IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007 485 2168

BETWEEN	BODY CORPORATE 344862 First Plaintiff
AND	ALAMIR COMPANY LIMITED Second Plaintiff
AND	NOVA GAS LIMITED Third Plaintiff
AND	K2G LIMITED (FORMERLY KOPI2GO LIMITED) Fourth Plaintiff
AND	E-GAS LIMITED First Defendant
AND	E-GAS 2000 LIMITED Second Defendant

Hearing: 23 and 24 June 2008

Counsel: A M Stevens & G J Robins for plaintiffs
L J Taylor & G Shaw for defendants

Judgment: 23 September 2008

RESERVED JUDGMENT OF DOBSON J

Nature of the claims

[1] The present application for summary judgment arises in proceedings that involve claims and counterclaims between two vigorous competitors in the retail gas supply market. The third plaintiff ("Nova"), which is essentially driving these proceedings, is owned by Todd Energy interests. The defendant E-Gas companies ("E-Gas") were described in submissions as being independent of producer interests, but are apparently associated with Shell's involvement in the gas industry in New Zealand. Although at various times during the dispute, distinctions were drawn between the conduct of the two defendant companies, it is sufficient for the issues I will address in this judgment to treat them as both being in the same position. I treat Mr Hunt's evidence for both companies as not making a distinction that is material, notwithstanding that the two companies have different shareholders.

[2] The remaining plaintiffs represent various categories of commercial gas consumers who sought to terminate gas supplies from E-Gas in order to transfer their supply to Nova. The position of those in the categories of the first and second plaintiffs has been resolved and they have taken no part in the present argument. The fourth plaintiff ("K2G") was representative of some 153 remaining customers who sought to transfer from E-Gas and still had issues to resolve ("remaining transferring customers" - "RTCs"). The number and status of other gas users said to be in the same position as K2G was not agreed, but that does not require immediate resolution.

[3] To the extent that K2G sought relief against E-Gas in its own right, this was resisted on additional grounds that the contract between those parties included an arbitration provision which applied and therefore E-Gas sought a stay of that part of the proceedings so that the E-Gas/K2G dispute could be referred to arbitration.

[4] Summary judgment was sought in respect of all of five causes of action. The first related to obligations said to arise pursuant to what is an industry code operating between the competing retailers of gas, reflected in a Reconciliation Code settled in 2000 ("the Code") and an Allocation Agreement concluded between the allocation agent responsible for administering the allocation of gas among retailers using the relevant distribution system, and those gas retailing companies in 2004 ("the Allocation Agreement"). Declarations were sought as to the extent of obligations on E-Gas in the circumstances of requests for transfer of customers to a new retailer, and also relief by way of injunction, orders for specific performance and/or damages.

[5] In its second cause of action, Nova alleged that by failing to effect requests to switch supply from E-Gas to Nova where that had been communicated by numerous E-Gas customers, E-Gas was unlawfully interfering with Nova's contractual relations with those transferring customers. Nova sought declaratory relief confirming the legal position it asserted, and specific performance and/or damages.

[6] The third and fourth causes of action focus on the circumstances and timing of K2G's attempts to switch its gas supply from E-Gas to Nova. Without prejudice to the contractual position, E-Gas did effect a switch for K2G with effect from 1 January 2008. However, K2G pleads that its contract with E-Gas ended in July or August 2007, and that no further sums are now due to E-Gas. K2G seeks a declaration confirming the correctness of its view on termination, and also seeks to enforce a term claimed to be implied in its own contract with E-Gas that the latter would comply with industry protocols, including the Code.

[7] In the fifth cause of action, Nova and K2G seek declarations as to which form of E-Gas's conditions were in force at the time of the initiatives taken by the RTCs to switch. That raises arguments as to the extent of circumstances in which E-Gas

was entitled unilaterally to vary the terms on which it contracted with the customers to whom it supplied gas.

Foreshadowed counterclaims

[8] For its part, E-Gas raised a number of matters which it submitted would constitute valid counterclaims, or found an equitable set-off. Submissions for E-Gas foreshadowed claims of misrepresentation by Nova to affected E-Gas customers, misleading and deceptive conduct in respect of the business of E-Gas presumably constituting conduct in breach of s 9 of the Fair Trading Act 1986, and constituting unlawful interference with the contractual relations between E-Gas and its customers. In addition, E-Gas complains that Nova is itself in breach of the Allocation Agreement and Reconciliation Code. No statement of defence has been filed, but it will apparently be alleged that the misrepresentations made to E-Gas customers means that they have not made a genuine election to change gas retailers, and that any transfer of those customers to Nova can be resisted because Nova has not acted in a "fair and equitable manner", which standard of conduct is required of all retailers by the Code.

[9] The extensive evidence includes diverse criticisms of various aspects of the conduct of both E-Gas and Nova. Mr Taylor for E-Gas forcefully claimed the moral high ground, possibly with some justification on the weight of the respective criticisms. However, much of that depended on E-Gas's view that Nova's interpretation of clause 48 of E-Gas's standard terms was "untenable", so that much of E-Gas's criticism of Nova would need to be seen in a substantially different light, if E-Gas's view on clause 48 is not correct.

[10] Submissions for E-Gas drew particular attention to 12 representations, each claimed to seriously misrepresent, and in some cases defame, E-Gas. A recurring theme in those statements was that E-Gas rates were very expensive, or higher than they need be, or "above the market rate" when there was no formal, identified "market rate". The reality was that Nova was able to offer lower rates in some cases, and in some cases substantially lower rates, although E-Gas could quibble about the accuracy of percentage differences cited by Nova representatives. The commercial

reality is that once E-Gas responded to Nova's aggressive campaign, in many cases it elected to match the lower rates which some of its customers had found sufficiently attractive to justify transferring to Nova.

[11] In Nova's marketing initiatives to urge E-Gas customers to transfer to Nova, Nova personnel indicated that Nova would assume responsibility for freeing such customers from their existing obligations to E-Gas. This was no doubt part of a strategy designed to make a decision by the customer to change as easy for them as possible. Among the strategies that Nova deployed (but not necessarily as a first step in the dealings for all customers who indicated they would change) was the assertion of a unilateral right for the customer to terminate the contract with E-Gas, upon payment of a penalty, the extent of which was calculated by reference to the terms of clause 48 in E-Gas's standard terms. E-Gas denies that clause 48 is to be interpreted so as to afford a unilateral right of termination to the customers.

[12] The application for summary judgment was supported or opposed by 25 affidavits (including 21 completed at various stages for the plaintiffs) and numerous volumes of documents. Whereas the relationship between E-Gas and Nova, as competing retailers of gas, was governed by the Allocation Agreement and the Code, the relationship between E-Gas and its own customers (in particular K2G) has been governed by successive iterations of standard form contracts used by E-Gas. In these circumstances, a preliminary plea for E-Gas was to the effect that the factual and legal complexity of these various relationships was such as to render the dispute entirely inappropriate for resolution in whole or in part by way of summary judgment. Whilst superficially attractive, that submission cannot adequately be considered, without covering a good deal of the ground it seeks to avoid.

[13] It is appropriate to deal with clause 48 of the E-Gas terms first, because its interpretation is at the core of all issues in the case. The second set of contractual issues arises out of the industry documents to which E-Gas and Nova are both parties, and which are intended to regulate how the competitors handle, among other things, the switch of customers between them. I propose to consider their interpretation and then assess whether a proper interpretation is impeded by the absence of the further evidence reasonably expected at a full hearing, or whether

there is any other reason to defer provision of a relevant interpretation. If an interpretation is declared, I then need to consider how that relates to the prospects for other relief. I will then deal with K2G's claims and whether they are to be stayed, and finally consider E-Gas's attempts during the relevant period to change unilaterally the terms of its standard form contract.

Clause 48

[14] I note at the outset that E-Gas criticised Nova's argument for failing to acknowledge that there had been three versions of this clause, over the period from 2000 to 2006. I do not see the changes in the successive versions as making any material difference. E-Gas' view was that the K2G contract was governed by the 2005 version, which omitted (immaterially in my opinion) the word "the" from two places in which it appears in the 2006 version quoted below.

[15] In the 2006 iteration of E-Gas's standard terms, clause 48 provided:

> 48. Early Termination of gas supply or term: With the exception to clause 46 – The customer will pay e-gas penalty of NZ $1.00 (One Dollar) per GJ for the remaining total estimated gas quantity for the remainder of the contract term with the customer, and only upon full payment of the penalty from Customer (or otherwise nominated party) to e-gas will this gas supply contract be terminated before it's (sic) term has expired.

[16] Clause 48 appears in a group of clauses, the heading of which is "ENDING OR SUSPENDING SUPPLY OF GAS". Clause 44, the first in this group of clauses, specifies a range of circumstances in which either party may terminate where the other party is in breach, requiring notice to be given of a requirement to remedy the breach and, if capable of remedy, the period of time given for that to occur. Next, clause 45 protects E-Gas from a claim of breach of the contract by setting out the circumstances in which it may suspend supply of gas. That clause cross-refers back to an earlier provision excluding liability on E-Gas where there is interruption to supply caused, in essence, by factors beyond its reasonable control.

[17] Then in clause 46, the contract recognises that if the customer ceases to occupy any site that was being serviced by E-Gas and wishes to discontinue the

supply of gas to that site, it can give notice to E-Gas of its wish to discontinue, and where discontinuance relates to all sites originally supplied for the customer, then the agreement is to be at an end. That is a narrow form of unilateral right of termination on the part of the customer, only available to it where it ceases to occupy the site or sites at which it had contracted to be supplied gas by E-Gas. Clauses 47 and 49 are mechanical provisions, the former providing for E-Gas's entitlement to disconnect equipment installed at the delivery point for a site to facilitate the supply of gas. Clause 49 obliges the customer to provide free, safe and unobstructed access to remove metering equipment and plant or equipment owned or provided by E-Gas.

[18] Considering first the meaning of clause 48 on its own terms, and in this group of clauses, the natural meaning of the heading of clause 48 "Early termination of gas supply or term" signals that the clause provides for two forms of early termination, namely early termination of gas supply, or early termination of the term of the contract.

[19] A purpose of the clause consistent with the heading is reflected if one goes to the very last part of it which confirms that it does make provision for early termination, by specifying that only compliance with the stipulation set out earlier in the clause will achieve termination before expiry of the term. That stipulation is the payment of a penalty at the rate of $1.00 per gigajoule for the estimated quantity of gas that would have been supplied in the remainder of the term. Despite strong arguments from Mr Taylor that provision of any unilateral right of early termination on payment of such an amount was commercially nonsensical and unrealistic, I do not find that to be the case. The essence of the clause is that it commits the customer for the fixed term provided for elsewhere, unless the customer is prepared to pay the penalty at the stipulated rate.

[20] Mr Taylor also argued that it was not a stand-alone provision, but rather the provision that would apply where termination arose under one of the other clauses. That argument is untenable because each of clauses 44 and 45 contemplates termination or suspension for cause, arising either where there is breach by the other party, or E-Gas's inability to perform by virtue of reasons beyond its control. That

leaves only clause 46, which is an explicit exception from the scope of application of clause 48.

[21] I next test that interpretation of clause 48 against the wider context of the agreement as a whole. Provisions under the heading "TERM" included the following:

> 7. Commencement and Term: This agreement commences on the Supply Commencement Date and shall remain in force until the later expiry of the Supply Period and any renewal of the Supply Period.
>
> 8. Renewal: Subject to clause 9, this agreement shall on the expiry of the Supply Period be automatically renewed for a further Supply Period equal to the original term of supply agreement. The renewed agreement will be on the same terms as the agreement (including this clause).
>
> 9. Renewal on amended provisions: If either party wishes to amend the provisions upon which this agreement is to be renewed or the Gas Price then that party must give the other party not less than three months prior written notice before the expiry of the Supply Period. The parties shall negotiate in good faith an agreement for the continued supply of gas by e-gas to the customer. If the agreement cannot be reached three months after expiry of the Supply Period this agreement will terminate. The customer will give e-gas the written opportunity to match any improved price or terms offered by an alternative supplier before agreeing to take a supply of gas from any supplier.

[22] Those provisions provide for a fixed term supply contract, automatically renewed in the absence of a specific initiative. If the customer wished to negotiate a variation to the gas price, three months' written notice before the expiry of the Supply Period must be given, both parties are then committed to negotiating in good faith, and the customer will only become entitled to terminate under clause 9 if agreement cannot be reached three months after the expiry of the Supply Period. Where the customer wishes to change to another supplier because of more advantageous price or terms, clause 9 obligates the customer to afford E-Gas an opportunity to match such improved price or terms.

[23] That process for terminating the contract, if the customer can achieve it, is a narrowly defined opportunity to exit, without cost, what otherwise appears as a perpetually renewable contract. I do not see it as inconsistent with a unilateral right of termination under clause 48 which can only be achieved at a cost. The extent of that cost will obviously be much less if clause 48 is invoked in the final months of a

contractual term, but that is not a factor against giving it the interpretation I have proposed.

[24] Similarly, Mr Taylor argued that $1.00 per gigajoule for the projected extent of gas that would have been supplied to the end of the term was quite inadequate as compensation for breaking a term contract. I note that "Penalty" is the subject of a separate definition in clause 59 of the contract in the same terms, and any perceived inadequacy now of that as compensation cannot raise any serious argument about the appropriateness of giving the provision the effect of the natural and ordinary meaning of the words.

[25] Another indication that clause 48 does afford a unilateral right of termination, at a cost, is the limited nature of the opportunity for a customer to bring the contract to an end by other means. Notwithstanding that clause 9 refers to either party wishing to amend the provisions, I note that clause 32(II) affords E-Gas an entitlement to increase the natural gas component of the gas price by giving the customer three months' notice, in addition to an annual review of the gas price by application of an inflation-indexed formula. On its terms, clause 32(II) affords an unconstrained entitlement for E-Gas to increase its charges for gas, without any corresponding entitlement for the customer to terminate where the extent of the increase is perceived to be uncompetitive. A business person evaluating the risks of making a commitment to a gas supply contract on these terms would appreciate the limited nature of the right to terminate without cost under clause 9, but appreciate that that was balanced by a unilateral right to terminate at a cost under clause 48. Mr Taylor characterised this as a right which could never have been contemplated by the parties, but, to the contrary, it appears a sensible balancing provision to what is otherwise a long-term commitment for the customer, assumed subject to the risk of increases in price that the customer could not immediately do anything about. The only other course for the customer would be to obtain a more competitive quote from another retailer, and resort to the process required by clause 9, in the period leading up to expiry of the current term. That would require the customer to pay the higher price for at least six months.

[26] Mr Taylor also argued that, in the context of the whole contract, clause 48 could not be unilaterally invoked, but rather contemplated dialogue and agreement between the parties. There is nothing in the terms in which clause 48 is expressed which supports this. Indeed, if it contemplated dialogue and a requirement for agreement, it would obviously be expressed in quite different terms. For business persons, it represents a projection in advance of the cost of getting out of the contract at any point in time.

[27] One argument about the inadequacy of the provision if it affords a unilateral right, is that the correct calculation of the extent of penalty could not be completed without input from E-Gas. Mr Hunt, general manager of the E-Gas companies, deposed as a matter of fact, that this was the case. However, there are two at least partial answers to that point. The first is that projected usage will have been addressed at the outset, with E-Gas having regard to projected volume in calculating the price it would offer. Both parties can be presumed to have retained a copy of the original projection. At any point throughout the contract the customer would then be able to calculate the amount still not purchased from E-Gas, relative to the original projection, at least from the point of E-Gas's last invoice. A second rejoinder is that the risk of a miscalculation cannot deprive the provision of what would otherwise be its contractual effect. Rather, if on presentation of an early termination notice accompanied by payment of the customer's calculation of the penalty then payable, E-Gas has reasoned grounds for disputing that calculation, then it is a matter of the payment being supplemented, or indeed some element of refund being offered if there has been an over-calculation.

[28] For Nova, Mr Stevens submitted that in the event that the Court identified any ambiguity in interpretation of the clause, then I ought to apply the *contra proferentem* principle against E-Gas, to adopt the interpretation most favourable to the customer. A useful instance of the approach to the application of *contra proferentem* arose in the judgment of Hammond J in *BP Oil New Zealand Ltd v B A Motors (NZ) Ltd* [1996] 1 NZLR 425. That case involved interpretation of a provision in an agreement between an oil company and a retailer of petroleum products, for supply of such products. The rationale was expressed in the following way:

> Once there are two reasonably plausible meanings for the clause (as I think there are in this case) then the one which is less favourable to the party who supplied the language is to be preferred. This contra proferentem ("against the profferer") principle is much resorted to by Courts in disputes relating to standard-form contracts. And it has been particularly useful in relation to unequal bargaining situations (such as Draconian exemption clauses in consumer contracts). But I know of no authority, and I see no reason in principle, why it should not apply even between parties with equal bargaining strengths. I appreciate that at the end of the day, contra proferentem is really a rule of resolution, as opposed to something which can properly be said to be an intrinsic test assisting in the ascertaining of the meaning of something. Thus the benefit of the rule is functional rather than intrinsic; it is a tie-breaker, and penalises the careless drafter of documents. (430)

[29] Whilst some might question the extension of its application to dealings between parties with equal bargaining strength, because inequality of opportunity to negotiate the terms in the first place is important in the rationale for the rule, that is otherwise a useful statement of the resort that might be had to *contra proferentem*.

[30] I am not inclined to treat the absence of a more detailed mechanism for calculating the extent of the penalty as a reason for transforming what can otherwise fairly be interpreted as affording a unilateral right of termination. However, were a point of ambiguity to be reached, then I would certainly treat the inequality of the position between E-Gas and commercial customers, and the circumstances in which these standard terms have been presented to customers as qualifying for the application of *contra proferentem*. That would lead to an interpretation upholding the unilateral nature of the right, and requiring a reasonable course of dealing between the parties in the event that E-Gas had genuine grounds for challenging the adequacy of the penalty calculation undertaken by or for the customer.

[31] E-Gas also objected to my determining the interpretation of clause 48 at all without the fuller factual matrix that would be available after discovery and hearing evidence at a substantive hearing. Reliance was placed on the current approach to interpretation of contracts, as specified in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74, adopting the formulation of Lord Hoffman in the House of Lords' decision in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98. The particular principle cited in *Boat Park* that was relevant to this argument was the following:

> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. (p 82)

[32] The matrix of fact may well be important in interpreting contracts that were individually negotiated. However, I can see little help in attempting to discern the circumstances surrounding entry into the standard form contract by any of the customers whose position was in issue. If any of them attempted to negotiate a variation to the standard term contracts, there is certainly no evidence of that, and the fair implication is that E-Gas's standard terms were treated by all of them as a non-negotiable aspect of the terms of the commitments they each made. Evidence of background circumstances known only to one party cannot logically aid in the interpretation of clauses in what are standard form terms.

[33] In the present circumstances, the interpretation of the contract is a relatively straightforward question of law. I do not consider I would be in any better position having heard evidence on the circumstances in which these standard terms were presented to, and subsequently accepted by, a range of E-Gas customers. The assertion that the clause was originally proposed by Nova (being adopted by E-Gas during a period when Todd interests were shareholders in E-Gas), and a suggestion that there would be evidence of Nova's prior attitude to the application of a materially similar clause in another contract, do not suggest background circumstances likely to be helpful in interpreting the clause. At most, two wrongs would not make a right, and where the effect of the clause is tolerably clear, the prospects of such further evidence do not seem helpful.

[34] Mr Taylor was also inclined to oppose determination of the meaning of the contract at this stage, because of the need for more evidence on how E-Gas had itself applied the provision, in earlier situations. Generally, how the party proffering standard terms has applied them with other contracting parties in the past is unlikely to be seen as a legitimate aid to interpreting how the provision ought now to be applied in that contracting party's dealings with others. It was argued that the Supreme Court decision in *Gibbons Holdings Ltd v Wholesale Distributors Ltd*

[2008] 1 NZLR 277 recognised, as a legitimate aid in interpreting a contract, the parties' conduct subsequent to entry into the contract. The point was dealt with in the judgment of Tipping J in the following terms:

> [52] As a matter of principle, the Court should not deprive itself of any material which may be helpful in ascertaining the parties' jointly intended meaning, unless there are sufficiently strong policy reasons for the Court to limit itself in that way. I say that on the basis that any form of material extrinsic to the document should be admissible only if capable of shedding light on the meaning intended by both parties. Extrinsic material which bears only on the meaning intended or understood by one party should be excluded.

[35] Again, that approach to interpretation of individually negotiated contracts does not afford assistance in the distinguishable circumstances of standard form contracts that are not negotiated between the party proffering the terms, and one among many of those who have made a commitment, simply by accepting the standard terms. It would be pointless to endeavour to analyse the meaning of clause 48 by attributing some purportedly jointly intended meaning between, say, E-Gas and K2G, or E-Gas and isolated former customers that E-Gas allowed to terminate without paying a penalty in accordance with clause 48.

[36] The evidence E-Gas foreshadowed included the manner in which clause 48 has been interpreted and applied by Nova when it was included in its own standard terms and conditions. Also, what the "genesis" of clause 48 had originally been, given that it was initially drafted by Nova, and the relative significance of the $1.00 per gigajoule penalty. Mr Taylor also foreshadowed argument that Nova's interpretation was inconsistent with industry practice as to the operation of fixed term gas supply contracts. I am satisfied I can discount those as evidentiary influences leading to any different interpretations.

[37] Accordingly, I do not see that the issue of interpretation of this contract needs to await a substantive hearing.

[38] E-Gas also argued that Nova had assumed a liberty in its application of clause 48, which it was not entitled to when Nova made payments on behalf of E-Gas customers of the calculated extent of the penalty. E-Gas denies that Nova can make payments to discharge the customer's obligation under clause 48, and indeed

treats Nova's involvement in this aspect of the matter as further evidence of Nova's unlawful conduct in wrongfully attempting to procure breaches of contract by E-Gas customers.

[39] Assuming I am otherwise correct in my interpretation of clause 48, then I can see no justification for confining the obligation to pay the penalty as one that must be personally discharged by the customer. The terms of clause 48 explicitly contemplate that a "nominated party" may make payment of the penalty. That could not justify a constraint that a party might only be nominated with the particular consent of E-Gas. It follows that a customer could advise E-Gas that it would be receiving the penalty payment from, say, the customer's bank, or an affiliated company. I therefore interpret clause 48 as not limiting those who may legitimately meet the customer's obligation to pay the penalty calculated pursuant to clause 48, to procure the customer's early release from the contract.

[40] The plaintiffs' pleading also alleged that E-Gas customers could validly terminate their contracts by giving an "end of term termination notice". This was one of the means resorted to by Nova in mid 2007. However, there was no detailed analysis of it in argument. My preliminary view is that any simple notification that a customer intended not to renew, would not be effective to terminate because it avoided the provisions in clauses 8 and 9 of the E-Gas terms as quoted in [21] above. Some such attempts might be affected by the facts of the particular case. I do not intend to rule definitively on the point in this judgment. I note that the prospect that there is no right to terminate at the end of a term without following the procedure in clause 9 would strengthen the interpretation of clause 48 that I have arrived at.

[41] I accordingly make a declaration that clause 48 of the 2005 and 2006 standard terms used by E-Gas entitles a customer to termination of that contract before its term has expired once the customer or another party on its behalf has paid in full a penalty at the rate of $NZ1.00 per gigajoule for the remaining total estimated gas quantity for the remainder of the contract term.

Application of the Code and Allocation Agreement

[42] In a document dated 1 July 2000, the New Zealand gas industry resolved the terms of a Reconciliation Code to have effect from that date. Part of the purpose for that Code was described in clause 1.1 as follows:

> 1.1 This Reconciliation Code (this "Code") has been established to assist the development of a competitive gas market by providing a uniform process for customer transfers between competing retailers, and allocation and reconciliation of gas quantities between users at Receipt Points into a transmission system or distribution network at which possession, control or ownership of gas passes from one person to another.

[43] The Code was intended to provide a uniform process for matters including customer transfers between competing retailers (clause 1.3). Allocation Agreements were recognised as one category of contract by which commitments between participants would be regulated, implicitly on standard terms applying throughout the industry. Certain core principles were recognised, relevant to the position of competing retailers such as E-Gas and Nova, including the following:

> 4.2 In addition, the following principles are the basis for this Code as they are seen as essential to ensure efficient customer transfer, information exchange, allocation and reconciliation processes:
>
> …
>
> (d) All persons involved in customer transfers, provision of data to Allocation Agents, and provision of allocation and reconciliation services, must co-operate to ensure fairness and equity, and that information is processed in a complete, accurate and timely manner;

[44] In somewhat similar vein, clause 5 of the Reconciliation Code provided a customer transfer protocol. It began with the following:

> 5.1 **Scope:** In an open access market an End User may elect to change from one retailer to another and once that election is made the transfer is to proceed in a fair and equitable manner, and be low cost and efficient. This Section provides for the processes required to effect the transfer, subject to any existing contract which may be in place between the parties.

[45] "Parties" for the purposes of the section are defined in clause 5.2, and exclude consumers such as K2G, who will have contracts with a retailer to supply gas.

[46] An Allocation Agreement, as contemplated by the Code, was completed in June 2004 between Tetenburg & Associates Ltd as the "Allocation Agent", and a series of retailers of gas, including Nova and E-Gas. The agreement was designed to regulate the relationship between the Allocation Agent and the remaining parties in terms of wholesale distribution of gas. The Allocation Agreement identified a substantial list of "receipt points" from which points downstream distribution could occur of gas allocated to retailers. Before any retailer of gas could share in distribution downstream from the "receipt points", it had to become a party to the Allocation Agreement.

[47] Clause 10.1 of the Allocation Agreement provided that each of the parties agreed to be bound by the Code and to perform their respective obligations as provided in the Code. By this means, the obligations in the Code are claimed by Nova to be enforceable against E-Gas.

[48] E-Gas does not dispute that binding obligations were assumed under the Code. Rather, it argues that the obligations to transfer are subject to an exception where the customers in question already have a fixed term contract with their existing retailer. E-Gas also argues that Nova cannot insist on enforcing the provisions in the Code in respect of customers where it is itself in breach of the obligations to conduct itself "in a fair and equitable manner".

[49] As to the first of these points, for the purpose of the summary judgment argument, Nova does not contest that the obligations on retailers to facilitate transfers do not extend to cases where the customer is still committed to a fixed term contract with the existing retailer. However, Nova argues that that is not an exception E-Gas can rely upon in present circumstances, because the customers for whom requests to transfer were made had terminated their contracts pursuant to the unilateral termination provision in clause 48 of E-Gas's standard terms of contract.

[50] This last proposition is subject to certain exceptions, in that Nova appears to have commenced its campaign seeking to persuade E-Gas customers to transfer to Nova, ignorant of the fact that the majority of them did have fixed term contracts with E-Gas. Also, Nova made initial requests of E-Gas in respect of numerous customers, either simply asserting an entitlement for the customer to transfer from one retailer to another, or using other modes of notice that purported to bring to an end the customers' obligations to E-Gas. It is unnecessary to traverse the rationale for those other initiatives, when dealing with the interpretation issues. The essential question on interpretation of the Code and Allocation Agreement is whether, assuming any fixed term contract has been properly terminated, the incumbent retailer is thereafter obliged to facilitate the transfer by the process specified in the Code and the Allocation Agreement.

[51] There are clearly powerful arguments in support of the enforceable nature of these commitments. The mutual commitments made and the pre-condition of becoming a party to the Allocation Agreement prior to getting access to downstream distribution from receipt points is sufficient by way of consideration to bind the parties to perform the obligations, both in the Allocation Agreement, and the Code which is incorporated in it by reference.

[52] I do not consider that the Code can be given its full effect if parties are entitled to deny an obligation to facilitate transfer of an existing customer, on the pretext that the new retailer to whom the transfer should be effected has not conducted itself (in the view of the incumbent) "in a fair and equitable manner". The structure of the Code contemplates that timely transfers will occur. Clause 5.7 provides that "any step or other action taken by any party pursuant to Section 5 is to be without prejudice to any rights or liabilities that party may have at law." That would leave any claims or counterclaims between parties to an Allocation Agreement for breach either of the reciprocal obligations under the Code or the Allocation Agreement to be resolved by means other than disrupting the orderly process of transfer provided for in those documents. Part 18 of the Code provides that parties to a dispute are to agree on the best means to resolve any dispute, failing which the mode of dispute resolution is to be referred to the Chairman of the

National Allocation Group, whose ultimate decision on the best means of resolving the dispute will be binding.

[53] The detailed provisions in the Code for the process to apply to customer transfers (clause 5.4) specify only five particular situations in which any of the parties who need to be involved in processing the transfer are entitled to reject one. In each case, the transfer is not to proceed until the reason for the rejection has been rectified (5.4(d)).

[54] In terms of the relief sought under the first cause of action, the third plaintiff is entitled to a declaration defining the extent of the obligations on the defendants arising under the Allocation Agreement and the Code. The extent of that declaration is as follows:

> That the customer transfer protocol in clause 5 of the Code, incorporated by reference in the Allocation Agreement of 29 June 2004, represents enforceable obligations on any retailer in accordance with its terms. Those obligations apply in circumstances including where a fixed term contract has been terminated by a customer subject to E-Gas's standard terms who has complied with the requirements on the customer under clause 48 of those terms. E-Gas cannot refuse to effect a transfer on the ground that it considers the new retailer has acted in other than a fair and equitable manner.

Second cause of action – interference with contractual relations

[55] Nova argued that various responses by E-Gas to the commitments Nova had secured with the RTCs constituted unlawful interference with those contracts. This conduct was said to be manifested in E-Gas' refusal to process switch requests, continuing to invoice the customers that Nova treated as its own, and pressuring some of the RTCs to re-sign with E-Gas, inter alia on terms asserting that Nova's terms of dealing with them had been unlawful.

[56] The validity of a good deal of the dialogue by both protagonists with the customers they were competing for depends on the correct interpretation of clause 48 of the E-Gas terms, and thereafter on the point which had been reached in the respective disengagements in reliance on that provision, as well as other aspects of the dealings with such customers.

[57] These matters are intensely fact specific, and any meaningful determination will depend on detailed factual findings after contested evidence. It is accordingly quite inappropriate to consider that cause of action in the summary judgment context.

K2G – Application to stay

[58] K2G sought declarations as to the validity of its termination of its gas supply contract with E-Gas, in addition to other relief. E-Gas opposes consideration of any aspect of K2G's claims on the basis that they must be referred to arbitration, because of the application of clause 53 of their standard terms providing for a dispute resolution process.

[59] Clause 53 provides as follows:

> Disputes: If a party believes there is a dispute in relation to this agreement (including any invoice), it will first notify the other party in writing giving details of the dispute. The dispute will then be promptly referred to a senior representative of each party for resolution and if they do not resolve the dispute within 10 working days, both parties agree to appoint an independent arbitrator to settle the dispute.

[60] Apart from the submissions filed on this argument, there is no evidence that E-Gas has taken any steps to define the "dispute" it currently has with K2G. Those submissions specify K2G's assertion of its entitlement to unilaterally terminate pursuant to clause 48 as a dispute, and, if that is right, whether clause 48 was sufficiently complied with. In addition, there is the claim for $8,913.17 relating to gas which E-Gas alleges it delivered during October to December 2007. It was also suggested for E-Gas that various criticisms of it raised in affidavits sworn for K2G in these proceedings could constitute "disputes" that were to be resolved under the disputes process provided for in the contract. However, most of those were historical criticisms constituting part of the narrative justifying K2G's wish to transfer. Rather than taking any steps to initiate the process required by clause 53, E-Gas has simply resisted K2G's entitlement to add its own position to the more general arguments being advanced on behalf of Nova. On one view, K2G simply exercised its rights under clause 48, and is now being supplied gas by another

retailer. The issue of which retailer supplied the gas it received in October to December 2007 may be one to be resolved between those two entities.

[61] The arguments for E-Gas in support of its application for stay was that it had disputes with K2G, they arose out of the contract for gas supply, and that the resolution of those disputes was therefore to be determined in accordance with clause 53. In reliance on authorities including *Montgomery Watson New Zealand Ltd v Melbourne NZ Ltd & Ors* HC CHCH CP86/00 9 October 2000 William Young J, it was argued that Article 8 in the first schedule of the 1996 Arbitration Act provides a very confined discretion not to stay proceedings, when Article 8 reflects the approach that the Court will respect the parties' prior contractual commitment, and therefore enforce reference to arbitration. That case was also relied on for the proposition that involvement of other parties in a proceeding does not afford a ground to decline a stay as between two parties who were contractually committed to arbitration.

[62] For K2G, a different approach was urged, to the effect that where the matter that one party to an arbitration agreement wishes to have litigated, can be resolved at the summary judgment stage, then it is to be treated as if there is no "dispute" for the purposes of referring the matter to arbitration. The authority for this approach was the Court of Appeal decision in *Royal Oak Mall Ltd v Savoury Holdings Ltd* CA106/89 2 November 1989, and the High Court decision of Penlington J in *Yawata Ltd v Powell* HC WN AP142/00 4 October 2000.

[63] Both of those cases were decided in relation to disputes involving parties to arbitration agreements which were the subject of the 1908 Act, s 5 of which afforded a more broadly worded discretion on stay, than that available under Article 8 of schedule 1 to the 1996 Act.

[64] These competing contentions on the approach to stay were not thoroughly argued, and the point is one of general importance. I consider the difference between the nature of the Court's role in considering stay under the 1908 and 1996 Acts is material. Under the former, the discretion was cast in terms that the Court:

> …may, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, make an order staying the proceedings.

[65] Article 8 of the first schedule to the 1996 Act is in terms that a Court before which proceedings are brought in a matter which is the subject of an arbitration agreement -

> …shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred…

[66] At first blush, a number of the cases considering applications under the 1996 Act appear to have adopted the approach from cases relating to submissions to arbitration under the 1908 Act, without acknowledging the marked difference in the wording of these two provisions on stay. However, on the basis of the change in wording, the approach of Master Thomson in *Todd Energy Ltd v Kiwipower (1995) Ltd* HC WN CP46/01 29 October 2001, and in *Alstom New Zealand Ltd v Contact Energy Ltd* HC WN CP160/01 12 November 2001 appears well justified. His approach was that an application for stay should be determined before, not after, an application for summary judgment. As recognised in *Montgomery Watson*, it is an important change from a discretionary consideration, to one that is mandatory on the terms of the provision directing stay, subject to the defined exception.

[67] One rationale for continuing to apply an approach similar to that used in cases dealing with the 1908 Act in stay applications under the 1996 Act is suggested in the decision of Heath J in *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 in the following terms:

> [28] In approaching the interpretation of art 8 I remind myself that the part of art 8 with which I am concerned has been adopted verbatim from the Model Law. The only words which have been added to art 8(1) are the concluding words "or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred" *which were inserted to maintain the integrity and efficiency of the summary judgment procedure used in this Court and the District Court for cases in which there was no arguable defence*. Reference is made to that policy decision in the

> Law Commission report at para 309: NZLC R20 at p 167. However, practical difficulties with that addition have already been identified: see, for example, *Todd Energy Ltd v Kiwi Power (1995) Ltd* (High Court, Wellington, CP 46/01, 29 October 2001, Master Thomson). (emphasis added)

[68] The consequence of that approach is that if a party to a contract including an arbitration provision wishes to litigate rather than arbitrate, then taking the initiative of commencing proceedings and seeking summary judgment will enable a party in that position to avoid arbitration, at least until the Court has heard a summary judgment argument on whether there is any arguable defence to the claim it pursues.

[69] With great respect to Heath J, I am not satisfied that the extent of the additional wording in Article 8, even when viewed in light of the prior gloss from the Law Commission's work that preceding the 1996 Act, warrants the reading down of the mandatory terms of Article 8. The Uncitral model intends that Courts respect the sanctity of commitments made by parties to contracts, to resolve disputes arising under them in a private forum. Permitting potential bifurcation of the dispute by allowing arguments on summary judgment before the Court, before the party preferring litigation can be compelled to refer the dispute (or what remains of it) to arbitration must be inconsistent with that principle. The consequence of a successful summary judgment argument is not that there was no dispute, but that the forum of one party's choosing has been persuaded that it is a dispute to which the other party had no arguable defence.

[70] One rationalisation between these two approaches is that a stay should only be declined if the whole dispute is able to be resolved on summary judgment. Where, as here, parts only of a dispute could be resolved at the summary judgment stage, then the whole of the dispute should be resolved in the one forum and summary judgment on part of the claims as pursued by the party preferring litigation should be declined. The one forum to which the parties are committed by the contract, namely arbitration, should be seized of the whole dispute.

Declarations if wrong

[71] It follows from this approach that E-Gas is entitled to a stay in respect of the causes of action pursued by K2G. I am bound to acknowledge a degree of artificiality about ordering a stay of all aspects of K2G's proceedings, when the preliminary issues to be determined in its claims involve exactly the same issues of law on interpretation of clause 48, as are being answered in relation to other plaintiffs, in these proceedings.

[72] For that reason, and against the eventuality that I may be wrong in recognising E-Gas's entitlement to a stay of all aspects of the dispute, I confirm that parity of reasoning would lead to a declaration under the first of K2G's claims, confirming its entitlement to unilaterally terminate the contract with E-Gas, in reliance on the procedure provided for in clause 48. Because of a degree of factual uncertainty about the precise timing of the respective steps taken, and to maintain the consistency with the extent to which summary judgment is available on claims pursued by Nova, even if a stay is not appropriate, then relief in favour of K2G would go no further than such a declaration, subject to the discrete issue of law which I address immediately below.

Implied term in K2G contract?

[73] The fourth cause of action pleaded an implied term of the K2G supply agreement with E-Gas that the latter would comply with gas industry protocols, including provisions in relation to transfer to a new supplier. On this cause of action, a declaration was sought to the effect that E-Gas had breached its obligations under the Allocation Agreement and the Code, implicitly on the basis that that breach was actionable by K2G because those obligations constituted an implied term of its own contract with E-Gas.

[74] By the time the summary judgment application was argued, the further relief sought on this cause of action for an order for specific performance directing E-Gas

to give effect to K2G's switch request was redundant, as that had been done several months earlier, without prejudice to E-Gas' rights not to have to accept the position.

[75] The submissions for Nova and K2G asserted that all the elements of the test required to imply a term as sought existed, without any significant elaboration on that proposition. E-Gas opposed the implication of any term, contending that at least four out of the five standard requirements before a term will be implied, as provided by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1997) 16 ALR 363, could not be made out. Its fallback position was that a fuller enquiry of the factual circumstances was required before the Court could evaluate the presence of the five conditions.

[76] I am satisfied that the conditions for the implication of a term as sought by K2G have not been made out, and could not be, irrespective of the additional evidence that might be adduced. In particular, it is untenable for K2G to claim that it is necessary to give business efficacy to the contract, to imply that E-Gas will comply with gas industry protocols. A consumer of gas takes supply of it from a retailer on the terms of that supply. Those terms are explicitly described as constituting the entire agreement, and are sufficient to regulate all aspects of the buyer/seller relationship between the retailer and the consumer.

[77] In addition, this form of wholesale importing of industry standards regulating the relationship between one party to this contract and its competitors could not be treated as being so obvious that it "goes without saying".

[78] There would also be a degree of artificiality in importing into a contract at the retail level documents intended to regulate relationships at the wholesale level, when those terms explicitly recognise the extent to which they create enforceable obligations. Mr Taylor drew attention to the provisions of clauses 10.1 and 10.2 of the Allocation Agreement, the first of which provided for the allocation agent and each of the parties to be bound by the Code and to agree to perform their respective obligations as provided in that Code. Clause 10.2 recognises that the benefit of those commitments extended to any other user of a "transport system" (i.e. a system for distribution of gas to retailers in another part of the country) who is a party to an

Allocation Agreement in respect of a receipt point on that (other) transport system – that extends the commitments to retailers whose obligations arise by virtue of their relationship with another allocation agent, covering a different geographical part of the country. The recognition in clause 10.2 that the obligations are reciprocally enforceable in that way pursuant to the Contracts (Privity) Act 1982 renders it inconsistent with parties to the Allocation Agreement, such as E-Gas, ever contemplating that their obligations would extend any further. That is particularly so where the extension asserted here would be stepping down into the next level of distribution, to eventual consumers.

[79] Accordingly, if K2G's causes of action were not stayed, I would find that there is no implied term as pleaded by K2G in the fourth cause of action.

Unilateral amendment to E-Gas terms

[80] The fifth cause of action sought a declaration that an attempt by E-Gas to further amend the relevant terms of its standard contract in or about July 2007 on a unilateral basis was unlawful. It appears that some time after E-Gas became aware of Nova's campaign, and the reliance in that on the interpretation of clause 48 that is considered earlier in this judgment, E-Gas purported to make amendments to clause 48. The new wording meant that clause 48 would apply only after the parties had recognised and attempted to resolve a dispute under clause 53, and in that event to pay a penalty "at an amount calculated at a dollar rate per GJ (to be determined at the time of termination) for the remaining total estimated gas quantity for the remainder of the contract term with the customer".

[81] It appears that E-Gas made some attempts to contend that these newly amended terms governed the attempts by the RTCs to terminate their contracts with E-Gas. For instance, a letter from E-Gas to Nova dated 23 July 2007 rejected Nova's *"…dubious interpretation on clauses [including 48] which have been amended under clause 50 of the said agreement"*. That letter continued *"For your information clause 48 was amended some time ago to reflect changing market conditions…"*.

[82] The letter invited Nova to consider the current version of its terms and conditions posted on its website. Nova's analysis suggested that those conditions had been posted on the E-Gas website some time around 10 July 2007.

[83] However, by the time the matter came to be argued, E-Gas did not assert that the July 2007 formulation of the provision governed the position of any of the relevant RTCs. Instead, Mr Taylor's argument focused on the 2006 version (or, implicitly, the 2005 version which was materially the same). In these circumstances, E-Gas did not present arguments defending its entitlement to unilaterally make these changes, and instead contended that the ability to amend those terms unilaterally was an entirely hypothetical issue which would have no practical effect, and as such, characterised the cause of action seeking a declaration about E-Gas's ability to do so lawfully as an abuse of process. I was also advised that this attempt by E-Gas to amend its terms had been the subject of a complaint by Nova to the Commerce Commission.

[84] Nova's argument is that the 2006 version of the E-Gas standard terms confined the circumstances in which E-Gas could amend it, by the terms of clause 50:

> E-Gas may amend its standard terms and conditions for gas supply from time to time in order to comply with gas industry legislation and operational regulations set out within the gas industry.

[85] The evidence for Nova was that such circumstances had not arisen in mid-2007, and there were good grounds for the inference that indeed the motivation for making the change was as a reaction to the campaign being mounted by Nova. The consequence is that circumstances permitting unilateral amendment had not arisen, and the previous terms of standard contracts would apply unless and until E-Gas negotiated with customers on an individual basis for them to accept amended terms.

[86] I accept Nova's position on this concern. Given, however, that, informally at least, E-Gas has resiled from relevant reliance on the 2007 version, there is not a practical need for a declaration on the point.

Defences, set off and counterclaim

[87] The declaratory relief sought by Nova included declarations that E-Gas had breached its obligations under the Allocation Agreement and the Code by failing to give effect to transfers, which relief might arguably arise after a finding upholding Nova's interpretation of clause 48 of E-Gas's standard terms. Judgment was also sought for damages.

[88] The standard required by a defendant to a summary judgment application, in putting prospective defences in issue, was reconsidered by the Court of Appeal in *Haines v Carter* [2001] 2 NZLR 167 at [97], including the following:

> 1. The process of summary judgment is intended to be summary. So the Courts are entitled to expect a defendant who wishes to maintain that there is an arguable defence will identify that defence in accordance with the ordinary rules and will give appropriate particulars of it and a reasonable level of circumstantial detail. We do not suggest that summary judgment cases are to be dealt with on the basis that the rules provide a procedural straitjacket. Common sense, flexibility and a sense of justice are required…
>
> 2. A bald assertion that there is a defence but without any elaboration or detail is unlikely to be seen as raising an arguable defence for the purposes of resisting summary judgment.

[89] Obviously, what is required will vary from case to case. Mr Taylor insisted, correctly, that there is no obligation to file a Statement of Defence. However, in providing some skeleton for the matters that would be raised by way of defence or counterclaim, in cases of some factual complexity a draft Statement of Defence and Counterclaim annexed to one of the defendants' affidavits is obviously likely to be of considerable assistance. If E-Gas did not want to do anything that might constitute the "taking of a step" against K2G so as not to compromise its argument for a stay against that plaintiff, E-Gas could have addressed only the defences and counterclaims against Nova.

[90] Here, Mr Stevens criticised the defendants' case by saying it constituted bald assertions, without material detail. That is not literally correct, when there were affidavits detailing specific complaints about the conduct of Nova representatives, in their dealings with prospective customers. In paragraphs [10] and [11] above, I

summarised the effect of the misrepresentations claimed by E-Gas to have been made by Nova representatives. After hearing full evidence on those matters, a Court might well decide that many of them were non-actionable puffery in a state of vigorous competition, rather than on the other side of a somewhat indistinct line, dividing legitimate competition from actionable misrepresentations or misleading conduct. The reality is that it is impossible to make even a provisional finding on the relative strength of those potential counterclaims, which would need to be substantively litigated. The argument on summary judgment does not allow them to be dismissed as untenable. By way of example, there was some evidence to suggest that representations on behalf of Nova extended to suggesting that E-Gas was in breach of its own contractual obligations to its customers, entitling customers to claim compensation from it. If made out, then such representations might arguably give rise to a right in damages.

[91] The financial consequences of this vigorous competition in recent years is further complicated by the predictable requirement for numerous adjustments that will arise from the dates and circumstances of transfers of customers from one retailer to the other. For instance, Nova accepted that it had included line charges for the services in delivery of gas that it was on-selling to its customers, when in fact those line charges were not being paid by Nova at all. There will also be issues of ownership of metering and other equipment required to effect deliveries to retail customers. It does appear that the allocation agreement and other arrangements with up-stream providers of gas delivery services can accommodate a reconciliation of all such charges, once the correct entitlement to sell gas to individual customers is resolved, as between these two competitors.

[92] In all of those circumstances, I do not consider it appropriate on this summary judgment application to grant any relief which could be offset, or subject to counterclaims under arguments available to E-Gas at a substantive hearing. However, that does not prevent declarations restricted to the interpretation of the relevant contracts. The terms of such declarations are indicated in [41] and [54] above.

Summary

[93] These disputes arise between relatively sophisticated businesses who are vigorously competing and are likely to have opposing perceptions of when they require an independent adjudicator to resolve differences. Without invoking Shakespearean "plagues on both their Houses", it is to be hoped that this determination on the preliminary points of contractual interpretation clears away the obstacles to either a resolution, or at least a narrowing of the remaining issues between them. It follows from my interpretation that numerous of E-Gas's criticisms of Nova that depended upon Nova having erred in its interpretation of clause 48 must now fall away. However, that does not afford a complete answer to the sort of counterclaims foreshadowed in submissions for E-Gas.

[94] It is inappropriate to evaluate the relative prospects of E-Gas making out one or more heads of counterclaim, or equitable set-off to enable it to resist monetary relief to which Nova might otherwise be entitled to. Those are matters necessarily dealt with at a substantive hearing.

[95] For Nova, vindication on the approach it has taken to interpretation of clause 48 does not necessarily entitle it to damages on any particular basis, or indeed to injunctive relief it sought. Unlike the interpretation issues, those claims require a substantive airing of the full extent of conduct on both sides.

[96] On the matters raised by the first two causes of action, Nova is entitled to declarations in the terms specified in paragraphs [41] and [54] above. In all other respects, the relief sought in those causes of action is not appropriately determined on summary judgment and must be the subject, if at all, of substantive argument.

[97] E-Gas is entitled to an order staying the third and fourth causes of action pursued by K2G. In the event that ordering a stay is wrong, and given that the primary issue is the same as the subject matter of the declarations:

(a) as to the third cause of action, K2G would be entitled to the benefit of the declaration on the first cause of action, applied in its own context to the extent specified in paragraph [72] above;

(b) as to the fourth cause of action, I would determine that the implied term as alleged could not be made out.

[98] As to the fifth cause of action, I accept that the purported amendment of E-Gas' terms was not lawfully effective but the point is moot and accordingly no declaration or other relief is appropriate.

[99] I acknowledge that after the hearing, further memoranda were filed, on behalf of the plaintiffs dated 26 June and 3 July 2008, and on behalf of the defendant dated 30 June 2008. Those have been considered but as will be apparent from the above reasoning, I did not consider their content to be relevant to the outcome.

Costs

[100] In view of the partial success for both sides, and the extent to which issues remain unresolved, I consider that no order as to costs is appropriate, and none will be made.

Dobson J

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