IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.169/82

BETWEEN: ALEX HARVEY INDUSTRIES LIMITED a duly incorporated company having its registered office at Manukau City and carrying on business as a Holding Company

First Plaintiff

AND: AHI OPERATIONS LIMITED a duly incorporated company having its registered office at Great South Road, Penrose, under the name of NEW ZEALAND GLASS MANUFACTURERS COMPANY, a unit of AHI OPERATIONS LIMITED as a Manufacturer

Second Plaintiff

AND: NEW ZEALAND FIBREGLASS LIMITED a duly incorporated company having its registered office at Aranui Road, Penrose, and carrying on business as a Manufacturer

Third Plaintiff

A N D AUCKLAND GAS COMPANY LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a supplier of gas

Defendant

Hearing: 5th and 6th June 1984

Counsel: F W M McElrea and Miss N E Dolan for plaintiffs
B R Latimour for defendant

Judgment: 18 th June 1984

JUDGMENT OF HENRY J.

The Defendant, Auckland Gas Company Limited (A G C) is a retailer of natural gas which it supplies to customers in the wider Auckland area bounded by Waiwera in the north and by Franklin County in the south. Its sales are divided into what are known as tariff sales, comprising industrial/commercial users and domestic users, and industrial special sales. The latter are governed by individual supply agreements. The First Plaintiff, Alex Harvey Industries Limited (A H I) is a party to one such supply agreement bearing date 28 May 1974, and which relates to the supply of natural gas for use on premises occupied by the Second Plaintiff and the Third Plaintiff, both of which are subsidiaries of A H I. The agreement covered a period of six years commencing 1 August 1974, and contains provisions as to rates of payment for supply. In particular, there are two provisions relating to variation and adjustment of rates of payment. The first is clause 5 (d) which states :

> "5. (d) Variation of Rates:
>
> During the period of this contract these rates will apply until the date of any and each adjustment in the contract price paid by Seller to the New Zealand Natural Gas Corporation for natural gas from Kapuni at present 4.5 cents per therm and all adjustments in this contract price will be passed on to Buyer in full in respect of all of the aforesaid rates.

In addition, each of the aforesaid rates shall be increased at the beginning of each contract year commencing 1st April 1975 by an amount to be calculated by multiplying the gross margins specified hereunder by the annual percentage increase in the New Zealand Consumers Price Index (All Groups) as published in the Monthly Abstract of Statistics commencing with the percentage increase in the index for the calendar year 1974 over 1623 being the index for the calendar year 1973:

(i) 7.5 cents per therm in respect of the first 750,000 therms per year for New Zealand Glass Manufacturers Company and the first 250,000 therms per year for New Zealand Fibreglass Limited.

(ii) 2.0 cents per therm in respect of the excess usage over 750,000 and 250,000 respectively.

(iii) 0.8 cents per therm in respect of the glass tanks usage."

The second is clause 8 of what is designated as General Terms and Conditions, which are a standard set of contractual provisions incorporated into special supply agreements. It states :

8. ADJUSTMENT OF RATES OF PAYMENT IN CASE OF INCREASE SUPPLY RATES OR TAXATION ETC:

The rates payable for gas supplied hereunder had been agreed upon the basis of the current rate of natural gas to the Seller by the New Zealand Natural Gas Corporation under the agreement hereinbefore referred to and if at any time or times during the continuance of this contract there shall occur any increase in any rate for such supply by the New Zealand Natural Gas Corporation or its successors and assigns or any tax or other statutory or other charge is levied upon or imposed in respect of the supply of natural gas then and in any such case and so far as the seller is bound to pay such increased rate or tax or other charge statutory or otherwise, the Seller shall be entitled to increase the price for the supply of natural gas hereunder by an amount appropriate to cover such matters."

By s.4(1) of the Energy Resources Levy Act 1976, a levy was imposed on all natural gas produced in New Zealand after 1 January 1977, the rate of such levy being fixed by s.4 (2) (a) at 45 cents per gigajoule. The Act provides, in s.4 (3), that the person liable to pay the levy is the person holding a licence relating to the land upon which the natural gas was produced. Section 31(1) enables the levy to be passed on to subsequent purchasers. It provides :

> 31.(1) Notwithstanding any other enactment or rule of law, every agreement, for the sale of an energy resource in respect of which a levy is payable, that has been made at any time before the day on which this Act receives the Governor-General's assent shall (unless the parties to the agreement otherwise agree or express provision to the contrary is made by the agreement or the amount of the levy has been specifically allowed for in the agreed price) be deemed to be modified by adding to the agreed price for the energy resource the amount of the levy payable in respect hereof."

A G C, which has some 22,000 customers, purchases its natural gas from the New Zealand Natural Gas Corporation, which in turn purchases from the producers. The volume of natural gas purchased by A G C is measured at the point of supply at Papakura. That measurement is always less than the measured volume sold to its customers because of losses occasioned by a number of factors, including inaccuracies in measuring equipment, seepage through pipes and through valves, regulators and joints. This difference in volume is known as "Unaccounted for Gas" (UFG) At all relevant times the additional 45 cents per gigajoule referred to in the Act was charged to and paid by A G C in respect of its total purchases

of natural gas. To cover the extra cost incurred by it as a result of the levy, A G C increased its charges to A H I by a total of 51.4 cents per gigajoule. This amount of 51.4 cents was calculated by assessing the extra cost of total estimated purchases by A G C for the 1977/78 year caused by the imposition of the levy, and then dividing that cost into the total estimated volume of sales for the same year. The estimated UFG loss for the 1977/78 year, as calculated by A G C in December 1976, was 11.09% of its total estimated purchases. Hence, to recover the total charge to it, A G C applied to its customers a figure higher than the levy of 45 cents.

The parties are agreed that the total amount at issue, taking into account certain adjustments which have no present significance, is $200,671.06. All are further agreed that A H I can properly be regarded as the party entitled to repayment, if any be due. The sole issue, therefore, is whether on its true construction the agreement restricted this increase in price to A H I to 45 cents per gigajoule.

A H I (or its subsidiaries) paid the full increase of 51.4 cents charged by A G C throughout the duration of the agreement. After its expiry, and in the course of negotiating a further supply agreement, A H I raised the question of the correctness of applying to its measured volume of purchases any charge in excess of 45 cents per gigajoule, and in this action now claims a refund of that excess.

For A G C, it was submitted that clause 8 of the general terms and conditions permitted an increase of price sufficient to cover the cost of the levy on the volume of natural gas purchased by A G C, although its total sales estimated for 1977/78 represented only some 88% of that purchase. It is, of course, self-evident that if the increase of 45 cents is applied only to actual sales to customers, and if sales represent only 88% of purchases, then the total cost of the levy to A G C will not be recovered. Therefore, it is contended that 51.4 cents per gigajoule is necessary, and consequently "appropriate" to cover the "matter" of the payment by A G C of the levy imposed by the statute.

In construing the agreement, regard must be had to the whole of the documentation. It is to be noted that in clause 4 reference is made to minimum and maximum quantities of supply, in each case (as in clause 7 also) the reference is to a specified number of therms, a therm being a unit of measurement used before the introduction of the metric system. Under clause 5, rates of payment are "per therm". Under Clause 6 the point of delivery is stipulated as the gas outlet from A G C's measuring equipment on the premises of the Second and Third Plaintiffs. Clause 5(d) is particularly relevant in that it deals not only with the question of adjustment in the contract price paid by A G C to the New Zealand Natural Gas Corporation, but also with an adjustment to what are described as the "gross margins", and which are to be

increased on 1st April of each contract year by the annual percentage increase in the New Zealand Consumer Price Index. The evidence given by Mr McDowell, for A G C, described the gross margin as a contribution to overheads, including UFG.

It is first necessary to consider the inter-relation of s.31(1) of the Energy Resources Levy Act 1976, clause 5 (d) and clause 8 of the general terms and conditions. I do not consider that s.31(1) has any direct application to the present issue. By a deeming provision in that subsection, the future agreements are modified as therein set out "unless the parties to the agreement otherwise agree or express provision to the contrary is made in the agreement". Argument was addressed to whether or not the provisions of clause 5 (d) and clause 8 were "to the contrary". In my view there is no room to so modify this agreement. An addition to the agreed price or rates would not harmonize with either clause 5 or clause 8, both of which specifically cover the question of an increase in cost such as that imposed by the Act. The parties have recorded their agreement and made express provision for that eventuality. Section 31(1) therefore does not apply. However, I do observe that if it did, it would have the result of restricting any addition to the agreed price to 45 cents, being the amount of the levy payable in respect of the energy resource the subject of sale under the agreement. In respect of clause 5 (d) and clause 8, I consider that both must be read together. They overlap to an extent, in that both deal with a charge in the

rates payable by A G C to the Corporation. That has probably arisen because of the incorporation of the standard general terms and conditions into a specific agreement which itself refers to a matter also referred to in the general terms and conditions. No doubt it would have been better drafting to have one provision only, but I can see no difficulty in reading the two together and their being consistent one with the other. Mr Latimour drew a distinction between on the one hand clause 5 (d) and also that part of clause 8 which deals with a rate, and on the other hand that part of Clause 8 which deals with a tax or other charge, submitting that it was only the latter, namely a tax or charge, which was here in question. In the particular circumstances that occurred, I think the effect on A G C of the imposition of the levy would come within the description of a payment by it of an increased rate, and also a payment by it of a tax or charge. Whichever it be, under clause 8 what increase could be said to be appropriate to cover that matter? The answer to the question must be determined by ascertaining what it is that can be covered. The "matter" is the increased rate or tax or other charge. The increased rate or tax or other charge can only be the 45 cents per gigajoule imposed by the Act; that is what A G C can cover pursuant to the agreement. The only volume of natural gas to which the agreement can relate in this context or indeed in any other context is, in my clear view, the volume which is sold to A H I. The agreement, on a reading of the whole of it, is concerned only with what is sold to A H I, and has no concern with the volume purchased by A G C, nor with any of the

overheads of A G C, including UFG, except to the extent they form part of the gross margin which is separately adjusted annually, pursuant to a formula laid down in Clause 5 (d). What A G C does with its own purchases from the Corporation, and the efficiency or inefficiency of its distribution system, is irrelevant. What is to be charged to A H I is the natural gas which is measured according to the terms of the agreement as having been distributed to it. That this is the true construction of the agreement is reinforced when regard is had to, for example, the change in volume of UFG as a percentage of A G C's purchases which, according to the evidence, fluctuates substantially, to a large extent depending on the volume of gas actually purchased by customers - the more purchased the less the percentage, for the reason that the actual volume of UFG is largely determined by factors other than volume of throughput. This could mean that if in the years subsequent to 1977/78 UFG was less than 11%, at 51.4 cents per gigajoule, A G C would achieve an over-recovery of its own price increase. If regard to the purchases of A G C was the yardstick, there would arise the additional problem of then determining whether the increase now imposed on A H I was "appropriate". Such an exercise would necessarily involve a close and careful examination of all relevant factors, such as the length and state of the pipes and other equipment supplying A H I, the number of joints, valves, and other equipment which could be the source of seepage and their relation to the whole of the supply system, and so on. In short, it would necessarily involve a proper analysis of the causes of UFG, and

probably its extent, year by year, so as to ensure any additional charge for that factor remained appropriate throughout the term of the agreement. In my judgment, the agreement in question, and in particular clause 8, does not envisage undertaking such an analysis. It is no answer to suggest that an across-the-board imposition on all customers is appropriate - it may well not be. To construe the agreement otherwise would also result in an anomaly. If there was an increase in rates charged by the Corporation, unrelated to any tax or other charge, this would be passed on under Clause 5 (d) only on the volume of gas sold. This in fact happened from time to time during the course of this agreement. On what possible basis can it be logical to provide a different basis, namely the basis of the increased charge being volume purchased by A H I plus 11%, because the increase happens to result from a statutory levy? On the other hand it is a simple matter to conclude that an increase of 45 cents per gigajoule is appropriate because that is the actual additional cost incurred by A G C in respect of the gas sold to A H I. The need for the increase to be "appropriate" rather than a direct passing-on of the tax or charge arises because there could be different ways of imposing a tax or charge - for example, as was mentioned by Mr McElrea in argument, by the imposition of a statutory levy of $100,000.00 per annum on any supplier of gas, or an increase in price to A G C on purchases by it above a certain level, and so on. In my judgment, the meaning and intention of the agreement is plain - namely, that any increase in price to A G C per unit is passed on per unit sold to A H I.

It follows that A G C was not acting under the terms of the agreement in imposing an increase beyond 45 cents per gigajoule on the measured volume of sales to A H I. Accordingly the claim must succeed, and A H I is entitled to recover the agreed sum of $200,671.06.

The Statement of Claim also seeks interest on the maximum rate allowable under s.87(1) of the Judicature Act 1908. The discretion to award interest is to be exercised according to established principle. In general, on a monetary claim such as this, interest will be awarded from the time the loss is suffered (North Island Wholesale Groceries Limited v Hawin [1982] 2 NZLR 176, 194). I have carefully considered the reasons put forward by Mr Latimour against such an award. I do not consider the fact that the issue was arguable and required determination by this Court is of any real consequence - that situation frequently applies, and should not disentitle a plaintiff who has established his claim. In practice, the unsuccessful defendant has had the use of the money which should have been available to the plaintiff. However, I do think it is relevant that A H I paid the extra part of the increase either with actual knowledge that the levy was fixed by statute at 45 cents, or certainly with the means of such knowledge. To an extent, it is therefore the author of its own misfortune. Having regard to all the circumstances, I have reached the conclusion that it would be just to allow interest at 11% on the agreed sum as from 1 January 1981, by which date the challenge to the validity of the charge had clearly been made.

No point is made by A G C of the delay from then until trial. According to the Schedule produced in evidence, this would amount to $76,309.00 plus a further $60.00 per day from 6th June down to the date hereof.

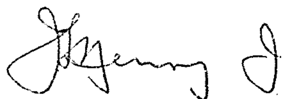
There will accordingly be judgment for the First Plaintiff in the sums of :

(a) $200,671.06

(b) $76,309.00

(c) $60.00 per day from 6 June 1984 down to the date of this judgment.

Costs are reserved. In the absence of agreement, counsel can either submit memoranda for my consideration or arrange a further fixture through the Registrar if that be more appropriate.



Solicitors:

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