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LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CP 101/88

BETWEEN EAST COAST GAS SUPPLY LIMITED

Plaintiff

A N D LOUIS WOOD & SONS LIMITED

Defendant

Hearing: 9 March 1989 (at Wellington)

Counsel: D R Broadmore for plaintiff
R A Lamont for defendant

Judgment: 18 APRIL 1989

JUDGMENT OF EICHELBAUM CJ

My interim judgment of 10 November 1988 left one point open which has now been the subject of further argument. This related to defences which the defendant wished to raise under the Commerce Act 1986, and in short the issue is whether the defendant is precluded from raising them by virtue of the provisions of S 43 of the Act. In turn this involved the interpretation of S 43 of the Gas Act 1982. The issue is discussed at pp 10 to 13 of my earlier judgment and I need not repeat what I said there, except that it will be convenient to quote the material part of S 43 of the Gas Act again:

> "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 franchise 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) ....."

Although I have had the benefit of further comprehensive submissions from both sides nothing emerged from counsel's consideration of the history and scope of the provision into the Gas Act to throw any further light on its interpretation. A provision of this kind has featured in the equivalent legislation since the Gas Supply Act 1908. Subject to qualifications it has always been a premise of the legislation that if a consumer requests a gas supplier to supply the latter is obliged to meet the request. Section 43 can be seen as affording the supplier a measure of protection against that duty, a form of quid pro quo. As to the potentially onerous nature of the obligation see Morton v Eltham Borough [1962] NZLR 1.

On the question of interpretation, the arguments have thrown up only two choices. Either "at least 12 months" means 12 months or more, or it means a period of up to 12 months. It hardly needs to be said that the former would usually be regarded as the natural and ordinary meaning. I need not rehearse the dictionary meanings quoted by Mr Broadmore, nor discuss his authorities, In Re Railway Sleepers Supply Company (1885) 29 Ch D 205, Chambers v Smith (1843) 12 M&W 2, and Associated Dominions Assurance Society Pty Limited v Balmford (1950) 57 ALR 672, none of which arose in a context in any way analogous to the present.

As to the present context, if the latter alternative (a period of up to 12 months) were adopted, from the point of view of enabling a franchise holder to recover the cost of installation a one year guarantee seems absurdly low. As noted, the provision itself originated long ago but the Act has been revised quite recently at a time when a one year period for the recovery of capital cost would have been regarded as quite inappropriate to modern economic

conditions. It needs to be emphasied that S 43 is the only provision authorising the supplier to require a take or pay contract. To limit such authorisation to a maximum of 12 months just does not seem meaningful, at any rate in the context of contracts for commercial supply.

However , when one turns to the alternative favoured by the plaintiff, namely that the effect of the section is to authorise any take or pay contract regardless of length, that does not appeal as an entirely happy solution either. If that was the legislative intent, Parliament must have perceived the scope it gave for insistence on a take or pay contract as an instrument of oppression, enabling a franchise holder to avoid the obligation to supply by requiring a take or pay provision of unnecessary and unreasonable length. One can only conclude that the legislature must have thought that ordinary commercial considerations would suffice to restrict any potential abuse.

Thus each solution has its unattractive side, but the one for which the defendant must content makes no commercial sense at all. In this situation I see no basis for ignoring the plain ordinary meaning of the words in their context, namely that the supplier is authorised to enter into take or pay contracts for a period of 12 months or more, no limitation being imposed on the length of the term which the supplier may require.

By way of alternative Mr Lamont argued that even if the plaintiff's interpretation were preferred, in terms of S 43 of the Commerce Act the provisions of the Gas Act did not "specifically authorise" a ten year take or pay contract. That submission must fail, on what I would describe as an ex hypothesis basis. If S 43 of the Gas Act authorises a supplier to require a take or pay contract of any length of term, it authorises one of ten years' duration. Whatever nuance be placed on the adverb "specifically" that result is inescapable. With encouragement from the Bench however

Mr Lamont endeavoured to develop what might be regarded as a refinement of that argument, namely that S 43 of the Gas Act only went so far as to authorise the supplier to require a take or pay contract; it did not validate the contract itself. No doubt in some senses that is correct; the section would not overcome defences based on, say, duress, or non-compliance with requirements of other statutes. But to the extent that any argument about enforceability revolves around the take or pay clause in relation to Part II of the Commerce Act it does not seem possible to draw any distinction between authorisation of a demand for a take or pay provision and the provision itself. It would be a contradiction in terms to say that while the demand was authorised the resulting contractual provision was still open to examination as a restrictive trade practice.

I have to say that had I been able to find a tenable basis upon which to reject the plaintiff's argument I would have done so. I am unhappy that the provisions of Part II of the Commerce Act should be pre-empted by as open ended an authorisation as that which, according to my findings, is conferred by S 43 of the Gas Act. However, I take consolation from the fact that the Commerce Commission, which must be equally concerned about the exclusion of the applicability of Part II, and which has a good deal more expertise in the practical application of the Gas Act than I do, has on more than one occasion reached the same conclusion about the validity of take or pay contracts. Indeed the Commerce Commission took that view in relation to this very contract when application was made for authorisation. For completeness I should record that Mr Broadmore submitted that because of what then occurred the defendant was estopped from advancing its present argument but I do not see anything on the defendant's part that could be said to amount to a representation, nor any reliance by the plaintiff on any act or conduct of the defendant's at the time.

There will be judgment for the plaintiff in the sum of $89,420 together with interest at 11% from 1 January 1988 to the date of this judgment. The plaintiff is entitled to costs which I fix in a total sum of $3500 together with disbursements as approved by the Registrar.

[illegible] CJ

Solicitors for plaintiff: Brandon Brookfield, Wellington

Solicitors for defendant: Carlile Dowling, Napier

Reserved Judgment of Eichelbaum CJ Delivered this 18TH day of April 1989 by B.D. Moore.

Deputy Registrar

B.D. MOORE