IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA32/2024
[2024] NZCA 645

BETWEEN	BANK OF NEW ZEALAND Appellant
AND	THE CHRISTIAN CHURCH COMMUNITY TRUST AND OTHERS Respondents (See Schedule A for complete list of Respondents)

Hearing:	31 October 2024
Court:	Goddard, Katz and Mallon JJ
Counsel:	S M Hunter KC, W M Irving and E B Boyle for Appellant R W Raymond KC, AV Foote and B I G Cummings for Respondents
Judgment:	9 December 2024 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The injunction granted in the High Court is set aside.

C The Gloriavale entities must pay costs to BNZ for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel.

D The costs order made in the High Court is set aside. Costs in the High Court are to be determined by that Court in light of this judgment.

REASONS OF THE COURT

(Given by Goddard J)

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Introduction

The issue: should BNZ be required to continue to provide banking services to the Gloriavale entities pending trial?

[1] The Bank of New Zealand (BNZ) has for many years provided banking services to various trusts, partnerships and companies associated with the Gloriavale Christian Community (Gloriavale entities). In July 2022 BNZ gave notice to the Gloriavale entities of its intention to terminate the provision of banking services. BNZ considered that this decision was appropriate in light of its (internal) human rights policy. BNZ initially gave the Gloriavale entities three months' notice that it would cease providing banking services. That deadline was extended to 30 November 2022 at the request of the Gloriavale entities. BNZ declined to provide any further extension.

[2] The Gloriavale entities made attempts to establish alternative banking arrangements, but were unsuccessful. They say that without bank accounts, they will not be able to continue to operate. The Gloriavale entities carry on a range of commercial activities, and meet the basic needs of the Gloriavale community including medical care, education of children in the community, and provision of food and clothing. If the Gloriavale entities do not have bank accounts, all of these activities will be at risk, as will the continued existence of the community.

[3] The Gloriavale entities sought an interim injunction requiring BNZ to continue to provide services to them. The application was initially made without notice.[1] An injunction was granted by Dunningham J on 7 December 2022.[2] The application then came before Cull J on notice on 30 May 2023. On 8 September 2023, Cull J granted an interim injunction preventing BNZ from terminating the Gloriavale entities' accounts pending trial.[3]

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1 BNZ participated on a "Pickwick" basis: see *Pickwick International Inc (GB) Ltd v Multiple Sound Distributers Ltd* [1972] 1 WLR 1213 (Ch).

2 *Christian Church Community Trust v Bank of New Zealand* [2022] NZHC 3271 [First injunction decision].

3 *Christian Church Community Trust v Bank of New Zealand* [2023] NZHC 2523, [2023] 3 NZLR 190 [Second injunction decision].

[4] BNZ appeals from the second injunction decision. BNZ seeks to have the injunction set aside, so it is able to close the Gloriavale entities' accounts.

The Gloriavale entities' claims

[5] It was common ground before us that as a matter of common law a contract by a bank to provide banking services to a customer is terminable upon reasonable notice in the absence of express contrary agreement or statutory impediment.[4]

[6] The Gloriavale entities do not contend that any legislation restricts the ability of BNZ to terminate the provision of banking services to them.[5]

[7] But the Gloriavale entities claim that the ability of BNZ to close their accounts and terminate their relationship is limited by the express terms of the contract between BNZ and the Gloriavale entities, properly interpreted. They also claim that BNZ owes them a fiduciary duty that would be breached by closing their accounts, and that BNZ is estopped from closing their accounts.

[8] The contractual relationship between the Gloriavale entities and BNZ is governed by BNZ's standard terms and conditions (BNZ standard terms). That contract expressly confers on each of the customer and BNZ the ability to terminate the banking relationship. As discussed in more detail below, cl 8.2 of the BNZ standard terms provides that BNZ can close a customer's account or end any other product or service "for any reason". Some examples are given of circumstances in which an account may be closed or suspended, but the contract expressly states that those examples do not limit the reasons why BNZ might close or suspend an account. The Gloriavale entitles say that cl 8.2, properly interpreted:

(a) requires BNZ to have a "reason" to close their accounts; and

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4 *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] UKPC 16, [2009] 1 WLR 1405 at [1] per Lord Hoffman.

5 It would be unlawful for a bank to refuse to provide banking services, or to terminate banking services, on the basis of any of the prohibited grounds of discrimination set out in the Human Rights Act 1993 — see s 44. But the Gloriavale entities do not plead that BNZ is acting in breach of the Human Rights Act, or any other legislation.

(b) requires that the reason cannot be founded on a mistake of fact, unreasonable, capricious, arbitrary, or require customers to meet standards of unpublished and unnotified policies of which they were not aware.

[9] The Gloriavale entities say that the High Court was right to grant an injunction, because:

(a) There is a serious question to be tried as to whether BNZ's decision to close their accounts breached cl 8.2. They say it is seriously arguable that BNZ's decision was made on the basis of unreliable and incorrect information; they were not provided with the BNZ human rights policy by reference to which the relationship was terminated; no attempt was made to engage with them to ascertain the correct position and whether the concerns identified were well founded or had since been addressed; and there was no discussion with them about what steps could be taken to enable the banking relationship to continue.

(b) The balance of convenience strongly favours continued provision of banking services until their claims have been determined. If the accounts continue, there is no material prejudice to BNZ. If the accounts are closed, the Gloriavale entities will suffer irreversible prejudice.

Summary

[10] It is not seriously arguable that cl 8.2, properly interpreted, limits the reasons for which BNZ may terminate the banking relationship. Rather, under cl 8.2 BNZ may terminate "for any reason", unqualified by the list of examples set out in that clause or by any requirement that the reason be of a particular kind.

[11] There is a substantial body of overseas authority to the effect that a discretionary contractual power conferred on one party may be subject to implied limits broadly analogous to the limits that apply to the exercise of public powers. These authorities do not speak with one voice: the law is developing, and remains

unsettled. This Court has not to date had to determine which (if any) of these lines of authority should be followed in New Zealand. On the approach which we consider most promising, it is strongly arguable that BNZ's power to terminate the agreements must be exercised for the purpose for which that power was conferred under the contract. But that purpose is to enable BNZ to bring the relationship to an end if BNZ wishes to do so "for any reason". On this approach, cl 8.2 preserves, rather than limits, BNZ's freedom at common law to terminate the relationship unilaterally in its own interests.

[12] Some overseas authorities suggest that a term should be implied into every contract that confers a discretionary power on one party to the effect that the power must not be exercised dishonestly, in bad faith, or capriciously or arbitrarily. But the Gloriavale entities do not contend that BNZ's decision was made dishonestly or in bad faith (in the sense that BNZ was seeking to cause them harm). It is not seriously arguable that BNZ's decision was made capriciously or arbitrarily: BNZ made a considered decision at a senior level that termination was appropriate, in light of its internal policies. The decision was not made on a whim, or for reasons unconnected with BNZ's legitimate interests. For the purpose of this interlocutory appeal we are content to proceed on the basis that the termination provision in the BNZ standard terms is arguably subject to an implied limit along these lines. But it is not seriously arguable that BNZ breached any such implied term.

[13] It is not in our view seriously arguable as a matter of law that a term should be implied into this contract that would require BNZ to act reasonably in making a termination decision, or that would impose process obligations before BNZ makes a decision to terminate a customer's account under cl 8.2. Such a term would be inconsistent with the express terms of the contract, in particular cl 8.2, and with the general scheme of the contract.

[14] Still less is it seriously arguable that BNZ has a fiduciary duty that would be breached if BNZ ceases to provide banking services to the Gloriavale entities, or that BNZ is (indefinitely) estopped from terminating the provision of those services.

[15] We are thus firmly of the view that there is no serious question to be tried in relation to the Gloriavale entities' claims against BNZ. In those circumstances an interim injunction should not be granted.

[16] If we had considered that it is arguable that cl 8.2 or an implied term of the contract imposed process obligations on BNZ that required it to make decisions about termination taking into account relevant matters and disregarding irrelevant matters, we would have assessed the Gloriavale entities' claims as arguable on the facts, but weak. We would nonetheless have declined to continue the injunction, as that would compel BNZ to provide services to the Gloriavale entities for an extended period against BNZ's will in circumstances where:

(a) BNZ believes in good faith that continuing to provide those services is inconsistent with its internal policies.

(b) BNZ's decision does not prevent the Gloriavale entities from obtaining banking services — it simply removes one provider as an option, in a market where there are many providers of banking services.

(c) The Gloriavale entities can seek to open accounts with other banks. If another bank is willing to provide banking services to a Gloriavale entity, that entity will suffer some inconvenience as it moves its accounts, but will not suffer serious or irremediable prejudice of the kind that would justify granting an injunction. If no other bank is willing to accept the Gloriavale entities as customers, that reluctance cannot be laid at the door of BNZ. The prejudice to the Gloriavale entities would result from the characteristics of those entities that are perceived by other bankers as relevant to the costs and risks of dealing with them. And it would be in precisely those circumstances that the prejudice to BNZ of being required to provide services to customers with whom no other bank wishes to deal would be most apparent, and would weigh most strongly against granting an injunction.

[17] Thus even if we are wrong about the existence of an arguable question to be tried, we do not consider that it would be in the overall interests of justice to grant an injunction requiring BNZ to continue to provide services to the Gloriavale entities for a further period (likely to be in excess of a year) until the claims could be tried.

[18] BNZ's appeal must therefore be allowed. BNZ has provided an assurance to the Court that if its appeal succeeds, it will continue to provide banking services to the Gloriavale entities for a period of three months from the date of this Court's decision. In reliance on that assurance, we set aside the injunction with immediate effect.

Background

BNZ's longstanding banking relation with Gloriavale

[19] Gloriavale is a Christian community based in an isolated location on the West Coast of the South Island. The nearest town is Greymouth. The Christian Church Community Trust (the Trust), which is responsible for the day-to-day functioning of the community, first opened a bank account with BNZ in March 1999. Various accounts were opened by Gloriavale entities from 1999 through to 2020.

[20] These proceedings concern 16 Gloriavale entities which between them have a total of 83 accounts with BNZ. BNZ is the only bank used by the Trust and the other Gloriavale entities. It is also the bank used by most individual members of the Gloriavale community.[6] It was common ground before us that many of the Gloriavale entities have a longstanding customer relationship with BNZ, and that the relationship has been a good one. The Gloriavale entities all operate their accounts in credit. However at their request they are not paid interest on their (substantial) credit balances, as that would be inconsistent with their religious beliefs. There is no

[6] BNZ has terminated its banking relationship with certain individual members of the Gloriavale community who are leaders of that community. That termination is not challenged. It appears those individuals have been able to make alternative banking arrangements. BNZ continues to provide banking services to other individual members of the Gloriavale community.

suggestion that any of the Gloriavale entities has ever breached any obligations owed by it to BNZ.

[21] The Gloriavale entities have access to BNZ's "Internet Banking for Business" platform, and most transactions are carried out online using that platform. Other services that cannot be provided through that platform are provided by BNZ's Greymouth branch, which has regular dealings with members of the Gloriavale community involved in the management of the Gloriavale entities. BNZ also provides a relationship manager for the Gloriavale entities, who is based in Christchurch. The relationship manager and their team are responsible for a small number of issues that cannot be dealt with at branch level, and are escalated to them — for example, establishing new accounts for existing entities or for new entities.

The terms of the banking relationship

[22] The relationship between banker and customer is contractual.[7] It is common ground that the terms of the relevant contract for each of the Gloriavale entities are the BNZ standard terms that apply to all BNZ transaction and savings accounts, and to account-related products and services.

[23] The BNZ standard terms provide that BNZ can change those terms at any time, generally with at least 14 days' notice. The Gloriavale entities did not suggest that earlier versions of the terms were more favourable to them, or that they had been prejudiced by any unilateral changes to the terms by BNZ. Rather, they rely on the current version of the BNZ standard terms.

[24] Clause 1.6 provides that BNZ will provide its services with reasonable care and skill. It is not suggested that BNZ has breached this obligation.

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7 John Odgers and Ian Wilson *Paget's Law of Banking* (16th ed, LexisNexis, London, 2023) at [4.1].

[25] Clause 2.1 of the BNZ standard terms is concerned with opening an account. It provides:

> **2.1** **Opening an account** … [BNZ has] sole discretion as to whether or not we will open an account or provide any product or service to you. We can decline your application for an account … and we do not need to give you a reason for doing so.

[26] Clause 2.11 provides that BNZ can decline to act on instructions "where we consider that we have *a good reason to do so*".[8]

[27] Clause 4.4 provides that BNZ can change its interest rates at any time without notice.[9]

[28] Clause 4.6 provides that BNZ may impose fees and charges for products and services, and may change those fees and charges at any time. Clause 4.8 provides that if a customer is not happy with a change to fees and charges, they can close their accounts and end any other products or services in accordance with s 8 and any relevant specific terms. (The same applies where a customer is not happy with a change to interest rates, though there is no specific term to that effect.)

[29] Section 7 of the BNZ standard terms is concerned with overdrafts. If a customer seeks to make a payment out of an account with insufficient funds, cl 3.4 provides that BNZ "can, at our discretion, choose whether or not to make a payment … or dishonour a payment". Clause 7.3 provides that this will be treated as a request for an unarranged overdraft, and cl 7.4 provides that BNZ will consider whether it agrees to the request and "can approve or decline the request".

[30] Section 8 of the BNZ standard terms sets out the circumstances in which the contract may be terminated by either party.

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8 Emphasis added.

9 Subject to the terms of any specific product or service, such as a term loan or term deposit. As one would expect, specific terms in relation to particular products and services prevail over the general terms in the BNZ standard terms.

[31] Clause 8.1 provides that a customer may close their account or end any other product or service at any time. Outstanding obligations to the bank must still be met; in particular, any debts owed on any account must be repaid.

[32] BNZ's right to terminate the provision of services is governed by cl 8.2, which we set out in full as it is central to this appeal:

> **8.2 When we can close or suspend your account or end or suspend any other product or service:** We can close your account or end any other product or service, or immediately suspend or restrict the operation of your account or the provision of any other product or service, for any reason. For example (but without limiting the reasons why we might close or suspend your account), we may close or suspend your account where:
>
> (a) we learn of your, or your guarantor's, death or any other lack of legal capacity;
>
> (b) we learn that you, or your guarantor, have suffered a Bankruptcy Event or an Insolvency Event;
>
> (c) there are insufficient available funds (including funds available under any overdraft, or other loan facility on that account) to meet payment instructions or other obligations from that account (including obligations that might arise later and our fees and charges);
>
> (d) we learn of a dispute over the ownership of funds or the operation of your account;
>
> (e) we learn that a party has reasonably claimed an interest in your account;
>
> (f) we reasonably believe that you or someone else has used or is using your account or has (or has attempted to use your account), illegally or fraudulently, or behaving improperly (for example, in a threatening or aggressive manner to our staff);
>
> (g) for organisation accounts (including those of trusts, companies, incorporated societies and other businesses), while the authority of the person representing the organisation is unclear;
>
> (h) we reasonably believe that there is a legal requirement to do so, including to comply with Sanctions, or as required by a Court or other authority;
>
> (i) you have breached these Terms or any relevant Product Terms;

(j) we reasonably believe that you, or payments in or out of your account, are subject to Sanctions;

(k) your account has never been used, or has not been used for an extended period; or

(l) you refuse to provide information that we ask for or we learn that information we have been provided in relation to you or in relation to the operation of your account, is incorrect or misleading or incomplete.

[33] Clause 8.3 provides that BNZ "will not usually close your account … unless we have told you that we are going to do so at least 14 days in advance".

[34] Clause 8.5 excludes liability for suspending or closing an account:

8.5 Liability if we suspend or close your account or end or suspend a product or service: If we suspend, restrict or close your account or end or suspend a product or service in accordance with clauses 8.2, 20.10 or 21.10:

(a) where there is more than one account holder (for example, for joint or partnership accounts), each joint account holder existing at the time of the suspension or closure of the account will continue to be jointly and individually liable for any outstanding debt; and

(b) we will not be liable to you for any consequences (including any Loss) arising out of the suspension, restriction or closure of that account.

[35] Clause 8.10 provides that if BNZ is asked to move a customer's account to another bank, BNZ will co-operate in a timely manner (subject to any legal constraints).

BNZ gives notice terminating the relationship

[36] In May 2022 the Employment Court delivered judgment in *Courage v Attorney-General*.[10] The Court found that three members of the Gloriavale community were employees from the age of six until they left.[11] The decision included a number of adverse findings about the circumstances in which those three members had worked at Gloriavale. The Court found that children aged six to 14 were coerced,

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10 *Courage v Attorney-General* [2022] NZEmpC 77, (2022) 18 NZELR 746.
11 At [9], [40], [55], [56], [165] and [203].

including through violence and denial of food, to perform laborious and often dangerous physical work for the commercial benefit of the Gloriavale community.

[37] The defendants in the *Courage* proceeding included senior members of the Gloriavale community (some of whom are or were trustees of the Trust), and one of the Gloriavale entities (Forest Gold Honey Ltd).

[38] There was no appeal from the *Courage* judgment. Leaders of the Gloriavale community issued a public apology for failing to prevent, and protect victims from, labour exploitation and sexual abuse.

[39] The *Courage* decision and the subsequent apology came to the attention of BNZ. BNZ is part of the National Australia Bank Ltd group of companies. It is subject to that group's human rights policy. BNZ says it considered the *Courage* judgment in light of the group human rights policy, and decided to terminate the provision of banking services to the Gloriavale entities based on the findings in the *Courage* judgment.

[40] In making that decision BNZ did not seek any input from the Gloriavale entities. BNZ does not suggest that it took into account the interests of those entities. Rather, BNZ says it made a decision internally, at a senior level, which it saw as appropriate in light of its human rights policy.

[41] The first that the Gloriavale entities knew about BNZ's consideration of whether BNZ would continue to provide banking services to them was when they were told, at an online meeting on 6 July 2022, that BNZ had made the decision to cease to do so. A letter formally recording the decision was sent by BNZ to the Gloriavale entities on 8 July 2022, attaching the list of all accounts to be closed. That list included accounts for the charitable trust that meets the needs of members of the community, the school, the pre-school, all businesses, the midwifery service, and accounts used for medical and laundry costs.

[42] The letter explained the decision to close the accounts as follows:

> 3. As we explained on the call, BNZ is aware of the recent Employment Court decision dated 10 May 2022, relating to a claim by three former members of the Gloriavale community. BNZ has serious concerns about the labour practices that have been described in that decision.
>
> 4. Based on what BNZ has learned about the labour practices followed at Gloriavale, and taking into account the public apology issued by Gloriavale, BNZ has formed the view that the labour practices amount to, or are likely to amount to, human rights abuses. BNZ understands that these human rights abuses are occurring (or have occurred) under the senior leadership of the Servants and Shepherds (as described in the Employment Court decision).
>
> 5. BNZ follows a strong human rights policy. Under this policy, BNZ must not tolerate, or be complicit in, any activities that contribute to adverse human rights impacts. We believe that continuing to provide banking services to you would be inconsistent with our human rights policy.
>
> 6. Therefore BNZ has reached a decision to terminate our banking relationships with you. …

[43] BNZ says the three month notice period it provided was intended to allow the Gloriavale entities to approach other banking providers, complete on-boarding with an alternative banking provider, or make alternative arrangements if it was unsuccessful in securing a different banking provider during this period. The BNZ letter offered to assist the Gloriavale entities to transition to another banking provider, and identified the relevant BNZ contact person to assist in making the necessary arrangements.

[44] The Gloriavale entities say that they attempted to engage with BNZ to provide information and correct inaccurate assumptions made by BNZ, to give assurances that steps were being taken within the Gloriavale community to remedy the practices of concern to BNZ, and to find a resolution that would enable the banking relationship to continue. They say that the Employment Court findings do not apply to most of the Gloriavale entities, contrary to the assumption that BNZ appears to have made, and that significant measures have been put in place to ensure that the concerns identified by that Court and by other agencies are effectively addressed including appointment of independent external trustees of the Trust, and employment of a new chief executive

officer of the Trust who is not a member of the community. But BNZ has not been willing to engage, or to revisit its decision.

[45] The Gloriavale entities asked for a copy of the human rights policy at the meeting on 6 July 2022, but were told that it was an internal policy. They were not given a copy. They saw the policy only when it was exhibited to an affidavit of a BNZ executive in these proceedings.

[46] As already mentioned, the Gloriavale entities sought an extension of the notice period. On 7 October 2022 BNZ agreed to extend the date by which the accounts would be closed from 14 October 2022 to 30 November 2022.

Attempts by the Gloriavale entities to open accounts with other banks

[47] Members of the Gloriavale community swore affidavits for the purpose of the May 2023 High Court hearing setting out the attempts they had made to put in place alternative banking arrangements. All of those attempts were unsuccessful.

[48] There is no updating evidence before this Court about whether any further efforts have been made by the Gloriavale entities to establish alternative banking arrangements since the hearing in the High Court, more than a year ago. We were advised from the bar that attempts to find an alternative banking service provider have continued, and have been unsuccessful. For present purposes we will proceed on the basis that there is a very substantial risk that the Gloriavale entities will not be able to open bank accounts with other New Zealand retail banks.

First injunction decision

[49] On 29 November 2022 the Gloriavale entities sought interim relief on a without notice basis. BNZ was advised of the application, and participated on a limited basis.[12] The Gloriavale entities had not prepared pleadings at that time, but made their

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[12] *Pickwick International Inc (GB) Ltd v Multiple Sound Distributers Ltd*, above n 1; and Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR7.46.05] and [HR7.53.12].

application on the basis that termination would be a breach of contract or a breach of fiduciary duty.[13]

[50] Dunningham J accepted that it was theoretically arguable that there are constraints on the exercise of power to terminate a contract, particularly given the importance of banking facilities in today's society.[14] The Judge considered it was unclear from the Employment Court decision whether the concerns identified applied to all the relevant Gloriavale entities.[15] She was satisfied that the balance of convenience lay with the Gloriavale entities, as the closure of their bank accounts meant that the community could not make alternative arrangements.[16] The Judge concluded that it was appropriate for the bank accounts to be sustained while the Gloriavale entities' claim is determined, and granted an "interim interim" injunction.[17]

Second injunction decision

[51] The Gloriavale entities then filed proceedings and applied on notice for interim relief pending trial. They plead three causes of action: breach of contract, breach of fiduciary duty, and estoppel by convention. The claims are described in more detail below.

[52] The Gloriavale entities' application for an interim injunction was, as already mentioned, heard by Cull J on 30 May 2023. The Judge concluded that there was a serious question to be tried on at least the breach of contract cause of action.[18] She considered that the balance of convenience and overall justice favoured allowing an interim injunction to continue until determination of the substantive claims.[19] The Judge's reasoning is set out in more detail below. Having found that the threshold was met, and there was a serious question to be tried on the first cause of action, the Judge did not need to address the arguments relating to the other causes of action.[20]

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13 First injunction decision, above n 2, at [28].
14 At [28].
15 At [28].
16 At [29].
17 At [33].
18 Second injunction decision, above n 3, at [84]–[85].
19 At [89]–[91] and [93].
20 At [85].

Leave to appeal

[53] BNZ sought and was granted special leave to appeal to this Court from the second interim injunction decision.[21]

[54] The main thrust of BNZ's appeal is its argument that there is no serious question to be tried. BNZ says it is clear as a matter of common law, and interpretation of the BNZ standard terms, that it had an express unilateral right to terminate the provision of banking services to the Gloriavale entities.

[55] For their part, the Gloriavale entities say that the High Court Judge was right to find that there is a serious question to be tried on their breach of contract cause of action. They say there are also serious questions to be tried on their breach of fiduciary duty and estoppel causes of action. They add that if there is a serious question to be tried, the balance of convenience overwhelmingly favours requiring BNZ to continue to provide banking services until those questions can be determined at trial. If BNZ withdraws banking services, and the Gloriavale entities are unable to find alternative banking facilities, they will not be able to continue to operate. A determination at trial that BNZ was not entitled to close their accounts will come much too late: they will suffer irreversible prejudice if they are deprived of banking facilities, which are essential for the operation of businesses and charitable trusts in the modern world.

Principles governing interim relief

[56] As Cull J said, the circumstances in which an interim injunction will be granted pending trial are well established in New Zealand.[22] The ultimate question is whether the overall interests of justice require that an injunction be granted.[23] In order to determine that question, the court will first consider whether there is a serious question to be tried. If that threshold is satisfied, the court then goes on to consider where the balance of convenience lies, and the overall interests of justice.[24]

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21 *Bank of New Zealand v Christian Church Community Trust* [2024] NZCA 246.

22 Second injunction decision, above n 3, at [16], citing *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (HC) at 133; *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142; and *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344, [2020] NZCCLR 29 at [22]–[24].

23 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*, above n 22, at 142.

24 *Intellihub Ltd v Genesis Energy Ltd*, above n 22, at [23], citing *Klissers Farmhouse Bakeries*

[57] Before the High Court, BNZ argued that the Gloriavale entities were seeking a mandatory injunction that would compel BNZ to continue to provide services to the Gloriavale entities. BNZ argued that mandatory injunctions are granted rarely, and the applicant is required to establish a "powerfully arguable or strong case to sustain a mandatory injunction".[25]

[58] The Judge did not accept BNZ's submission. She considered that attempting to classify injunctions as either mandatory or prohibitory can be a barren exercise.[26] What ultimately matters is the practical implications of ordering the injunction sought.[27] The court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.[28]

[59] The second reason that the Judge did not accept BNZ's submission was that the interim injunction prevented BNZ terminating the Gloriavale accounts. The Judge considered that because the injunction prohibited termination of the accounts, it was a prohibitory injunction.[29]

[60] The Judge proceeded to apply the orthodox test for an interim injunction to the facts of the case.[30]

[61] There was no real dispute before us about the principles governing the grant of interim injunctions pending trial. BNZ reiterated its submission that a customer of a bank seeking to prevent the bank from closing its accounts is seeking a mandatory injunction, requiring the bank to continue to do business with the customer against the bank's will. BNZ submits that mandatory injunctions are granted rarely, and there is authority to the effect that the applicant is required to establish a powerfully arguable

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Ltd v Harvest Bakeries Ltd, above n 22, at 142.

25 Second injunction decision, above n 3, at [19], relying on *Croser v Focus Genetics Ltd Partnership* [2019] NZHC 627; and *Acernus Aero Ltd v Vincent Aviation Ltd* [2012] NZHC 295.

26 Second injunction decision, above n 3, at [20], citing *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd*, above n 4; and *Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559 at [90].

27 *Commerce Commission v Viagogo AG*, above n 26, at [90], citing *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd*, above n 4.

28 *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd*, above n 4, at [17]; and *Croser v Focus Genetics Ltd Partnership*, above n 25, at [78].

29 Second injunction decision, above n 3, at [21].

30 At [22].

or strong case to sustain a mandatory injunction.[31] Whether or not a higher standard formally applies to a mandatory injunction, BNZ submits that this Court should be mindful that, properly construed, the injunction compels BNZ to continue to provide services to the respondents on an ongoing basis.

[62] For their part, the Gloriavale entities support the approach of the High Court Judge. They say the High Court was correct to proceed on the basis that the relief sought is not a mandatory injunction. But in any event, classification is not the issue — rather, what ultimately matters is the practical implications of ordering an injunction.

[63] We proceed on the basis of the orthodox approach to interim injunctive relief before the New Zealand courts set out at [56] above. An essential prerequisite for the grant of an interim injunction is that there must be a serious question to be tried. That question is the main focus of our analysis on appeal. If there is no serious question to be tried on the claims advanced, it would be inappropriate to grant an injunction pending trial. If there is a serious question to be tried, it is then necessary to consider the practical consequences of granting or refusing an injunction for the parties, and for the ability of the courts to do practical justice at trial.

[64] As this Court has previously observed, arguments about whether injunctions are classified as mandatory or prohibitory are "barren … [w]hat matters is what the practical consequences of the actual injunction are likely to be".[32] But we accept BNZ's submission that the effect of granting an injunction in this case is to compel BNZ to continue to provide services to the Gloriavale entities, and deal with those entities, in circumstances where BNZ does not wish to do so. That is a relevant factor, among others, if there is a serious question for trial with the result that the balancing stage of the analysis is reached.

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31 See *Croser v Focus Genetics Ltd Partnership*, above n 25, at [78]; and *Acernus Aero Ltd v Vincent Aviation Ltd*, above n 25, at [9].

32 *Commerce Commission v Viagogo AG*, above n 26, at [90], citing *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd*, above n 4, at [20] per Lord Hoffman.

Limits on BNZ's ability to terminate the contractual banking relationship

Second injunction decision

[65] Before the High Court, the Gloriavale entities accepted that in the absence of an express contrary agreement a bank may terminate a relationship with a customer on reasonable notice. However the Gloriavale entities submitted that:

(a) Clause 8.2 of the BNZ standard terms provides an express, contractual requirement that BNZ must have a qualifying reason for closing the affected accounts.

(b) BNZ's exercise of power under cl 8.2 is an exercise of contractual discretion, and contractual discretions cannot be exercised in a manner that is arbitrary, capricious or unreasonable, having regard to the provisions of the contract.

[66] The Judge considered that cl 8.2 of the BNZ standard terms, by giving examples of reasons for BNZ to terminate a customer's account, appeared to imply either that there would need to be a valid reason for termination, or that BNZ would act reasonably.[33]

[67] The Judge also considered that it was reasonably arguable that the common law "default rule" controlling the exercise of unilateral contractual powers or discretions applies in this case.[34] The Judge referred to the manner in which this rule was articulated by Leggatt LJ in *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)*:[35]

> For purposes of judicial review the Court is concerned to judge whether a decision-making body has exceeded its powers, and in this context whether a particular decision is so perverse that no reasonable body, properly directing itself to the applicable law, could have reached such a decision. But the exercise of judicial control of administrative action is an analogy which must be applied with caution to the assessment of whether a contractual discretion has been properly exercised. The essential question always is whether the

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33 Second injunction decision, above n 3, at [50].

34 At [52].

35 At [39], citing *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)* [1993] 1 Lloyd's Rep 397 (CA) at 404.

> relevant power has been abused. Where A and B contract with one another to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application.

[68] The Judge also referred to what has been described as the "expanded default rule" drawn from the decision of the United Kingdom Supreme Court in *Braganza v BP Shipping Ltd*.[36] That case is sometimes cited as authority for the proposition that where a contract assigns a decision-making function to one of the parties, the same constraints apply as in the public law context where a statute assigns a decision-making function to a public authority. In particular, the decision-maker must take into account relevant matters, and must not take into account irrelevant matters.

[69] As the Judge noted, in *Woolley v Fonterra Co-operative Group Ltd* this Court proceeded on the assumption that the default rule applies in New Zealand, without expressly deciding the point.[37] This Court did not consider that *Woolley* was an appropriate vehicle for deciding whether to adopt the *Braganza* approach in New Zealand.[38]

[70] The Judge considered that it is reasonably arguable that the default rule or the *Braganza* approach may be applicable to the banking relationship, and to the exercise of BNZ's discretion to terminate under cl 8.2. She did not accept BNZ's submission that BNZ had an absolute termination right.[39]

Submissions for the Gloriavale entities

[71] The Gloriavale entities support the finding of the High Court that it is seriously arguable that there are restrictions on the ability of BNZ to close their accounts.

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36 Second injunction decision, above n 3, at [41], citing *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661 at [19] per Lady Hale.

37 Second injunction decision, above n 3, at [42], citing *Woolley v Fonterra Co-Operative Group Ltd* [2023] NZCA 266, [2023] 3 NZLR 405 at [103] and [112]–[115].

38 *Woolley v Fonterra Co-Operative Group Ltd*, above n 37, at [103] and [112]–[115].

39 Second injunction decision, above n 3, at [51]–[52].

[72] They plead that, correctly construed, the BNZ standard terms:

(a) require there to be a "reason" to suspend or close an account; and

(b) require that the reason "cannot be founded on a mistake of fact, unreasonable, capricious, arbitrary, or require customers to meet standards of unpublished and unnotified 'policies' of which they were not aware".

[73] The Gloriavale entities say that BNZ cannot suspend or close their accounts as there is no qualifying "reason" to do so.

[74] The Gloriavale entities submit that contractual interpretation is objective, the aim being to ascertain what the words would convey to a reasonable person. They say that a reasonable person would not expect that BNZ could terminate an account for a reason that is invalid, unreasonable, or factually incorrect, or a matter that is wholly outside the banking relationship.

[75] The Gloriavale entities say that cl 8.2 must be interpreted in light of the wider context of the contract. They emphasise that the banking relationship stretches back some 40 years. They note that cl 8.2 is not a negotiated outcome arrived at by legally advised parties. Rather, it is a clause unilaterally imposed by BNZ.

[76] Mr Raymond KC, who appeared for the Gloriavale entities, put particular emphasis on the limbs of cl 8.2 that contemplate BNZ acting reasonably. For example, para (h) refers to BNZ closing or suspending an account where "we reasonably believe that there is a legal requirement to do so, including to comply with Sanctions, or as required by a Court or other authority". Mr Raymond said that it would make no commercial sense for BNZ to be free to close an account in reliance on the general language in cl 8.2 by reference to a belief that it was legally obliged to do so, if that belief was not reasonable. A customer would not expect that BNZ was free to take steps to close or suspend an account under cl 8.2 on the basis of unreasonable beliefs.

[77] Mr Raymond added that BNZ's argument that it can close the account for any reason, even an irrational or capricious reason, is irreconcilable with:

(a) BNZ's obligations under s 7 of the Fair Trading Act 1986, which prohibits unconscionable conduct;

(b) the Code of Banking Practice, which states that participating banks (including BNZ) will act "fairly, reasonably, and in good faith";

(c) additional information on BNZ's website, including a commitment from BNZ that "[w]e agree to: treat you fairly and reasonably";

(d) the wider regulatory context, including the purpose of the Deposit Takers Act 2023 to "promote the prosperity and well-being of New Zealanders and contribute to a sustainable and productive economy by protecting and promoting the stability of the financial system";[40] and

(e) the Fair Conduct Principles that will apply to BNZ under the Financial Markets (Conduct of Institutions) Amendment Act 2022, with effect from 31 March 2025.

[78] The Gloriavale entities say that it is seriously arguable that the common law "default rule" in relation to the exercise of unilateral contractual powers or discretions applies, with the result that BNZ must exercise its power of termination honestly and in good faith, and must not exercise the power arbitrarily, capriciously or unreasonably. They say that it is also arguable that the *Braganza* approach applies in this context, with the result that BNZ is required to consider all relevant matters before exercising the termination power, and must not consider irrelevant matters. The Gloriavale entities do not plead any implied term to this effect: their pleading is focused on the interpretation of BNZ's standard terms, and in particular cl 8.2. But these issues were canvassed in the High Court and in submissions before this

[40] Deposit Takers Act 2023, s 3(1).

Court. We accept Mr Raymond's submission that these arguments are squarely on the table for the purposes of this appeal.

[79] Mr Raymond identified a number of concerns in relation to the sources on which BNZ relied in making its decision, including Wikipedia and media stories; inaccurate and outdated information; and a failure to engage. In response to questions from the bench he accepted that at the time it made its decision, BNZ did not know that other banks would decline to provide banking services. But he said that BNZ made an erroneous factual assumption about the availability of alternative services, and was not willing to revisit its decision in light of the information subsequently provided about this (and other matters).

[80] Mr Raymond accepted, in response to questions from the bench, that BNZ is free to terminate in its own interests under cl 8.2. But he submitted that before doing so BNZ is required (by cl 8.2, and any relevant implied term) to treat the customer fairly, including consulting the customer about the time frame for any proposed withdrawal of services. He referred to evidence that BNZ's website informs customers they will be treated fairly and reasonably, and submitted that this was implicit in cl 8.2.

[81] Mr Raymond added that if BNZ really is free to terminate for any reason, however arbitrary or capricious or unfounded, then that would be an unusual and surprising power that would need to be clearly highlighted in the contract. Clause 8.2 does not give such a surprising power the prominence that would be required in order for it to be effective.

[82] Mr Raymond confirmed that the Gloriavale entities are not arguing that BNZ acted in bad faith in the sense that it set out to harm the Gloriavale entities. But, he said, BNZ has not acted in good faith as it has made a significant decision affecting the Gloriavale entities and members of the Gloriavale community without following a fair process: there was no warning, no provision of the policy against which the conduct of the Gloriavale entities was being assessed,[41] no opportunity to correct errors in the information that BNZ was relying on, no opportunity to provide

[41] We were advised from the bar that the group human rights policy can be accessed through the National Australia Bank website, but not through the BNZ website.

reassurance about future conduct, and no reassessment of the decision in light of information subsequently obtained, in particular the inability to find any alternative banking provider.

[83] Mr Raymond was especially critical of BNZ seeking to terminate the relationship for what he described as reasons outside the four corners of the banking relationship, without any prior notice that it would seek to do so. The examples given in cl 8.2 are, he said, all matters that concern the banking relationship. The issues raised by BNZ in respect of its human rights policy are not. Before terminating for these "non-banking reasons", a proper process needed to be followed.

Submissions for BNZ

[84] BNZ submits that cl 8.2 expressly provides that BNZ can close an account "for any reason", and it is not seriously arguable that this provision gives rise to anything other than an express unilateral power of termination. BNZ says that this approach is consistent with the contract more broadly:

(a) Customers also have unilateral termination rights. It could not be seriously argued that a customer's unilateral termination right is in some way constrained, and that a customer would not be entitled to close their bank account merely because they felt like it.

(b) This approach gives cl 8.2 a meaning that is consistent with BNZ's rights under cl 2.1 to decline an application to open an account or to decline to provide any product or service without needing to give a reason.

[85] BNZ submits that the Judge's reasoning that the inclusion of example reasons in cl 8.2 may imply either that there would need to be a valid reason for termination, or that BNZ would act reasonably, is not seriously arguable. The BNZ standard terms expressly provide that those examples are included "without limiting" the reasons for which BNZ can terminate.

[86] BNZ also submits that it is not seriously arguable that there is any implied limit on the exercise of BNZ's termination power based on the "default rule" or the *Braganza* approach. Neither applies to the exercise of a right of termination that is conferred on a party for the sole benefit of that party.

[87] In oral submissions that expanded on this point, Mr Hunter KC, who appeared for BNZ, accepted that a contractual power — including a termination power — must be exercised only for the purpose for which it is conferred.[42] So, for example, a termination power cannot be used for an ulterior motive to defeat other provisions of the contract while keeping the parties' relationship on foot, as the UK Supreme Court recently held in *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers*.[43] But the purpose of cl 8.2 is to permit BNZ to terminate "for any reason", in its own interests, and without having to enter into a debate about the validity of its reasons for doing so. In the present case, Mr Hunter said, there is no suggestion of an ulterior motive: BNZ's genuine purpose is to bring the relationship to an end.

[88] Mr Hunter did not accept the characterisation of BNZ's decision as unrelated to the banking relationship. BNZ's concerns related to money flowing through BNZ accounts that was the product of the practices described in the *Courage* decision. BNZ was entitled to decide to act on those concerns without undertaking its own investigation, or setting up monitoring systems to ensure such conduct was no longer continuing.

[89] Mr Hunter submitted that if BNZ were required to consider whether a customer would be able to make alternative banking arrangements before giving a notice under cl 8.2, it would in all cases have to give some sort of preliminary notice and seek information from the customer: it could not simply give a termination notice, as cls 8.2 and 8.3 contemplate. The more commercially unattractive the customer, the less likely it would be that they could make alternative banking arrangements — and, on

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42 Mr Hunter adopted the approach to constraints on contractual powers outlined in Paul S Davies and Philip Sales "Controlling contract discretions: Wednesbury reasonableness, good faith and proper purposes" (2024) 140 LQR 106.

43 *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers* [2024] UKSC 28, [2024] IRLR 998.

the approach contended for by the Gloriavale entities, the more likely it would be that BNZ would be required to continue to provide services to that customer.

Interpretation of cl 8.2

[90] In *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* the Privy Council set aside an injunction restraining a bank from closing a customer's account.[44] Lord Hoffmann, delivering the advice of the Board, said:

> [1] The chief issue in this appeal … is whether a bank, "by merely giving reasonable notice", can lawfully close an account that is not in debit, where there is no evidence of that account being operated unlawfully. Their Lordships have no doubt that in the absence of express contrary agreement or statutory impediment, a contract by a bank to provide banking services to a customer is terminable upon reasonable notice: Paget's Law of Banking, 13th ed (2007), p 153.

[91] The correctness of this statement of the common law position was not challenged before us. The Gloriavale entities do not contend that there was any statutory impediment to BNZ closing their accounts, though as explained below they say that certain statutory regimes are relevant to the interpretation of the BNZ standard terms. But the Gloriavale entities say that there is an express contrary agreement that limits the common law freedom of BNZ to terminate their accounts on reasonable notice. They also argue that there is an implied term limiting BNZ's freedom to do so.

[92] The Gloriavale entities locate the express contrary agreement on which they rely in cl 8.2 of the BNZ standard terms, the introductory words of which we set out again for ease of reference:[45]

> **8.2 When we can close or suspend your account or end or suspend any other product or service:** We can close your account or end any other product or service, or immediately suspend or restrict the operation of your account or the provision of any other product or service, *for any reason*. For example (*but without limiting the reasons why we might close or suspend your account*), we may close or suspend your account where …

[93] It is difficult to read this clause as imposing any limit on BNZ's common law freedom to close a customer's account. BNZ has reserved to itself the ability to close

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44 *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd*, above n 4.
45 Emphasis added.

an account "for any reason". Examples of reasons are given, but the contract expressly provides that these examples do not limit the reasons why BNZ might close an account.

[94] The language used in cl 8.2 can be contrasted with the requirement in cl 2.11 that before declining to act on an instruction, BNZ must consider that it has a *good reason* to do so. Clause 8.2 expressly provides that "any reason" will suffice.

[95] Contract interpretation has been the subject of a number of decisions of the Supreme Court in recent years. It is well established that the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[46] In the present case it is not suggested that the relevant context includes any pre-contractual negotiations between the parties. The BNZ standard terms are unilaterally determined by BNZ, without negotiation. One relevant contextual feature is that BNZ, its customers, and the hypothetical reasonable observer would all understand that these are standard terms that apply to all BNZ's customers: it could not sensibly be argued that these terms should be interpreted in light of circumstances peculiar to a particular customer. Customer-specific circumstances might conceivably give rise to a collateral contract or an estoppel, but could not bear on the interpretation of the BNZ standard terms as between BNZ and each of its many thousands of customers.

[96] The contract set out in the BNZ standard terms is a commercial contract, though it is not the product of a negotiation. It applies to the banking services provided by BNZ to many commercial entities, including a number of the Gloriavale entities. One of its important purposes is to create certainty for the parties.

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[46] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60] per Arnold J, quoting *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann. See also *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [41] per Winkelmann CJ and Ellen France J.

[97] We make two preliminary points. First, the time for determining the meaning of cl 8.2 is when the contract was first entered into (or when that term was first introduced into the contract, if that occurred at a later stage), not the time when BNZ made its decision to close the Gloriavale entities' accounts. The arguments advanced by the Gloriavale entities in relation to the interpretation of cl 8.2 leant heavily on the serious consequences for them of closure of their accounts as matters have transpired. But at the time the accounts were opened, neither the parties nor the reasonable observer could know the details of these subsequent events. That evidence is not relevant to the interpretation of cl 8.2.

[98] Second, at the time each account was opened an important contextual feature was that BNZ was just one of a number of banks providing current accounts and other banking services to the public in New Zealand. A reasonable person would understand that the BNZ standard terms confer many unilateral powers on BNZ — including the power to change the terms themselves. The primary constraint on how BNZ exercises those unilateral powers is the constraint provided by its competitors in the banking market, not any constraint provided for in the contract itself. So for example a reasonable person reading the BNZ standard terms would understand that BNZ is free to set whatever interest rates it thinks fit for current accounts, in its own commercial interests, without consulting with its customers and without considering their interests.[47] Similarly, BNZ can increase fees or introduce new fees for current accounts without consulting its customers and without considering their interests. The protection for customers is not found in the contract — rather, it lies in their ability, expressly recognised in cl 8.1, to move their funds (or overdraft) to another bank if better terms are on offer elsewhere, and close their account with BNZ.

[99] Similarly, a reasonable person would understand that the discretion provided for in cl 7.4 in relation to unarranged overdrafts is a discretion exercisable by BNZ without reference to the customer, and without considering the interests of the customer. BNZ is free to decide whether to honour a payment out of an account with insufficient funds based solely on BNZ's own interests, without any prior reference to the customer.

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[47] BNZ's ability to set interest rates may be constrained by express terms in other contexts, for example term loans and term deposits.

[100] These provisions reflect the arms-length nature of the banker-customer relationship, and the many respects in which the parties have preserved, rather than limited, their unilateral freedom of action.

[101] When interpreting cl 8.2 the reasonable observer would thus need to consider whether the provision incorporates substantive or procedural limits on BNZ's decision-making, or is another example of a unilateral power that BNZ can exercise in its own interests and without prior reference to the customer. The reasonable observer would recognise the risk of BNZ deciding to close the customer's accounts at some time in the future for a reason that the customer would not consider reasonable or well-founded. But that observer would also be conscious that a customer whose accounts were closed in circumstances where a reasonable bank would not do so would expect to be able to open an account with another bank (there being, by hypothesis, no good reason to decline to bank that customer). Thus the practical consequence of an arbitrary or capricious or unreasonable closure of an account would be likely to be limited to the inconvenience of moving those accounts to another bank.

[102] The reasonable observer would also be conscious of the customer's unfettered freedom under cl 8.1 to decide to move some or all of their business to another bank, and to close their account at any time.

[103] Against this backdrop, we consider that the meaning of cl 8.2 is clear. It is not an "express contrary agreement" of the kind referred to by the Privy Council in *National Commercial Bank Jamaica Ltd*.[48] Rather, it expressly provides that BNZ can terminate for any reason, and it expressly provides that the examples given do not limit the reasons why BNZ can close an account. It is not implicit in the requirement that BNZ have "any reason" for closing an account that the reason must be a good reason, or a valid or well-founded reason, or a reason relating to the operation of the customer's account. "Any reason" means what it says, as the language in a commercial contract usually will. The clear scheme of the contract, consistent with the common law default position, is that the relationship subsists for so long as both parties wish it to do so, but either is free to bring it to an end at any time for any reason.

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[48] *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd*, above n 4, at [1] per Lord Hoffman.

Neither has any liability to the other if it chooses to do so (as cl 8.5 expressly confirms in the case of BNZ).

[104] Nor is there anything in the text of cl 8.2 to suggest that BNZ has process obligations that require it to test information or engage with a customer before exercising the power to close an account. Courts cannot invent obligations of this kind under the guise of interpretation if the parties have not agreed to assume them.

[105] The high point of Mr Raymond's interpretation argument is that a reasonable observer might pause to wonder whether, in circumstances where some of the examples given in the cl 8.2 paragraphs contemplate a reasonable belief on the part of BNZ about certain matters, BNZ could rely on the general language of the clause to close or suspend an account on the basis of an unreasonable belief about those same matters. But the language providing that the examples in cl 8.2 do not limit BNZ's freedom to act for any reason could not be clearer, and that language cannot simply be disregarded. It is not easy to see how a drafter could have spelled out more clearly that the examples provided do not limit the introductory words of cl 8.2. Clear drafting of this kind would not be disregarded by a reasonable observer, and should be given effect by the courts.

[106] In *Targa Capital Ltd v Westpac New Zealand Ltd* Campbell J declined to grant an interim injunction restraining Westpac from closing Targa's accounts.[49] The relevant contract provided that Westpac could close a customer's account "if Westpac believes it has reasonable grounds for doing so".[50] The Judge did not consider that it was arguable that this clause required Westpac to have a reasonable belief that it had reasonable grounds to close the account.[51] The plain language of the termination provision required an inquiry into Westpac's subjective belief as to whether it has reasonable grounds to terminate. "Targa's interpretation would flip a subjective inquiry to an objective inquiry. It would introduce an objective qualifier to Westpac's belief that the contract did not include."[52] Other provisions included an objective qualifier, but the termination provision did not. The Judge considered that Targa's

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49 *Targa Capital Ltd v Westpac New Zealand Ltd* [2023] NZHC 230, [2023] NZCCLR 21.
50 At [22].
51 At [35]–[43].
52 At [38].

interpretation was not tenable, as it would involve an illegitimate rewriting of the termination provision.[53]

[107] Similarly, in the present case, the interpretations of cl 8.2 contended for by the Gloriavale entities are untenable as they would involve an illegitimate rewriting of cl 8.2. They run directly counter to the express provision in the contract that BNZ can close an account "for any reason", and to the express provision that the examples provided do not limit the reasons for which BNZ can take this step.

[108] Mr Raymond's interpretation arguments based on the regulatory framework face a number of insuperable difficulties. The first, and most obvious, difficulty is that most of the matters relied on postdate the opening of the relevant accounts. (It was not argued before us that some later date when cl 8.2 was introduced into the BNZ standard terms was the relevant date for this purpose.) As already noted, the relevant accounts were opened — and the relevant contracts came into existence — between 1999 and 2020. At the risk of stating the obvious, a reasonable person seeking to ascertain what the parties had agreed at some time leading up to 2020 would not have been aware of, or taken into account, the unconscionable conduct provisions inserted in the Fair Trading Act with effect from 16 August 2022 by the Fair Trading Amendment Act 2021, the purpose of the Deposit Takers Act, or the fair conduct principles provided for in the Financial Markets (Conduct of Institutions) Amendment Act, which will have effect from 31 March 2025.

[109] Nor, quite apart from timing, is there any reason to read cl 8.2 differently in light of these regulatory initiatives. Mr Raymond suggested in oral argument that a reasonable observer would expect BNZ to comply with the law. We agree. But we cannot see how it could reasonably be argued that this expectation would inform the interpretation of cl 8.2. The "reasonable observer" test in the context of contract interpretation is concerned with how the reasonable observer would understand the language (and conduct) of the parties as at the time of contracting.[54] It does not involve a broader inquiry into what the reasonable observer might have expected the parties to contemplate or agree: that goes well beyond the legitimate scope of the interpretation

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53 At [39] and [43].

54 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 46, at [60] per Arnold J.

exercise. Nor for that matter can an expectation that the parties to a contract will comply with the law be translated into a contractual commitment to do so: these are very different propositions.

[110] Mr Raymond referred to the Code of Banking Practice, which states that participating banks (including BNZ) will act "fairly, reasonably, and in good faith". The Code expressly provides that it does not form part of the terms and conditions of the relationship between bank and customer, or override or replace those terms and conditions. Nor can we see how it could be relevant to the interpretation of those terms and conditions. Rather, it sits alongside those terms and conditions, and is enforced through complaints to participating banks and to the Banking Ombudsman.

[111] Mr Raymond also referred to the statement on BNZ's website that "we agree to treat you fairly and reasonably". There is no evidence before this Court about when that statement first appeared on BNZ's website, so we do not know whether that occurred before or after the dates on which the relevant accounts were opened, and the relevant terms fall to be interpreted. But even assuming this statement appeared on BNZ's website before some or all of the relevant accounts were opened, we cannot see how it can assist in the interpretation of cl 8.2. We return below to the question of whether a generally applicable term to this effect can be implied into the contract.

[112] We add that we do not accept the submission that cl 8.2, interpreted in this manner, is such an unusual and surprising term to find in the BNZ standard terms that it required greater prominence before it could be treated as binding on a customer. Far from being unusual or surprising, cl 8.2 read in this manner is consistent with the common law position in the absence of any express provision to different effect. It is just one of a number of provisions enabling BNZ to act in its own commercial interests, in a manner that is consistent with the broader scheme of the contract. Nor is there a lack of balance in the contract, read in this way: the customer also has an unfettered ability to terminate at any time, in their own interests — and in their case, without prior notice.

Implied term restricting the exercise of the cl 8.2 power?

[113] The Gloriavale entities' interpretation arguments shaded into their arguments that cl 8.2 was subject to an implied term limiting the exercise of the power to close an account. That is unsurprising — the process of identifying additional terms that are implicit in the parties' express agreement is closely akin to, and on one view forms part of, the process of interpreting the express terms of that agreement.[55]

[114] There are two principal categories of implied term:[56]

(a) Terms implied "in law" — that is, default terms brought into operation not on the basis of any intention of the parties, but rather by operation of law.

(b) Terms implied "in fact" to give a contract business efficacy — this form of implication is based on an intention imputed to the parties by the courts in the particular circumstances, often referred to as presumed intention.

[115] The law in relation to implied terms that limit the exercise of contractual powers and discretions is at present unsettled. There are a number of ways in which the issue can be framed, and a number of approaches have been proposed.[57]

[116] Cull J referred to the statement of the "default rule" in *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)*, where Leggatt LJ said that in his judgment:[58]

> … the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or

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55 *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 46, at [93]–[102] and [106] per Winkelmann CJ and Ellen France J.

56 At [92] per Winkelmann CJ and Ellen France J. There is a third, less common, category of implied term — terms implied by custom in a particular trade or area of business.

57 For a helpful overview of the different approaches that have been proposed, and their conceptual underpinnings, see Jason N E Varuhas "Three Issues in the Law of Contractual Discretion" (2022) 42 OJLS 787.

58 Second injunction decision, above n 3, at [39], citing *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)*, above n 35, at 404.

> unreasonably. That entails a proper consideration of the matter after making any necessary inquiries.

[117] This "default rule" is usually characterised as a (default) term implied by law in all contracts. As a default term it may of course be displaced by inconsistent express terms.

[118] In *Equitable Life Assurance Society v Hyman* Lord Steyn concluded that a term should be implied into retirement policies entered into by a life assurance society to the effect that the discretion of the directors of the society relating to bonuses could not be exercised in conflict with, and so as to override, other contractual rights of policyholders.[59] Lord Steyn emphasised that this was an individualised term imputed to the parties from their actual circumstances, not a term implied in law. Lord Cooke agreed with that way of viewing the case, but observed that the same conclusion could be reached by starting from "the principle that no legal discretion, however widely worded … can be exercised for purposes contrary to those of the instrument by which it is conferred".[60]

[119] In *Braganza* the UK Supreme Court held that where a contract conferred on a party — in that case, an employer — a discretion to make a decision that would affect the rights and obligations of both parties, a term should be implied to the effect that the power should be exercised not only in good faith but also without being arbitrary, capricious or irrational in the sense in which that term was used when reviewing the decisions of public authorities. Lady Hale observed that "[t]here are signs … that the contractual implied term is drawing closer and closer to the principles applicable in judicial review".[61]

[120] A central issue in that appeal was whether both limbs of the *Wednesbury* test applied to the decision of the employer.[62] The employer argued that its decision could be impugned only if it was a decision that no reasonable employer could have reached (the second limb of the *Wednesbury* principle). For the claimant[63] it was argued that

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59 *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL) at 459–460 per Lord Steyn.
60 At 460 per Lord Cooke.
61 *Braganza v BP Shipping Ltd*, above n 36, at [28] per Lady Hale.
62 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) at 233–234.
63 The employee's widow and executrix.

the first limb also applied, and that the employer's decision was not valid if the employer had taken into account matters which they ought not to have taken into account, or, conversely, had failed to take into account matters which they ought to have taken into account.

[121] In the passage that is most frequently cited as a statement of the *Braganza* approach, Lady Hale said:

> [29] If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of "*Wednesbury* reasonableness" (or "*GCHQ* rationality") review to consider the rationality of the decision-making process rather than to concentrate on the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.
>
> [30] It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable — for example, a reasonable price or a reasonable term — the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the *Wednesbury* formulation in the rationality test. …
>
> [31] But whatever term may be implied will depend on the terms and the context of the particular contract involved. …

[122] In *Woolley* this Court proceeded on the basis accepted by both parties that the "default rule" applies in New Zealand, and expressly refrained from deciding whether the *Braganza* approach should be endorsed or rejected.[64]

An implied term requiring powers to be exercised for a proper purpose?

[123] We consider that the most promising approach to ascertaining the (implied) limits of a contractual power or discretion is along the lines suggested by Professor Paul Davies and Lord Sales in their recent article on this topic, in which they suggest that:[65]

> [A]ny restrictions need to be found through the normal techniques of interpretation and implication, and that these usually have the effect that contractual powers must be exercised for a proper purpose. The application

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64 *Woolley v Fonterra Co-operative Group Ltd*, above n 37, at [103] and [112]–[115].

65 Davies and Sales, above n 42, at 106.

> of these techniques will sometimes indicate that the parties intended that a discretion should be unlimited or that extensive restrictions should apply.

[124] As the authors explain, although the analogy between contractual discretions and discretions in public law conferred by statute has a superficial attraction, there is a fundamental difference of context between contractual discretionary powers and public law discretionary powers.[66] The most fundamental difference is that public powers are conferred for the public good, and a public authority may not pursue its own self-interest when exercising discretion. However:[67]

> … that outward-directed orientation is missing in the context of most contractual relationships, where it is implicit that the power-holder *may* have regard to its self-interest. The core difficulty in articulating rules to constrain the exercise of a contractual discretion is that typically the party exercising that discretion is entitled to have regard to its own self-interest, often in the context of a zero-sum situation vis-à-vis the other party. In such circumstances, it cannot be said that the party exercising the discretion acts irrationally when it decides to act for self-interested reasons.

[125] As the authors go on to explain, the contractual context lacks the longstanding constitutional principles and values against which the rationality of an exercise of a public power can be assessed:[68]

> By contrast, given the fundamental importance of freedom of contract, there are few significant external background values to structure the context in which assessment of the lawfulness of the exercise of a contractual discretion takes place. Business common-sense plays only a limited role. Unlike in the public law context, the parties themselves generate the values which are to apply, as something inherent in the contract they have made. The constitutional basis for intervention in the public law context, which helps to ensure the proper ongoing administration of the relevant public power, does not apply in the private law context. Moreover, whilst public decision-makers are not, in the absence of malice, liable for losses caused by their decisions, the same is not true for private parties who wrongly exercise a discretion in breach of an obligation.

[126] Accordingly, they suggest, a simple rationality test along public law lines is inapposite.[69] To apply such a test would generate confusion and uncertainty about what it means.[70] A more relevant analogy can be drawn with *Padfield v Ministry of*

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66 At 109.
67 At 109 (footnote omitted, emphasis in original).
68 At 109–110 (footnotes omitted).
69 At 110.
70 At 110.

Agriculture, Fisheries and Food, which holds that statutory powers must be used for proper purposes.[71]

[127] In the contractual context, in many cases the parties cannot have intended that the power-holder should be entitled to exercise a contractual discretion exclusively in their own self-interest. "That will appear because the discretion has plainly been conferred for use for particular purposes within a scope capable of being derived objectively from the context and terms of the contract itself."[72]

[128] But in other contexts, the purpose of a contractual discretion is to preserve the freedom of one party to act unilaterally in their own interests. It is up to the parties to determine the respects in which, and period for which, their pre-contractual freedom of action is to be constrained by the contract they enter into. There is nothing problematic about including in a contract provisions the purpose of which is to identify matters in respect of which that freedom is preserved. The authors identify termination provisions as a good example of such a discretion.[73] The purpose of such a provision is to enable a party to end the relationship. The authors note that the traditional approach is "very clearly that the decision to terminate will not be reviewed by a court on the grounds of irrationality, for example".[74] They go on explain why that traditional approach is appropriate:[75]

> Exercising a power to terminate — whether because of a repudiatory breach or under an express termination clause — should not be deemed "invalid" in some way, even if the true motivation of the terminating party rests upon external factors, such as an advantageous shift in the market. Certainty concerning termination is very important in the commercial environment, and it is unlikely that parties intend a power to terminate only to be exercised in "good faith". Courts should be very slow to imply such a restriction in fact, let alone impose such a duty through a term implied at law. This was made

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71 At 110, citing *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 997 (HL). In the public law context the New Zealand Supreme Court restated this requirement in *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53]–[55] per McGrath J.

72 Davies and Sales, above n 42, at 115.

73 At 125.

74 At 125, referring to *Reda v Flag Ltd* [2002] UKPC 38, [2002] IRLR 747; *Lomas v JFB Firth Rixson Inc* [2012] EWCA Civ 419, [2012] 2 All ER (Comm) 1076; *Shurbanova v Forex Capital Markets Ltd* [2017] EWHC 2133 (QB); *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm); *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [88]; *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) at [51]; *Sucden Financial Ltd v Fluxo-Cane Overseas Ltd* [2010] EWHC 2133 (Comm); *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2017] 1 All ER (Comm) 1009; and *Lombard North Central Plc v European Skyjets Ltd (in liq)* [2022] EWHC 728 (QB).

75 Davies and Sales, above n 42, at 125–126 (footnotes omitted).

clear in *TAQA Bratani Ltd v Rockrose UKCS8 LLC*, where H.H.J. Pelling Q.C. rightly observed that:

> "[I]f a right of the sort [to terminate the contract] being exercised by the claimants in this case was to attract a *Braganza* qualification, then there is almost no contractual provision that would not attract them. That would have profound implications for English commercial and contract law — not least because of the difficulties posed by attempting to exclude such terms referred to by Jackson L.J. in *Mid Essex Hospital Services NHS Trust v. Compass Group UK* [2013] EWCA Civ 200 … for which there is no support in the authorities."

[129] The authors endorse the observation of Brown and Rowe JJ in the Supreme Court of Canada in *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* that:[76]

> … where a contract discloses a clear intention to grant a discretion that can be exercised for any purpose, courts, operating within their proper role, *must* give effect to that intention.

[130] As the authors note, in the context of termination, concepts of loyalty to the original joint venture do not apply.[77]

[131] The authors conclude that the principled way forward is to "focus upon terms implied in fact in conjunction with the requirement that powers be exercised for a proper purpose".[78]

[132] On this approach, there may be cases where the purpose for which a termination clause may be exercised is qualified by an express term, or by a term implied in fact in circumstances where termination would defeat or undermine the purpose of a contract by denying the very benefit promised under it. A good example is provided by the recent decision of the UK Supreme Court in *Tesco*, where it was held that a term should be implied in fact preventing Tesco from exercising its contractual right to dismiss the claimant employees on notice for the purpose of removing or diminishing their contractually guaranteed right to receive certain "retained pay" as part of their remuneration.[79] Tesco did not genuinely wish to bring

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76 At 127, citing *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* 2021 SCC 7, [2021] 1 SCR 32 at [133] per Brown and Rowe JJ (emphasis in original).

77 Davies and Sales, above n 42, at 128.

78 At 129.

79 *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers*, above n 43, at [56]–[57] per Lord Burrows and Lady Simler, and [129]–[136] per Lord Leggatt.

the employment relationships to an end: they had offered the claimants continued employment on identical terms save for the "retained pay" provision. This was an example of the misuse of a termination provision to achieve a modification to the relevant contracts that Tesco did not otherwise have the right to bring about.

[133] On the approach proposed by Professor Davies and Lord Sales, the purpose of cl 8.2 of the BNZ standard terms is clear. It is to enable BNZ to bring the relationship to an end if it wishes to do so "for any reason". No term needs to be implied to this effect: the clause sets the position out with sufficient clarity. A "proper purpose" implied term would add nothing. Nor is this a case where BNZ is seeking to invoke the termination clause for some ulterior motive, as in *Tesco*. It is common ground that BNZ genuinely wishes to terminate its relationship with the Gloriavale entities.

[134] On this approach, it is not arguable that BNZ is in breach of any relevant implied term.

An implied term in law based on the "default rule" or Braganza*?*

[135] Although we consider that the "proper purpose" approach is the most promising way to conceptualise any limits that might apply to contractual terms that confer a discretionary power on one party, this interlocutory appeal is not the appropriate setting in which to determine whether New Zealand courts should adopt that approach rather than the "default rule" or the *Braganza* approach. We therefore go on to consider whether, if New Zealand law were to adopt the "default rule" or the *Braganza* approach as terms implied in law, there would be a seriously arguable issue for trial.

[136] The "default rule" approach would lead to a term being implied by law in some or all types of contract that would require a party exercising a contractual discretion to do so honestly and in good faith, and not arbitrarily or capriciously or unreasonably/irrationally (in the sense that the decision is outside the range of decisions that could reasonably be made by a rational contracting party in that situation).

[137] It is not alleged (and on the material before us, could not properly be alleged) that BNZ acted dishonestly. Mr Raymond accepted in the course of argument that BNZ was not acting in bad faith in the sense that it sought to harm the Gloriavale entities.

[138] We do not consider that it is seriously arguable that BNZ acted arbitrarily or capriciously when it decided to close the accounts. BNZ identified reasons for taking that action, by reference to its internal policy on human rights issues and a recent Employment Court decision that raised human rights concerns. BNZ made a considered decision at a senior level based on those reasons. BNZ did not act on a whim or caprice.

[139] In particular, we do not accept the argument that it was arbitrary or capricious or irrational for BNZ to terminate the relationship for reasons beyond compliance with BNZ's standard terms, or immediate financial risk. A bank may have a legitimate commercial and reputational interest in adopting, and acting on, policies in relation to matters such as social and environmental responsibility and human rights. So, for example, it would not be arbitrary or capricious or irrational for a bank to adopt an environmental responsibility policy, and to decide not to provide banking facilities for a major polluter pursuant to that policy, however regular the conduct of that entity's accounts and however good that banking relationship may have been.

[140] It is difficult to see how a term could be implied into this contract in relation to the reasonableness of BNZ's decision, in circumstances where BNZ is entitled to exercise the power to close accounts for any reason, in its own interests. It is also difficult to see how a term could be implied in relation to the process to be followed by BNZ before it makes such a decision. Lady Hale expressly noted in *Braganza* that "whatever term may be implied will depend on the terms and the context of the particular contract involved".[80] Different implied requirements would be appropriate depending on the particular provision in issue, and the nature and architecture of the contract in which that provision is found: these are not "one size fits all" approaches.

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[80] *Braganza v BP Shipping Ltd*, above n 36, at [31] per Lady Hale.

[141] As Mr Raymond was constrained to accept in the course of argument, there can be no implied constraints on BNZ's discretions to set interest rates and fees for current accounts. Those discretions are conferred for the sole benefit of BNZ. The rates and fees set are in effect posted prices that a customer can accept or reject by moving their current account funds (or overdraft) elsewhere. It would not be consistent with the scheme of the contract to require BNZ to engage with customers, or consider their interests, before exercising those discretionary contractual powers. As noted above, the same is true of BNZ's discretion under cl 7.4 in relation to unarranged overdrafts.

[142] It is in our view plain that cl 8.2 falls into the same category. The only relevant process obligation under cl 8 of the BNZ standard terms is that BNZ must give notice to the customer of termination after the decision is made, and this notice must generally be given at least 14 days before the termination has effect. It would be inconsistent with the text and purpose of these provisions, and with the scheme of the contract more generally, to imply a term requiring BNZ to follow a particular process, take certain matters into account and disregard other matters, or to have a "valid" or "qualifying" reason before exercising the power to close a customer's accounts and terminate the relationship. It is not seriously arguable that a term of that nature, restricting the exercise of the cl 8.2 power to terminate, should be implied in law in the context of the BNZ standard terms.

[143] Put another way, terms implied in law are default terms — they apply unless the parties have agreed otherwise. We consider that the express provisions of the BNZ standard terms, in particular cl 8.2, and the scheme of the contract more generally, are inconsistent with — so override — any default term of the kind that the Gloriavale entities say should be implied, and was breached, in this case.

Implied term in fact?

[144] Nor is it seriously arguable that a term of this kind should be implied in fact in the particular context of this contract. As the Supreme Court has recently confirmed, the legal test for the implication of a term in fact is a standard of strict necessity, which

is a high hurdle to overcome.[81] The BNZ standard terms do not lack business efficacy without such an implied term: to the contrary, they would be closely aligned to, and no less workable than, the well-established common law framework governing the banker-customer relationship. As that framework illustrates, a restriction on the circumstances in which an account may be closed does not meet the strict necessity test. Nor, of course, can a term be implied in fact that is inconsistent with the express terms of the contract. Far from being implicit in the express terms of the BNZ standard terms, the implied terms contended for by the Gloriavale entities are inconsistent with the express provisions and the basic scheme of that contract.

[145] Mr Raymond's arguments that a term should be implied to reflect the regulatory context, the Code of Banking Practice, and/or statements on BNZ's website, did not engage with the high threshold for implication of a term in fact. It is not strictly necessary to imply a term in a contract that one or both parties will comply with the regulatory framework from time to time. There are many reasons why the parties might not wish to give contractual effect to a relevant regulatory framework, in addition to the legislatively prescribed effect and consequences of that framework. Such a term is not necessary. Nor is it necessary to imply into the contract statements made on BNZ's website about the manner in which banking services will be provided. There is a well-developed legal framework for determining the consequences of such statements at common law, under the Fair Trading Act, and under other applicable legislation: implication of a term based on such statements, in addition to that framework, is not strictly necessary.

Summary — no arguable case for an implied term

[146] It follows that whether New Zealand law ultimately follows the path suggested by Professor Davies and Lord Sales, or adopts a different approach in relation to terms implied by law concerning the exercise of contractual discretions, it is not seriously arguable that there is any implied restriction on BNZ's power to close accounts under cl 8.2 of the BNZ standard terms.

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81 *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 46, at [116] per Winkelmann CJ and Ellen France J.

Serious question to be tried in relation to BNZ breach?

[147] If the BNZ standard terms could be interpreted as imposing limits on the circumstances in which BNZ can close an account, either by requiring BNZ to follow a process to obtain information and input from affected clients or by requiring BNZ to have a qualifying reason to do so, then it would be necessary to consider whether there is a serious question to be tried in relation to BNZ's compliance with that requirement.

[148] The Judge considered that there were serious questions to be tried in relation to whether the BNZ process was procedurally fair and reasonable, and whether BNZ's exercise of discretion was substantively reasonable.[82]

[149] Because of the conclusion we have reached that there are no relevant contractual limits, we consider this issue only briefly.

[150] The Judge also considered that there was a serious question to be tried as to whether there is a public interest obligation on BNZ "as an essential service to provide a minimal or transactional banking facility to customers without alternative banking options".[83] That argument was not pursued before this Court. In some jurisdictions an obligation along these lines is imposed on banks by statute, at least in relation to basic transactional accounts for natural persons.[84] But there is no such requirement in New Zealand legislation, and we do not consider that it is arguable that such a requirement could be imposed by the courts as a matter of common law.

Submissions for Gloriavale entities

[151] The Gloriavale entities say that the process adopted by BNZ to make the decision was flawed in a number of respects:

(a) it relied on factually incorrect information, including information sourced from Wikipedia;

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82 Second injunction decision, above n 3, at [84].
83 At [75]–[83] and [84(c)].
84 See Bank Act (SC 1991, c 46), s 627.17–627.19; and Payment Account Regulations 2015 (UK), regs 22–26.

(b) the Gloriavale entities were not given any opportunity to comment on the factual material relied on by BNZ;

(c) BNZ appears to have relied on the Employment Court judgment, and attributed that judgment to all the Gloriavale entities despite only one of those entities being a party to it;

(d) BNZ failed to distinguish between commercial enterprises, the charitable trust, a private trust, the school and pre-school, the midwifery service and community accounts;

(e) BNZ did not provide the Gloriavale entities with a copy of the internal policy document on which it relied, even when that was requested;

(f) BNZ ignored the effect on individuals within the community of terminating the banking services; and

(g) there was no opportunity for proper consultation.

[152] The Gloriavale entities also say that the decision itself was unreasonable, arbitrary, and lacked good faith:

(a) Having had the benefit of funds from the Gloriavale community without payment of interest for decades,[85] BNZ summarily terminated the relationship.

(b) BNZ made its decision in circumstances where the leaders of the community had issued an apology for matters of the past, and the community was on a clear path of change.

(c) The decision took no account of the vulnerability of the community.

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[85] At the Gloriavale entities' request, based on their religious beliefs, they did not receive interest on credit balances in their accounts.

(d) Rather than support and encourage change, BNZ simply sought to pass the "Gloriavale problem" to another bank.

(e) BNZ did not consider each account holder separately.

(f) BNZ refused to consider any assurances, offers of improvement, or monitoring.

[153] So, the Gloriavale entities say, BNZ's decision has all the hallmarks of being unreasonable, arbitrary, and lacking in good faith. There was no legitimate risk to BNZ. It is at least seriously arguable that BNZ breached process and substantive requirements that must be met in order to close an account under cl 8.2 of the BNZ standard terms.

Submissions for BNZ

[154] BNZ's primary position, as noted above, is that the alleged implied limits on its ability to close an account do not exist. But in the alternative, BNZ submits that the High Court erred in finding that it was seriously arguable that BNZ's decision did not meet the requirements of the default rule, the *Braganza* approach, or any similar implied term requiring BNZ to act rationally.

[155] Mr Hunter submits that it is not seriously arguable that BNZ's decision was arbitrary, capricious, or irrational. Nor, if the *Braganza* approach applies, is it seriously arguable that the decision was made without taking into account relevant considerations, or taking into account irrelevant considerations.

[156] Mr Hunter emphasises that whichever standard is said to apply, the test is not an "objective standard of 'reasonableness'", with the court replacing the bank's judgement with its own. Rather, the assessment is at the highest whether BNZ's decision-making process was rational, following a proper process.

[157] It was rational for BNZ to rely on the Employment Court decision in *Courage* to form a view that there were serious concerns in relation to child labour practices. Although not all of the Gloriavale entities were defendants in the Employment Court

proceedings, the findings were not limited to particular entities. Rather, the Employment Court decision describes a system of conduct occurring across all of Gloriavale's commercial operations. It was rational for BNZ to conclude, on the basis of that decision, that the Gloriavale entities were engaged in that conduct.

[158] BNZ submits that if there is any doubt about the rationality of its decision, that is confirmed by the decisions made by other banks to decline to provide banking services to the Gloriavale entities. This is relevant evidence of banking practice that supports the reasonableness of BNZ's decision. Far from being a decision that no reasonable contracting party could have reached, it appears to be the same decision that other registered banks in New Zealand have reached.

[159] BNZ also submits that to the extent that a fair process was required, it is not seriously arguable that BNZ failed to follow one. It gave over three months' notice of its intention to terminate the provision of banking services. The decision was made at a high level within the bank. An extension to the initial termination date was granted. The Gloriavale entities did not present a transition plan designed to respond to the concerns identified by BNZ in relation to forced child labour issues. BNZ did not consider that the Gloriavale entities were in a position to present a credible transition plan, or that it was realistic for BNZ to take on the role of externally monitoring compliance with a transition plan of some kind.

Discussion

[160] As already mentioned, we do not consider that it is seriously arguable that BNZ acted dishonestly, in bad faith, capriciously, or arbitrarily in deciding to close the accounts.

[161] We explained above why we consider that a term could not be implied into this particular contract in relation to the reasonableness of BNZ's decision, or in relation to the process to be followed by BNZ before it makes such a decision. But we are conscious that there is authority to support a different view, and that because this is an interlocutory appeal we have not had the benefit of full argument. If we are wrong about this, would there be a serious issue for trial?

[162] We do not consider that it is seriously arguable that BNZ's decision was irrational, in the sense that no reasonable bank could have acted in this way. The criticisms of the decision made by the Gloriavale entities fall far short of this threshold. And there is considerable force in BNZ's submission that the Gloriavale entities' own evidence about the reluctance of other banks to provide services to them confirms that this was not an irrational decision that no reasonable bank could make.

[163] However BNZ did not engage with the Gloriavale entities in any way before it made its decision. If BNZ was required to follow a process designed to ensure it was acting on the basis of accurate information, or was fully informed about the steps being taken by the Gloriavale community to address the concerns identified in *Courage*, then it is well arguable that BNZ failed to do so. Such a requirement might be founded on the default rule, if a decision made without following such a process could be described as unreasonable or irrational for the purpose of that rule.[86] It would perhaps more naturally be founded on the *Braganza* approach, which emphasises the public law requirement that a decision-maker take relevant matters into account and disregard irrelevant matters, and applies that requirement by analogy to (some) contractual decisions.

[164] It follows that if we had reached a different view on whether an implied term imposing process obligations was tenable in this context, we would have accepted that there was a serious question to be tried. However we would still have seen the Gloriavale entities' case as weak, as it would require a trial court to accept that BNZ had process obligations in connection with cl 8.2 that are not easy to reconcile with the express terms and underlying scheme of the contract.

Serious question to be tried in relation to breach of fiduciary duty?

The claim for breach of fiduciary duty

[165] The Gloriavale entities plead that there is a fiduciary relationship between them and the BNZ because:

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[86] In *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)*, above n 35, at 404 Leggatt LJ suggested that the implied term required "a proper consideration of the matter after making any necessary inquiries".

(a) The Gloriavale entities, and the Gloriavale community generally, had placed trust and confidence in BNZ to not act contrary to their interests.

(b) The Gloriavale entities reasonably believed that they had a secure relationship with BNZ, based on the history of that relationship.

(c) The Gloriavale entities are vulnerable to BNZ, because no other banking services are available to them and banking is an essential service for them.

(d) They are based in a remote location over an hour from the nearest town, and are dependent on their own resources to meet the needs of the Gloriavale community.

(e) The investigations, media attention, social media harassment and ridicule faced by the members of the Gloriavale Community make them especially susceptible to detriment.

(f) The volume of accounts operated by the Gloriavale entities and associated entities means that transfer of accounts in the event of suspension or termination would be difficult, time consuming and unlikely to be achievable at the local branch level.

[166] The Gloriavale entities go on to plead that BNZ owed them fiduciary duties not to act unfairly, arbitrarily, capriciously, and without reference to their freedom of association and without giving them the opportunity to remedy any perceived wrong, and provide assurances to BNZ about the correct factual position.

[167] In the course of oral argument, Ms Foote (who argued this aspect of the appeal for the Gloriavale entities) accepted that the core banker-customer relationship is not fiduciary in nature. Rather, it is an arms-length contractual relationship. She submitted that the relationship between BNZ and the Gloriavale entities became a fiduciary relationship when BNZ decided it would look beyond the financial matters that it is normal for a bank to consider. When BNZ stepped outside the four corners

of the debtor-creditor relationship by considering matters that are not directly relevant to that relationship, she said, it became subject to fiduciary obligations to the Gloriavale entities.

Discussion

[168] It has long been accepted that the essential relationship between a bank and its customer is contractual, and that it is not a fiduciary relationship.[87] The Gloriavale entities did not identify any authority to support the proposition that the relationship between banker and customer is fiduciary in nature, or gives rise to fiduciary obligations. The relationship between banker and customer is not one of the recognised categories of relationships which are inherently fiduciary.[88] (Fiduciary duties may of course arise in connection with particular services provided by a bank — for example, the provision of financial advice.)

[169] Nor is there any authority to support the proposition that a bank is in a fiduciary position vis-à-vis its customer when deciding whether to close or suspend an account. To say this is a fiduciary obligation would be to say that the bank owes a duty of loyalty to its customer in this context, which would preclude the bank from utilising their position in a manner which is adverse to the interests of the principal.

[170] The argument advanced for the Gloriavale entities — that BNZ owed fiduciary obligations because of the nature of the factors it was considering — finds no support in the authorities. Nor does it make any sense as a matter of principle: the Gloriavale entities needed to point to some aspect of their relationship with BNZ that precluded BNZ from making termination decisions in BNZ's own interests, and that limited the matters that BNZ could properly take into account when making that decision. They have not identified, in their pleadings or in their argument before us, any arguable basis on which BNZ could be required to subordinate its interests to the interests of the Gloriavale entities.

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87 *Paget's Law of Banking*, above n 7, at [4.1].

88 See *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [72]–[74] per Blanchard and Tipping JJ.

[171] To the contrary, Ms Foote accepted — as she had to — that in making a termination decision, BNZ is free to act in its own interests. It is obvious from the example reasons provided in cl 8.2 that the decision to close or suspend an account is one that BNZ is entitled to make to protect its own interests. It is also clear that the decision may be made even though it is adverse to the interests of the customer: indeed that will generally be the case.

[172] The argument that BNZ owes fiduciary duties to the Gloriavale entities in this context is misconceived. It does not give rise to a serious question to be tried.

Serious question to be tried in relation to estoppel?

The estoppel claim

[173] The Gloriavale entities plead that BNZ has by its conduct over many years of the banking relationship represented to them that, absent a material breach of the BNZ standard terms, BNZ would continue to provide banking services to them. They say they have relied on that representation and reasonably assumed their relationship with BNZ would continue subject to their compliance with its terms and conditions. Thus, they say, it would in all the circumstances be unconscionable for BNZ to depart from the assumption that the parties' relationship will continue subject to the Gloriavale entities breaching the BNZ standard terms.

[174] BNZ sought further and better particulars of the allegation that it had made representations to the Gloriavale entities that it would continue to provide banking services to them. The Gloriavale entities' response did not identify any specific representations made. Rather, they refer to BNZ's election to continue to provide banking services to them, and to accept some of the recently established entities as new customers. They also refer to "positive and successful" interactions, including meetings and correspondence, over an extended period, and to the "unilateral imposition" of BNZ's standard terms on them, "creating the expectation that the parties' relationship would continue provided the [Gloriavale entities] complied with those Terms". Reference was also made in argument to the many years during which BNZ had benefited from the Gloriavale entities' substantial credit balances without paying any interest on those balances.

Discussion

[175] This issue can be dealt with very briefly. The estoppel cause of action adds nothing to the cause of action founded on breach of contract. If BNZ's standard terms impose limits on the circumstances in which BNZ can close or suspend an account, then BNZ must comply with those contractually binding limits. If there are no such limits, then the Gloriavale entities have not identified in their pleadings or in their evidence anything that could found an estoppel that would prevent BNZ from exercising its contractual right to close an account in its own interests.

[176] In particular, the Gloriavale entities do not identify any commitment by BNZ to provide banking services indefinitely, or for a particular period. Nor do they identify any indication by BNZ that it would refrain from exercising any contractual right it had to close or suspend accounts.

[177] The Gloriavale entities say that they changed their position by not establishing a banking relationship with any other bank in reliance on the assumption they were encouraged to make that BNZ would continue to provide services to them. There are three main difficulties with this argument.

[178] The first is that as already mentioned, the Gloriavale entities have not identified any statements or conduct on the part of BNZ, apart from the continuing provision of services, that could provide a foundation for such an assumption. But there is no inconsistency between the ongoing provision of services, and a good relationship, on the one hand and a right to terminate the provision of those services on the other hand. The Gloriavale entities may have assumed a continuing banking relationship, but they cannot point to anything BNZ said or did to encourage them to believe that BNZ would not exercise its cl 8.2 rights.

[179] The second difficulty is that the Gloriavale entities do not suggest that they consciously turned their attention to, and relied on, an expectation of continuing banking services. Nothing that was pleaded or argued goes beyond refraining from taking any steps to establish a new banking relationship because they were happy with the existing one. That is likely to be true of many customers of any bank, and cannot without more limit the ability of the bank to terminate the relationship on reasonable

notice, any more than it limits the freedom of the customer to cease to deal with the bank.

[180] The third difficulty is that in those circumstances it is not seriously arguable that BNZ would be acting unconscionably in exercising the termination rights provided for in the BNZ standard terms.

[181] On the material before us, there is no serious question to be tried in relation to estoppel.

Overall assessment

[182] We have concluded that there is no serious question to be tried in relation to any of the three causes of action pleaded by the Gloriavale entities. That threshold is not a high one — but it must not be disregarded. Here, it is not met. It follows that there is no proper basis for requiring BNZ to continue to provide services to the Gloriavale entities.

[183] If we had considered that there was a serious question to be tried in relation to the contractual cause of action, we would nonetheless have declined to grant an interim injunction.[89]

[184] We would have reached that conclusion only if we considered that it is arguable that the default rule or the *Braganza* approach applied in this context, and imposed process obligations on BNZ requiring it to take into account relevant matters and disregard irrelevant matters. On that approach it would be arguable that BNZ had breached an implied term because of the process it followed, and in particular because it failed to provide the Gloriavale entities with an opportunity to correct any errors in the information BNZ was relying on, and to provide further relevant information. If we had been persuaded that there was a serious question to be tried along those lines, we would nonetheless have seen the argument as very weak having regard to the language of cl 8.2 and the nature of the contract.

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[89] As the Privy Council would have done in *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd*, above n 4, at [21] per Lord Hoffman.

[185] In those circumstances it would have been necessary to consider the practical consequences of continuing, or setting aside, the injunction pending trial.

[186] Continuing the injunction would compel BNZ to provide services to the Gloriavale entities for an extended period against BNZ's will, in circumstances where BNZ believes in good faith that doing so is inconsistent with its internal policies.

[187] Setting aside the injunction and allowing BNZ's decision to take effect would not of itself prevent the Gloriavale entities from obtaining banking services — it would simply remove one provider as an option, in a market where there are multiple providers of banking services. The Gloriavale entities would remain free to seek to open accounts with other banks. If any other bank is willing to provide banking services to a Gloriavale entity, that entity will suffer some inconvenience as it moves its accounts, but will not suffer serious or irremediable prejudice of the kind that would justify granting an injunction. If no other bank is willing to accept the Gloriavale entities as customers, that reluctance cannot be laid at the door of BNZ. The prejudice to the Gloriavale entities would result from the characteristics of those entities that are perceived by other bankers as relevant to the costs and risks of dealing with them — matters that are within those entities' control. And it would be in precisely those circumstances that the prejudice to BNZ of being required to provide services to customers that no other bank wishes to deal with would be most apparent, and would weigh most strongly against granting an injunction.

[188] Thus even if we are wrong about the existence of an arguable question to be tried, we do not consider that it would be in the overall interests of justice to grant an injunction requiring BNZ to continue to deal with, and provide services to, the Gloriavale entities for a further extended period until the claims could be tried.

[189] BNZ's appeal must therefore be allowed. But it would be unreasonable to expect the Gloriavale entities to make alternative arrangements immediately following the delivery of this judgment. BNZ has provided an assurance to the Court that if its appeal succeeds, it will continue to provide banking services to the Gloriavale entities for a period of three months from the date of this Court's decision. In reliance on that assurance, we will set aside the injunction with immediate effect.

Result

[190] The appeal is allowed.

[191] The injunction granted in the High Court is set aside.

[192] Costs should follow the event in the ordinary way. The Gloriavale entities must pay costs to BNZ for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel.

[193] The costs order made in the High Court is set aside. Costs in the High Court should be determined by that Court in light of this judgment.

Solicitors:
Russell McVeagh, Auckland for Appellant
Duncan Cotterill, Christchurch for Respondents

SCHEDULE A – complete list of Respondents

BRUNNER STATION LIMITED
CANAAN FARMING ENGINEERING LIMITED
CANAAN FARMING DEER LIMITED
CANAAN FARMING DAIRY LIMITED
HAUPIRI NET LIMITED
VALUE PROTEINS LIMITED
CHRISTIAN PARTNERS
CARING MIDWIVES LIMITED
FOREST GOLD HONEY LIMITED
PURE VITALITY LIMITED
ALPINE HEALTH MANUFACTURING NEW ZEALAND LIMITED
VALUE ENERGY LIMITED
CHRISTIAN PARTNERS ASSETS LIMITED
CHRISTIAN PARTNERS HOLDINGS LIMITED
THE CHRISTIAN CHURCH COMMUNITY TRUST
BRUNNER CHRISTIAN RESIDENTIAL TRUST