

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2016-404-001732  
[2017] NZHC 1132**

BETWEEN                      THE RINTOUL GROUP LIMITED  
   Plaintiff  
  
AND                              FAR NORTH DISTRICT COUNCIL  
   Defendant

Hearing:                      1 - 4 May, 8 May and 10 May 2017

Counsel:                      SA Grant, R Mark and JA Zwi for Plaintiff  
   GJ Christie and DA Rowe for Defendant

Judgment:                      29 May 2017

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**JUDGMENT OF DOWNS J**

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*This judgment was delivered by me on Monday, 29 May 2017 at 11 am  
pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors/Counsel:  
R Mark, Kerikeri.  
SA Grant, Auckland.  
Simpson Grierson, Auckland.

## Table of Contents

<b>Issues in context</b>	Para No [1]
<b>Background</b>	[4]
<b>A breach of contract?</b>	[24]
<b>Manifestly or materially false bid information?</b>	[42]
<i>An unfinished stretch of trail?</i>	[45]
<i>Test-ride</i>	[49]
<i>The Clegg test</i>	[50]
<i>Practical completion certificate</i>	[53]
<i>Payment claim</i>	[56]
<i>Conclusion on timely completion</i>	[58]
<i>Within budget?</i>	[60]
<i>Additional works</i>	[62]
<b>An additional breach?</b>	[68]
<b>A causative breach?</b>	[72]
<b>What percentage chance did Rintoul have?</b>	[79]

### Issues in context

[1] The Rintoul Group Ltd, more easily Rintoul, alleges the Far North District Council unlawfully excluded it from four tender processes in circumstances amounting to breach of contract. Rintoul seeks damages for lost opportunity for profit. The Council acknowledges each process gave rise to a “process contract”,<sup>1</sup> but contends its exclusion of Rintoul was lawful because Rintoul provided misleading tender information. Rintoul disputes that. The Council argues even if it was wrong to exclude Rintoul, the action must fail because each process contract did not require it to accept any tender. So, any breach of contract did not cause lost opportunity for profit.

[2] The parties agreed if I concluded Rintoul lost that opportunity, I should quantify—as a percentage—the likelihood it would have been awarded the four underlying projects but for the breach. Only then would a quantum hearing need proceed.<sup>2</sup>

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<sup>1</sup> *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313 (CA). See also *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, [2005] 2 NZLR 433.

<sup>2</sup> When it became clear the trial would exceed its time estimate, the parties agreed quantum should be resolved separately. That order was made by consent; see r 10.15 of the High Court Rules.

[3] These issues arise against the backdrop of construction of part of the national cycle trail.

## **Background**

[4] Rintoul is a Northland-based construction company. Much of its work is for local and central government. Rintoul and the Council have or at least had a longstanding association; the parties have been contracting with each other since the 1980s.

[5] Amid the global financial crisis, the New Zealand government decided upon a national cycle trail. One part of the trail is the twin coast cycle trail, which when complete, will run from Hokianga harbour to Opua. This trail is funded by central government and the Council. The Council has divided its construction into 15 sections, and called for separate tenders for each. Rintoul has completed much of the trail. It hoped to complete the four sections which underlie this case.<sup>3</sup>

[6] The Council called for tenders between 19 February and 3 March 2016. The relevant conditions of each of the four tender processes were the same. Separate analysis is not called for:

- (a) Tenders were to be submitted in three envelopes. The first was to contain all information other than price. The second all information (including price). The third envelope was to contain the first and second. Non-price envelopes were to be opened first and their contents evaluated. Then the second envelope.
- (b) Tenders were to contain details of three completed projects to demonstrate the applicant's requisite experience.

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<sup>3</sup> Kawakawa to Opua, FNDC5/16/007; Koeke Mangrove Route FNDC5/16/010; Kaikohe to Kawakawa FNDC5/16/016; and Kaikohe to Kawakawa FNDC5/16/017.

- (c) Tenders were to be evaluated using the New Zealand Transport Agency (NZTA) Procurement Manual “price quality” method.<sup>4</sup> This method balances price and other factors according to a weighted formula. Price was weighted at 55 percent. Other factors were weighted differently:
  - (i) Experience and track record: 15 percent.
  - (ii) Resources: 10 percent.
  - (iii) Management skills: 5 percent.
  - (iv) Methodology: 15 percent.
- (d) A fail score (45 or less) on any factor other than price entitled the Council to reject the tender.
- (e) There was a “privilege clause”.<sup>5</sup> The lowest priced tender, highest scoring tender or any tender need not necessarily be accepted by the Council.
- (f) NZS 3910:2013 was adopted as the basis for each section of trail. It provides conditions of contract for building and civil engineering construction.

[7] Rintoul submitted tenders for each contract between 14 and 30 March 2016. All were within time. As required, Rintoul identified three examples of relevant work. The common and material example was an earlier cycle trail contract with the Council: “FNDC5/16/008”. About this, Rintoul said:

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<sup>4</sup> The Council’s tender documents referred to both “price quality” method and “price quality simple” method, but the latter does not appear in the New Zealand Transport Agency Procurement Manual. The parties agreed this was typographical error.

<sup>5</sup> Burrows, Finn & Todd *Law of Contract in New Zealand* (5<sup>th</sup> ed, LexisNexis, Wellington, 2016) at 49.

<b>Relevant Experience and Track Record</b>					
<b>Project Name</b>	Contract 5/16/008, Cycle Trail: Kawakawa to Taumarere, Ch 700 to Ch 3970 (Waiomio Road and Bristow Road, Kawakawa)	<b>Principal</b>	Far North District Council	<b>Location</b>	Kawakawa
<b>Planned start</b>	December 2015	<b>End</b>	February 2016	<b>Value</b>	\$191,000
<b>Actual start</b>	December 2015	<b>End</b>	January 2016	<b>Value</b>	\$171,000
<b>Explanation of variances</b>	There were no variances to the contract other than minor works agreed to by the engineer and were mostly to work in with the adjacent landowners.				
<b>Description (Scope, special features and challenges)</b>	<p>The contract was for the construction of a cycle trail alongside the Bay of Islands Scenic Railway from Gillies Street in Kawakawa to the existing cycle path in Taumarere by State Highway 11, for a length of 3.3km.</p> <p>A 2.5m path width was specified where it was practical to achieve. At entrances, construction matched the existing entrance grades. Some trimming and three removal, earthworks and drainage work was required.</p> <p>Work included vegetation clearance, earthworks, culvert construction, timber bridge construction, pavement construction and working with the adjacent landowners / farmers in creating new fencing.</p>				
<b>Performance</b>	The Rintoul Group Limited completed the work within the period and budget allowed for within the contract. The company has built up considerable skill in completing cycle trail work due to the long association it has had with the project.				
<b>Referee</b>	Andrew Young ...				

The parties referred to this contract as 008. I do likewise.<sup>6</sup>

[8] Four other companies submitted tenders. Rintoul was the only applicant to submit a tender for every contract.

[9] The Council evaluated the tenders at internal meetings between 4 and 20 April 2016. Its evaluation team comprised four employees: Franz Wagner, an engineer and project manager; Michael Fox, who dealt with contracts and tenders;

<sup>6</sup> The judgment uses 008 in relation to both the contract and trail. Context identifies which is being discussed.

Aimee Page, a contract support officer; and Andrew Young, the construction supervisor for the twin coast cycle trail project.<sup>7</sup> Mr Young had dealt extensively with Rintoul in this capacity: he had managed five cycle trail sections completed by Rintoul, and other lesser company works. Indeed, Mr Young was a referee for Rintoul. During an earlier tender process, consideration had been given to whether this gave rise to a conflict of interest. It was concluded no conflict arose.

[10] Non-price envelopes were opened first and their contents evaluated. Only then were the second envelopes opened. Detail of the tenders need not detain us. It is sufficient to observe Rintoul's price was the cheapest for every contract, and overall, by a considerable margin. But Rintoul's non-price attributes were less competitive. In relation to two contracts contested by four applicants, it was last equal with another. For a contract involving three applicants, it was second on non-price factors. In relation to the remaining contract, Rintoul was second—and last.

[11] Concerns were raised within the evaluation team's meetings about Rintoul's tenders. Mr Young said he was "not blinkered" about Rintoul's propensity for low prices, nor a related concern this might constitute anti-competitive behaviour. He explained:

A ... I've been dealing with The Rintoul Group for nearly 14 years starting at the Star Hotel Walkway. And historically The Rintoul Group ... has always priced contracts low. It's not uncommon for them to do that. So there's always been talk of The Rintoul Group tendering low. That's just within council.

A. ... the concern for me is, there's two concerns, is not the – the lowest price is not always the best value. Sometimes it's better to pay more initially and you get a – but you get a better long-term job. The other thing with contractors who price low is that it discourages competition in that other contractors know, and it's a very small pool of contractors in the Far North. They all know each other, they all know what they're up to and it discourages competition 'cos they just think, "Oh, if this particular contractor goes in, they're probably gonna be low," they're gonna put a whole bunch of effort into pricing work and it's unlikely they'll get it. So it discourages competition....

A. ... but sometimes the lowest price is the best price, but not always.

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<sup>7</sup> Mr Young gave evidence for Rintoul.

But these concerns did not extend to Rintoul's 008 representations, which were not discussed at the evaluation meetings.

[12] Applying the "price quality" method, the evaluation team concluded Rintoul was the preferred provider for every contract. Draft evaluation reports in relation to the four contracts recorded as much, albeit these went unsigned.

[13] On 6 May 2016 representatives of Rintoul and the Council met at the latter's request to discuss Rintoul's tenders. No decision had yet been made. Present were Kenneth Rintoul, Rintoul's shareholder and director; John Schollum, Rintoul's contract administrator; and two Council representatives: Franz Wagner<sup>8</sup> and Warren Ure, a procurement specialist. Recollections differ on some aspects of the meeting. However, it is common ground there was no reference to 008.

[14] The meeting had been arranged because the Council was worried Rintoul may not be able to complete all four contracts simultaneously. Rintoul was a small company of approximately 12 people. There were concerns also about environmental and traffic management, and anti-competitive pricing. The overarching concern was that quality may be sacrificed for price.

[15] Mr Rintoul said he was "confident" after the meeting Rintoul would be awarded all four contracts. I pause at his juncture to observe I am not satisfied anything was said or done by the Council's representatives to imply that. The minutes do not support that view, a copy of which was sent to Rintoul in the wake of the meeting for comment. Neither does any other piece of documentary evidence, nor circumstance more generally.

[16] On 12 and 16 May 2016 Rintoul sent an email to the Council addressing matters raised at the meeting.

[17] On 23 May 2016 Ms Page concluded the Council's draft evaluation report in relation to one of the proposed contracts was inconsistent with "price quality"

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<sup>8</sup> Mr Wagner joined the Council at the beginning of 2016.

weighting.<sup>9</sup> In her view, 008 had not been finished. Ms Page's interest at this point was unrelated to her membership of the evaluation team. Indeed, her interest was academic: she was completing a course that required submission of two examples of tender evaluation. Ms Page had chosen 008 as one of the two examples. Ms Page also considered 008 went over budget. Ms Page did not raise these views with Mr Young, even though he had been the construction supervisor for 008.

[18] Ms Page's view did not gain immediate traction. On 23 May one of the four draft evaluation reports was amended so as to become a little more favourable to Rintoul.<sup>10</sup> But Ms Page's view ultimately prevailed. By 4 July 2016, a decision was made to exclude Rintoul from the tender process.

[19] The exact sequence between 23 May and 4 July is unclear, largely because the Council did not call the decision-maker(s) to testify. Mr Wagner said the evaluation team's deliberation in relation to the contracts was largely overtaken by events—meaning the Council's decision to exclude Rintoul—and he was not involved in that decision. Mr Ure recommended Rintoul be excluded, but was not a decision-maker either. And, Mr Ure did not say when he made his recommendation or who the decision-maker was, other than he believed “the general managers and probably the CEO and the Mayor” were involved.

[20] On 4 July 2016 Mr Wagner was asked to draft a letter to Rintoul informing it of its exclusion. That letter was sent on 6 July. It was signed by in-house counsel. The letter alleged Rintoul's bid representations in relation to 008 were false. The material part reads:

Your tender submissions state that the contract was completed in January 2016 for a value of \$171,000 with ‘no variations to contract other than minor works agreed by the engineer to contract’.

After the tender submissions were received FNDC has received:

- Claims on this contract totalling significantly more than \$171,000, and
- A request for practical completion for this contract which, by default is excessively longer than the contractual construction period and should attract liquidated damages.

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<sup>9</sup> FNDC5/16/016.

<sup>10</sup> An evaluation report was prepared for each contract.



[21] By then, Mr Young had tendered his resignation (on 23 June 2016), citing frustration with “an increase in the level of ... bureaucracy” within the Council and reduced “service delivery”.

[22] Rintoul immediately wrote to the Mayor and councillors to complain the Council had done its “best to unfairly exclude a local business from contracts”. It described the Council’s approach as “totally bizarre”.

[23] On 7 July 2016 the Council sent an invoice to Rintoul for \$61,586.99 in relation to 008. The Council said its invoice constituted a “Deduction of various orders previously paid due to failure to provide supporting evidence”. The same day, Rintoul threatened judicial review proceedings through its solicitor. The Council replied on 8 July through its lawyers, noting there was nothing to injunct as the contracts had now been awarded to others. Three contracts had, and at approximately the same time as Rintoul’s notice of exclusion. The fourth was awarded in late July. Rintoul commenced this action that month.

### **A breach of contract?**

[24] The first issue is whether the Council’s exclusion of Rintoul from the tender processes constituted a breach of contract. This turns on whether the process contracts provided for unilateral exclusion of an applicant prior to completion of the tender processes, and if so, whether Rintoul’s exclusion was justifiable according to the terms of those contracts. As observed earlier, separate analysis of each is not required because their terms do not materially differ.

[25] It is common ground there was no express contractual provision by which the Council could exclude Rintoul from the tender processes. For the Council, Mr Christie submitted an implied term conferred this power. For Rintoul, Ms Grant submitted no implied term existed. There was related disagreement on the extent to which bid information would need to be false before an applicant may be excluded pursuant to an implied term, and whether Rintoul’s bid information in relation to 008 was false. The latter occupied much trial time.

[26] The test for an implied contractual term is not entirely free from doubt. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,<sup>11</sup> Lord Simon of Glaisdale said before such a term may be implied it must:

- (a) Be reasonable and equitable.
- (b) Be necessary to give business efficacy to the contract, so no term will be implied if the contract is effective without it.
- (c) Be so obvious as to go without saying.
- (d) Be capable of clear expression.
- (e) Not contradict any express contractual term.

[27] Lord Simon's test was seemingly ameliorated in the later Privy Council decision of *Attorney General of Belize v Belize Telecom Ltd*.<sup>12</sup> Lord Hoffmann said:<sup>13</sup>

The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of 'necessary to give business efficacy' and 'goes without saying'. As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant.

[28] Both formulations were cited by the New Zealand Supreme Court in the recent decision of *Mobil Oil New Zealand Ltd v Development Auckland Ltd*.<sup>14</sup> There, William Young J noted there was "scope for argument whether adoption of the undiluted version of Lord Hoffmann's interpretation approach is appropriate".

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<sup>11</sup> *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC).

<sup>12</sup> *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.

<sup>13</sup> At [27].

<sup>14</sup> *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48.

The point was not seen as material to determination of that case. It remains unresolved.

[29] Whatever else may be said about the two approaches represented by *BP Refinery* and *Belize Telecom*, the former is stricter. I adopt it in the interests of commercial certainty, and because of *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd.*<sup>15</sup> There, the United Kingdom Supreme Court said *Belize Telecom* should not be read as diluting the traditional tests in this area, which it considered provided a clear, consistent and principled approach.

[30] It is important to be clear what is contended for. Mr Christie submits it was an implied term the Council may unilaterally exclude an applicant from the tender process if it supplied bid information “false in a material respect”. As observed, Ms Grant’s position is that no term should be implied. However, she submitted in the alternative a power of unilateral exclusion must be confined to situations in which the applicant made “manifestly false” bid statements, meaning statements which were obviously, plainly or unarguably false.

[31] Mr Christie’s argument suffers three difficulties. First, in issue is unilateral exclusion. That power is not obviously reasonable and equitable in this context. There is falsity and falsity. Materiality is in part value judgment. Risk of error arises. So too abuse of contractual tender process based on alleged falsity of bid information.

[32] Second, it is far from clear a term is necessary to give business efficacy to the contract, which could operate without the power of unilateral exclusion. False bid information could be treated by the Council as failing the relevant attribute or criterion during the evaluation process. Or put by the Council to one side. What is contended for is largely superfluous. The four projects were not the first of their kind offered by the Council. A small number of applicants inhabited this business area, and were known to the Council. There is no evidence the absence of a term had caused problems before this case. Unsurprisingly, the process contracts in issue

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<sup>15</sup> *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 (SC).

were largely “cut and paste” from earlier cycle trail tender processes. Their replication in the absence of a term suggests the term was not seen by the Council as necessary.

[33] Third, the term is not so obvious to go without saying. Context reinforces this view. The pool of applicants in this area is small. And the project works relatively unsophisticated. The parties would not, objectively, consider the term to be self-evident given the setting. In cross-examination, Mr Rintoul accepted Rintoul’s bid information should be correct, and a requirement of this nature accorded with common sense. But that concession is of limited relevance because the test is objective.

[34] The clarity of expression test could be met, but as will be apparent, Lord Simon’s formulation required satisfaction of all ingredients, hence the strictness of *BP Refinery*. The final ingredient of non-contradiction I return to shortly.

[35] The position in relation to a unilateral power of exclusion vis-à-vis manifestly false tender information is more arguable. Tender assessment takes time, effort and money. If an applicant submits manifestly false information, it is not clear why the party calling for tenders should be required to apply the tender criteria, only to then reject the tender for the very reason that would have enabled exclusion. Imagine the Council received a tender in which a hitherto unknown applicant asserted it had completed various construction projects, and simple vetting revealed the applicant had not completed any of them. It is not obvious why the Council should not be able to treat the provision of such information as vitiating the tender, particularly when, in all probability, it would not knowingly contract with a party that had provided patently false information. The factual matrix also reveals some pressure to complete the cycle trail quickly, in turn providing some support for an implied term.

[36] It follows Ms Grant’s version of the postulated term is arguably: reasonable and equitable, necessary to give business efficacy to the contract (through provision of a facility to “weed out” unarguably false applications), so obvious as to go without saying, and capable of clear expression.

[37] As to the last criterion an implied term may not contradict an express one, Ms Grant submitted because the contracts identified evaluations would be carried out using the price quality method, an implied term according to either formulation was necessarily inconsistent with this provision. This does not follow. That the contracts required evaluation of tenders according to a particular method says nothing about whether unilateral exclusion is permissible. Obviously, all compliant tenders must be evaluated according to the method stipulated, here, the “price quality” method. But that still leaves room for tenders containing manifestly false information to be treated differently, namely by removing them from the process altogether.

[38] However, I am not persuaded a term permitting unilateral exclusion for manifestly false bid information should be implied to the four process contracts. I see the business efficacy criterion as decisive: other contractual means existed to deal with the problem, most obviously by failing an applicant using the required “price quality” methodology. Or to borrow language from *Marks and Spencer*, the contract would not “lack commercial or practical coherence” in the absence of the implied term. It bears repeating the commercial context meant a problem of this nature was most unlikely to arise. It had not before this case. Moreover, implying a term would add uncertainty to the tender process, in turn eroding efficiency.

[39] For completeness, no different result would arise if the issue was approached according to *Belize Telecom*. There, in relation to business efficacy, Lord Templeman observed:<sup>16</sup>

It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean.

That would not be the position here in the absence of an implied term.

[40] It follows there was no provision by which the Council was permitted to unilaterally exclude Rintoul from the four process contracts. The Council breached each.

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<sup>16</sup> *Attorney-General of Belize v Belize Telecom Ltd*, above n 12, at [23].

[41] For completeness, I now consider what the position would have been if an implied term conferred power to exclude for the provision of false information according to the competing formulations advanced by the parties.

**Manifestly or materially false bid information?**

[42] A little more detail about 008 is first necessary. The Council awarded Rintoul this contract on 2 December 2015. It involved construction of a 3.3 kilometre section of cycle trail from Kawakawa to Taumarere. The project was to be completed within 50 working days, otherwise liquidated damages were payable by Rintoul of \$200 per day (or part thereof). The contract price was \$179,379.10, plus GST. That figure included \$20,000 for contingencies. Construction was managed by Mr Smith for Rintoul, and Mr Young for the Council.

[43] Mr Christie submitted Rintoul's bid representations (set out at [7]) were materially false as:

- (a) The trail was incomplete at the end of January 2016.
- (b) The project exceeded budget.
- (c) Contractual variations were not minor.

[44] Argument (a) reduces to five interrelated threads. First, a section of trail between the Tirohanga bridge and the Kawakawa rugby clubrooms was incomplete. Second, a required test-ride did not occur until 3 June 2016. Third, no request for a practical completion certificate was made until two days before that date. Fourth, no Clegg test was performed on the trail. Fifth, Rintoul's own paperwork implied work was still being completed in March 2016.

*An unfinished stretch of trail?*

[45] On 17 March 2016 Ms Page accompanied Mr Young to several cycle trail sites, including a section between the Tirohanga bridge and the Kawakawa rugby

clubrooms.<sup>17</sup> Ms Page did not attend to inspect the sites—that was not her role. Rather, Ms Page was there to learn about the construction process so she would be better placed to approve monthly progress claims, an aspect of her role. Ms Page said the shale in this section moved noticeably underfoot. She considered it unsuitable for use by cyclists. Ms Page said Mr Young told her this section was still to be compacted, and a roller would be used.

[46] Mr Young agreed he and Ms Page visited a number of sites that day, including this one. But he said Ms Page was mistaken as this section was finished. Mr Young said shale takes time to settle, and becomes harder over time. Mr Young had no recollection of a roller being used on this particular section. Mr Smith also said this section was finished on time. It will be recalled he was Rintoul's project manager for 008.

[47] Mr Rintoul said a roller was used in connection with 008 after a significant flood in February 2016. He said Mr Young requested a roller to crush exposed stones. Photographic evidence was adduced by consent of the February flooding. Parts of the trail were under approximately a metre of water, perhaps more.

[48] Ms Page's evidence on this issue has only modest probative value.<sup>18</sup> She was not there to inspect the trail. Or to assess if the shale was suitably compressed for cyclists. Ms Page had no relevant expertise or experience, whereas Mr Young had both. He was well placed to determine whether the shale was cycle-ready. So too Mr Smith. That assessment was central to each's role. Sections of trail were affected by the February flood. While it is not clear this particular section was flooded, the event may explain the difference in testimony between Ms Page on the one hand, and Mr Young and Mr Smith on the other. Whatever the position, I accept their evidence for the reasons above.

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<sup>17</sup> It was common ground a section of trail immediately adjacent the bridge was unfinished, but only because a question remained with the Council as to what to do with the bridge. The Council did not contend Rintoul was at fault for not completing the bridge section, or making a false representation in relation to this section. The issue above is concerned with the larger area *between* the bridge and rugby clubrooms.

<sup>18</sup> Ms Grant did not contest the admissibility of Ms Page's evidence the surface was unsuitable for cyclists. This particular piece of testimony was arguably a species of expert opinion evidence. Doubt attaches to whether it was substantially helpful in terms of s 25 of the Evidence Act 2006. In the absence of objection, I assumed it was.

### *Test-ride*

[49] 008 required a representative of Rintoul and the Council test-ride the cycle trail to confirm its surface was fit for purpose. That ride did not occur until 3 June 2016. Mr Young said his Council manager had not required a test-ride before this time, whether for this trail or any other, and he had, in any event, regularly ridden the trail on a bike supplied by the Council for that purpose. As discussed shortly, Mr Young was satisfied the trail was practically complete by the end of January 2016. He told Rintoul that.

### *The Clegg test*

[50] The 008 contract required the surface pavement of the cycle trail “to achieve a minimum Clegg Impact Value of 25, unless otherwise specified”. For the uninitiated, the Clegg Impact Value is a level of compaction tested by use of a falling weight which records rebound height. Mr Christie submitted as this test was never performed, 008 was contractually incomplete.

[51] Mr Rintoul said shale was not amenable to this type of testing. Mr Wagner said it was. Given Mr Wagner’s expertise as an engineer, I accept testing of this nature was possible. However, the evidence is clear the Council never insisted upon Clegg testing vis-à-vis Rintoul.

[52] Mr Smith said just that, both in relation to 008 and other sections previously constructed by Rintoul for the Council. Mr Young confirmed this aspect of Mr Smith’s testimony. He said another section of trail built by a different contractor might have been Clegg tested, but he had not required Rintoul to do that. He thought it more important the trail was fit for purpose. He considered it was. Mr Young said he had been involved in constructing approximately 50 kilometres of cycle trail and “as far as compaction goes we’ve never had a cyclist complain that their bicycle has sunk into the shale”. The best test, he said, involved cyclists riding the track.



### *Practical completion certificate*

[53] Mr Christie submitted Rintoul did not apply for a practical completion certificate until 1 June 2016, three months after 008 was supposed to be complete. And, because a practical completion certificate had never been issued, 008 remained incomplete to this day.

[54] Mr Smith said he considered 008 practically complete on 28 January 2016. He made a diary entry to that effect on the 28th. Mr Smith made a similar diary entry on 2 February 2016. In cross-examination, Mr Smith agreed the second entry was made in a different pen, and possibly later. However, he said Mr Young had agreed 008 was practically complete in this period.

[55] Mr Young's evidence was consistent with that of Mr Smith. Mr Young regarded 008 as practically complete by the end of January 2016. He accepted it was not until 3 June 2016 he recommended a practical completion certificate issue. But he regarded a certificate as a mere "formality". Mr Young said contractors frequently ask for a practical completion certificate months after works have finished, particularly if they discover they have not been paid in full. He did not do so earlier because it was Rintoul's responsibility to apply for one, and Rintoul did not do so until 1 June 2016.

### *Payment claim*

[56] On behalf of Rintoul, Mr Schollum submitted a payment claim on 31 March 2016. The claim referred to the period 1 March to 31 March 2016. It sought payment of \$20,166.74 for work in this period, of which \$12,690 related to 008 as originally agreed. Mr Christie submitted this demonstrated work remained ongoing.

[57] Mr Schollum said the payment claim was inaccurate, as culverts governed by the \$12,690 figure had been installed by "mid January". This evidence is supported by Mr Young's testimony, who said he would have noticed if culverts to this value were missing when he agreed with Mr Smith the trail was practically complete at the end of that month. It is also consistent with the evidence of Mr Smith, who it will be

recalled made diary entries at the end of January and beginning of February the trail was practically complete.

*Conclusion on timely completion*

[58] I am satisfied Rintoul's representation the trail was finished on time was neither manifestly nor materially false. For reasons already given, I do not consider Ms Page's evidence on this issue to be of assistance. Conversely, the evidence of Mr Young, Mr Smith and Mr Schollum was. It demonstrates the trail was practically complete by 31 January 2016—an assessment with which the Council agreed. Mr Christie's argument reduces to the submission the contract was not complete because its various procedural requirements had not been observed. But Rintoul did not represent they had. Moreover, it is awkward for the Council to raise these points now when its conduct at the time was consistent with waiver of at least the Clegg test and test-ride requirements.

[59] A final matter should be mentioned. As noted earlier, the twin coast cycle trail is funded by central government and the Council. On 9 May 2016 Jonathan Kennett, the national project manager, inspected sections of the twin coast cycle trail, including 008. He was accompanied by a number of people, including Mr Young. Mr Kennett produced a report the next day. The 008 trail was positively described. Aspects were referred to as "scenic and enjoyable", a "good job", "another fun section", and this "new section is excellent". Mr Kennett's inspection occurred a little over three months after 008 had to be complete, so the report does not directly address timeliness. However, the inspection also occurred after remedial work in relation to the February flood. The report provides some confirmation of the accuracy of Mr Young's testimony. It also implies the trail was completed to a suitable standard. This brings us to budget.

*Within budget?*

[60] Mr Christie submitted Rintoul's assertion 008 was completed within budget was materially false because:<sup>19</sup>

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<sup>19</sup> Mr Christie also relied on a number of factors already addressed in relation to timely conclusion.

- (a) The total cost was \$188,115.00; whereas Rintoul had represented the total cost was \$171,000.00.
- (b) Rintoul submitted further payment claims after making this assertion in its bids.

Both can be dealt with quickly.

[61] The figure identified by Mr Christie includes works agreed to by Mr Young as contractual additions or variations. Deducting these from 008's agreed price of \$179,379.10 produces a figure between \$150,619.10 and \$152,831.60,<sup>20</sup> a range lower than the figure cited by Rintoul. It follows Mr Schollum's figures reproduced at [7] overstate the project's cost. Mr Schollum said he advanced conservative figures in Rintoul's bids "to err on the side of caution". I accept this testimony, which accords with the figures. As discussed below, Rintoul's further payment claims were for additions to and variations of the contract—works beyond 008's original scope.

#### *Additional works*

[62] Mr Christie submitted it was manifestly false there were no variations to the contract "other than minor works agreed to by the engineer".

[63] Rintoul claimed 15 additional matters totalling \$26,047.50. And, a further \$12,000 in relation to the installation of three concrete bridges the Council wished to use. The first figure represents 19 percent of the unvaried cost of work in relation to 008, which both parties agreed was approximately \$150,000.<sup>21</sup> Or, 15 percent of the contract price. The percentages are obviously higher when one adds the cost of the bridges (25 percent of the total cost of work, and 21 percent of the contract price).

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<sup>20</sup> The parties disagreed on the precise cost of the additions and variations. Ms Grant advanced a figure of \$26,547.50; Mr Christie \$28,760.00. These figures do not include \$12,000 for the installation of three bridges. Included, the figures become \$38,547.50 and \$40,760.00.

<sup>21</sup> Ms Grant submitted the figure for total cost of work absent additions and variations was \$149,567.50. Mr Christie advanced a figure of \$150,619.10. Nothing turns on the difference.

[64] Reasonable minds could reasonably disagree about whether these figures constitute “minor” contractual variations in relation to a contract for \$179,379.10. However, contentions of material falsity are awkward when the statement is an admixture of fact and opinion and the complainant is the other party to the cited contractual example. The obvious should be stated: the Council agreed to all of the variations without argument at the time. That it later considered they were not “minor” is not Rintoul’s fault.

[65] Mr Christie notes the additional works were not authorised as required: in writing (in advance) by the Council’s engineer. Mr Young was not an engineer. Instead, Mr Young and Mr Smith agreed upon the variations orally, either by telephone or in the field. And a fixed price was used rather than the daily rates outlined in 008.

[66] Again, this argument overlooks the fact Mr Young agreed to the variations on the Council’s behalf as its project manager for 008. And, that Rintoul had dealt exclusively with Mr Young until Mr Wagner was appointed engineer on 8 June 2016. Rintoul’s four bids were of course submitted earlier (during March 2016).

[67] It follows nothing about 008 in Rintoul’s tender applications was materially false. So, even if an implied term existed of the nature contended for by the Council, it had no basis to lawfully exclude Rintoul from the tender processes. Rintoul has established breach of contract.

### **An additional breach?**

[68] Rintoul advanced an additional breach. Section 5.5 of the NZTA Procurement Manual provides a party considering tenders must act fairly and reasonably, use transparent evaluation criteria and processes, employ fairness and consistency, take into account only relevant factors, and communicate clearly with applicants.

[69] Ms Grant submitted these duties were incorporated by cl 2.1 of the process contract documents which provided “tender evaluation will be carried out in accordance with the New Zealand Transport Agency (NZTA) Procurement Manual

2009 using the price quality simple method”. Ms Grant submits the rest of the manual is needed “to contextualise the price quality method”. And, she observes a number of Council witnesses accepted they regarded themselves as having the duties identified at s 5.5.

[70] Doubt attaches to whether this contention adds much to Rintoul’s case, for, in unilaterally excluding Rintoul from the tender processes, the Council breached each process contract. And, if there was no breach of contract, it is not obvious what these elements add. In any event, I do not accept this argument for five reasons.

[71] First, the process contracts’ terms refer not to the NZTA Procurement Manual generally but to the adoption of “price quality” in terms of the manual. Second, much of the manual was of little relevance to the parties. By way of example, the manual refers to a number of different ways to evaluate tenders; “price quality” method is only one. It is therefore difficult to see how the entire manual could “contextualize” the “price quality” method when much of it is directed at alternative methods of identifying a supplier. Third, the obligations identified at s 5.5 fit more comfortably in administrative proceedings or curial process. While the Council is a public body, it was engaged in a competitive commercial exercise.<sup>22</sup> Fourth—and for this reason—unequivocal language would normally be required to incorporate these considerations to a commercial setting. That was not done. And as observed, the process contracts say nothing about incorporating the entire manual. Fifth, while like much of the law this area is fact-specific, similar arguments have been rejected in at least two New Zealand cases.<sup>23</sup>

### **A causative breach?**

[72] Mr Christie submitted the Council’s breach had not caused Rintoul to lose opportunity for profit because when it excluded Rintoul, the tender evaluation process was largely complete. In substance, he submitted, Rintoul lost the tenders

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<sup>22</sup> See *Transit New Zealand v Pratt Contractors Ltd*, above n 1, at [90]-[92] and [97]-[99]; and *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [56]-[60].

<sup>23</sup> *Pratt Contractors v Palmerston North City Council* [1995] 1 NZLR 469 at 485; *Transit New Zealand v Pratt Contractors Ltd*, above n 1, at [81].

rather than being disqualified from competing for them. Mr Christie's closing address put the argument this way:

1. By the time FNDC decided to exclude TRGL's tenders "from further consideration", the tender process was well advanced with draft evaluation reports and close to completion, and the decision had been made not to accept TRGL's tenders. Although the rejection was expressed as an exclusion, TRGL was not excluded from the tender process – its tenders had all been considered and evaluated.
2. In fact, FNDC made the final decision to exclude TRGL just days before sending letters of acceptance and declinature to the other tenderers. Mr Wagner confirmed that he was not aware that the disqualification of TRGL was made formal until 4 July 2016 when he received instruction to draft the exclusion letter from his manager Ms Robson, and sent it to the management team on 5 July 2016.
3. In this context, TRGL's "exclusion" was, in substance, the same as a rejection. Whether by way of rejection or "exclusion", FNDC's decision in respect of every tender except the winning one was made within the context of its authority – conferred by the privilege clause – to not accept any tender. FNDC says that it therefore had the legal authority by the privilege clauses to exclude TRGL at the point that it did.

[73] I do not accept the argument.

[74] Rintoul was informed in writing by the Council's in-house lawyer it had been excluded from the tender processes because it had advanced false information in relation to 008. That this notice was more or less contemporaneous with letters to successful applicants does not alter the fact Rintoul was unilaterally excluded from the tender processes.<sup>24</sup>

[75] Before Ms Page raised the accuracy of Rintoul's 008 bid representations, Rintoul had a chance of being awarded all four contracts. By then, the evaluation team had considered all of the tenders in relation to the four projects. And, recommended Rintoul be awarded all of them. True, concerns remained about Rintoul, hence for example the May meeting. The point, however, is that Ms Page's 008 concerns altered the course of events; the trajectory thereafter was against favourable contractual outcomes for Rintoul. Mr Wagner agreed once 008 was raised "it was almost out of the hands of the tender evaluation team ... the

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<sup>24</sup> The fourth contract was not awarded until 28 July 2016.

information was of such importance that it would overrule any recommendation made”.

[76] As observed earlier, the exact sequence between 23 May and 4 July 2016 is unclear,<sup>25</sup> largely because the Council did not call the decision-maker(s) to testify. The evidence does not reveal when the decision was made, or by whom. The precise basis for the decision is also unknown, beyond what Rintoul was told in the letter. It was open to the Council to adduce evidence on these points. It did not. The Council should not benefit from its own evidential vacuum.

[77] An action for loss of chance is concerned with just that.<sup>26</sup> As will be apparent, if the Council had performed the process contracts by not excluding Rintoul, I am satisfied there was a chance Rintoul would have been awarded the projects.

[78] It follows I do not accept Mr Christie’s related argument the privilege clauses permitted reference to 008 representations, for, on the evidence, the point does not arise. Once Ms Page raised the accuracy of these representations, the issue gained a life of its own divorced from workings of the Council’s evaluation team despite Ms Page’s membership of that team. The issue was removed to a class described as “management”, from which no witness has emerged. Or put another way, on the evidence, 008 and exclusion were synonymous. As observed, pre-008 trajectory favoured Rintoul. But once 008 was raised, the view appears to have been exclusion—and *only exclusion*—would suffice. Against this background, there is no factual basis for the argument the same outcome would have occurred if Rintoul had not been excluded from the process contracts.

### **What percentage chance did Rintoul have?**

[79] A preliminary matter first. Ms Grant submitted “price quality” methodology led to identification of the supplier, not merely a preferred supplier, and any considerations beyond those permitted by “price quality” methodology were impermissible. It followed, in her submission, Rintoul was all but certain to be

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<sup>25</sup> The date Mr Wagner was asked to draft the exclusion letter.

<sup>26</sup> *Barker v Corus (UK) Ltd* [2006] 2 AC 572 at [36].

awarded the four contracts because application of “price quality” methodology by the evaluation team identified Rintoul as the supplier with whom the Council was bound to contract.

[80] I disagree. First, the “price quality” methodology identified by the NZTA Procurement Manual refers to a “preferred supplier”. For example, the concept of “price quality” evaluation is introduced in the manual in this way:<sup>27</sup>

Price quality is a supplier selection method where the quality attributes of suppliers whose proposals meet the RFP’s requirements are graded, and the *preferred* supplier is selected by balancing price and quality through the use of a formula.

[81] The manual’s provisions in relation to “price quality” methodology later introduce negotiation under that heading, and then observe:

The approved organisation may negotiate with the preferred supplier, providing any negotiations are carried out in accordance with the RFP’s requirements.

[82] Second, the argument gives little or no weight to the privilege clause in each contract. It also ignores the fact the Council highlighted this clause to applicants, for, when submitting a tender, each was required to certify:

We understand that you are not bound to accept the lowest or any tender you may receive.

[83] Ms Grant submitted the privilege clause could still operate in the event the Council was dissatisfied with all applicants by rejecting every tender and starting the process afresh. This submission ignores the language of the privilege clause which reserved to the Council a discretion not to accept the lowest price tender, highest scoring tender or any tender.

[84] Third, in *Transit New Zealand v Pratt Contractors Ltd*, McGrath J for the Court of Appeal emphasised the various commercial imperatives protected by a privilege clause,<sup>28</sup> at least one of which was live on the evidence. Mr Young, who

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<sup>27</sup> Emphasis added.

<sup>28</sup> *Transit New Zealand v Pratt Contractors Ltd*, above n 1, at [90].



had a good relationship with Rintoul, said he was cognisant of perceptions of anti-competitive behaviour on Rintoul's part. So too others within the Council.

[85] Now percentage chance. New Zealand cases have tended to adopt the following statement of principle of Lord Diplock from *Mallet v McMonagle*:<sup>29</sup>

In determining what [happened] in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[86] I have already rejected the contention it was all but certain Rintoul would be awarded the four contracts and the competing argument there was no reasonable prospect Rintoul would be awarded any. The true position lies between these extremes.

[87] I am satisfied the Council was genuinely torn as to what it should do. It was attracted to Rintoul's pricing. That is apparent from the recommendations of the evaluation team led by Mr Wagner, which referred to the savings that could be achieved if the Council awarded the contracts to Rintoul, in turn putting the Council "in good stead for financing the remaining cycle trail sections". The enthusiasm is hardly surprising. Rintoul's price for the four sections of trail was more than \$630,000 cheaper than its competitors, which is a lot of money for a small local authority even taking into account central government funding. And, Mr Young had a good relationship with Rintoul. He believed the company should be awarded the contracts. As the Council's project manager for the twin coast cycle trail, it is reasonable to assume his opinion carried weight.

[88] However, the Council had genuine reservations about contracting with Rintoul irrespective of anything to do with 008. A perception of anti-competitive behaviour has already been mentioned. There were other concerns too. The May

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<sup>29</sup> *Mallet v McMonagle* [1970] AC 166, 176; also cited in *Astra Pharmaceuticals (NZ) Ltd v Pharmaceutical Management Agency Ltd* [2001] 1 NZLR 415 at [73], and *Martelli McKegg Wells & Cormack v Commbank International NV* CA75/96, 7 November 1996 at 11.

meeting was called because of concerns about environmental and traffic management, Rintoul's ability to complete the projects simultaneously, and concern quality was being sacrificed for price.

[89] The Council received information from the Bay of Islands Vintage Railway Trust on or about 3 May 2016. The Trust did not want the Council to award one of the contracts to Rintoul; there had been "issues" between it and Rintoul. The related process contract expressly provided for consideration of the Trust's view, for, it would be affected by the construction.<sup>30</sup> There was also an issue of some type between Rintoul and the Council: the fact of an earlier contractual dispute leading to arbitration was mentioned briefly in evidence.

[90] Rintoul supplied more information to the Council in the wake of the May meeting. This was received somewhat sceptically by Mr Wagner and Mr Ure; they saw Rintoul as providing bland and generic assurances. But the Council remained tempted by price. On 13 May 2016 Mr Wagner sent an internal email in which he inclined to the view Rintoul should be awarded the contracts providing they were framed so the Council could "remove Rintoul from a site if [it] plays up again". Mr Wagner asked if the outcome of the arbitration was available, presumably because he thought that relevant to the decision too.

[91] Mr Wagner's belated appointment as engineer to 008 then led to concerns of procedural shortcomings by Rintoul in relation to that contract. By then, the tendering processes were dragging on. Rintoul was anxious to know from the Council what was happening. The relationship deteriorated sharply after 21 June when Mr Wagner began to question Rintoul about aspects of 008's pricing. Mr Young resigned two days later. On 4 July, Mr Wagner was instructed to draft the exclusion letter. Timing of the exclusion decision is otherwise unclear.

[92] Against this background, I am satisfied the chance of Rintoul being awarded all four contracts was evenly divided, meaning it enjoyed a 50 percent chance of success.

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<sup>30</sup> The Trust operated trains on railway lines next to or through the proposed trail.

[93] Mr Christie submitted a distinction should be drawn in relation to a contract not awarded until the end of July.<sup>31</sup> Here, a different option was undertaken than that advanced by Rintoul. Mr Christie submitted this amendment made it even less likely Rintoul could have completed the four contracts at the same time, so the Council would, in all probability, never have awarded this contract to Rintoul even if it continued to contemplate awarding Rintoul the other three.

[94] I am not persuaded a credible basis for separate treatment arises. The evaluation team had recommended this contract be awarded to Rintoul, and Mr Wagner's 13 May email was specifically directed to all four contracts (the subject line refers to all four). And as observed, he then inclined to the view Rintoul should be awarded them all. Only later did his attitude change. That change was global too.

[95] To recapitulate, I am satisfied had Rintoul not been excluded from the process contracts, it stood a 50 percent chance of being awarded the four sections of trail. The choice, as the Council saw it, was broadly between price and quality. It was torn. Concern about 008 then intervened, which became synonymous with exclusion. And but for exclusion, it was equally likely Rintoul would be awarded all four contracts—or none.

[96] In light of this judgment, it may be the parties are able to agree upon quantum. If not, I invite a joint memorandum of counsel within 15 working days identifying:

- (a) The hearing time required for quantum determination.
- (b) A related timetable.

[97] I thank counsel for their assistance and courteousness.

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**Downs J**

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<sup>31</sup> Koeke Mangrove Route FNDC5/16/010.