



## **Introduction**

[1] The issue in this case is whether time is of the essence in a contractual provision requiring the plaintiff, Open Country Cheese Company Limited, to provide a forecast of its raw milk requirements to the defendant, Fonterra Co-operative Group Limited, within a stipulated time. Open Country argued that, on a proper interpretation of the contract, strict compliance is not required. Fonterra argued that the provision is to be interpreted strictly and that if Open Country does not comply strictly Fonterra can choose whether to supply raw milk either at all or at a higher price.

[2] Under the Dairy Industry Restructuring (Raw Milk) Regulations 2001 Fonterra can be required to supply up to 50 million litres of raw milk at a regulated price each year to any independent processor. At present about 3% of its raw milk production is supplied to independent processors. Open Country is an independent processor and in 2004 it entered into a raw milk supply contract with Fonterra.<sup>1</sup> The contract requires Open Country to provide advance estimates of its raw milk requirements. This includes a “three month forecast”, which is a forecast required on the first day of each month of the volume of product Open Country wishes to purchase on each day of the month that is the third month ahead of the current month. The description “three month forecast” is confusing because it actually requires an advance estimate of two to three months, depending on what day of the month is being referred to.

[3] On 27 December 2007 Open Country sent Fonterra a three month forecast which was intended to forecast its March 2008 requirements. In error, the forecast given was for February 2008 rather than March 2008. On 17 January 2008 Open Country realised the error and sent an amended milk order form with a forecast for March 2008. Fonterra maintained that the contract required the March 2008 forecast to be provided no later than 1 January 2008 and, as a result of Open Country’s failure to provide the forecast within the required time, it was not required to provide

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<sup>1</sup> There is a dispute over whether the 2004 contract was superseded by a fresh contract in 2007. However, the relevant provisions are the same in both contracts and I do not need to decide which contract applies in this proceeding

raw milk at the regulated price during March 2008. Instead, Fonterra said it would supply the milk at the higher market price.

[4] Open Country obtained an interim injunction requiring Fonterra to supply the milk at the regulated price for March 2008 pending resolution of the substantive issue between the parties. In this proceeding Open Country seeks a declaration that Fonterra was obliged to supply it with raw milk at the regulated price during March 2008. Fonterra counterclaims for \$1,515,111.00 being the difference between the regulated and market prices for the raw milk supplied during March 2008.

### **Relevant principles**

[5] Time is not of the essence in a contract unless the contract itself stipulates for that or the facts require that implication.<sup>2</sup> *Halsbury's Laws of England* (4ed, 1998) vol 9(1) Contract at [931] paragraph 931 summarises the position:

Time will not be considered to be of the essence except in one of the following cases: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature or the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

[6] The usual means by which time is made of the essence in a contract is the use of the expression "time being of the essence" or similar. The same effect can be achieved by the use of other language but the intention must be unmistakable. In *Thomas v Monaghan*<sup>3</sup> the Court of Appeal said that any form of language would achieve that result if it met the test laid down by the Privy Council in *Jamshed Khodaram Irani v Burjorji Dhunjibhai*<sup>4</sup> citing from the judgment of Lord Haldane:

The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract were to be taken as having really and in substance intended as regards the time of its performance might be excluded by any plainly expressed stipulation. But to have that effect the language of the stipulation must show that the intention was to make the

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<sup>2</sup> *United Scientific Holdings Limited v Burnley Borough Council & Ors* [1978] AC 904 at 927 and 943

<sup>3</sup> [1975] 1 NZLR 1 at 7

<sup>4</sup> (1915) 32 TRR 156

rights of the parties depend on the observance of the prescribed time limits in a fashion which was unmistakable. The language would have that effect if it plainly excluded the notion that those time limits were of merely secondary importance in the bargain and that to disregard them would be to disregard nothing that lay at its foundation.

[7] The contract in this case did not stipulate that time was to be of the essence in relation to the three month forecast. Nor did Fonterra give notice making time of the essence. The questions, therefore, are whether the language of the contract is sufficiently clear to make time of the essence and, if not, whether the surrounding circumstances make it necessary to imply that.

[8] This enquiry is a question of contractual interpretation, which is the ascertainment of 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 at the time of the contract. That background knowledge includes “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”, provided it was reasonably available to the parties at the time.<sup>5</sup> Previous negotiations between the parties and declarations of subjective intent have always been and still are excluded from the background information that the Court can take into account. However, following the Supreme Court’s decision in *Gibbons Holdings Limited v Wholesale Distributors Limited*<sup>6</sup> the Court may now take into account the parties’ subsequent conduct, provided it is mutual or shared conduct objectively capable of assisting in ascertaining the shared intention of the parties at the time the contract was entered into.

[9] In determining whether the parties intended time to be of the essence there may be particular indicators. For example, in *Bunge Corporation v Tradax Export S.A.*,<sup>7</sup> Lord Wilberforce considered that where compliance with a notice provision in a contract affected the ability of the other party to perform this obligation, that would bring the case within the exception to the general rule that time was not of the essence. In *United Scientific*, Lord Diplock noted the absence of any serious

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<sup>5</sup> *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 All ER 98 (HL) at 114-115 adopted in New Zealand in *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74

<sup>6</sup> [2008] 1 NZLR 277

<sup>7</sup> [1981] 2 All ER 513

detriment to the other party as a result of non-compliance with a time requirement indicated that time was not intended to be of the essence. It is, however, a factual enquiry in the particular circumstances as to whether that intention is to be ascertained from the contract and the surrounding circumstances.

### **Is time of the essence?**

#### *The regulatory framework*

[10] Fonterra was formed in 2001 through the amalgamation of a number of co-operative dairy companies and merger with the New Zealand Dairy Board. The Dairy Industry Restructuring Act 2001 (DIRA) was enacted to facilitate this amalgamation. Fonterra now produces the vast bulk of raw milk in New Zealand. However, DIRA included provisions intended to facilitate a level of competition in the dairy industry that would allow independent producers to operate. To this end DIRA authorised the making of regulations that would require Fonterra to supply raw milk (and other products) to independent processors and, in recognition of Fonterra's planning needs, allow Fonterra to require independent processors to give advance notice of their requirements.

[11] The Dairy Industry Restructuring (Raw Milk) Regulations 2001 came into force in November 2001. As already noted, they require Fonterra to supply up to 50 million litres of raw milk per season at a specified price to any one independent processor. The obligation in regulation 4 to supply raw milk to independent processors is, however, subject to regulations 5-15, which include the power to require advance estimates and provides for the price to be charged. The independent processor can require raw milk to be supplied at a "default price" which is the wholesale milk price plus the reasonable cost of transporting the raw milk. The default price is lower than Fonterra could otherwise obtain by converting the raw milk into a commodity product for sale in the market.

[12] Regulations 4-6 and 8 as they stood at the date of the contract, provided:

#### **4 New co-op must supply raw milk<sup>8</sup>**

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<sup>8</sup> New co-op ultimately became Fonterra

- (1) New co-op must supply raw milk to independent processors.
- (2) The obligation in subclause (1) is subject to regulations 5 to 15.

#### **5 Advance estimates of raw milk requirements**

New co-op may require an independent processor to estimate the quantity of raw milk to be supplied by new co-op to the independent processor.

#### **6 Raw milk estimates**

- (1) This regulation applies to a quantity of raw milk to be supplied in 1 day to an independent processor and any interconnected body corporate of the independent processor, except a quantity of winter milk to which regulation 7 applies.
- (2) For a quantity of raw milk to which subclause (1) applies, an estimate may be required by new co-op –
  - (a) up to 3 months before the date on which the milk is to be supplied; and
  - (b) up to 1 week before the date on which the milk is to be supplied.
- (3) A quantity estimated under subclause 2(b) must be within the range from 40% more than a quantity estimated under subclause 2(a) to 40% less than that quantity.

#### **8 Price of raw milk (2 November 2001 to 29 November 2001)**

- (1) New co-op and an independent processor may agree a price for the supply of raw milk.
- (2) However, an independent processor may require new co-op to supply the raw milk specified in subclause (3) and (4) at the default milk price.
- (5) The default milk price for raw milk supplied to an independent processor in a season is the wholesale milk price for that season plus –
  - (a) for raw milk except organic milk or winter milk, the reasonable cost of transporting the raw milk to the independent processor;...

[13] Under the regulations Fonterra and independent processors could enter into contracts for the supply of raw milk pursuant to the regulations, which is what Fonterra and Open Country did. Regulation 10 conferred the power on both Fonterra and the independent processor to require certain additional terms of supply:

#### **10 Other terms of supply**

- (1) New co-op may require an independent processor to contract to buy a quantity of raw milk not exceeding 80% of the quantity of raw milk estimated by the independent processor under regulation 6(2)(b) or regulation 7(2)(a)(ii) or (b)(ii).
- (2) An independent processor may require new co-op to contract to sell a quantity of raw milk not exceeding 120% of the quantity of raw milk estimated by the independent processor under regulation 6(2)(b) or regulation 7(2)(a)(ii) or (b)(ii).
- (3) New co-op or an independent processor may require that a contract for new co-op to supply raw milk to an independent processor includes terms that are reasonable having regard to industry practice before the commencement of these regulations.
- (4) New co-op may require an independent processor to contract to notify new-co-op of its actual requirement for raw milk by noon on the day before the raw milk is to be supplied.
- (5) This regulation does not allow new co-op to require that a contract to supply raw milk to an independent processor includes a take or pay requirement.

[14] It is apparent that the wording of the regulations does not make time of the essence in relation to any forecasts Fonterra requires. I therefore turn to consider the terms of the contract between the parties.

#### *The contract*

[15] Fonterra has entered into contracts for the supply of raw milk with most of the independent processors it supplies. There are a few who do not have a contract but their requirements are very low and Fonterra does not require estimates from them. For all other independent processors, including Open Country, Fonterra uses a standard form of contract.

[16] Clause 3.2 of the contract imposes a general obligation on Fonterra to supply and Open Country to purchase:

- 3.2 **Volume to be supplied:** The Purchaser shall purchase Product from Fonterra, and *Fonterra shall supply that Product, in the Volumes for each day that are ordered in accordance with clause 5.1.*

(emphasis added)

[17] Clause 5.1 imposes an obligation to place orders two business days before the date delivery is required:

5.1 **Placing orders:** The Purchaser shall place separate Orders in relation to each Delivery Point (separately specifying any Organic Milk required) by 5pm two Business Days prior to the date on which the Purchaser requires the Product to be Delivered to the Delivery Point specified in the Order. *Fonterra will supply Product so ordered in accordance with the terms of the Orders and this agreement but is not obliged to supply: (a) Product Volumes exceeding 120% of the Volume specified for that day in the applicable Weekly Estimate; or (b) Organic Milk volumes exceeding the limit specified in Part 1 of this Agreement (if applicable).*

(emphasis added)

[18] Clause 4 requires Open Country to provide forecasts in advance of orders placed under cl 5.1, including the three month forecast:

4.1 **Three Month Forecasts:** On the first day of each month, the Purchaser must provide Fonterra with a separate forecast in relation to each Delivery Point of the Volume of Product (separately specifying any Organic Milk) it wishes to purchase on each day of the month that is the third month ahead of the current month (including Winter Months) (“**Three Month Forecast**”). For example, on 1 August the Purchaser must provide a Three Month Forecast for each day from 1 October to 31 October.

4.2 **Winter Milk Forecast:** For any day during the Winter Months, the Purchaser must provide a separate forecast (“**Winter Milk Forecast**”) to Fonterra of its daily Winter Milk requirements in relation to each Delivery Point at least 18 months before that day. There is no requirement to provide a Winter Milk Forecast in relation to any day for which the Volume of Product being forecast is less than 20,000 litres.

4.3 **Weekly Estimate:** The Purchaser will provide Fonterra with a separate forecast in relation to each Delivery Point (“**Weekly Estimate**”) of the Product it anticipates it is likely to require on each of Sunday, Monday, Tuesday, Wednesday, Thursday, Friday and Saturday, by Thursday of the previous Week.

4.4 **Limit on Weekly Estimate:** A Weekly Estimate for a day must be within the range of 40% less to 40% more than:

- (a) in relation to Winter Milk to which clause 4.2 applies, the Winter Milk Forecast given in accordance with clause 4.2 in relation to the corresponding Delivery Point; and
- (b) for all other Product, the Three Month Forecast given for that day in accordance with clause 4.1 in relation to the corresponding Delivery Point.



To the extent that a Weekly Estimate is not within that range, Fonterra has no obligation to supply Product in relation to that Weekly Estimate. Where Fonterra chooses to supply Product, the Market Price will apply in accordance with clause 9.2(c).

- 4.5 **Good faith and best forecasts:** The Purchaser shall ensure that any forecast or estimate made in accordance with this agreement is made in good faith, on reasonable grounds with due care and consideration of all relevant factors at the time of forecasting or estimating and accurately states the Purchaser's anticipated requirements for Product from Fonterra.

[19] The question of price is dealt with in cl 9. Fonterra must charge the "estimated regulated price" and "transport charge" for raw milk except in certain specified circumstances. The estimated regulated price and transport charge essentially reflect the "default price" under the regulations, being the estimated wholesale price of the milk together with reasonable transport costs. However, cl 9.2 specifies circumstances when the price charged will be the higher "market price" together with and transport charge. The relevant clauses provide:

**9. PRICE**

- 9.1 Regulated Price:** The Regulated Price applies to Product supplied under this agreement unless the Market Price applies under clause 9.2.

- 9.2 Market Price:** The Market Price applies to all Product supplied by Fonterra pursuant to an Order in any or all of the following situations:

- (a) where the Purchaser does not comply with the October Rule;  
or
- (b) above the limit specified in clause 3.1; or
- (c) in the circumstances contemplated by clause 4.4; or
- (d) that it is not obliged to supply under clause 5.1; or
- (e) as agreed with the Purchaser.

...

- 9.6 Price:** The Purchaser will pay to Fonterra, in respect of each month:

- (a) for the Quantity of Product Delivered to the Purchaser to which clause 9.1 applies:
  - (i) the most recent forecast of the Estimated Regulated Price;

- (ii) the Transport Charge; and
- (b) for the Quantity of Product Delivered to the Purchaser to which clause 9.2 applies:
  - (i) the Market Price;
  - (ii) the Transport Charge; and
- (c) for the Quantity of Winter Milk Delivered to the Purchaser, the Estimated Winter Milk Charge for the Island in which the Delivery Point is located; and
- (d) for the Quantity of Organic Milk Delivered to the Purchaser, the Organic Milk Charge; and
- (e) any Tanker Delay Charges payable under clause 6.4.

[20] Ms Fitzgerald, for Fonterra, submitted that, although the contract did not specifically refer to time being of the essence, the forecasting requirement is clear and unequivocal; the requirement in cl 4.1 that Open Country “must” provide Fonterra with the forecast on a particular day and that the word “must” is repeated in the example given eliminates any possibility of confusion. She described the clause as emphatic and unambiguous.

[21] A requirement that a party “must” take a particular step on a specified day could suggest strict compliance. However, when I consider the wording of cl 4 in the context of the contract generally I am unable to reach that conclusion in this case. The primary obligations imposed by the contract under cl 3.2 require Fonterra to supply and Open Country to purchase product in the volumes for each day that are ordered in accordance with cl 5.1. Clause 5.1 requires Open Country to place orders by 5 pm two business days prior to the date delivery is required. The obligation by Open Country to purchase and by Fonterra to supply is clearly triggered by the making of orders under cl 5.1. There is nothing at that point to indicate that supply is contingent upon receipt of the three month forecast on the day stipulated by cl 4.1. Indeed, there is no express indication as to what the consequence might be of failing to provide the three month forecast on time.

[22] Fonterra argued that the contract does provide a consequence for not providing the forecasts on time. Under cl 4.4 the three month forecast must be within the range 40% more or less than the three month forecast “given in

accordance with clause 4.1”. It also provides that Fonterra is not required to supply product (or can choose to supply it at market price) where they weekly estimate is not within that range. Ms Fitzgerald submitted that a forecast supplied late is not given in accordance with cl 4.1 and therefore any subsequent weekly estimate could not comply with cl 4.4. As a result, the stated consequence is that Fonterra has no obligation to supply and if it chooses to do so, may charge the market price.

[23] I do not accept this argument because the focus of cl 4.4 is the range of the weekly estimate compared to the three month forecast. It is not directed to when the forecast must be provided. It depends on interpreting cl 4.1 as requiring strict compliance rather than assisting in determining whether that is in fact the requirement. Clause 5.1 has a similar effect. Under cl 5.1 Fonterra is not obliged to supply product volumes exceeding 120% of the volumes specified in the applicable weekly estimate which is, in turn, required to be within a range of 40% more or less of the three month forecast. I cannot interpret these indirect references as an intention that time would be of the essence in relation to the three month forecast with the effect that Fonterra is relieved of its obligation to supply. They could only be interpreted this way if I was able to conclude on other grounds that cl 4.1 was to be complied with strictly.

[24] Clause 9.2 specifically relieves Fonterra of the obligation to charge the regulated price for raw milk in certain circumstances. These circumstances do not include failure to provide the three month forecast on time. But it does include product that Fonterra “is not obliged to supply under clause 5.1”. This wording clearly relates back to the second sentence of cl 5.1 which provides that Fonterra is not obliged to supply product volumes exceeding 120% of the volume specified in the applicable weekly estimate. I have already accepted that the requirement that the weekly estimate be within 40% more or less of the three month forecast is, indirectly, incorporated into cl 5.1. However, all these provisions relate to range and fall well short of clear and unmistakable language that could make time of the essence in respect of forecasts to be provided under cl 4.1 requiring strict compliance with cl 4.1. Since the drafter of the contract has specified the effect of failing to comply with the required range but not of failing to comply with the time stipulated for providing the three month forecast, I find that the overall effect of the contract is

not to make time of the essence. To interpret the contract in this way would be to deprive the primary obligation under cl 5.1 of its meaning.

[25] I therefore conclude that, on its wording, the contract does not make time of the essence. Strict compliance with cl 4.1 will therefore only be required if the surrounding circumstances require that to be implied.

*The surrounding circumstances*

[26] In the absence of clear language making time of the essence I turn to consider the circumstances surrounding the contract. First, I note that historically, Fonterra has not required strict compliance with cl 4.1 in that it has accepted forecasts sent on a particular day each week or month even though that does not always fall on the first day of each month as required by cl 4.1. Open Country uses a single milk order form to provide both the three month forecast and the weekly estimate. The top half of the document contains the three month forecast, specifying the month to which the three month forecast refers. The bottom half of the document contains the weekly estimate, listing the month in which the weekly estimate falls and the date on which it is sent. There is a table showing the days of the week with an estimate of product for each day. Mr Walters, Open Country's chief financial officer, gave evidence that since 2004 Open Country's practice has been to send a completed version of the milk order form to Fonterra each Thursday. As a result, the weekly estimate changes to show the upcoming week and once a month, on the last Thursday of each month, the three month estimate is changed to a new estimate two months in advance. The result is that Open Country has never provided three month estimates on the first day of each month except where the first day of the month happens to fall on a Thursday.

[27] The main argument advanced by Fonterra was that its internal planning requirements are very complex and cannot be managed without the timely provision of forecasts by all its customers, including the independent processors to whom it is required to supply raw milk under the regulations. Because of this it argues that strict compliance with cl 4.1 should be implied into the contract.

[28] Although Fonterra accepted that the figures contained in the three month forecasts are not binding, it submitted that they are significant in that they are the first formal advance notice it receives of an independent processor's requirements for raw milk in any given month. Fonterra informally requests an annual estimate but that is not required under the contract and is acknowledged as having no binding effect. The only other advance notification is the weekly estimate. However, there was evidence that this estimate is directed towards operational planning such as scheduling truck drivers and arranging delivery routes. The weekly estimate is not used to determine demand as part of Fonterra's overall planning process.

[29] Mr Rich, Fonterra's Business Manager, explained that Fonterra's planning process required it to balance expected milk supplies with anticipated global and domestic demand, including its obligations to supply independent processors. Mr Rich described the many variables that affect planning of both the milk supply and demand. Because of its obligation to supply the independent processors under the regulations Fonterra allocates the amount of raw milk required by the independent processors first, with the balance of collected milk used to manufacture its own product and supply other customers.

[30] Mr Rich gave detailed evidence about the planning process. A "demand plan" is prepared which estimates each customer's milk supply requirements for an entire year and is adjusted monthly to take account of updated forecasts received. Mr Rich said that the three month forecasts were a key element in determining demand for any particular month. Mr Rich did not regard the 40% plus or minus range of the weekly estimates as undermining the significance of the three month forecast because, in his experience, the variation between weekly estimates and three week forecasts was rarely that great. Mr Rich said that, almost without exception, its raw milk customers supplied the three month forecasts in a timely manner and that Fonterra's internal planning process would collapse if customers continually sent in forecasts past the due date or at different times during the month. Mr Rich also pointed out that although independent processors make up only 3% of Fonterra's total milk supply, supply to them is nevertheless significant (450 million litres of milk per milk season). If not being supplied to independent processors, that volume would be available to Fonterra to market and sell at higher prices.

[31] The three month forecasts are required on the first day of the relevant month and adjustments to the demand plan are made by the fifth day of each month. The demand plan is then used to produce a report of all liquid requirements for the supply month. That report is sent to Fonterra's Global Portfolio Optimisation Department which ascertains how the expected milk resources should be allocated. According to Mr Scott, the Regional Product Mix Manager, if the three month forecast is not received on time and there are significant variances from what was previously forecast, there can be serious effects on what milk will be available to produce products for other customers or for product that has already been committed to other customers in any given month. Mr Scott said that the demand forecasting from raw milk customers is critical to Fonterra's planning because it must be met and that fact directly influences the availability of milk for use in other products and for other customers.

[32] There can be no doubt on the evidence that Fonterra does rely on the forecasts, including the three month forecasts in its planning process. However, Mr Gillivray, for Open Country, submitted that Fonterra had overstated the significance of the three month forecasts and that this was evident from Mr Rich's cross-examination. Mr Rich acknowledged that it was Fonterra's general practice to supply milk to independent processors even where they have provided a late forecast or for some other reason Fonterra was not actually obliged to supply the milk but that the price charged was market price. He accepted that there was sufficient flexibility in Fonterra's production planning to re-direct milk even after its planning process had been closed off for a month. Mr Rich was not aware of any instance in which Fonterra had found itself in the position of having committed milk elsewhere through its monthly planning process such that it could not supply milk to an independent processor.

[33] When asked what he did to update his demand plan at times when no three month forecast was received, Mr Rich said that either the demand plan would be changed to zero if it was obvious (e.g. in a winter month where the customer had indicated an indication to close its factory) or, if the forecast was simply late, the annual estimate would remain in the plan until further information came to light. Mr

Scott, too, said that if forecasts were received late Fonterra would have to rely on the annual estimates given voluntarily.

[34] Mr Rich also acknowledged that there had been several occasions when Fonterra had not reviewed the three month forecasts by the fifth day of the month. In the case of the March 2008 forecast, none of the three month forecasts received from independent processors were used to update the demand plan because of the staff member being on holiday. As a result, if Open Country had provided its forecast on time in December 2007 nothing would have been done with it anyway. On this point Ms Fitzgerald cautioned against interpreting the contract on the basis of a single incident because the reason that forecasts are usually provided on time was that the parties recognise that requirement and the consequences of non-compliance.

[35] I accept on the evidence before me that the size and scale of Fonterra's planning operation means that forecasting in advance of the weekly estimate would be needed. However, even accepting that Fonterra has significant and complex planning requirements, it is still not apparent from the evidence that strict compliance with cl 4.1 should be required. The evidence suggests that circumstances within Fonterra do vary in terms of the significance of the three month forecast and that it is not uncommon to proceed with the demand plan on the basis of the annual estimate rather than being unable to plan due to the lack of the three-month forecast. The fact that Fonterra's general practice is to supply milk regardless of non-compliance by the independent processor strongly suggests that time is not of the essence; Fonterra is clearly able to perform its obligation to supply notwithstanding such non-compliance. The only consequence is a change in the price. But the change in price is not specifically tied to lateness of forecasts in the contract and the surrounding circumstances in this case would not justify the implication on this ground.

[36] Ms Fitzgerald also submitted that if one considers what the position would be if time were not of the essence, it becomes apparent that parties must have intended that time would be of the essence. She referred first to the evidence of how difficult internal planning would be for Fonterra if its numerous customers lodged forecasts

late and at varying times during the month. The current planning process which depends on production of the demand plan and updating of that plan by the fifth day of each month would be in disarray. Ms Fitzgerald submitted that it was no answer that Fonterra was able to make time of the essence if it wished and specifically require the forecast. This, she said, would cause practical difficulties and uncertainty because any timeframe for requiring strict compliance with cl 4.1 could not fit within Fonterra's internal schedule. Ms Fitzgerald cited from *Universal Scientific* at 946:

In equity, and now in the fused system, performance had or has, in the absence of time being made of the essence, to be within a reasonable time. What is reasonable time is a question of fact to be determined in the light of all the circumstances. After the lapse of a reasonable time the promisee can give a notice fixing a time for performance. This must itself be reasonable.

[37] Fonterra cannot know whether the lack of a three month forecast is due to lateness or the fact that the independent processor has elected not to order milk for the month in question. Given its internal schedule it would be difficult for Fonterra to give reasonable notice of any requirement for strict compliance with cl 4.1. The problem of finding sufficient time to make time of the essence also depends on when the five day period between expected receipt of the forecast and the updating of the demand plan might fall. Weekends and public holidays might prevent Fonterra realising that the forecast was late in enough time to give its customer reasonable notice of the requirement to submit a forecast.

[38] It is true that the period between the first and the fifth days of the month is short enough without adding in the complication of determining whether a customer should be prompted to provide a forecast and giving it sufficient time to do so. However, this problem is driven entirely by Fonterra's internal planning process and schedule. There is no evidence that this was known to Open Country, or indeed to any other customer. Open Country's focus is on securing raw milk pursuant to its contract. Enough would certainly have been known for Open Country to appreciate the need for forward planning beyond a weekly estimate to Fonterra but it is most unlikely (and there is no evidence) that Open Country fully understood the extent of the internal planning process going on within Fonterra. In particular, there is nothing to suggest that a general appreciation of the need for forward planning would cause Open Country to expect that strict compliance with the forecast was necessary.



Fonterra itself might reasonably have intended strict compliance with cl 4.1 but in the absence of any explanation as to its internal planning process there is no basis on which to find that such intention was shared by Open Country.

[39] Ms Fitzgerald also submitted that if time were not of the essence the time stipulations under cl 4.1 would be rendered meaningless. I do not accept this latter submission. Not requiring time to be of the essence does not deprive cl 4.1 of meaning; the obligation to provide forecasts remains. It is only a question of whether it is to be complied with strictly or not.

[40] Three aspects of post-contract conduct were also raised as relevant to the determination of the parties' intention at the time the 2004 contract was entered into but I do not find them of assistance. First, Open Country points to instances of error in its weekly milk estimates. In June 2007 Open Country overlooked sending a weekly order form. On that occasion Fonterra contacted Open Country to check whether it did require milk. In July 2007 Open Country sent a weekly estimate that contained a clerical error and Fonterra took no issue. However Fonterra's response is that there was no reason to take issue with minor typographical errors when the forecast is provided on time and is clear as to its intent. Further, a slight lateness in weekly estimates can be accommodated more easily because (as already discussed) they serve a different function from the three month forecasts. I find that Fonterra's response to late compliance with the weekly estimate does not assist in determining the parties' intention as to whether the three month forecast must be strictly complied with.

[41] Second, Fonterra relied on correspondence between itself and Open Country during 2004 prior to the contract being entered into. It pointed to correspondence from Open Country recording its understanding of the forecasting arrangements. However, these letters do no more than paraphrase the terms of the contract and formed part of the pre-contractual negotiations which are inadmissible (this is so even where the contract was for the most part a standard form contract).

[42] Mr Rich also gave evidence that he continued to make Open Country aware of the importance of timely forecasting and the contractual terms and that when

Open Country's October 2004 forecast (due 1 August 2004) was late Mr Rich emailed Open Country reminding it that the forecast was due. It transpired that Open Country was using an incorrect email address. Mr Lawson had telephoned Mr Rich three times on the morning of 9 August 2004 when the forecast was finally sent to check that it had been received. Fonterra also relied on the fact that Mr Lawson had been so anxious as to indicate his awareness of the need to send the forecast on time.

[43] After Fonterra received the forecast Mr Rich emailed Open Country stating that:

...I was starting to get worried that you had missed the deadline as this could have led to repercussions re: price that we charge (as you are no doubt aware). It is important for our planning that forecasts are received in time. This is particularly so for customers such as Open Country, who take large volumes.

[44] Mr Rich said that because Open Country had tried to send the forecasts on time and the late forecast was received during the early days of Open Country's operation Fonterra determined that it would nevertheless supply milk at the regulated price.

[45] I do not regard either Mr Rich's letter or Mr Lawson's anxiety as helpful in ascertaining the parties' intention. The letter is not mutual or shared conduct as envisaged by *Gibbons*, but merely records Fonterra's subjective view of the contract. Mr Lawson's anxiety is equally explicable as a desire to comply with the terms of the contract as with a belief that time was of the essence.

[46] The third aspect of post-contract conduct relied on is Fonterra's consistent stance with other raw milk customers in relation to late three month or winter milk forecasts. Fonterra's response to these instances of lack of compliance has been to, initially at least, require market price to be paid for the milk. On some occasions, however, Fonterra ultimately agreed not to charge market price for the entire period or, on some occasions, for any of the period for reasons connected with the individual customer. This conduct is not mutual or shared conduct as envisaged by

*Gibbons* and cannot assist in ascertaining the common intention of Fonterra and Open Country when they entered into their contract.

[47] Fonterra also relied on findings by the Commerce Commission in a dispute between Fonterra and another independent processor, Independent Dairy Producers Limited.<sup>9</sup> In that case the Commerce Commission concluded that under the Regulations estimates triggered the future obligation to supply raw milk and if estimates are not provided on time then no obligation to supply arises. I have not been assisted by this decision, however, because Open Country's rights and obligations are to be determined by reference to the terms of its contract and I have already concluded that under those terms Fonterra's obligation to supply to Open Country was triggered by the making of an order under cl 5.1. Further, there was no consideration given in the Commerce Commission's decision as to whether time was of the essence in providing estimates required by Fonterra and I assume the point was not argued.

## **Result**

[48] I have concluded that the express words of cl 4.1 do not have the effect of making time of the essence in relation to the three month forecasts. Nor do the surrounding circumstances require that implication. As a result, there will be a declaration that Fonterra was obliged to supply Open Country with raw milk at the regulated price throughout March 2008.

[49] Counsel may address the issue of costs by memoranda filed on behalf of Open Country by 25 January 2010 and in reply by Fonterra by 1 February 2010.

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P Courtney J

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<sup>9</sup> *Independent Dairy Producers Limited v Fonterra Co-operative Group Limited* Commerce Commission 30 June 2003 J5466 30 June 2003