

# WHAT WAS THAT THING YOU SAID? THE NZ SUPREME COURT'S VEXING *VECTOR GAS* DECISION

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## I WHAT IS IT WE ARE LOOKING FOR?

Our task in this themed issue is to identify the worst decision handed down by New Zealand's top court in the last quarter-century (and, presumably, defend our choice through some form of reasoned analysis). To accomplish this undertaking, we must resolve a number of preliminary matters. First of all, we need to specify the object of our inquiry. An immediate complicating factor is that before 1 January, 2004, the Judicial Committee of the Privy Council sat at the apex of New Zealand's judicial pyramid. Following that date, a newly formed domestic Supreme Court took up the role.<sup>1</sup> Consequently, we must choose whether to include in our pool of potential contenders those decisions made at 9 Downing Street, or limit it to the output of the still quite young domestic institution. Including the Privy Council's contribution to New Zealand jurisprudence would have the benefit of permitting cases such as *Buchanan v Jennings*<sup>2</sup> or *Bottrill v A*<sup>3</sup> to have a chance of grabbing the dubious honour at stake. However, insofar as choosing a 'worst decision' involves an element of criticism and condemnation of judicial practice, we would prefer to level this at judges deliberately appointed to oversee New Zealand's case law and responsible for that task alone.<sup>4</sup> In short, castigating a judicial body sitting some 18,000 kilometres distant for doing a bad job when deciding what New Zealand's law ought to be — a job its members undertook alongside a range of others, and no longer have to perform — seems a bit beside the point. So for that reason, we have decided to confine the range of potential 'worst decisions' to the 167 final judgments with reasons handed down by the New Zealand Supreme Court as of the end of 2011.

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<sup>1</sup> *Supreme Court Act 2003* (NZ).

<sup>2</sup> [2005] 2 All ER 273. For criticism of the reasoning underpinning this ruling, see James Allan, 'Parliamentary Privilege: Will the Empire Strike Back?' (2002) 20 *New Zealand Universities Law Review* 205. The Privileges Committee of the New Zealand House of Representatives has twice recommended that this decision be reversed by legislation; see Privileges Committee, *Final Report on the question of privilege referred 21 July 1998 concerning Buchanan v Jennings*, 1.17G, May 2005, 9; Privileges Committee, *Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders*, 1.17A, May 2009, 22.

<sup>3</sup> [2003] 2 NZLR 721 (PC). This is, to date, the sole Privy Council decision from New Zealand to be overruled by the Supreme Court; see *Couch v Attorney-General (No 2) (on appeal from Hobson v Attorney-General)* [2010] NZSC 27, [2010] 3 NZLR 149.

<sup>4</sup> See Supreme Court Act, 2003, s.3(1): 'The purpose of this Act is—

- (a) to establish within New Zealand a new court of final appeal comprising New Zealand judges—
  - (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
  - (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions.'

Having thus identified the eligible contenders, the next matter to decide is how to decide which of these is the 'worst'. Deciding how to decide this question involves formulating a set of evaluative criteria that can distinguish between 'good' and 'bad' examples of judicial practice. In some fields of human endeavour, ranking an outcome or achievement relative to others is relatively straightforward. So, for example, it is possible to say definitively that the All Blacks are better at rugby than the Wallabies as they have emerged victorious on 99 of the 146 occasions that the two teams have met on the field.<sup>5</sup> Similarly, we can say that the Tampa Bay Buccaneers of 1976-77 are the worst ever team to play in the National Football League, due to the 0-26 record they amassed over that period. Or, we can say that Usain Bolt is the best sprinter in modern history as the only man to hold both the 100 and 200 meter world records at the same time. (As to whether he is the 'greatest athlete to live', as he proclaimed himself to be,<sup>6</sup> is then a further question that can only be resolved by extensive alcohol-fuelled barroom debate.) Such statements confidently can be made because sports have an inbuilt means of determining a clear hierarchy of achievement: the very purpose of the enterprise is to produce an outcome where, according to their performance on the day under the particular rules of the game, one competitor or team is shown to be the best.<sup>7</sup> However, when we turn to assess the relative merits of court decisions, this evaluative process is not as straightforward. There is no preordained method of direct comparison inherent in the very practice of judicial decision-making that allows us to say that the judgment in *A v B* outperformed that in *C v D*, much less to anoint the court's decision in *Y v Z* as obviously the poorest example of the lot.<sup>8</sup> So if the act of rendering judgment does not permit us to measure a court's case-versus-case performance as we would a football team's or marathon runner's, we must develop and impose a means of evaluation that will permit us to achieve our goal.

At this point we could try and cheat a bit by adopting a shortcut method of establishing such a ranking through pointing to some general consensus amongst those involved in legal education or practice. So, for example, in the United States there exists a commonly accepted 'anticanon' of Supreme Court constitutional law decisions that 'embod[y] a set of propositions that all legitimate constitutional decisions must be prepared to refute'.<sup>9</sup> Everyone (or, nearly everyone)<sup>10</sup> involved in US constitutional law just knows that cases such as *Dred Scott v Sandford*,<sup>11</sup> *Plessy v Ferguson*,<sup>12</sup> *Lochner v New York*<sup>13</sup> and *Korematsu v United States*<sup>14</sup> represent grave judicial errors

<sup>5</sup> Of course, any retort that the Australian cricket team likewise is better than New Zealand's is proved false by the fact that the most recent test series between the two teams was split 1-1.

<sup>6</sup> Robin Scott-Elliot, "'I am the greatest athlete to live'" boasts Usain Bolt after 200 metres victory', *The Independent* (online), 10 August, 2012, <<http://www.independent.co.uk/sport/olympics/athletics/i-am-the-greatest-athlete-to-live-boasts-usain-bolt-after-200-metres-victory-8027332.html>>.

<sup>7</sup> Some may try to claim that irrespective of the score at the end of the game, one team nevertheless 'played better' and 'deserved to win', thus was 'the moral victor'. However, such arguments almost always come from supporters of the losing side who seek some measure of consolation in the face of their team's failure and may convincingly be refuted by telling them to 'read the scoreboard and weep, loser'.

<sup>8</sup> That is, so long as the members of the court really are 'judging' the issue before them. We exclude the possibility of cases where, for example, the court resolved the dispute based on what the judges had for breakfast, bribes paid by one of the parties, or fear of being shot by the government.

<sup>9</sup> Jamal Green, 'The Anticanon' (2011) 125 *Harvard Law Review* 379, 380. See also Richard E. Primus, 'Canon, Anti-Canon and Judicial Dissent' (1998) 48 *Duke Law Journal* 243.

<sup>10</sup> See below, n 18.

<sup>11</sup> 60 US (19 How) 393 (1857).

<sup>12</sup> 163 US 537 (1896).

<sup>13</sup> 198 US 45 (1905).

that are to be avoided in contemporary legal reasoning. Indeed, obtaining an understanding as to why these cases widely are considered to be so wrong is an integral part of learning how US Constitutional Law works. However, an appeal to consensus is unlikely to help in our present task.<sup>15</sup> For one thing, it takes a period of time for any general agreement over the merits (or lack of merits) of a judicial decision to develop. It is no accident that the most recent entry to the US's anticanon was handed down some 68 years ago. Where the time period at issue is a mere 25 years (as we are restricted to for present purposes), much less only the 8 years the New Zealand Supreme Court has been operational, there will not be the opportunity to develop a general acceptance within the broader legal community that the court got it completely, utterly wrong in some case or other. For another, it is not easy to explain exactly why a particular judicial decision comes generally to be regarded as *so* bad as to deserve its place amongst the ranks of the worst-of-the-worst. As Jack Balkin and Sanford Levinson note in the US context: 'Much of what is canonical [or anticanonical] is not the result of conscious planning, but of the serendipitous development of the ever-shifting contours of a culture, a discipline, or an interpretive community.'<sup>16</sup> Thus, it may be that those decisions most commonly identified as being exemplars of judicial error are not actually the very worst ones that the court has made.<sup>17</sup> It equally is possible to argue that a so-called anticanonical case was *correctly* decided, and that current common legal wisdom is in fact in error.<sup>18</sup>

## II JUDICIAL DECISION-MAKING, REASONS AND THE (ULTIMATELY FUTILE) SEARCH FOR CERTAINTY

If an appeal to consensus is unlikely to identify a worst decision by New Zealand's Supreme Court—and even if it did, that still would require us to explain *why* it is regarded as being the worst—then we need to get down to brass tacks. What makes a particular decision by a nation's highest court a 'bad' one? That question requires us to consider just what it is that a court, and in particular the nation's highest Court, is supposed to do. The obvious starting point for any answer to that inquiry is that courts exist to decide cases. A visitor from Mars (or, an ordinary member of the public, who likely will have just as little idea about what is going on) who happened to stumble into a courtroom would watch teams of people in funny robes walk into it, give a series of little speeches to another person (or group of people) sitting on a raised dais before them, and then retire to wait for that person (or group) to tell them who was right and who was not. That promise of a determinative judgment, in which the judge (or judges) tell the disputing parties who wins and who loses with the parties then

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<sup>14</sup> 323 US 214 (1944).

<sup>15</sup> Indeed, an attempt to elicit public nominations for a 'worst case' produced no less than thirteen separate candidates: see the comment thread at Andrew Geddis, 'Getting By With a Little Help From My Friends', <<http://www.pundit.co.nz/content/getting-by-with-a-little-help-from-my-friends>>.

<sup>16</sup> J.M. Balkin & Sanford Levinson, 'The Canons of Constitutional Law' (1998) 111 *Harvard Law Review* 963, 995.

<sup>17</sup> Consider, for example, *Buck v Bell*, 274 U.S. 200 (1927), in which the Supreme Court upheld the State of Virginia's policy of compulsory sterilisation of the 'feeble minded' on the basis that: 'It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.'

<sup>18</sup> As is attempted in David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (University of Chicago Press, 2011).

having to abide by that decision, is why the matter has come to trial in the first place. So if the parties to the case happened to have the misfortune of drawing a Justice Tatting to sit on it,<sup>19</sup> his declared inability to provide them with an answer to their dispute would produce a visibly baffled outcry that the court had 'failed to do its f\*cking job!'

However, while the primary function of the courts is to provide a decision to the parties appearing before it, obviously not just any old decision will do. If all that is wanted is a resolution to the dispute, there are lots of quicker, easier and cheaper ways to get one. So the fact an issue has come before a *court* instead of (say) a practitioner of ADR, a religious leader, or a local gangland boss indicates that the parties desire a particular *type* of resolution. The nature of that resolution can be discerned in the oath that all members of the judiciary are required to swear upon appointment: 'I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will.'<sup>20</sup> That is to say, the parties expect to receive an answer to their dispute from an individual with some expertise in legal matters who has considered the matter dispassionately and impartially, before reaching a conclusion through applying 'the laws and usages of New Zealand' to the issues involved. The quite considerable time, effort and money required to get a court to decide a matter is not expended simply to get an answer that is binding on all concerned, but rather to get an answer *of a particular sort*: one handed down by a knowledgeable and unbiased decision-maker that backs up the conclusion with reasons as to why it is the required *legal* outcome to the issues in contention.

These reasons why a court believes its particular decision is the required legal one serve a variety of different purposes, depending on the court in question. In all cases decided by all courts, the provision of reasons for a decision may reconcile the losing party to the fact they have not received the desired answer.<sup>21</sup> Of course, this acceptance may not happen in fact. A party on the wrong side of a judgment still may believe that the court made a mistake in deciding that the required legal outcome was that they must lose, or may even believe that the judge (or judges) had it in for them from the get go. But as a matter of human psychology, it is more likely that losing parties will be prepared to accept disappointment where they are shown that the impartial decision-maker has genuinely and in good faith considered the arguments they put forward, but concluded that 'the law' requires a result that goes against their interests. And where losing parties accept, even if only grudgingly, that they are not going to get the outcome they want, this better enables courts to operate as a means of dispute resolution. Simply put, it is more socially desirable to have a losing party willingly accede to the court's judgment on some matter than it is to force them to comply with it through the blunt hammer of contempt proceedings or the like. So with regard to the parties to the particular case in question, providing reasons for the court's judgment serves both an individual-respecting purpose (the court owes them an explanation of why the outcome must be what it is), as well as a system-benefitting purpose (it makes the court's job easier if people accept its decision).

<sup>19</sup> Tatting J was, of course, the member of the bench who could not decide what to decide in Lon Fuller's fictional 'The Case of the Speluncean Explorers', ending his tortured judgment with the statement: 'Since I have been wholly unable to resolve the doubts that beset me about the law of this case, I am with regret announcing a step that is, I believe, unprecedented in the history of this tribunal. I declare my withdrawal from the decision of this case.' See Lon L. Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

<sup>20</sup> *Oaths and Declarations Act 1957* (NZ), s 18.

<sup>21</sup> So Lord Devlin states that; 'The social service which the judge renders to the community is the removal of a sense of injustice.' Patrick Devlin, 'The Judge as Lawmaker' in Patrick Devlin, *The Judge* (Oxford University Press, 1981) 3.

Beyond the immediate parties to the case, providing reasons for the court's judgment has other system-benefitting purposes. A given court does not reason about and decide a case in isolation from the other courts in the judicial hierarchy. The system of appeals that operates within the judicial structure allows a higher court to scrutinise a lower court's decision, as well as the reasoning that produced the decision, and correct any errors that the higher court may believe have been made. The system-rule then is that the higher court's view of the correct legal outcome (based on its understanding of proper legal reasoning) trumps that of the lower courts.<sup>22</sup> A corollary to that system-rule is the principle of *stare decisis*—that lower courts are bound to accept and apply the majority reasoning of higher courts when deciding cases of a like nature. This understanding that 'like will be treated alike' is a part of the particularly 'legal' reasoning process that the courts-as-institutions are there to provide. Furthermore, the production of reasons by the courts as to why a particular outcome in a particular case is required as a matter of law then casts a shadow in which all future disputes lie. As New Zealand's Chief High Court Judge has observed: 'the product of our courts through published precedent is a set of rules which enables people and businesses to organise themselves and thus avoid conflict through a shared understanding of rights and duties. And ... it is also the backdrop against which disputes settle.'<sup>23</sup>

Consequently, the giving of reasons by a nation's *highest* Court fulfills a threefold function. As with all courts, these reasons tell the losing party (or parties) why the time, effort and money they have invested in a matter that has been taken through at least three different trials has not produced the outcome the ultimate loser wanted. The highest Court's reasons for either endorsing or overturning the decision of the lower courts on the matter then serve as a guide for all other courts in the land as to how future cases of a like nature ought to be resolved. Once the New Zealand Supreme Court states that the law as it applies to the particular case is such-and-such, then as far as other judges in lower courts are concerned, the law *is* such-and-such when it comes to future cases of a similar nature (at least, until they hear differently from Parliament or the Supreme Court). And given that the courts provide a backstop forum for settling conflict in situations where parties otherwise are either unable or unwilling to resolve their differences, the fact all courts will hold the law to be such-and-such in a certain type of case and thus require a particular outcome in analogous situations inevitably will shape how disputes get resolved. Indeed, it will define whether there even is a legal dispute between the parties in the first place.

From the above, we might then say that in order for a nation's highest Court to be doing its job properly—that is, for it to be making good decisions—it is necessary that it provide both a final resolution to the particular dispute that the parties have laid

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<sup>22</sup> This system-rule can then be justified on the basis that higher courts are better placed to make better decisions than are courts lower in the hierarchy. So Lord Bingham (as he then was) defended the role of the House of Lords (as it then was) as a superior forum for legal decision-making 'because of the considered judgments which will be before the members of the House when they come to consider the question, because of the high standard of argument which the House is usually privileged to enjoy, because of the academic commentary which the case is likely by that stage to have generated, and because of the varied experience which the five, occasionally seven, members of the constitution are likely to be able to contribute.' Tom Bingham, 'The Highest Court', in Tom Bingham, *Lives of the Law: Selected Essays and Speeches 2000-2010* (Oxford University Press, 2011) 169.

<sup>23</sup> Hon. Justice Helen Winkelmann, 'ADR and the Civil Justice System', speech to the AMINZ Conference, Wellington, 1 August 2011 <[http://www.aminz.org.nz/Story?Action=View&Story\\_id=1483](http://www.aminz.org.nz/Story?Action=View&Story_id=1483)>.

before it and reasons for why it believes its decision was required as a matter of law.<sup>24</sup> We hasten to note that while these are necessary conditions for a good decision, they are by no means sufficient. So it may be that a highest Court may decide and give copious reasons as to why the law requires that a black man be considered a white man's chattel, or why it is permissible to forcibly incarcerate all persons of a particular ethnic group for reasons of national security, or the like. Such judicial determinations are bad irrespective of the giving of reasons for why the outcome is required as a matter of law. However, we suggest that had the US Supreme Court, after hearing full argument on the matter, simply declared 'Dred Scott's appeal is denied' or 'Mr Korematsu will remain behind barbed wire' with no further explanation for its conclusion, its judgment in each case would have been an *even worse* example of judicial lawmaking. Equally, a judicial decision now universally regarded as praiseworthy and correct—*Brown v Board of Education of Topeka*,<sup>25</sup> say—would nevertheless fail to pass muster if all the Court had said was 'these 20 children must be allowed to attend a white-only school'. Although that substantive outcome would be just as admirable and morally desirable, the Court's failure to explain (both to the parties concerned and to the wider legal community) why it was legally necessary would mean it simply was not doing what it is there to do.

There is then a further wrinkle on the claim that the provision of a reasoned determination of the case at hand is a necessary prerequisite for a good judicial decision. What does it mean for 'a court'—in particular, a nation's highest Court—to give reasons for its decision? Certainly, a *per curiam* judgment contains the reasoning of the court by definition, irrespective of the decision's actual individual author. But where unanimity is not forthcoming, further system-rules are needed to deal with division of opinion amongst a multi-member body (such as the New Zealand Supreme Court's five-strong panel).<sup>26</sup> If the members of the court split on the outcome they believe the case requires, then its disposition is resolved on a majority-rules basis: the decision of three Supreme Court judges beats that of two (plus however many other lower court judges may have considered the matter).<sup>27</sup> Likewise, if a majority of judges agrees on the reasons for disposing of a case in a particular way, then its reasoning is deemed to be that of 'the Court'. Such rules for determining a case's *ratio decidendi* are a tenet of the common law that every first year law student is expected to have mastered by the time his or her final exams roll around. However, where the majority view on the case's particular disposition masks differences in the reasoning of the

<sup>24</sup> This requirement is emphasised by the *Supreme Court Act 2003* (NZ), s 16(1), which imposes a duty on the Court to give reasons for any refusal to give leave to appeal to it.

<sup>25</sup> 347 U.S. 483 (1954). Note, however, that the merits of the Supreme Court's decision in *Brown* were not universally appreciated at the time it was handed down. The future Chief Justice William Rehnquist, for example, wrote a memo for Justice Robert H. Jackson arguing that racial segregation on a 'separate but equal' basis was constitutionally permissible — a view he came to repudiate during Senate confirmation hearings in 1986. S. Hrg. 99-1067, *Hearings Before the Senate Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States* (July 29, 30, 31, and August 1, 1986).

<sup>26</sup> Assuming, of course, that the individual judges on the multi-member court are each permitted to hand down judgments on the case before them, rather than be required to join a common opinion. This latter requirement applied to the Judicial Committee of the Privy Council until 1966, in line with its role as advisor to the Sovereign. However, since that time a single dissenting judgment has been allowed alongside the majority decision of the Court; see *Judicial Committee (Dissenting Opinions) Order 1966* (SI 1966 No. 1100).

<sup>27</sup> Thus it is that the views of 3 Supreme Court Justices in *Brooker v Police*, [2007] NZSC 30, [2007] 3 NZLR 91 as to the meaning of 'disorderly behaviour' took precedent over the views of no less than 7 other judges who considered the matter on its journey through the court hierarchy.

individual members comprising that majority, then there may be no approach to the legal issues involved that is common to a majority. In such a case, all that can be said is that the Court found a particular outcome to be legally required in the particular set of circumstances before it. But the reason for this finding, and thus the legally required approach in circumstances that differ even slightly from the case at hand, remains indeterminate.

Two points need to be made at this juncture. First of all, we must remember that 'a court' at the highest level of a country's judicial pyramid still consists of a panel of individual judges. Each of those judges owes a personal duty to abide by the oath he or she swore upon taking office: to 'do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will'. Consequently, a Justice of the Supreme Court would be acting in bad faith if she or he were to decide the outcome of a case based solely upon a desire to present a unified face to the world, instead of her or his best understanding of the right resolution in light of the legal materials and arguments to hand. Fidelity to the judicial role, as encapsulated in the oath of office, actually requires that a Justice dissent from her or his colleagues in a situation where she or he believes that they are reaching a legally erroneous conclusion (provided always that the court in question permits such dissenting opinions to be voiced).<sup>28</sup> Second, the reasons for judgment handed down by a highest Court are Janus faced in nature. They are backward looking in that they review the law as it was prior to the Court considering the matter. They also are forward looking, insofar as they purport to lay a path along which future lower court decisions must travel. So in any case where a Supreme Court Justice is required to 'apply the law' to a particular case, she or he not only has to decide whether the law as it currently stands is as it should be, but also what track the law henceforth should take. Is it better to join with colleagues in clearly blazing a single trail for others to follow, or to strike out on one's own in the hope that the alternate path's merits eventually will persuade others to follow?

Taking these points into account, some measure of indeterminacy is an inescapable feature of a common law system that permits individual judges to render judgment on particular cases. Indeed, as any first-year law student quickly discovers, a large part of 'learning the law' involves coming to terms with the unsettling fact that a court's decision on a matter can create just as many questions and uncertainties as it purportedly resolves. Nevertheless, there remains a tension between the individual responsibility that a judge may feel she or he has to decide a case in the right way (both for the individual parties and for the future development of the law) and the system-role of a highest Court to give guidance as to what is legally required in analogous situations. That tension then needs a balanced resolution. A judge ought not to try and avoid it by simply saying in every case 'I'll go along with whatever a majority of my colleagues says' (or, even, 'I'll go along with whatever Justice X says'). To do so would be an abdication of the judicial role. But equally, a Supreme Court Justice who insists on having her or his individual say on every single case without trying to identify any common ground with her or his colleagues also is failing to perform her or his role properly. Supreme Court Justices are not members of the academy, whose opinion on legal matters occasionally may be mildly interesting (and even less occasionally persuasive) to a reader. They are part of the apex institution in the judicial hierarchy, given a custodial role over large parts of the nation's laws. They therefore owe a collective duty to the nation, wherever possible, to make that law clear and predictable in its application.<sup>29</sup>

<sup>28</sup> John Adler, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) *Oxford Journal of Legal Studies* 20, 221 at 227-33.

<sup>29</sup> Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 42-46.

Once the issue becomes one of reconciling individual duty and collective responsibility, then it is possible to critique the Court—in reality, the various members of the Court—for failing to properly strike that balance in a given case. That is to say, even if the individual Supreme Court Justices do their best to decide a case according to the laws and usages of New Zealand and provide reasons for why they believe the outcome is legally required, the fact that their various judgments fail to provide a majority position represents a failure of judicial craft. Such criticism must, of course, go beyond simply complaining ‘the decision leaves the law in an indeterminate state’. As noted above, some indeterminacy is an unavoidable feature of a common law system in which individual judges are permitted to give judgment on particular cases. It must rather be that the members of the Court have somehow failed properly to recognise that institution’s purpose in setting out the correct legal approach, either by introducing uncertainty into the law where it is not necessary to do so in order to resolve the case at hand, or by failing adequately to value future legal certainty as a goal when resolving the case at hand. That failure then means that the individual judges concerned have not fulfilled their role as *Supreme Court* judges. And it is on this basis that we (finally) turn to our chosen nominee for the Supreme Court’s worst decision, *Vector Gas Ltd v Bay of Plenty Energy Ltd*.<sup>30</sup>

### III WHAT WAS *VECTOR GAS* ALL ABOUT?

Vector (NGC)<sup>31</sup> supplied gas to Bay of Plenty Energy (BoPE) pursuant to a contract formed in 1995 that was due to expire in 2006. However, in 2004, faced with a depleting source, it gave notice to terminate its supply contract with BoPE. BoPE disputed the validity of the termination and threatened to seek an interim injunction requiring NGC to continue supplying gas under the 1995 contract. The parties then entered into negotiations for an interim supply agreement pending resolution of the termination dispute. The resultant agreement provided that NGC would continue to supply gas based on the terms of the 1995 agreement but should BoPE lose its challenge to the contract’s termination, BoPE would pay to NGC the difference between the price set out in the 1995 contract and ‘\$6.50 per gigajoule’. BoPE was indeed unsuccessful in its proceedings against NGC, whereupon another dispute arose over the amount payable under the interim agreement. The issue for the Court was whether the agreed upon price of \$6.50 per gigajoule was inclusive or exclusive of the cost of transmitting the gas to BoPE. At stake were \$3 million of transmission costs that each party sought to lay at the door of the other. Hence the immediate argument between the parties revolved around the correct interpretation of the interim agreement, which in turn gave rise to important questions about the objective of contract interpretation and the admissible sources of evidence to assist in the task of interpretation.

In the end, the Supreme Court had no difficulty resolving the immediate point of contention. It ruled unanimously that the proper understanding of the parties’ intentions when making the interim agreement was that the price was exclusive of transmission costs, meaning that BoPE was required to pay those in addition to \$6.50 per gigajoule. However, while the Court was unified as to the parties’ respective legal rights and obligations, the reason for its decision was less clear. Five separate judgments were issued, with all five Judges taking different routes to reach the same

<sup>30</sup> [2010] NZSC 5, [2010] 2 NZLR 444.

<sup>31</sup> Vector was then known as Natural Gas Corporation (NGC) and is referred to as such throughout the Supreme Court’s judgment. For ease of use, we will also refer to Vector as NGC.

outcome. It is this multiplicity of legal approaches that leads us to select this case as being the worst decision that the Supreme Court has handed down in its first 8 years of existence. In a nutshell, our criticism of the Court is directed at the unnecessary confusion resulting from its failure to provide a clear majority position on the deeper issues relating to contractual interpretation in a situation where it was not strictly necessary to address those issues in order to render a judgment in the case. We are not concerned critically to analyse the substance of each judgment and to express a view on which, if any, of the approaches should be considered the right one doctrinally.<sup>32</sup> Rather, our claim is that the five members of the Court ought to have done a better job of looking for common ground as to *why* the contract ought to be interpreted in NGC's favour, for the benefit of the commercial community and its legal advisors and for the ongoing clarity and coherency of contract law.

In order to demonstrate that this was not achieved and yet could have been, it is necessary to start with a brief description of the principles of contract interpretation as they were understood in New Zealand prior to *Vector Gas*. We do that before proceeding to consider the facts of the case and the individual judgments in more detail.

#### A *Contractual Interpretation before Vector Gas*

Were this an article purely devoted to principles of contract interpretation, much more could be said about the development of the law in this area. However, for present purposes only a brief outline of the principles as they were understood to be prior to *Vector Gas* is necessary. We provide this purely to illustrate why, if the Court really felt it necessary to depart from these settled matters of law, its members ought to have tried harder to find a common basis for doing so.

When NGC and BoPE brought their dispute before the courts, Lord Hoffmann's speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,<sup>33</sup> as adopted by the Court of Appeal in *Boat Park Ltd v Hutchinson*,<sup>34</sup> represented the touchstone for the principles of interpretation employed to determine the meaning of contractual terms in New Zealand. The principles are as follows:

- (1) Interpretation is the ascertainment of the meaning that the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- (2) The background (or 'matrix of fact') is anything reasonably available to the parties and includes absolutely anything that would have affected the way in which a reasonable man would understand the language of the document.
- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent (which are admissible only in an action for rectification), for reasons of practical policy.

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<sup>32</sup> For a very detailed critical analysis of the judgments, see David McLauchlan, 'Contract Interpretation in the Supreme Court – Easy Case, Hard Law?' (2010) 16 *New Zealand Business Law Quarterly* 229.

<sup>33</sup> [1998] 1 WLR 896 (HL).

<sup>34</sup> [1999] 2 NZLR 74.

(4) The meaning of a document is not the same thing as the meaning of its words. The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' is not absolute. While we do not easily accept that people have made linguistic mistakes, if it is clear from the background that something has gone wrong with the language, the court will not attribute to the parties an intention that they plainly could not have had. Consideration of business commonsense will be relevant.

These five principles articulated a shift away from a conservative, literal approach to contractual interpretation that concerned itself with identifying and applying the plain or ordinary meaning of the words, without reference to context or the parties' knowledge and intentions. Traditionally, departure from that literal approach to interpretation was only justified in exceptional circumstances such as where the ordinary meaning could be replaced by a technical meaning arising from trade usage, for example. The alternative interpretative approach summarised by Lord Hoffmann instead represented a contextual understanding of the meaning of words, objectively assessed from the standpoint of the reasonable person armed with knowledge of the background of the contract as understood by both parties.

This contextual approach therefore holds that a contract's factual background is always admissible as an aid to interpretation. However, a particular point of contention within the contextual approach is the role played by both the parties' prior negotiations and their conduct subsequent to the formation of the contract. In Lord Hoffmann's third principle, prior negotiations were declared to be inadmissible for reasons of 'policy': allowing admission of prior negotiations would result in additional delay, expense and uncertainty and would be unfair to third parties who rely on the contract but who cannot be expected to know the content of the parties' prior negotiations. In a more recent case, the House of Lords revisited this issue and affirmed the exclusionary rule in relation to prior negotiations, as well as to the contracting parties' subsequent conduct.<sup>35</sup>

However, building upon the widespread acceptance and application of Lord Hoffman's principles in New Zealand, a majority of the New Zealand Supreme Court had ruled in 2008 in *Gibbons Holdings Ltd v Wholesale Distributors Ltd*<sup>36</sup> that evidence of the parties' subsequent conduct is admissible when seeking to give a contract its proper meaning. With this move, the Supreme Court appeared set on developing an even broader contextual approach to contract interpretation. Certainly, the majority's reasoning in *Gibbons Holdings* suggested that *any* background evidence that would help a reasonable person understand what the parties that used the words meant by them was relevant to the question of the contract's interpretation, whether arising before or after the contract was formed. And if there were no valid reasons of policy or pragmatism to prevent recourse to subsequent conduct in *Gibbons Holdings*, it was entirely foreseeable that the Supreme Court would also allow admission of evidence of prior negotiations when given the opportunity to do so.<sup>37</sup>

Consequently, at the time the *Vector Gas* case began to wind its way through the courts, the legal community understood New Zealand's fundamental approach to

<sup>35</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

<sup>36</sup> [2008] 1 NZLR 277.

<sup>37</sup> David McLauchlan, 'Interpretation and Rectification: Lord Hoffmann's Last Stand' (2009) *New Zealand Law Review* 431, 453.

contractual interpretation to be contextual in nature (and increasingly so). Should the Supreme Court come to consider the question whether prior negotiations ought to be admissible when interpreting a contract, the two options open to it appeared to be either to remain consistent with its approach in *Gibbons Holdings* and make prior negotiations admissible; or effectively to backtrack on that approach by adopting the House of Lords' more recent decision affirming exclusion of both prior negotiations and subsequent conduct. *Vector Gas* presented the Court with a potential opportunity to resolve the matter.

### B *The facts of Vector Gas in more detail*

Understanding why prior negotiations were a potential issue in *Vector Gas* requires a more detailed description of its facts. The price for gas established under the original 1995 contract included within it the cost of transmission, known as a bundled rate within the industry. Following NGC's notice of termination in August 2004, BoPE proposed arbitration.<sup>38</sup> NGC confirmed its intention to terminate and suggested a replacement agreement. BoPE intimated it would seek an injunction preventing the termination. On 24 September, BoPE requested by letter advice on the price NGC would supply gas on an interim basis. By letter dated 28 September, NGC responded with an offer of two pricing options and made it clear that as transmission costs had not been included, a meeting would be required to discuss transmission arrangements. The first of the price options was supply of gas at \$6.50 per gigajoule through to the end of the 1995 contract term.

BoPE rejected the offer by letter on 5 October because of 'the severity of the price discrepancy which they indicate' and advised that court proceedings disputing the termination were about to be issued. BoPE noted that NGC's previous letter confirmed that it had gas available to supply and the price of that gas was \$6.50 per gigajoule. It proposed that pending resolution of the proceedings, NGC should agree to supply gas 'on the basis of the [1995] Agreement' and BoPE would undertake to file the proceeding by 31 October and, if it was discontinued or unsuccessful, BoPE would pay NGC 'for each GJ supplied, the difference between the Agreement price and \$6.50 (or the current market price, whichever is the lower), plus interest.' All of this, it said, was to be done in lieu of an application by it for interim injunctive relief.

NGC responded on 8 October that it would continue to supply gas on two conditions: first, BoPE must file its proceeding on or before 31 October, and, secondly, in the event BoPE was unsuccessful or withdrew, BoPE would pay to NGC 'for each GJ supplied, the difference between the price set out in the Agreement and \$6.50 per GJ'. BoPE responded on 15 October accepting these terms, subject to two uncontentious and irrelevant changes. On the same day, NGC responded by facsimile, accepting the changes and stating that: 'for the avoidance of doubt, the terms of the proposal are set out in full below'. The section that resulted in all the later litigation read as follows:

3. Without prejudice to its position, NGC is prepared to agree to continue to supply gas based on the terms of the Agreement for Supply of Gas dated 10 October 1995 ('the Agreement') pending determination of BoPE's proceeding, or 30 June 2006, whichever is the earlier, provided that BoPE undertakes to:
  - 3.1 file that proceeding on or before 31 October 2004; and

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<sup>38</sup> The parties' respective legal advisors conducted all the correspondence described herein.

- 3.2 in the event that BoPE is unsuccessful in, or withdraws, that proceeding, pay NGC on demand, for each GJ supplied, the difference between the price set out in the Agreement and \$6.50 per GJ, plus interest at the Interest Rate set out in the Agreement ...

BoPE confirmed its agreement on the same day. However, later realising that the interim agreement as it was set out in the 15 October facsimile did not expressly provide for separate transmission costs, NGC's lawyers wrote to BoPE on 20 October seeking an amended undertaking which clarified that the interim agreement was indeed exclusive of transmission costs. It noted that this was 'a slight change' from the 1995 Agreement pricing structure, 'but is consistent with the terms of NGC's offer of [27] September 2004 on which the proposal is based'. BoPE refused to provide such an undertaking and in the High Court termination proceedings, NGC counter-claimed for a declaration that the correct rate under the interim agreement was \$6.50 plus transmission costs.

On the issue of termination, the High Court ruled that NGC had validly terminated the 1995 contract.<sup>39</sup> The Court of Appeal upheld this aspect of the case<sup>40</sup> and the Supreme Court refused BoPE leave to appeal on it.<sup>41</sup> On the issue of price, the High Court found that the interim agreement price was exclusive of transmission costs. This was overturned by the Court of Appeal, which refused to consider any correspondence before the 8 October letter on the basis that this was 'a wholly new proposal'.<sup>42</sup> The 15 October letter containing the interim agreement was clear that the price is the price as per the 1995 Agreement: a bundled price inclusive of a transmission charge.<sup>43</sup> There was thus no need to consider the prior negotiations. The Supreme Court granted leave to appeal the interim agreement price issue. All members of the Supreme Court accepted that the chain of correspondence showed a shared understanding that the price of \$6.50 was exclusive of transmission.<sup>44</sup> But, was this correspondence recording the parties' prior negotiations admissible?

### C *The Judgments in the Supreme Court*

Although the Supreme Court was unanimous in finding that the \$6.50 price was exclusive of transmission costs and that the prior negotiations were relevant to reaching this conclusion, the five Judges' routes to this conclusion varied considerably.

#### 1 *Blanchard and Gault JJ*

Blanchard J (with whom Gault J concurred<sup>45</sup>) applied the existing principles of contract interpretation to reach his decision in a fairly orthodox manner.<sup>46</sup> To

<sup>39</sup> *Bay of Plenty Energy Ltd v NGC New Zealand Ltd* HC Wellington, CIV-2004-485-2287, 1 February 2006, Harrison J.

<sup>40</sup> *Bay of Plenty Energy Ltd v Vector Gas Ltd* [2008] NZCA 338.

<sup>41</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2008] NZSC 109.

<sup>42</sup> *Bay of Plenty Energy Ltd v Vector Gas Ltd* [2008] NZCA 338, [91].

<sup>43</sup> *Ibid*, [92].

<sup>44</sup> *Ibid*, Blanchard J at [15] (Gault J concurring at [151]); Tipping J at [47]; McGrath J at [93]; Wilson J at [142].

<sup>45</sup> At [151]. However, Gault J also suggested another route to resolve the dispute, quite apart from the principles of contract interpretation: the contract should not be treated as a formal written document but instead as an agreement whose terms are reached progressively by correspondence – effectively as an extended offer and acceptance exercise. The only other Judge to mention something similar was Tipping J and only in his criticism of the Court of Appeal taking as its starting point correspondence that came mid-way through the

determine the meaning of a term, the ordinary meaning is the starting point but reference can be had to the background whether or not there is an ambiguity.<sup>47</sup> The inquiry therefore began with the reference to the terms of the 1995 contract contained within the interim contract itself and, as the Court of Appeal had ruled, this suggested the price was inclusive of transmission costs as it was in the 1995 contract.<sup>48</sup> However, consideration of the surrounding context showed otherwise. The interim agreement was formed pending resolution of a larger supply dispute: 'the interim agreement was plainly a proxy for what the Court would almost inevitably require from BoPE if it were to grant an interim injunction restraining NGC from terminating supply'.<sup>49</sup> Without the interim agreement, BoPE would have to give an undertaking to meet NGC's loss, such loss being the difference between the 1995 contract rate and the market rate. The market rate at the time of the interim contract was just over \$6.50 exclusive of transmission costs—meaning that if \$6.50 was considered to be an inclusive price, the gas-only price was \$4.64 per gigajoule and NGC was committing itself to an entirely avoidable loss. Given this context, Blanchard J ruled that it would be so commercially absurd for the price to have been inclusive of transmission costs that the parties could not reasonably be supposed to have intended that meaning.<sup>50</sup>

His Honour went on to say that his conclusion was reinforced by reference to the prior negotiations that showed the parties had mutually 'put the question of transmission costs to one side'.<sup>51</sup> In Blanchard J's view, recourse to the parties' correspondence was available under an existing exception to the exclusionary rule that allows such evidence in order to identify the subject matter of the contract.<sup>52</sup> Hence there was no need to consider whether the general rule excluding prior negotiations required amendment or rejection, and the question was expressly left for another day.<sup>53</sup>

## 2 *Wilson J*

Wilson J offered an exposition on the principles of contractual interpretation that appears significantly different from the previously established position, in that it is at once both more restrictive and broader than the existing law. His Honour began with a preference for the plain and ordinary meaning of the words used in a contract, but where there is ambiguity or the ordinary meaning makes no commercial sense, then prior negotiations are admissible to establish what the parties actually intended.

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negotiation process (at [49]): 'The effect of the Court of Appeal's approach was to draw a line between what was in effect offer and acceptance. That, with respect, represents a most unusual way of approaching the ambit of correspondence leading up to formation of a contract.'

<sup>46</sup> Apart from his use of the subject matter exception to the exclusionary rule. See below, n 52.

<sup>47</sup> *Ibid* [4]. Note, in respect to whether ambiguity is a prerequisite for resorting to context, the Australian approach is at odds with English and New Zealand authorities: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

<sup>48</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2008] NZSC 109, [5].

<sup>49</sup> *Ibid*, [10].

<sup>50</sup> *Ibid*, [8]; [11].

<sup>51</sup> *Ibid*, [15].

<sup>52</sup> It is arguable that Blanchard J adopted a very wide view of what counts as subject matter given the dispute was not about the gas but about its price. His Honour's response to this objection was that the issue was whether the contract dealt with supply of gas or merely with gas only [14]. If this is right, and subject matter can be understood so widely, it could be argued that effectively the exception to the exclusionary rule is big enough to render the rule useless. See further McLauchlan, above n 32, 239.

<sup>53</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2008] NZSC 109, [14].

I think that it is not necessary, whenever construing a contract, to go outside the contract so as to ascertain the meaning which the document would convey to a reasonable person with all the background knowledge available to the parties. To the contrary, the Court should I believe go beyond the contract itself only to resolve a relevant ambiguity or for the purpose of addressing issues of commercial sense or estoppel.<sup>54</sup>

Wilson J thus appeared to take a very restrictive approach to contractual interpretation where ambiguity or commercial nonsense is not an issue, while at the same time his exceptions allow for a very wide range of admissible evidence. Wilson J went so far as to say, provided an ambiguity is present, 'the time has come to remove in this country the barrier imposed' by the exclusionary rule.<sup>55</sup>

Applying this approach to the immediate case, Wilson J ruled that on the face of the contract there was no ambiguity given the reference to the 1995 agreement, which indicated the price was a bundled rate.<sup>56</sup> However, given the background knowledge already referred to above in the discussion of Blanchard J's judgment, 'it would have defied commercial sense for NGC to have contracted on those terms, and BoPE could not reasonably have thought that NGC would be prepared to do so'.<sup>57</sup> Consequently, Wilson J ruled that the parties must have intended that the price was to be exclusive of transmission costs. His Honour also ruled, in the alternative, that BoPE was estopped from relying on the plain meaning of the contract because the correspondence showed a common understanding between the parties that \$6.50 excluded transmission costs.<sup>58</sup> It was only in relation to this estoppel ground that reference was had to the parties' prior negotiations.

### 3 *Tipping J*

The most liberal judgment regarding principles of contract interpretation was delivered by Tipping J. Starting with the purpose of contract interpretation as being the identification of the meaning that a reasonable and properly informed person would think the parties intended their words to bear,<sup>59</sup> his Honour stated that 'context is always a necessary ingredient in ascertaining meaning'<sup>60</sup> and thus an ambiguity is not required in order to have recourse outside of the document.<sup>61</sup> Prior negotiations are admissible where they are relevant in 'establish[ing] a fact or circumstance capable of demonstrating objectively what meaning both parties intended their words to bear'.<sup>62</sup>

Having ruled that prior negotiations are available as interpretation aids, Tipping J then began his analysis of the case before him by identifying the context in which the interim agreement was formed and in which the prior negotiation evidence should be considered. The contract was a commercial substitute for an undertaking to pay the market rate that BoPE would have to have given to secure an interim injunction.<sup>63</sup> In that commercial context, it made sense that the price must have excluded transmission

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<sup>54</sup> Ibid, [127].

<sup>55</sup> Ibid [122].

<sup>56</sup> Ibid [134], [135].

<sup>57</sup> Ibid [137].

<sup>58</sup> Ibid [140]-[144].

<sup>59</sup> Ibid [21].

<sup>60</sup> Ibid [23].

<sup>61</sup> Ibid [22].

<sup>62</sup> Ibid [31].

<sup>63</sup> Ibid [38]-[39].

costs as the market rate did.<sup>64</sup> This was reinforced by the prior negotiation evidence, which showed the parties agreed that the price did not include transmission costs.<sup>65</sup> Alternatively, given that the parties were agreed on the meaning in their correspondence prior to formalising the interim contract, Tipping J ruled that NGC could raise an estoppel.<sup>66</sup>

#### 4 *McGrath J*

Of all of the judges, McGrath J took the strictest approach to interpretation and his judgment appears to place him closer to the traditional literal meaning camp than the other Judges: the interpretation of contracts is not concerned with the intention of the parties but with the meaning of the words evident to a reasonable person.<sup>67</sup> His Honour did, however, accept that determining the meaning of language requires an awareness of context<sup>68</sup> that allows for evidence of relevant background facts known to the parties.<sup>69</sup> This does not, however, include pre-contractual negotiations, which are generally inadmissible because of their subjective nature, subject to already established exceptions.<sup>70</sup> In application, his Honour accepted that for NGC to agree to \$6.50 including transmission costs 'would be so extraordinary that it would flout business commonsense. The background circumstances known to the parties and the purpose of the interim agreement together give a strong indication that something went wrong with the language used'.<sup>71</sup> But the 'something wrong' in the contract could not be corrected by reference to the parties' correspondence.<sup>72</sup> Instead, his Honour ruled that BoPE was estopped from relying on the plain meaning of the contract because the correspondence showed a common understanding between the parties that \$6.50 excluded transmission costs.<sup>73</sup>

#### D *What does Vector Gas mean?*

As noted above, *Vector Gas* produced an overwhelmingly clear result for the immediate parties to the case—all five Judges ruled that BoPE must pay for the transmission costs in addition to the contract price. There can be no complaint that the Supreme Court failed to do its job in respect of designating a winner and a loser in the immediate case. But *why* was the contract interpreted so that '\$6.50 per gigajoule' meant '\$6.50 per gigajoule *exclusive of transmission costs*'? And what does the answer to the previous question tell us about how contracts should be (and, therefore, will be) interpreted in New Zealand? The fact that these twin queries still cannot be answered with any certainty in the wake of the Supreme Court's decision is the primary problem with *Vector Gas* and the reason we have nominated it as the Court's worst case.

Blanchard J (and Gault J), relying on the context in which the interim agreement arose, ruled that the correct meaning was the only one that made commercial sense. Wilson and Tipping JJ agreed but also reached the same outcome relying on estoppel. McGrath J too agreed that only one meaning was consistent with commercial common

<sup>64</sup> Ibid [46].

<sup>65</sup> Ibid [47].

<sup>66</sup> Ibid [48].

<sup>67</sup> Ibid [76] and [77].

<sup>68</sup> Ibid [57].

<sup>69</sup> Ibid [73].

<sup>70</sup> See, particularly ibid [76].

<sup>71</sup> Ibid [82].

<sup>72</sup> McGrath J rejected the applicability of the subject matter exception, saying that the subject matter was gas, while the problem needing resolution was price, at [83].

<sup>73</sup> Ibid [93].

sense but it is not clear from his reasoning that this was part of his ratio or simply a reason to look for a solution, which he then found in estoppel.<sup>74</sup> Consequently, at least four of the five Judges resolved the case by reference to commercial common sense in light of the general context in which the interim agreement arose. This meant that none of the four then really needed to resort to the prior negotiations—an interpretation of the price as being exclusive of transmission costs was the only one that would fit with the overall purpose of the contract, irrespective of the discussions between the parties. Nevertheless, they proceeded to admit the prior negotiations upon different conditions that cannot be reconciled with each other. Blanchard and Gault JJ allowed them under a very wide understanding of the subject-matter exception to the exclusionary rule; Tipping J allowed them with no caveat at all;<sup>75</sup> and Wilson J allowed them only when the relevant term in question is ambiguous or where the ordinary meaning makes no commercial sense.

The result is a great deal of confusion about the conditions for admissibility of prior negotiations in New Zealand. This confusion, along with the attendant uncertainty it creates for those trying to ascertain their legal rights and obligations, has attracted criticism from academics.<sup>76</sup>

[Lower courts in New Zealand] will probably conclude, with some justification, that the law of contract interpretation has been left in a state of disarray. Why, they might ask, was it necessary to deliver five separate judgments, especially given that all were agreed that Vector's appeal should be allowed? Is the law of contract interpretation, which is one of the most practically important areas of commercial law, really so difficult and contentious that it could not reasonably be expected that the Judges would get together and prevent more of a uniform view and thus fulfil the Court's primary duty to state and clarify the law for the benefit of the lower courts, the profession and through them the commercial community?<sup>77</sup>

Among practitioners actually concerned with advising clients on what their contracts with others might mean, there also has been debate about what the case stands for and whether the court should have done more (or less). Some argue that given the lack of any majority ratio on the question of the admissibility of prior negotiations, *Vector Gas* leaves the law unchanged.<sup>78</sup> Others claim that there is 'now strong authority that pre-contractual negotiations are admissible'.<sup>79</sup> And the debate continues over the competing interests of certainty in contracting and giving effect to the parties' bargain.<sup>80</sup>

<sup>74</sup> See McLauchlan, above n 32, 252.

<sup>75</sup> His requirement that any subjective content of prior negotiations cannot be admissible is a corollary of the objective approach to contractual interpretation held in common by all of the Judges and by most contract lawyers.

<sup>76</sup> McLauchlan, above n 32; Mark Henaghan, 'The Changes to Final Appeals in New Zealand Since the Creation of the New Zealand Supreme Court' (2011) 12 *Otago Law Review* 579, 586-589.

<sup>77</sup> See McLauchlan, *ibid* at 265.

<sup>78</sup> Brent O'Callahan, 'Transactions' (2010) *New Zealand Law Journal* 69; 'Contract Interpretation' (2010) *New Zealand Law Journal* 137; Lisa Tat 'A Timely Reminder of the Importance of Careful Drafting' (Bell Gully Commercial Quarterly, 2010) <[www.bellgully.com/newsletters/18corporate/commercial\\_1.asp](http://www.bellgully.com/newsletters/18corporate/commercial_1.asp)>.

<sup>79</sup> Jeremy Johnson, 'Contract: missed opportunity?' (2010) *New Zealand Law Journal* 50.

<sup>80</sup> C Hall 'Vector Gas – An Unwelcome Decision' (2010) 138 *NZ Lawyer* (11 June 2010) at 23; Martin Taylor 'Vector Gas – What Does It Mean?' (2010) 134 *NZ Lawyer* (16 April 2010) at 16-17; Martin Taylor, 'Certainty versus correctness after Vector Gas' *NZ Lawyer extra* (30 July 2010, Edition 7) <<http://www.nzlawyermagazine.co.nz/NZLawyerextraarchive/Bulletin7/extra7F3/tabid/24>

The varying responses of the lower courts to *Vector Gas* also demonstrate the problems caused by a lack of a clear steer from the nation's highest court. Some courts have described *Vector Gas* as mere confirmation by the Supreme Court of the principles from *ICS*.<sup>81</sup> Some cite *Vector Gas* for general statements of the objective of interpretation without making any reference to the issue of prior negotiations.<sup>82</sup> Some courts appear prepared to more readily consider prior negotiations and subsequent conduct since *Vector Gas*.<sup>83</sup> And in many cases the lower courts have resolved the divergent approaches taken in the Supreme Court by simply adopting one of the judgments and ignoring the rest, with Tipping J's judgment appearing to have attracted the greatest following.<sup>84</sup> Finally, in some situations it could be said that the implications of *Vector Gas* are being ignored altogether.<sup>85</sup>

What makes this confusion all the worse is that discussion about admissibility of prior negotiations was not strictly necessary to resolve the case in the first place. It would have been consistent with the law of contract interpretation as it stood prior to *Vector Gas* to decide that the price of \$6.50 was exclusive of transmission costs on the basis that this was the only meaning that a reasonable observer could have concluded the parties intended, given the commercial background to their bargain. The point is encapsulated in the fifth *Investor Compensation Scheme* principle:

While we do not easily accept that people have made linguistic mistakes, if it is clear from the background that something has gone wrong with the language, the court will not attribute to the parties an intention that they plainly could not have had. Consideration of business common sense will be relevant.

Given the very wide gap between the market price-per-kilojoule of gas and the amount NGC would receive per kilojoule if the \$6.50 price was inclusive of transmission costs, no reasonable observer could think that the parties really intended to hand BoPE such a financial windfall. As such, it is tempting to ask whether the Supreme Court's discussion of the pre-contractual negotiations between the parties and whether these ought to be admissible was simply an attempt to add some extra jurisprudential ballast to what otherwise would be a relatively straightforward exercise in correcting the Court of Appeal's inappropriately literal approach to the meaning of the contract. This may have made the case a more interesting one for the Court's

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<sup>81</sup> *KC Securities Ltd v Belgrave Finance Ltd (In Rec)* [2010] NZCA 409, [31].

<sup>82</sup> *Trustees Executors Ltd v QBE Insurance (Int) Ltd* [2010] NZCA 608, [32]. In relation to this case, Andrew Beck notes that: 'It would be hard to find all the elements of [the Court of Appeal's approach] in any three judgments from the Supreme Court in *Vector Gas*. It may, however, be the best that can be done in terms of crafting a working rule.' Andrew Beck, 'Recent Developments: Contract' (2011) *New Zealand Law Review* 363, 369. In other words, the Court of Appeal has resolved the Supreme Court's divergent opinions by rewriting what it said for itself.

<sup>83</sup> *Harper v Beamish* HC Napier, CIV-2009-441-000636, 8 December 2011; *Luxor Vending Ltd v The Warehouse Group Ltd* HC Auckland, CIV-2011-404-4390, 29 July 2011.

<sup>84</sup> *Cap D'Amarres Residents' Assoc Inc v Centurion Management Services Ltd* HC Auckland, CIV-2010-404-8369, 18 August 2011; *Divett v Refocussing Trust* HC Auckland, CIV-2007-404-3606, 19 July 2011; *Chief of the NZ Defence Force v NZ Public Service Assoc* [2011] NZEmpC 39; *I-Health Ltd v iSoft NZ Ltd* HC Auckland, CIV-2006-404-7881, 8 September 2010; *Todd Pohokura Ltd v Shell Exploration NZ Ltd* HC Wellington, CIV-2006-485-1600, 13 July 2010

<sup>85</sup> In *ASB Bank Ltd v South Canterbury Finance Ltd* [2011] NZCA 368, the Court of Appeal held that matters outside the contract are not helpful to interpretation where the contract is a standard form.

individual Justices to decide, but it comes at the cost of leaving those tasked with understanding what the Court as an institution has said scratching their heads.

#### IV CONCLUSION: WHY IS *VECTOR GAS* THE SUPREME COURT'S WORST DECISION?

We admit that in terms of 'bad decisions courts have made', the New Zealand Supreme Court's effort in *Vector Gas* probably will not raise many eyebrows amongst an international audience. Certainly, it is not a decision that has morally repugnant consequences, in the mould of *Dred Scott* or even *Jones v. Ministry of Interior Al-Mamlaka Al-Arabyia AS Saudiya (the Kingdom of Saudi Arabia)*.<sup>86</sup> Nor can it be said that the Court failed to do substantive justice as between the immediate parties to the dispute; it seems obvious to us that BoPE were seeking to take advantage of an inadvertent mistake on NGC's part when drafting the interim supply agreement to collect a multi-million dollar windfall. It is not even clear that the Court's decision is doctrinally suspect, in that it misapplied or ignored prior legal doctrine in a way that failed to decide the case 'according to law'. The fact that we cannot then come up with a worse example of the New Zealand Supreme Court's output for the purposes of this article may be taken as reflecting well on that institution and its capabilities. Nevertheless, in this closing section we will recap our reasons for why we think that the *Vector Gas* decision is worthy of being described as the Supreme Court's worst (albeit not *that* bad) effort to date.

In short, we think that *Vector Gas* represents a failure of the sort of judicial craft expected of judges sitting on a nation's highest court. This claim is not so much based on the various judges 'getting the law wrong' on the issues involved, but rather that they took up an issue that, according to their own judgments, they did not strictly need to consider to resolve the immediate dispute before them and then left that issue in a worse state than it was before. What is more, the issue on which the five members of the bench each went their separate ways — when and how prior negotiations may be used to determine the meaning of a contract — is one where clarity and predictability in application is particularly important. For while noting that perfect certainty in regards any legal matter ultimately is an unobtainable goal, the underlying purpose of contract law requires that the parties to a contract know with some confidence what it is that they are legally bound to do.<sup>87</sup> Without such confidence, there will be a constant temptation to litigate the issue in an effort to gain a measure of advantage (as BoPE did in the *Vector Gas* case). This is because, ultimately, the answer to the question 'what is it that this contract requires of me (and the other party to it)?' rests upon a prediction as to what a court will say the contract means. And if it is unclear just what a court will look at in order to determine a contract's meaning, and in particular if and when it will look at the parties' prior negotiations in order to do so, then there is room for parties to pursue a meaning that is most beneficial to their own interests, despite a shared understanding of a different meaning.

In failing to provide some sort of clear answer, the Supreme Court has left the law in a more unsettled and uncertain state in circumstances in which it did not need to do so. Consequently, we charge that it failed in its role as the highest court for New Zealand. It could have done a better job by its individual members trying harder to establish some measure of common ground as to if and when pre-contractual negotiations will be admissible; or if such common ground really could not be found,

<sup>86</sup> [2006] UKHL 16. In this case, the House of Lords accepted that Saudi Arabia's claim of state sovereign immunity could defeat compensation claims brought by British nationals whom Saudi Arabian police had tortured in order to obtain confessions.

<sup>87</sup> John Smillie, 'Certainty and Civil Obligation', (2000) 9(4) *Otago Law Review* 633, 639-41.

consciously leaving the issue for a future case where that issue is central to the dispute at hand. To instead provide five separate judgments each containing the individual judge's personal view of what the law ought to be may have been intellectually satisfying for the authors of each judgment, but it represents the worst of all possible outcomes for those trying to determine what the Court as an institution is saying. As Professor Henaghan notes:

Concurring judgments work best if all the judges are singing from the same song sheet. Difficulties arise when the result is unanimous, but judges (as was the case in *Vector Gas*) give quite divergent reasons for that result. This leaves the law in an unclear state, which is unhelpful for lower courts, legal practitioners and the community.<sup>88</sup>

And given that we expect a nation's highest court to act in a way that is helpful to the society over which it acts as legal guardian, *Vector Gas* is, with respect, the worst decision that the New Zealand Supreme Court has handed down.

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<sup>88</sup> Henaghan, above n 76, 601.