deposit of US$5 million, and consideration of US$35 million to be paid on settlement, which occurred in November 2010.
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> - Two further performance payments of US$40 million each would become due on defined volumes of coal being shipped from the permit areas. The first performance payment was due when Bathurst had shipped 25,000 tonnes of coal, and the second payment when one million tonnes of coal had been shipped.
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> - When the second performance payment was due, or if Bathurst received notice of an offer to acquire more than 50 per cent of its shares (or notice of a transaction having substantially the same effect), Bathurst was obliged to issue fully paid ordinary shares representing five per cent of the then current post-issue share capital of Bathurst.
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> - In addition to that sequence of payments, Bathurst was obliged to pay royalties on amounts received for sales of coal. The detailed royalties provisions were recorded in a separate deed of royalty, a draft of which was annexed to the ASP [sale agreement] and which was separately completed in August 2010 (the royalty deed). The initial royalty rate was 10 per cent of gross sales revenue of coal, but after the first performance payment was made the rate would drop to five per cent until the second performance payment was made, and thereafter would be 1.75 per cent.
>
> - If Bathurst was constrained by regulatory requirements, or for any other reason, from issuing shares to L&M when the second performance measure was achieved, then in lieu of the issue of those shares the relevant royalty rate in the royalty deed would increase by two per cent.

[13] As the Judge observed, between settlement of the sale agreement in November 2010 and mid to late 2016, a "constructive and co-operative relationship between the parties" existed.[5] L&M did not strictly enforce its contract rights. It gave assistance to Bathurst to enable it to perform its remaining contractual obligations.

[14] In August 2012 the parties entered into a deed of amendment addressing what would happen if Bathurst failed to pay the performance payments when due.[6] It was in fact the third such deed since execution of the sale agreement. The critical

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4 High Court judgment, above n 1, at [5].
5 At [6].
6 See [30] below.

provision, relevant to the second issue we address in this judgment, is cl 3.10. It is set out at [30] below. In short it provided that failure to make a performance payment was "not an actionable breach of or default under this Agreement for so long as the relevant royalty payments continue to be made under the Royalty Deed".[7]

[15] Challenges to resource consents caused significant delays to the extraction of coal from the permit areas. Those consents were eventually granted in June 2014. Coal was extracted from the Escarpment Mine between September 2014 and March 2016. By September 2015, some 25,000 tonnes of coal had been extracted. L&M say at this point the obligation to pay the first performance payment was triggered. By March 2016 a total of some 50,000 tonnes had been extracted.

[16] In that month, March 2016, Bathurst announced it was suspending mining operations at the Escarpment Mine. That mine would be placed in "care and maintenance". Thereafter Bathurst ceased paying royalties, except for small amounts payable for sales of stockpiled coal.

[17] In September 2016, Bathurst acquired a majority interest in a joint venture which then purchased other coal mining interests at Rotowaro and Maramarua, in the North Island, and the open cast mine at Stockton on the West Coast of the South Island, from Solid Energy. Bathurst wishes to exploit those resources before resuming mining at the Escarpment Mine or other prospects within the permit areas acquired from L&M.

[18] L&M commenced this proceeding in December 2016, seeking a declaration that the first performance payment was due and owing, and an order that Bathurst pay US$40 million to L&M, together with interest and costs.

The contracts

[19] Negotiations began in August 2009 between Bathurst's Mr Bohannan, and L&M's Mr Loudon. A confidentiality agreement was entered. In December 2009 Bathurst issued a letter of offer. Further information was exchanged between the

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7 The royalty deed was an annexure to the sale agreement.

parties, and negotiations continued. On 23 February 2010 the parties signed a binding letter of intent. It was in effect a heads of agreement.

The sale agreement

[20] The sale agreement was executed on 10 June 2010. It provided a transfer to Bathurst of all shares owned by L&M in its subsidiary L&M Coal Ltd. That subsidiary company held the relevant exploration permits, and the mining permit application.

[21] Clause 3.1 of the sale agreement provided that the aggregate consideration payable for the shares comprised the deposit, settlement cash consideration, performance payments, performance shares and the royalty payable by L&M Coal Ltd to L&M under a royalty deed (to be entered in the form set out in sch 2 of the agreement):

(a) The deposit was US$5 million, and was to be paid within 20 days of execution. It was non-refundable.[8]

(b) The settlement cash consideration was a further US$35 million, payable at settlement, which was five days after the satisfaction of all conditions to which the contract was subject. Those conditions included Overseas Investment Office consent, ministerial consent to the royalty deed under the Crown Minerals Act 1991, shareholder approval on Bathurst's part, a mutually satisfactory extension to one of the exploration permits, a definitive feasibility study being completed "to the reasonable satisfaction of the Purchaser" and Bathurst arranging sufficient finance to meet the settlement cash consideration (the US$35 million).

(c) The performance payments were provided for in cl 3.4 of the sale agreement:

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8 Save under two exceptions which need not detain us.

3.4 **Performance Payments**

The Purchaser shall pay the Vendor or its nominee, to such bank account as the Vendor may direct in writing at least 5 Business Days before payment is due to be made:

(a) US$40,000,000 within 30 days of the date on which the first 25,000 tonnes of coal has been shipped from the Permit Areas; and

(b) US$40,000,000 within 30 days of the date on which the first one million tonnes of coal has been shipped from the Permit Areas,

and the Purchaser shall immediately notify the Vendor of the occurrence of any event which gives rise to an obligation on the Purchaser to make a payment to the Vendor under this clause 3.4.

(d) The performance shares were provided for in cl 3.5 of the sale agreement. In essence it required Bathurst to issue shares to L&M amounting to five per cent of the post-issue share capital of Bathurst on either of two events: the due date of the second performance payment or Bathurst receiving a third party offer for more than 50 per cent of its shares.

[22] Clauses 9.3 and 9.7 provide certain remedies for default:

9.3 **Remedies for default**

If a Party (*the defaulting Party*) does not comply with the terms of a Settlement Notice then, without prejudice to any other rights or remedies available at law or in equity, the non-defaulting Party may:

(a) sue the defaulting Party for specific performance; and/or

(b) cancel this Agreement; and/or

(c) sue the defaulting Party for damages.

…

9.7 **Non-Payment of Performance Payments**

The Vendor shall have the same rights as are specified under clause 9.3 (except clause 9.3(b)) in the event of any non-payment of the Performance Payments.

[23] Clause 9.3, it may be observed, applied only in the event of non-compliance with a settlement notice. Its effect was spent, therefore, in November 2010. That is important, because it means the amendment made in August 2012 (which we turn to shortly) could not have been directed at that clause.

[24] Clause 9.7 limited L&M's remedial options in the event of non-payment of a performance payment. In short, it could do anything apart from cancellation. That provision of course was not spent when this dispute arose.

[25] The contract contained a standard "no waiver" clause to the effect that no failure, delay or indulgence by any party in exercising a power or right under the agreement shall operate as a waiver of that power or right.[9]

The royalty deed

[26] The royalty deed required payment of royalties by the permit holder, L&M Coal Ltd, to L&M in accordance with cl 4.1:

> 4 **CALCULATION AND PAYMENT OF ROYALTY**
>
> 4.1 The Grantor shall pay to, or at the direction of, the Grantee amounts calculated by reference to the following percentages based on the Gross Sales Revenues, calculated in accordance with either paragraph (a) or paragraph (b) or, if neither applies at the relevant time, then paragraph (c), subject always to paragraphs (d) and (e) and to clause 4.2:
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> (a) from the date of this Deed until the date of payment in full of the cash consideration payable by the Guarantor under clause 3.4(a) of the Sale and Purchase Agreement (the *First Payment Date*), at a rate of 10% of Gross Sales Revenues;
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> (b) from the First Payment Date until the date of payment in full of the cash consideration payable by the Guarantor under clause 3.4(b) of the Sale and Purchase Agreement (the *Second Payment Date*), at a rate of 5% of Gross Sales Revenues; and
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> (c) on and from the Second Payment Date, and thereafter for the duration of the Permits, at a rate of 1.75% of Gross Sales Revenues until the later to occur of the end of the term of both Permits or the final cessation of mining operations in the Permit Areas (*End Date*),

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[9] Clause 16.6.

and all amounts payable under this clause 4.1 shall be paid within thirty days from the end of each Quarter. For the avoidance of doubt:

(d) subject to clause 4.2, the Royalty shall be payable at the rate of 10% of Gross Sales Revenues from the date of this Deed until the End Date in the event that the First Payment Date does not occur; and

(e) subject to clause 4.2, the Royalty shall be payable at the rate of 5% of Gross Sales Revenues from the First Payment Date until the End Date in the event that the First Payment Date occurs but the Second Payment Date does not occur

[27] "Gross Sales Revenues" were defined:

Gross Sales Revenues means the gross sales revenues, derived or deemed to be derived from the sale of Coal, with no deductions being made on any account (whether for mine operating costs, hedging or otherwise) and regardless of whether or not mining is profitable;

And "Coal" was defined:

Coal means coal mined from the area of any Permit part or all of which falls within the external boundaries of the Permit Areas;

[28] The deed also provided that L&M Coal Ltd and its related companies were only to sell coal "at arm's length terms" and "shall not do anything that would have the effect of defeating or reducing [L&M's] Royalty entitlement".[10]

[29] Importantly, cl 8.1 placed obligations on L&M Coal Ltd in these terms:

8 **GRANTOR'S OBLIGATIONS**

8.1 Throughout the currency of this Deed, the Grantor shall:

(a) satisfy the minimum work programme in respect of the each of the Permits;

(b) conduct mining operations in accordance with good mining practice and with a view to maximisation of Coal sales at the best available price;

(c) otherwise keep each of the Permits in good standing; and

(d) notify the Grantee of the grant of any mining permit within the Permit Areas, within 5 days of receiving notification.

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[10] Clause 4.6.

The 2012 sale agreement amendment

[30] The parties subsequently executed three deeds of amendment to the sale agreement, in September 2010, October 2010 and (most importantly) August 2012. Neither the first nor second need detain us, but the third is important. It purported to insert a new cl 3.9, although the draftsperson had obviously overlooked the first amendment which had already inserted a new cl 3.9. So although the clause is numbered cl 3.9 in the third amendment, it has been treated by all parties as cl 3.10. It reads:

> [3.10] **Failure to make Performance Payments**
>
> For the avoidance of doubt, the parties acknowledge and agree that a failure by the Purchaser to make, when and as due, a Performance Payment is not an actionable breach of or default under this Agreement for so long as the relevant royalty payments continue to be made under the Royalty Deed.

[31] The second issue we must resolve turns entirely on the correct interpretation of this superadded provision. The contextual background to that amendment will be examined when we reach that issue.[11]

The interpretation of contracts

[32] Before addressing the three issues posed by this appeal, two of which concern the meaning of the sale agreement and its 2012 amendment, we summarise the approach we propose to take to the interpretation of these contracts.

[33] The leading New Zealand authority on contract interpretation is the decision of the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[12] The Court emphasised three considerations: the objectivity of the interpretation exercise, the primacy of the text, and the relevance of third parties to the scope of the interpretation exercise.[13]

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11 At [65]–[68] below.
12 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.
13 At [60]–[63].

Objectivity principle

[34] *Firm PI 1 Ltd* holds authoritatively that in New Zealand the aim of contract interpretation is to ascertain the meaning the contract would convey to a reasonable person, having the background knowledge reasonably available to the parties in the situation they were in at the time of the contract. "This objective meaning is taken to be that which the parties intended".[14] In his *Principles of Contractual Interpretation*, Professor Calnan calls this the "guiding principle" of contract interpretation.[15]

[35] In mediating the tension between intention and objectivity, gallons of ink have been spilt. "Intention" implies an inquiry into the common subjective state of mind of the contracting parties (or those who represent them). The objectivity principle immediately swerves away from that course and, as Lord Bingham said in *Bank of Credit and Commerce International SA v Ali*:[16]

> To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment …

[36] Some leading commentators argue, vigorously, that a more liberal view as to the reception of common subjective intent should be taken — both in the ultimate question addressed by the Court and in the evidence it receives in answering that question.[17] But that view over-expands the role of interpretation. Interpretation is one of the three principal elements of contract construction.[18] The other two elements are implication and rectification.[19] If interpretation and implication are objective processes, rectification most assuredly is not — enabling parties to reinstate their (subjectively) intended bargain where the objective expression of it fails them. But rectification is subject to important limitations which apply when a contract has ceased to be a purely private bargain and has been instead relied on by third parties, or where an estoppel by convention can be raised by a party, based on reliance on the apparent

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14 At [60].

15 Richard Calnan *Principles of Contractual Interpretation* (Oxford University Press, Oxford, 2013) at 9.

16 *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 at [8].

17 See, for instance, David McLauchlan "Contract Interpretation: What is it about?" (2009) 31 Syd L Rev 5.

18 *Ward Equipment Ltd v Preston* [2017] NZCA 444, [2018] NZCCLR 15 at [86].

19 See Gerard McMeel, *McMeel on the Construction of Contracts* (3rd ed, Oxford University Press, Oxford, 2017).

form of the agreement. Ultimately it is rectification that ensures parties are not held to an objectively-ascertained bargain they did not in fact intend, provided departure does not cause injustice.[20]

[37] The objectivity of contract interpretation is one of the distinguishing features of the common law — distinguishing it from civil law which is more willing to delve deep into the common subjective intention of the contracting parties.[21] Professor McMeel traces the origins of the objective principle as the definitive position of the common law to a series of judgments written by Lord Denman CJ and Parke B in 1833.[22] Objectivity has been the unbroken orthodoxy of the common law in interpreting contracts since then. The leading statement is perhaps still that of Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen*:[23]

> When one speaks of the intention of the parties to the contract, one is speaking objectively — the parties cannot themselves give direct evidence of what their intention was — and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

[38] Similarly, in *Deutsche Genossenschaftsbank v Burnhope*, Lord Steyn put it in trenchant terms:[24]

> It is true [that] the objective of the construction is to give effect to the intention of the parties. But our law of construction is based on an objective theory. The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to express rather than actual intention.

[39] The question then is that posed at [34] above: what meaning does the contract convey to a reasonable person, having the background knowledge reasonably available to the parties at the time of the contract? In short, to an objective observer

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20 Contrast David McLauchlan "The Contract That Neither Party Intends" (2012) 29 JCL 26 at 31.

21 McMeel, above n 19, at [3.39].

22 At [3.40].

23 *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL) at 996. See also *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24, (1982) 149 CLR 337 at 352 per Mason J.

24 *Deutsche Genossenschaftsbank v Burnhope* [1996] 1 Lloyd's Rep 113 (HL) at 122. See also his Lordship's similar observations in *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 WLR 3251 at [18].

cognisant of the admissible context. This Court described the resulting process in its decision in *GTV Holdings Ltd v Harris*:[25]

> The technique the common law adopts for interpretation in such a case is not far removed from the technique it adopts for implication. In effect, the common law conjures up a notional reasonable bystander (cousin to the 'officious bystander' of implied term renown). Primacy is given to text, but within the relevant context. … The only real difference here between interpretation and implication is whether the law places a pen in the hand of the bystander. …

While the bystander (or objective observer) is reasonable (because it is the Court), he or she will bear in mind the contractual purpose, relative bargaining strengths, character of the parties and other context admissible for construction. The bystander's task is then to work out the meaning the agreement conveys, having regard to all that admissible context, and in the context of the issue now confronting the parties.

[40] The objectivity principle is justified on a series of policy planks. We identify four here.

[41] First, there is the reality that the pursuit of actual intended meaning will often be a futile exercise. No contract (except perhaps one involving the most basic performance obligations) can provide for all potential eventualities. Dispute may arise from a performance issue which the parties (1) may have considered, but not provided for (perhaps because it is simply too difficult to do so) or (2) not considered at all.[26] The inability of parties to anticipate and provide for all eventualities means that what contracting parties really do when they bargain incompletely is to engage the court as reasonable bystander (or objective observer) to bridge the gap and make the bargain work, if that can be done within the limits of construction. Lord Hoffmann observed that the most usual inference to be drawn from a gap is that nothing at all was intended.[27] But a gap does not necessarily connote silence, or interpretive inertia. As Professor McMeel has said, "[As] a matter of principle the courts will attempt to find the solution in the interstices of the contract, having regard to its overall nature and

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25 *GTV Holdings Ltd v Harris* [2018] NZCA 95, at [28]–[29]. A good example of the bystander's notional inquiry may be found in *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56 at [22].

26 *GTV Holdings Ltd v Harris*, above n 25, at [25]–[27].

27 *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [17].

purpose, the other terms, and the context. The contract is the governing instrument and must be made to yield a solution".[28] Notably, that solution is not reached by looking at prior negotiations — perhaps the best evidence of actual intention, yet inadmissible in interpretation.

[42] Secondly, disputes bring about distorted, *ex post* thinking. What parties have to say with the benefit of hindsight about their contractual intentions is unlikely to be either reliable or helpful. That is one of the reasons why there is an unchallenged rule against the receipt of direct declarations as to intention in evidence to interpret instruments.

[43] Thirdly, the objectivity principle is also a rule of commercial efficiency.[29] It recognises that there must be a limit to the extent to which it is gainful to dig into material beyond the confines of the contract itself to ascertain meaning. It also recognises that third parties associated with or dependent on the contract have limited access to extrinsic evidence beyond the contract, which is one of the reasons why the second and third principles exist (emphasising the primacy of the text and restricting access to extrinsic evidence where the contract has ceased to be a merely private bargain but instead has become the subject of third party reliance). And even where the contract remains a purely private bargain, if it is a contract of some duration, the negotiating personnel may well have moved on and access to the factual matrix will become increasingly ephemeral to those persons charged with management of a contract in later years: "Parties forget things; time effluxes and memories fade".[30] The "reasonable person" lens therefore best approximates the position of a bona fide, objective observer, albeit one who has at least some access to extrinsic evidence of context (and which a third party might reasonably have accessed before changing their position in reliance on the contract).

[44] Fourthly and finally, the objective principle may give way to actual mutual intention in a case where the objective interpretation does not accord with that intent. It does so particularly in the realm of rectification, an important equitable remedy,

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28 McMeel, above n 19, at [1.103].

29 See, for example, Brian Coote "Reflections on Intention in the Law of Contract" [2006] NZ L Rev 183 at 203.

30 *Ward Equipment Ltd v Preston*, above n 18, at [90].

embracing as admissible evidence of prior negotiations and of intent generally, but with important qualifications. Rectification is a remedy that has been rather crowded out by contract interpretation being invited to undertake more than its proper task, often on the basis of extrinsic evidence only remotely relevant to objective analysis. The doctrinal distinctions between these remedies arose for good reasons and were not mere adventitious exceptionalism. Cramming them together comes at a real cost in an age in which far more evidence might be searched for, found and pressed upon a court, regardless of whether it really forms part of the admissible context helpful to an objective observer. This case exemplifies that: *ex post* evidence of intent, and of the course of negotiations, was advanced before the Judge without due heed to limits germane to objective interpretation. Rectification did not need to be pleaded, and was not, but that limits the admissible context.

Primacy of the text

[45] In *Firm PI 1 Ltd* the Supreme Court said that while context is a necessary element of interpretation, the text is of central importance:[31]

> If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.

[46] The textual primacy principle is itself an expression of the objectivity principle. The words used are the best objective evidence of what was intended. And the common law places a premium on words used because it is efficient to do so, and because the factual matrix is often difficult to capture, even for the parties themselves as time passes. The law has therefore been more receptive to receipt of evidence of subsequent conduct in reliance on the text than it has to prior negotiations, even though the latter often represent a demonstrably objective record of a developing mutual intent (and are admissible if rectification is sought).[32] But as Professor Coote has observed, exclusionary rules such as the one regarding prior negotiations are "simply a rational and necessary response to practical constraints, by which a balance of convenience has been struck".[33]

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31 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd,* above n 12, at [63].
32 See discussion at [41] above, and [63] below.
33 Coote, above n 29, at 183.

The relevance of third parties to the scope of the interpretation exercise

[47] The third authoritative statement of general principle made by the Supreme Court in *Firm PI 1 Ltd* concerned the relevance of third parties to the scope of the interpretation exercise. The Supreme Court observed that the language of complex commercial contracts:[34]

> … will result from a process of negotiation, will attempt to record in a formal way the consensus reached and will have the important purpose of creating certainty, both for the parties and for third parties (such as financiers). The fact that parties are aware their contract might be relied upon by a third party may justify a more restrictive approach to the use of background in some instances, the parties' awareness being itself part of the relevant background. …
>
> (Footnotes omitted.)

[48] Accordingly, it is a relevant contextual inquiry to ask to whom the contract was addressed, or by whom it was to be relied upon. The wider that audience, the more restrictive the approach to receipt of extrinsic evidence may be. Professor McLauchlan has suggested that the common law's concern for third parties has been greatly exaggerated.[35] With great respect, we do not agree with that criticism. In the world of commercial bargaining, orthodoxy and predictable development assume a particular importance. The "plain meaning rule" is behind us, but the arc of reform should bend gently in the common law construction of contracts. The third principle stated by the Supreme Court is orthodox, efficient and fair.[36] It recognises the importance of the contractual audience and, in particular, the inconvenience, risk and expense of requiring (or assuming) access to all contextual material where contracts are not intended to be merely private bargains.

Issue 1: What is the correct meaning of "shipped from the Permit Areas" in cl 3.4 of the sale agreement?

[49] It will be recalled that the first performance payment, of US$40 million, was payable when 25,000 tonnes of coal had been "shipped from the Permit Areas".

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34 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd,* above n 12, at [62]. See also *Green Growth No 2 Ltd v Queen Elizabeth Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [60] (in the context of a registrable covenant).

35 McLauchlan "Contract Interpretation", above n 17, at 39.

36 See, for example, *The Starsin* [2003] UKHL 12, [2004] 1 AC 715 at [73]–[74] per Lord Hoffmann; and *Re Sigma Finance Corp (in rec)* [2009] UKSC 2, [2010] 1 All ER 571 at [37] per Lord Collins.

And that although more than 50,000 tonnes of coal have now been mined by Bathurst from the permit areas, it says this does not trigger the first performance payment obligation. It says the coal has not been "shipped" from the permit areas, because it has not been exported. It was common ground that the predominant destination for production from the project was expected, in 2010, to be the export market for coking coal.

[50] For convenience we repeat cl 3.4 of the sale agreement:

> 3.4 **Performance Payments**
>
> The Purchaser shall pay to the Vendor or its nominee, to such bank account as the Vendor may direct in writing at least 5 Business Days before payment is due to be made:
>
> (a) US$40,000,000 within 30 days of the date on which the first 25,000 tonnes of coal has been shipped from the Permit Areas …
>
> …
>
> and the Purchaser shall immediately notify the Vendor of the occurrence of any event which gives rise to an obligation on the Purchaser to make a payment to the Vendor under this clause 3.4.

[51] The issue in short is whether coal is "shipped from the Permit Areas" when it leaves the boundaries of the permit areas (by truck) or if it also requires that it be carried by ship (exported).

High Court judgment

[52] Having regard to the contractual context, subsequent conduct, other usage by the parties, dictionary definitions, case law and expert evidence on usage,[37] the Judge interpreted cl 3.4 as applying to coal "transported" out of the permit areas.[38] The obligation to pay the first performance payment was therefore triggered in September 2015.

[53] The Judge first considered contractual context. He noted an argument based on the change in terminology from the letter of intent to the sale agreement.

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37 High Court judgment, above n 1, at [58]–[113].
38 At [113].

The former used the expression "Deferred cash consideration", whereas the latter moved to "Performance Payments". Bathurst had argued that the change was significant, as importing more specific performance measures. The Judge accepted that a distinction could be drawn, but he was not persuaded that it properly influenced the interpretation of the word "shipped". As the Judge put it:[39]

> … The obligation was dependent on performance, but I am not satisfied that the nature of that performance was confined to the subset of potential production of coal for export.

[54] Bathurst also sought to draw a distinction from the use of the word "mined" in the definition of "Coal" in the royalty deed, set out at [27] above. But the Judge found insufficient evidence in the context of the sale agreement and the negotiations of its terms to "justify a finding that the different formulae used in defining the two payment obligations was deliberate, or intended to identify different categories of production".[40]

[55] The Judge noted that after the sale agreement, and until commencement of the proceeding, Bathurst conducted itself consistently with the word "shipped" meaning "transported".[41] In particular its financial statements in 2014, 2015 and 2016 acknowledged that the first performance payment had been triggered by production at the Escarpment Mine. A letter in June 2016 from Bathurst's chief executive made no suggestion that the first performance payment had not been triggered; rather cl 3.10 (introduced by the third amending deed) was relied on to deny that non-payment was a breach. Publicly at least, Bathurst's current position on triggering of the first performance payment obligation appears to have been adopted in the period leading up to its December 2016 financial statements. At that point the "non-shipped" point was taken explicitly. The Judge noted all this evidence. But he did not appear to place substantial reliance upon it.

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39 At [73].
40 At [78].
41 At [85].

[56] The Judge then referred to dictionary definitions of the word "shipped", concluding that these were capable of supporting both positions urged by the parties. Context, as is commonly the case, was everything then. The Judge went on to say:[42]

> … Unless the context signals to the reader that passage of goods by sea is contemplated, without more it is not appropriate to confine its interpretation to transport on board a sea-going vessel. The context here is the transport of a bulk cargo from a land-locked area on the west coast of the South Island. Coal could never be "shipped" in the narrow sense from the boundaries of the permit areas. On the other hand, if the buyer of the coal was outside New Zealand, carriage for the sea leg of its delivery to the buyer would inevitably be by ship.

[57] The Judge concluded that the dictionary definitions took the question of interpretation no further than acknowledging the prospects of carriage either by sea or by other means.[43] The Judge referred also to case law on the words "shipment" or "shipped", but found the reasoning of little help in the different contexts engaged.[44] He referred also to expert evidence on usage called by Bathurst, but again did not find that materially helpful.[45]

[58] Fundamentally, the Judge found that no distinction was drawn between different types of coal in the sale agreement, in other contractual documents or in the contemporaneous record of negotiations. Although the coal sold domestically to the cement producer Holcim was at a different scale of production, "it was nonetheless coal produced from the permit areas, having a commercial purpose once it was transported away from the permit areas for delivery to Holcim".[46] Considering the words in their context, the Judge concluded that L&M's interpretation of "shipped" in cl 3.4 as meaning "transported" was correct.

Submissions

[59] On appeal, Bathurst submits that the contractual language and admissible contextual material support an export-related interpretation of cl 3.4. Because the measure of the agreed "performance" milestone to trigger the additional payment was

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42 At [102].
43 At [103].
44 At [105].
45 At [109].
46 At [112].

the establishment of a producing coking mine for export purposes, "shipped" must mean "carried by ship", rather than including domestic coal. This was said to be supported by the discrepancies in the wording of the royalty deed and the sale agreement, as well as contemporaneous evidence not admitted by the Judge. Bathurst also submitted that the Judge incorrectly had regard to subjective statements of intent found in the evidence of Messrs Loudon and Bohannon (who negotiated the sale agreement on behalf of L&M and Bathurst respectively) and post-contract "admissions" by Bathurst.

Discussion

[60] We do not accept Bathurst's submissions on Issue 1. Nor do we consider the Judge erred in the conclusion he reached that the word "shipped" in cl 3.4 meant, simply, "transported". In short, while the focus of the project was export coking coal, it was not the project's exclusive focus. An objective observer, cognisant of context, would not conclude that the words "coal … shipped from the Permit Areas" were merely a mangled description of export tonnages. Had liability for the first performance payment depended on export tonnages, a more sophisticated formulation to identify timing would necessarily have been adopted.

[61] More than that we need not say. Where after due consideration an appellate court finds itself wholly in agreement with the first instance Judge's reasoning, it is unnecessary for it to restate its reasoning separately. As Lord Wilberforce once observed in a tax appeal: "To restate the argument in words of my own, even if this were to result in a difference of formulation, would not be productive of advantage, and I am more than content fully to adopt the single judgment of the Court of Appeal …".[47] The Judge's essential reasoning is set out at [53] to [58] above. Save in one respect, that too is our reasoning.

[62] The respect in which we differ is in relation to the admittedly limited reliance placed by the Judge on Bathurst's post-contract conduct in its financial statements of 2014 to 2016. This evidence is discussed at [55] above. We reach our conclusion on the meaning of cl 3.4 without reference to that evidence. It was evidence of the

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[47] *Brumby v Milner* [1976] 1 WLR 1096 (HL) at 1099.

unilateral conduct of one party only, and equally consistent with a unilateral mistaken understanding as with any reflection of the parties' common understanding.

[63] The Supreme Court, by majority, approved the admissibility of subsequent conduct evidence to ascertain meaning in *Wholesale Distributors Ltd v Gibbons Holdings Ltd*.[48] However it remains controversial whether the subsequent conduct must be that of *all* parties. There was neither a majority for that proposition, nor for the contrary view.[49] The question remains open.[50] In any event, even if unilateral subsequent conduct is admissible, it may well command little weight. As the authors of *Burrows, Finn and Todd on the Law of Contract in New Zealand* observe, the problem with the admission of the unilateral subsequent conduct of one party only is that it may show only that party's subjective understanding at the time the contract was entered.[51] Indeed it may show even less than that, because as we have just observed, it may also be indicative of a merely mistaken perspective of obligation. Such a perspective ought not to bind, and the actor ought to be able to renounce it, unless their conduct creates an estoppel by convention, apart from the contract itself. It is not suggested that that is so here. At the end of the day, the evidence is simply of very little assistance to us and we set it to one side.

Issue 2: The effect of cl 3.10

[64] The background to the introduction of cl 3.10 was explained by the Judge in these terms:[52]

> During 2012, the parties were working co-operatively to optimise the chances of Bathurst raising the capital necessary to bring the mine into production, including the capacity to make the first performance payment. The consenting processes took longer than had been anticipated. One concern was the consequence of Bathurst going into default under the ASP if the first performance payment obligation was triggered before it had the financing in place to make the payment.
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> I accept Mr Bohannan's explanation that Bathurst would have been obliged to announce to the ASX that it was in breach of the ASP, and the fact of breach

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48 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

49 However Tipping J subsequently appeared to recant from his insistence on mutuality, in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [30].

50 *Wheeldon v Body Corporate 342525* [2016] NZCA 247, (2016) 17 NZCPR 353 at [95].

51 Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at 200.

52 High Court judgment, above n 1, at [115]–[116].

> would likely impair attempts to raise the necessary finance. Because of those concerns, Bathurst requested an addition to the ASP to confirm that non-payment of the first performance payment when it fell due would not amount to a breach of its obligations under the ASP. …

[65] This analysis requires a little unpicking, before we proceed further. We note three points as to the context in which the amendment must be construed. In doing so we confine ourselves to evidence which might properly be considered by an objective observer undertaking the exercise of interpretation.[53]

[66] First, the parties were already subject to binding obligations under the sale agreement. Clause 3.10 arose in the context of an amendment sought by Bathurst. The amendment sought was a concession by L&M, and we will point later to the fact that no material consideration flowed from Bathurst for it.[54]

[67] Secondly, L&M had limited levers to compel Bathurst to get on with mining. We have referred at [29] to cl 8.1 of the royalty deed, which contained generalised obligations to satisfy the minimum work programme (prescribed in the permits), and to conduct mining operations "in accordance with good mining practice and with a view to maximisation of Coal sales at the best available price".

[68] Thirdly, the first performance payment depended on 25,000 tonnes of coal having been shipped from the permit areas. It followed, for that obligation to be triggered, that some permits at least had been granted and some measure of commercial mining would have begun. All this, along with any need to make a stock exchange announcement, necessarily lay in the future at the time of negotiation of the amendment in August 2012.

High Court judgment

[69] The Judge recorded Bathurst's submission that it had always been entitled to defer payment of a performance payment on condition it continued to pay royalties at

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53 See the discussion beginning above at [39].

54 This Court disagrees over the admissibility, for the purposes of construction, of the fact that Bathurst sought, but was denied, a second, evidently less significant, concession two weeks before the amendment in issue. Its effect would have been to exclude domestic coal sales from the royalty regime. As it does not affect the outcome, we put that to one side.

the higher rate. It derived that argument from cl 4.1(d) of the royalty deed, which is set out at [26] above. Bathurst said this amounted to an option enabling it to elect to continue paying royalties at the higher rate instead of making the first performance payment.

[70] The Judge did not agree with that submission. He interpreted the royalty deed provisions as simply requiring those payments to continue at the higher royalty rate until the performance payments had been made. But he said there was nothing in cl 4.1(d) to exonerate Bathurst from the consequence of being in breach of contract if it did not pay the performance payment when it fell due.[55]

[71] The Judge referred to the evidence of Mr Hogan of L&M and Mr Bohannan of Bathurst (but who gave evidence for L&M) that an accommodation was reached orally (before the third amendment was entered), recognising that at that point it was not in anyone's interests that L&M treat Bathurst as being in default of payment. L&M had a first ranking security over the assets sold to Bathurst, but "did not have the resources or the inclination to take the assets back and re-market them".[56] The Judge went on:[57]

> I consider it most likely that in this context, when Ms McArthur was instructed to prepare the third amendment, she was given to understand a mutual expectation operating that non-payment would not be relied on as a default. That expectation was inconsistent with the terms of the ASP, but acknowledged by both parties as the way in which the commercial relationship had developed between completion of the ASP and completion of the third amendment.

[72] The Judge then considered Bathurst's submission that the words "[f]or the avoidance of doubt" in the third amendment indicated simply a clarification of the obvious rather than a fundamental change. The Judge did not accept that submission.[58] The Judge put it this way:[59]

> In this case, the doubt as perceived by the drafter was as to the difference between Bathurst's original contractual obligation to pay the first performance payment on shipment from the permit areas of 25,000 tonnes of coal (with the consequence that Bathurst would be in default if that obligation was not performed), and the informal assurances since completion of the ASP that

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55 High Court judgment, above n 1, at [121].
56 At [124].
57 At [125].
58 At [126].
59 At [126].

> L&M would work co-operatively with Bathurst to facilitate performance and would not insist on enforcement of its strict contractual entitlements.

[73] The Judge then went on to consider what he described as the "starkly different interpretations" as to how cl 3.10 would work.[60] L&M had asserted that the clause allowed Bathurst to defer payment of the US$40 million performance payment, so long as L&M was receiving royalties at the higher rate "on a reasonable level of production from the permit areas".[61] Bathurst's position, however was that there was no obligation on it to mine uneconomically, so circumstances could well arise where coal was not being sold and no royalties were paid. So long as Bathurst was not breaching its obligations under the royalty deed, it was free to continue to deny under cl 3.10 that non-payment of a performance payment amounted to an actionable breach of or default under the sale agreement.

[74] The Judge found that neither of the parties had addressed the contingency that mining operations might occur to such an extent that the first performance payment was triggered by the shipment from the permit areas of 25,000 tonnes of coal and then cease on a semi-permanent basis.[62] Bathurst, after all, had paid the first US$40 million price component via the deposit and settlement cash consideration. As the Judge put it, Bathurst's subsequent decision to place the mine in care and maintenance so that production ceased and no material level of royalties would be payable was an unforeseen contingency at the time of entry into the third amendment, at least from L&M's perspective.[63]

[75] The Judge went on to observe that the question was what the words used reasonably convey to a person appreciating the circumstances as they were at the time. L&M had not sought rectification of cl 3.10, for instance to provide for a reasonable level of production from the permit areas as a condition of the protection provided in the new clause.[64]

[76] As to meaning, the Judge concluded:

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60 At [132].
61 At [132].
62 At [135].
63 At [136].
64 At [139]. It had of course sought in the alternative to imply a term to that general effect: see Issue 3, below.

> [144] I interpret the reference to royalty payments being made under the royalty deed as convenient shorthand to describe the unquantified extent of payments required. It does not go further so that compliance with the royalty deed would inevitably entitle Bathurst to rely on cl 3.10 to deny what would otherwise be an actionable breach or default. What is contemplated is an alternative money flow to the payment of the performance payment. The quantum is at large, in that no minimum level of royalties is stipulated. However, it is reasonably to be interpreted as the level of royalties calculated in accordance with the royalty deed that become payable on a reasonable level of production from the permit areas.

[77] This, he found, to be "more consistent with the bargain as originally struck, and all the surrounding circumstances of the 2012 modification".[65]

Submissions

[78] Mr Hodder argued that cl 3.10, reinforced by context in the general objective background, meant that Bathurst had flexibility about the date of making the first performance payment provided it paid the higher (10 per cent) royalty rate "as and when due" under the royalty deed. And, said Mr Hodder, Bathurst had done that.

[79] In support of this submission Mr Hodder criticised the judgment for over-reliance on extrinsic evidence, and characterisation of the contract as relational in nature, requiring, if L&M were to accept the risk now realised, greater control over Bathurst's operations.

[80] A principal premise of Bathurst's reasoning on this issue was that prior to entry into the 2012 amendment, there was room for doubt as to when the first performance payment was payable. The contention made here was that the effect of cl 4.1(d) of the royalty deed was to permit deferral of payment of the first performance payment, provided the higher 10 per cent royalty level was paid.

[81] Mr Hodder submitted that the construction given by the Court to the 2012 amendment, in cl 3.10, was a "major departure" from objective interpretation, and instead an exercise in the "*implication* of a new and extraordinarily vague obligation". Nothing in the sale agreement or the 2012 amendment indicated a

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65 At [147].

"reasonable level of production" was required for the protective effect of cl 3.10 to continue. If it had been, that would have been made explicit.

Discussion

[82] We do not accept Bathurst's argument. While clever, it is commercially unrealistic, inconsistent with the context in which cl 3.10 was introduced, and at odds with the meaning the words would convey to an objective observer tasked with interpretation of the amendment. We therefore agree with the conclusion reached by the Judge, albeit for slightly different reasons (and which we shall therefore express in full). Our analysis moves from context to text.

[83] We start, first, with the commercial position before the amendment was mooted. That is simple enough: two payments (US$5 million and US$35 million) had been paid, and a further payment of US$40 million would be payable once 25,000 tonnes of coal had been extracted and transported from the permit areas. For that to have occurred, permits for the Escarpment Mine would have to be in place, along with sufficient funding to achieve that degree of commercial mining.

[84] Secondly, we do not accept Mr Hodder's submission that the sale agreement already permitted deferral of the first performance payment (provided increased royalties were paid). This argument was important, strategically, for Bathurst, because only that might explain, to an objective observer, why L&M would take the enormous risk inherent in Bathurst's interpretation. Bathurst says: no great risk, because no real change was made. But that premise is unsound.

[85] It may be observed that if the sale agreement already had that effect, then Bathurst would have no reason to be worried about the stock exchange, and nothing to notify it about. Bathurst's reasoning works backwards from the terms of the amendment. Reasoning instead in a forward direction, we start with the sale agreement itself. Having dealt with the meaning of the word "shipped", the meaning of the payment obligation in cl 3.4(a) is we think perfectly clear to an objective observer.[66] What is more, cl 9.7 preserves all remedies apart from cancellation in the

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[66] See [21] above.

event of non-payment. In short, L&M could sue at once when payment was not made. That right was unqualified.

[86] Mr Hodder, however, sought to inject doubt by reference to cl 4.1(d) of the royalty deed.[67] We accept that the two instruments must be read together, the deed forming an annexure to the sale agreement. But cl 4.1(d) of the royalty deed does not confer an option to defer the first performance payment in place of the unqualified obligation of Bathurst to pay in cl 3.4(a) and the unqualified right of L&M under cl 9.7 of the sale agreement to sue if Bathurst does not pay. Rather, cl 4.1(d), as its opening words make clear, simply clarifies the royalty rate in the event the premise for the rate in cl 4.1(a) — that there is a "First Payment Date", that is, a date on which payment in full of the first performance payment is made — does not occur.[68] In that case, the 10 per cent rate is payable down to the end of mining. But it is by no means an option, forestalling the express right in cl 9.7 of the sale agreement to sue for payment. *That* is why Bathurst was concerned about matters in late 2012, ahead of the first performance payment obligation being triggered; why it was worried about the prospective stock exchange announcement having to be made; and why it sought the amendment.

[87] We therefore agree with Dobson J that there was nothing in cl 4.1(d) to exonerate Bathurst from the consequence of being in breach of contract if it did not pay the performance payment when it fell due.[69]

[88] Thirdly, it follows in our view an objective observer would necessarily conclude that the 2012 amendment was intended to change — rather than clarify — rights under the sale agreement. It did so by suspending, conditionally, the otherwise unqualified right of L&M to sue under cl 9.7 if the performance payments were not made. The prospect of L&M exercising or retaining that right gave rise to the concern

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67 See [26] above.

68 The same is true of cl 4.1(e), which addresses what happens if there is not a "Second Payment Date" for the purposes of cl 4.1(b). It may be observed that these clauses are also preceded by the words "For the avoidance of doubt": see [26] above. Mr Hodder sought to place some reliance on their appearance in cl 3.10. But their presence does not mean what is being said is merely confirmatory, as cl 4.1(d) and (e) demonstrate.

69 High Court judgment, above n 1, at [121].

about the prospective stock exchange announcement, and therefore also to the amendment — which created a conditional suspension of the right to sue.

[89] Fourthly, the immediate question then is whether the effect of the amendment was to postpone an entitlement to a US$40 million payment to, instead, a higher 10 per cent royalty rate continuing on whatever level of mining and sales Bathurst might undertake. And so, if Bathurst changed its plans and put the Buller project into care and maintenance, L&M would be entitled only to receive nominal royalties. We do not accept that an objective observer would infer such a meaning from the language and context of the amendment. We set out why that is in the succeeding paragraphs of this discussion.

[90] Fifthly, as we noted earlier, the bargaining context in August 2012 involved the parties already being subject to binding obligations under the sale agreement. Clause 3.10 arose in the context of an amendment sought by Bathurst. The amendment sought was a concession by L&M. It involved, on its face, a conditional suspension of rights. The objective observer would infer that, had L&M been confronted in 2012 with a scenario in which only nominal royalties were payable instead of the first performance payment of US$40 million, it would have rejected the proposition out of hand. And, by the same token, the objective observer, understanding this bargaining context, would not think Bathurst could have achieved such a significant concession. It was supplicant to L&M, without negotiating strength — and gained the concession without material counter-concession, let alone consideration commensurate with the risk it says L&M took. It follows, objectively, that the concession achieved was something far less than it now asserts it gained. It was unlikely to have been intended to alter fundamentally the economic balance of the sale agreement.

[91] Sixthly, the new clause began with the words "[f]or the avoidance of doubt". An objective observer would not think those the words of revolution. What is being done, here, is of limited consequence. The clause goes on to create a conditional suspension of the remedial rights provided in cls 9.7 and 9.3(a) and (c) of the sale agreement only "for so long as the relevant royalty payments continue to be made". The critical question is what those words mean to an objective observer acquainted

with the context. Here, all that was sought was a concession against exercise of the remedial rights noted above. As noted, no counter-concession or other material consideration was given by Bathurst.[70] Nothing would suggest, to an objective observer, an entitlement to simply place a US$40 million debt on ice, indefinitely.

[92] Seventhly, we suggested in the course of argument that the amendment might have limited effect in a different sense. That is, that the amendment, providing that failure to make a performance payment was "not an actionable breach of or default under this Agreement", might be limited in scope to the specific remedies identified in cl 9.3 (cancellation being excluded of course by cl 9.7), but did not exclude a right of action in *debt*. While L&M adopted that argument, it had not pleaded it or presented its case in that manner. We accept Bathurst's subsequent submission that had that meaning been pleaded, it might have altered the admissible evidence led below. There are other difficulties with the argument. We therefore put it to one side.

[93] Eighthly, we consider that an objective observer appreciating the context and economic dynamics of the primary sale agreement would infer that the amendment proceeded on the shared assumption that continuing payment of royalties (only), at the higher rate, would have to compensate L&M for the delay in receiving US$40 million due and payable. And, that the suspension of L&M's cl 9.7 rights would only exist if royalty payments "continue". The objective observer would fix on the words "for so long as the relevant royalty payments continue to be made". What do *those* words mean?

[94] That textual formulation is not self-contained. Its meaning is not obvious from text alone. It requires interpretation. As we said earlier, that requires the objective observer to (1) bear in mind the contractual purpose, relative bargaining strengths, character of the parties and other context admissible for construction, and then (2) work out the meaning the agreement conveys, having regard to all that admissible context, and in the context of the issue now confronting the parties.[71]

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70 See, similarly, *Sunflower Services Ltd v Unisys New Zealand Ltd* [1997] 1 NZLR 385 (PC).
71 See [39] above.

[95] In this case, that observer would bear in mind at least four contextual points. First, that this is an amendment, and that the primary obligations were established already. Second, the provisions from the royalty deed that we identified at [28] and [29] above: that nothing would be done that would have the effect of defeating or reducing L&M's royalty entitlement, that it would satisfy the minimum work programme in respect of the permits, and, in particular, "conduct mining operations in accordance with good mining practice and with a view to maximisation of Coal sales at the best available price". Third, the contextual points made at [90] above as to consideration and relative bargaining strength. And, fourth, the shared assumption as to compensation for delay in payment noted at [93].

[96] We take the clear view that the observer would take the words "for so long as the relevant royalty payments continue to be made" to mean that the debt would not be payable so long as L&M continued to receive royalties from *continuing* mining and sales at a level not materially less than had resulted in the US$40 million payment being triggered in the first place. That would provide commercially realistic compensation to L&M for the delay in receipt of the performance payment. Otherwise, the agreement would have made no commercial sense at all from L&M's perspective. By contrast, the objective observer would not have thought the words were intended to enable Bathurst to (as we put it earlier) effectively place payment of a US$40 million debt on ice indefinitely, while mining ceased and merely nominal royalties only were paid in respect of sales from a stockpile, for so long as that stockpile remained.

[97] In context, the requirement that "relevant royalty payments continue to be made" is not met by merely nominal royalties from sales from a stockpile of coal left after mining has ceased. Any other interpretation would be devoid of commercial sense and cannot be what the words mean.

[98] Finally, we note Bathurst's complaint that, on this approach, the expression of the measure of royalty generation required is "extraordinarily vague". Even the Judge expressed it in slightly different ways in the course of his judgment: on a "reasonable

level [or volume] of production",[72] a "substantive volume of coal sales",[73] or "'substantive' levels of production".[74] We do not think the objection is sound. What is firm ground at least is that the "relevant royalty payments", on the continuation of which the proviso depends, reflect continuing mining and sales of the mined coal, and are not nominal.

[99] But in any event, vagueness is no friend to Bathurst. For if the proviso was ineffective for uncertainty, the amendment would fall away, and Bathurst would be no better off than if the amendment had not occurred. It would, in short, be liable for the payment in full as from September 2015.

[100] Exactly what measure of production was set by the words "relevant royalty payments continue to be made" might have been the subject of nice argument had Bathurst actually maintained commercial mining and paid L&M substantial royalties. In that event, and if the cooperative relationship then became frayed, an argument might have ensued as to whether the level achieved was sufficient.

[101] But in our view Bathurst gets nowhere near the level of production, and continuing royalty payments, that would entitle it to rely on cl 3.10. That in the end is the short answer to this issue.

Issue 3: Implied term alleged

[102] The implied term pleaded and contended for by L&M was this:

> … that once a substantial volume threshold in clause 3.4 has been met, in order to further defer payment of the deferred consideration comprising the corresponding Performance Payment, continued royalty payments cannot be notional, but must reflect the proceeds of ongoing mining and substantive coal sales, thereby providing commercial value for LMCH being denied receipt of a sum otherwise due and owing.

[103] The Judge was critical of that pleading, describing it as far more elaborate than necessary.[75] Whether or not that is so need not detain us. We have found the essence

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72 High Court judgment, above n 1, at [132] and [144].
73 At [158].
74 At [167].
75 At [158].

of the implication advanced to be embraced already by the express words "relevant royalty payments continue to be made" in cl 3.10. The implication of a term is unnecessary.

Summary and conclusion

[104] The sale agreement in this case provided for a performance payment of US$40 million to be made by Bathurst to L&M when Bathurst had "shipped" 25,000 tonnes of coal from the permit areas. We have held, in answering Issue 1, that this was unequivocally triggered once that tonnage was transported from the permit areas by road. It did not also need to be exported by ship.

[105] We held, also, that the unamended sale agreement did not permit Bathurst to unilaterally defer the performance payment and pay a greater royalty stream instead. Rather, L&M held an unqualified right to sue Bathurst for damages, debt or specific performance in the event of non-payment.

[106] In August 2012 the parties negotiated an amendment to the sale agreement. This qualified L&M's otherwise unqualified right to sue Bathurst in the event of non-payment. It suspended L&M's right to sue "for so long as the relevant royalty payments continue to be made". The amendment was expressed to be "[f]or the avoidance of doubt", implying a measure of practical and economic insignificance. No material counter-concession was given for it by Bathurst.

[107] Issue 2 required us to consider the meaning of that amendment. We have held that an objective observer would conclude that the conditional suspension of L&M's right to sue for non-payment would not apply where merely nominal royalties were paid on sales from a stockpile of coal left after mining has ceased. Those would not be the "relevant royalty payments", the continuation of which was required for suspension of the right to sue.

[108] Accordingly, L&M's right to sue Bathurst for the US$40 million debt was not suspended.

Result

[109] The appeal is dismissed.

[110] The appellants must pay the respondent costs for a complex appeal on a band B basis plus usual disbursements. We certify for second counsel.

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