East Coast Gas v Louis Wood 10.11.

HC-W 1514/88 ACB

[redacted]

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CP 101/88

SET 2

BETWEEN EAST COAST GAS SUPPLY LIMITED

Plaintiff

A N D LOUIS WOOD & SONS LIMITED

Defendant

Hearing: 7-8 November 1988

Counsel: D R Broadmore for plaintiff
A K Monagan for defendant

Judgment: 10 NOV 1988

INTERIM JUDGMENT OF EICHELBAUM J

For about 70 years, until early 1986, the defendant carried on a commission wool scouring business in premises at Awatoto. For the purposes of that operation large quantities of heated water were required daily. For 67 of the 70 years the defendant's heating requirements were supplied by a heating plant fired by sawdust fuel supplemented with oil.

As a franchise holder under the Gas Act 1982 the plaintiff was the supplier of natural gas in the Hawkes Bay area. In the first half of 1983 the plaintiff approached the defendant to consider taking a supply of gas from a pipeline which it was proposed to extend into the Napier area, in order to fuel the wool scouring operation. The plaintiff made a detailed proposal in a letter of 20 June 1983. A term of the suggested arrangement related to the construction cost of the pipeline, referred to as a lateral or extension line, which would take the

supply from the main line to the boundary of the defendant's premises. The plaintiff said that the cost of that extension would be $37,500 but if a contract was signed and the defendant's boilers were converted by 1 October 1983 the plaintiff was prepared to offer a discount of $20,000. There were certain other exceptions which would bring the total payable by the defendant by way of capital contribution to $21,500 and in addition, I presume, there would have been the cost of converting its boilers and making the connection within its own premises. At that time the defendant was not prepared to undertake expenditure of this magnitude. Thereupon in a letter dated 11 July the plainiff offered three alternative methods of meeting the capital cost. It is plain from the correspondence, current and later, that the plaintiff was anxious to clinch a deal. Concessions as to the initial price per gigajoule of gas were also offered.

On 2 August, evidently following up a meeting held the previous day, the plaintiff wrote again to the defendant offering alternative bases of supply. The first was on the footing of a long term contract including take or pay conditions "based on 65% of 20,000 gigajoules per annum", ie 13,000 gigajoules. There were different rates per unit depending on whether the conversion was effected by 1 October. The contribution towards the extension line was to be $17,500 as stated earlier but the time limit was extended to 31 March 1984. A 50% deposit was required. The second basis did not involve any discount of the $37,500 cost but if the number of gigajoules purchased in any one year within the first 5 years of supply exceeded 9604 the plaintiff undertook to make a refund of $20,000 to the defendant. Evidently the defendant had not made any decision, or at any rate no decision to proceed, by the date of the fire about to be mentioned.

On 30 September 1983 a fire at the defendant's plant damaged the equipment that produced steam, necessitating the use of oil to run such plant as remained undamaged. According to the defendant it had to decide urgently what heating system to install for the future. The defendant must indeed have made a prompt decision because by 4 October it had signed an order form requesting the plaintiff to proceed with the construction of the lateral line at a basic cost of $37,500, plus certain extras which took the total to $44,355 but subject to the discount of $20,000. The defendant paid a deposit of half the net figure on 4 October. In his second affidavit Mr R G Woods, a director of the defendant, has deposed that he had forgotten about the letter of 2 August when he consulted his solicitors (it was not mentioned in the exchange of affidavits until the plaintiff's affidavit in reply). In his further affidavit Mr Woods denies that when, after the 30 September fire, the defendant decided to go ahead with gas, it did so on the basis of the alternative proposal contained in the 2 August letter. However, the order form signed by Mr Woods himself for the defendant on 4 October had in fact been executed on behalf of the plaintiff on 2 August, and plainly was a form which accompanied by 2 August letter, as the letter itself says.

After signature of the order form the plaintiff wrote the defendant a letter dated 5 October, parts of which in the absence of fuller explanation, are opaque. It showed however that there had been a discussion about contract terms, quite likely at the time the defendant signed or agreed to sign the order form. Clearly a formal contract was envisaged as well, although this was not executed until 10 December 1983. However, Mr Woods deposed that at the time the order form was signed he took legal advice as to the form of the contract. He said that he was advised that the "take or pay" clause was dangerous,

but when he attempted to raise this with the plaintiff the response was that this was the contract and the defendant could take gas or not as it chose. Mr Woods refers to this episode (at least, it appears to be the same episode) in both his affidavits but not in exactly the same terms. As a result it is not clear whether he took advice and raised the matter with the plaintiff before or after the signing of the works order and the discussion which took place at that time. One possible view is that by the time of his attempt to get the plaintiff not to insist on a take or pay clause, there was already a contract (partly oral, partly written) in which case one might place a different construction on the plaintiff's attitude to a request to modify it. However, I proceed on the assumption, in the defendant's favour, that the defendant's request to the plaintiff not to insist upon the take or pay clause was made before any contract was concluded.

The contract eventually signed was obviously on a standard form used by the plaintiff. It was for a term of 10 years. The plaintiff bound itself to supply, and the defendant to accept, a minimum annual quantity of 20,000 gigajoules. The "take or pay" clause provided:

> "Buyer covenants that in any event it will purchase a gas volume equivalent to the "Minimum Annual Quantity" in each year or accept liability for payment in each year whether all of such quantity is so taken by Buyer or not, such obligation to apply from date of supply."

Gas was duly supplied, accepted and paid for until 1 April 1986. As at that date, a sale of the defendant's plant and equipment to Elders International (NZ) Ltd took effect, whereupon the defendant's need to use gas ceased. Elders have since used the premises principally for storage. The plaintiff's claim is for the year ended 30 September 1987, and is for the minimum quantity of 12,000 gigajoules

at the prices current during that year. It is not stated specifically but presumably the defendant did not take any gas at all during that period. The claim is for $89,420. The contract has another six years to run, and it was said, or implied, that like issues might arise in connection with other similar contracts of the plaintiff's. So the matter is of some moment to the parties.

How the minimum quantity came to be stated at 20,000 gigajoules is something of a mystery and it seems possible that there was an error unnoticed on both sides. At any rate, in 1984 the figure was amended to 12,000. That was the level applicable at the time relevant to these proceedings.

Without losing sight of the fact that ultimately the onus rests with the plaintiff to satisfy the Court that there is no defence, proof of the contract and of non-payment is sufficient to shift an evidential onus to the defendant. So I proceed to consider separately the several alternative bases on which the defendant contended that there was a tenable defence which the plaintiff had failed to exclude.

1 Economic Duress

The correspondence makes it plain that before the fire, the plaintiff offered the defendant options. No doubt the full material is not before the Court at this stage but sufficient has emerged to make it apparent that the plaintiff persevered with various alternatives with the purpose of overcoming the reservations the defendant had about committing itself to gas. A long term contract on a take or pay basis was not the only option. The defendant's attitude, as described in its affidavits, was not consistent. In the initial stages of the negotiations the objection seemed to focus on the capital payment required for the extension line, and one of the arguments raised, to be discussed later, was that

the plaintiff misrepresented the cost of that work. On the other hand Mr Woods has deposed that he would have willing foregone the $20,000 discount offered in respect of that work, had the defendant been able to get quit of the take or pay clause. Be that as it may, the defendant's case on this point, in summary, is that following the fire, the defendant urgently required an alternative source of heating, and at that stage the plaintiff insisted on a take or pay clause; the defendant could have gas on that basis or not at all. There was no evidence that the defendant ever enquirec whether both the options plainly open at the stage of the 2 August letter remained available; indeed Mr Woods professed that he had forgotten about the letter and placed it on another file, notwithstanding that the form which he signed on 4 October had been forwarded with the same 2 August letter.

At this point I remind myself of Lord Diplock's dictum in Eng Me Yong v Letchumanan [1980] AC 331, 341, that:

> "Although in the normal way it is not appropriate for a judge to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically as raising a dispute of fact which calls for further investigation, every statement on an affidavit however unequivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

In the plaintiff's 2 August letter the take or pay type contract was linked with an arrangement for payment for the extension construction on a basis that included a $20,000 discount. The contents of the order form show that Mr Woods opted for the $20,000 discount; the deposit he paid was calculated on that footing. He asked the plaintiff if it would waive the take or pay clause, which request was declined. The defendant does not claim that it enquired into any other possible overall basis, such as the different option contained in the 2 August letter. The defendant was an old established

organisation, no doubt small in comparison with the plaintiff but with access to legal advice and, one must assume, with officers possessed of some commercial knowledge. It had managed without gas for 70 years and the suggestion that it had to make an instant decision to opt for gas or suffer disaster, which is hinted at but not spelled out, does not I am afraid impress me in the slightest. Plainly other options apart from gas were available before the fire, because the defendant would not commit itself to gas then, and on the face of it there would have been other options afterwards. I am even less taken by the submission that between the fire on 30 September and the signing of the order form on 4 October, the plaintiff somehow learned enough about the defendant's plight to tighten the screws in its negotiations, and catch the defendant with a take it or leave it proposition the defendant could not refuse, and indeed had to accept immediately.

In my opinion, the case based on duress does not get off the ground. But even if it the view were taken that there was some sufficient factual foundation to enable the defendant to say that the plaintiff had failed to exclude this defence completely, on further analysis there is simply no legal foundation for it. Counsel argued the issue of duress on the footing of the four propositions set out in Pau On v Lau Yiu [1980] AC 614 as tests or enquiries to determine whether there has been a coercion of the will so as to vitiate consent. Given that there is some evidence of the first (protest) the defendant fails on the second, third and fourth : there were alternatives open; the defendant had independent advice; and it did not take steps to avoid the contract until years afterwards, and then because of a different circumstance altogether, namely that it had sold its business. It took gas as long as it suited. I am satisfied therefore that the plaintiff has excluded this ground of defence.

2 Misrepresentation

It seems likely that effectively, the plaintiff was in a position to insist that it undertake responsibility for construction of the extension line. Against that backgrou there is I think some foundation for arguing that the plaintif statement as to the cost of the extension was a representation not necessarily as to the cost as such but perhaps to the effect that it had investigated the cost and that the figure quoted ($37,500) was the result. I put it in that tentative way because the nature of the representation was not subjected to much discussion in argument. Then there is some suggestion - at this stage the case becomes extremely tenuous - that the representation was incorrect. It is unnecessary to explore these and other difficulties facing the defendant because in my opinion, at least one obstacle is unsuperable. Whatever importance the cost factor may have played prior to the fire, it is plain that after that event, it ceased to be critical. Mr Wood's own evidence to the effect that he would have willingly foregone the $20,000 discount (that is, been willing to pay $20,000 more for the extension) eliminates any room for the proposition that a representation that the cost was $37,500 rather than (as now suggested) some $10,000 less, could have induced the defendant to enter into the contract.

A further difficulty worth brief mention is that for the same reasons, there is simply no foundation for suggesting that in terms of S 7(4) of the Contractual Remedies Act 1979, the parties had impliedly agreed that the truth of the representation was essential to the defendant. Nor, having regard to the overall scope of the contract, would a misrepresentation of the order of $10,000 be sufficient to bring any of the provisions under subclause (b) of subsection (4) into play. The second matter goes to remedy not breach and if it were the only objection, could leave the defendant with a set-off or counterclaim but in the circumstances, not I think any sufficient ground for opposing the entry of judgment for the plaintiff in some form. However, I

need not explore this further. For the reason given earlier this heading does not provide an obstacle to the plaintiff's application.

3 Illegality - S 37 Gas Act 1982

Section 37 provides how the cost of an extension connectio to a franchise holder's main is to be met. The first 15 metres are paid for by the franchise holder, the next 15 metres by the consumer; thereafter, subject to the provisions of S 39, the cost falls on the franchise holder. The plaintiff has argued that as the present contract provided for the whole of the cost to fall on the consumer, it was illegal, and that since that portion (as was contended) was not severable the whole contract was void.

Section 39 provides that a consumer who can be supplied only by means of an uneconomic supply shall be entitled to be supplied only upon such terms, not inconsistent with the Act and any regulations under it, as may be agreed. "Uneconomic supply" means any supply from which the estimated annual return to the franchise holder is less than 20 percent or such other percentage as the Minister may, from time to time, by notice in the Gazette, determine of the estimated capital cost of the extension necessary to give the supply.

Mr Monagan sought to persuade me, on the basis of a calculation he made, that quite possibly the supply to the defendant did not fall within that definition. Mr Broadmore objected to the admission of the calculation, which in one important facet (the cost of gas to the plaintiff) had to depend on information not to be found in the papers before the Court. In fairness to the defendant I would be reluctant to dispose of the point simply by means of that objection, although Mr Broadmore is quite within his rights to insist that the argument should proceed only on evidence properly brought before the Court on affidavit. However, the defendant's argument must fail in any event. In the pre-contract correspondence, in fact as early as the letter of 20 June 1983,

the plaintiff signalled that it considered that the proposed supply was uneconomic. The defendant never took the point up. Subsection (4) of S 39 provides:

> "Where a consumer is not satisfied that the supply of gas to him would be an uneconomic supply, the Minister shall, on application by the consumer, determine if the supply of gas is an uneconomic supply and the consumer and the franchise holder shall be bound by that determination."

In the face of this procedure I do not see that it is permissible, years later, for the consumer to come along and claim that the supply was not uneconomic. The deal having proceeded on the basis that it was, the defendant is estopped from raising the issue at this stage.

4 Commerce Act 1986

This argument focussed on the "take or pay" provision of the contract. It is convenient to go immediately to issue raised by S 43 of the Gas Act, in the context of S 43 of the Commerce Act. The latter provides:

> "**43 Statutory exceptions** - (1) Nothing in this Part of this Act applies in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act.
>
> (2) For the purposes of subsection (1) of this section, an enactment or Order in Council does not provide specific authority for an act, matter, or thing if it provides in general terms for that act, matter, or thing, notwithstanding that the act, matter, or thing requires or may be subject to approval or authorisation by a Minister of the Crown, statutory body or a person holding any particular office, or, in the case of a rule made or an act, matter, or thing done pursuant to any enactment, approval or authorisation by Order in Council.
>
> (3)....."

The statutory provision relied on as a specific authorisation in this case is S 43 of the Gas Act. It was so regarded by the Commerce Commission when the plaintiff made application

in respect of its "take or pay" contracts for authorisation of a restrictive trade practice under S 58 of the Commerce Act. Of course the view taken by the Commission is not binding on the Court, although entitled to respect. So far as material S 43 of the Gas Act provides:

> "43. Franchise holder may require agreement and security as condition of supply - Where a consumer has requested a franchise holder to supply gas to any place the franchis holder may, at any time thereafter, by notice in writing, require the consumer, as a condition of that supply, -
>
> (a) To enter into a written agreement with the franchise holder to receive and pay for a supply of gas for a period of at least 12 months;
>
> (b) ....."

Provisions equivalent to S 43(a) have long featured in the predecessors of the 1982 Act but do not appear to have been the subject of judicial consideration. Mr Monagan submitted that they did not justify a ten year take or pay clause. In his submission S 43(a) could not be said to authorise such a clause specifically, so as to satisfy S 43 of the Commerce Act.

Mr Broadmore, in reply, pointed out that subject to certain qualifications under S 37 a franchise holder could be obliged to provide a supply to places where there was no existing connection. He said that having regard to the high cost of capital works to which a franchise holder would necessarily be committed, the underlying purpose of provisions such as S 43 was to assure the franchise holder of continued demand, or at any rate continuation of income; it provided a quid pro quo. He argued that in the context the meaning of the words "at least" was simply "not less than". The effect was that any contract in excess of 12 months or more was authorised; no distinction could be drawn between a ten year, a fifty year contract or ones for any other longer term. As to shorter contracts, while in terms of S 43 the

franchise holder could not "require" such a contract there was nothing to stop the supplier and the consumer from entering into such a contract voluntarily. Mr Broadmore suggested that the rationale was that if the franchise holder could recover its costs in less than 12 months, then the implication was that the legislature must have considered that the franchis holder should bear those costs itself.

Although the provision is short and seemingly simple, I confess I have found its meaning and intent puzzling. It applies to consumers of any kind, and I find it difficult to imagine that the legislature contemplated (say) 10 year take or pay contracts, or even longer ones, with domestic consumers. Furthermore, if one can discern an intent in the Act to the effect that in general, a franchise holder is bound to supply gas (see for example sections 37 and 40) it would be curious if the legislature should have enabled the franchise holder to frustrate that intention by demanding unacceptable contractual terms, say a 100 year take or pay clause. On the other hand I readily accept that in the context of commercial users, a take or pay provision for 12 months only, while affording some security to the franchise holder, would not seem to go very far in that direction. No doubt it might be said that a lateral line of a given length would cost the same whether the end use was commercial or domestic. On the assumption that the legislature could not have meant to leave the question in an uncertain state, there is some attraction in the view that the true meaning is to authorise the franchise holder to insist on a 12 month contract, and that the words "at least" do no more than express the notion that the franchise holder thus would be assured of payment for at least 12 months.

If I say that the case as a whole was thoroughly argued on both sides counsel will not mind if I add that this particular point was not developed very fully. I have set out the gist of the entire argument submitted on it. Further

consideration and research may not reveal anything more, but on the other hand there may well be additional material that could be placed before the Court to assist with a decision particularly as to any relevant policy considerations. In any event it would not be right that an issue which I suspect could have wide implications for the gas industry and consumers generally should be dealt with in any way casually. Accordingly, at the moment I say no more than that there is an argument that the section does not specifically authorise a franchise holder to insist upon a take or pay contract extending for a period longer than 12 months.

If that interpretation were correct it would follow that a 10 year contract was not "specifically authorised" in terms of S 43 of the Commerce Act. In turn, that would lead to a consideration of whether the plaintiff's insistence on such a contract (if insistence there was) resulted in an infringment of either of the two sections of the Commerce Act relied on by the defendant : S 27 (dealing with contracts substantially lessening competition), and S 36 (use of a dominant position in the market). Although Mr Broadmore argued to the contrary, I think it is beyond question that at that stage, the enquiry would involve questions of fact not capable of resolution on a summary judgment application.

5 Quantum

I can deal with this briefly. I accept Mr Broadmore's submission that if the plaintiff is entitled to succeed on liability, there is no room for an issue about quantum. It is a claim for a liquidated sum and questions of damage flowing from the breach, and of mitigation, are irrelevant.

For the reasons given under ground No 4, at the moment the plaintiff has not left me "persuaded to the point of belief" of the absence of any real question to be tried : Pemberton v Chappell [1987] 1 NZLR 1, 3-4. It is however

purely an issue of interpretation, and as Somers J said in Pemberton v Chappell (p 4) questions of law, if clear cut, should be decided at this stage. The parties should not be put to the expense and delay of becoming enmeshed in full scale litigation which, one imagines, would range over wide fields of enquiry when the answer on a question of law may be decisive. Accordingly I will not dispose of the application finally, but direct that the single issue of the interpretation of S 43 of the Gas Act should be set down for further argument. So far as I am concerned that could take place either in Wellington or on the next occasion when I sit in Napier. If counsel are unable to resolve the question of a date and place for the further hearing promptly it should be referred to me. Costs reserved.

Solicitors for plaintiff: Brandon Brookfield, Wellington

Solicitors for defendant: Carlile Dowling, Napier

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NAPIER REGISTRY

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BETWEEN EAST COAST GAS SUPPLY LIMITED

Plaintiff

A N D LOUIS WOOD & SONS LIMITED

Defendant

JUDGMENT OF EICHELBAUM J

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3. There will be an order striking out of the amended statement of defence para 11 (b) relating to the defence of statutory qualified privilege.

4. The other orders sought in the motion are declined.

5. The plaintiff has succeeded on one only of the various matters argued. He has been granted legal aid. But for that fact I should have allowed costs to the defendant of $250.

Solicitors: Phillips, Shayle-George & Co., WELLINGTON, for Plaintiff

Goddard, Moran, Finlayson & Co., WELLINGTON, for Defendant