IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO: 16/2015

BETWEEN	**PORTER GROUP HOLDINGS LIMITED** trading as TOA GAS a duly incorporated company having its registered office at Rarotonga Applicant
AND	**THE COOK ISLANDS PRICE TRIBUNAL** a body constituted pursuant to the Control of Prices Act 1966 Respondent

Date: 24 September 2015

Counsel: Mr T Manarangi for the Applicant
Ms A Mills and Ms Dengate Thrush for Respondent

Minute: 24 September 2015

ORAL JUDGMENT OF THE CHIEF JUSTICE

[1] On 9 September 2015 the applicant company, which trades as Toa Gas, filed papers seeking judicial review of a decision made by the Respondent Tribunal.

[2] That decision was due to come into effect on or about 15 September 2015. The applicant company filed three affidavits in support of its application. It also sought Interim relief.

[3] The Respondent immediately filed a Notice of Intention to Defend and those papers came before me on 11 September 2015 at the commencement of the September sitting of the Court. At that stage I directed that the application for Interim Injunction would need to come on for hearing sometime during the second week.

[4] The Respondent Tribunal then filed a lengthy affidavit from Taitana Burn together with submissions of counsel. Mr Manarangi responded to those submission in further submissions dated 24 September 2015 noting that, absent timing constraints, there were matters of fact to which he would wish to respond were there time to do so.

[5] The September sitting of the High Court has been particularly busy and it has been extremely difficult to find time to allocate to this matter. As it happens, a two hour envelope has become available this afternoon and I've heard argument during that time. The combination of a lack of Court time, together with the admitted urgency of the application, has caused difficulties both for the Court, and the parties and their counsel. I regret that those realities have meant that the hearing today has been more abrupt than would otherwise be preferable. I also regret that I have not had time more fully to consider all the issues in the case.

[6] The issues, though, are complex and require more careful consideration than is available to the Court on this Interim Injunction application. Because of the importance of the issues, I am directing that a substantive hearing should take place in the second week of the November/December sitting of the Court. At this stage I anticipate those dates will be the Wednesday and Thursday but that will need to be confirmed.

[7] Counsel are not sure that a full two days will be required but I think it would be prudent to ensure that two days are allocated so there is plenty of time should that become necessary.

[8] The designated hearing is now ten weeks away. I need to address what is to happen in the meantime. The applicant wants interim relief effectively maintaining the existing dual-price template structure until its substantive application can be heard.

[9] The Respondent opposes that, saying that the September price order should be allowed to come into effect.

[10] The judicial review application is addressed under the Judicature Amendment Act 2008 which essentially mirrors the New Zealand legislation. Interim Orders are available under s.50F which corresponds to section 8 of the equivalent New Zealand legislation. Because the Respondent is the Crown, any Interim relief can only be in the form of an Interim Declaration.However, such Interim Declarations are treated by the Crown as being an effective remedy in these sort of cases.

[11] The most recent decision on the standard to be applied for interim relief when judicial review is sought appears to be a decision of the Supreme Court of New Zealand, *Ministry of Fisheries v Anton's Trawling [2007] NZSC 101* I've been given a copy of the unreported decision but I suspect in fact that it is reported. Paragraph [3] of that decision provides that the assessment to be made by the Court under Section 8 of the New Zealand Legislation is as follows;

"*If that condition is satisified the Court has a wide discretion to consider all the circumstances of the case including the apparent strengths or weaknesses of the applicant's claim for review and all the repercussions public and private of granting interim relief*"

[12] The decision of the Supreme Court made it clear that there is a distinction between that test and the usual Interim Injunction test requiring an arguable case and an assessment of the balance of convenience. As I understand it, though, there is not, at least so far as this case is concerned, a significant practical difference between those two approaches.

[13] I have given consideration to the strengths of the applicant's claim for review. There are five causes of action which raise reasonably standard judicial review considerations involving taking account of irrelevant considerations, error of law, breach of natural justice, and so on.

[14] These allegations concern the Control of Prices Act 1966. This is said to be an Act "to make provision for the control of prices so as to prevent any exploitation of the public". The Act has two main functions. The first of these is to provide for price control. In the 1970's further provisions were introduced to the Act which dealt with the more standard competition law consequences of unlawful trade practices. There

are also other provisions of the Act concerning weights and measures and other features which are not relevant here.

[15] Unvarnished price control these days is regarded as somewhat old fashioned and is not necessarily consistent with modern competition law and policy. Nevertheless, the legislation here includes provisions for price control. The price control that is here under challenge, prima facie, is instituted in terms of the Act. Therefore, it is not for me to determine whether or not such a form of price control is economically a good idea. Rather, my job is to apply the law.

[16] It is not a necessary pre-condition for the imposition of price control that there should be exploitation of the public. Here the Tribunal has determined that LPG should be the subject of price control and there has been some history of that. This year the Tribunal, following a process of consultation, determined it would move to a single-template form of price control whereby both Origin and Toa Gas (who are the current gas wholesalers) will be subject to a single form of price control. Toa's challenge is not directly focussed on that particular aspect of the Respondent's approach.

[17] On 15 July 2015 Notice was given that price control would occur at the wholesale level in a specified figure. Toa objected to that figure (set by reference ot Origin's costs) and the Notice was set aside on the basis that later in the year there would be price control. I have not been able to get to the bottom of exactly how the Tribunal moved from its position in July until the giving of notice in September. Nevertheless, sometime in September, Notice was given to Toa and Origin that price control would now be introduced. The wholesale price level was at a slightly different level to that originally set out in July.

[18] Toa says that if that price control comes into effect it will be out of business. It is true that the new price level is at a figure somewhat below the current regulatory level. The current regulatory level for Toa is $3.72c per kg of gas. The price control level now proposed is approximately $3.10c.

[19] Toa, through counsel, argues that, in effect, the Price Control Tribunal has a duty to ensure that the two heads in the market of Origin and Toa should remain. That is because two heads represent competition and the Act encourages competition. It is true that the trade practices part of the Act does do that but I have some reservations about whether the balance of the Act, which institutes price control, does contain a competition preference.

[20] If the Tribunal does have a duty as alleged then it seems to me it is in an impossible position. On the one hand it would have to maintain two heads in the market but, on the other, it would thereby be prevented from instituting price control if it had the effect of driving one firm out of the market. Therefore, the alleged obligation to maintain two heads in the market effectively removes any ability it otherwise would have to institute price control at any appropriate level. It seems unlikely that the Legislature would have intended that the wide powers to set price control would be so constrained.

[21] That chain of logic seems to me unattractive. I do not discern such limitation upon the Tribunal. I am conscious, though, that these are reasonably difficult issues and argument has been swift and my comprehension may be less than complete.

[22] I am prepared for present purposes to accept that there is an arguable case here but I do not think it is a particularly strong one as I currently understand the matter.

[23] I now turn to consider what would be the repercussions, both public and private, of granting interim relief.

[24] As I understand it, this is essentially a balance between considering the interests of Toa Gas on the one hand and the public on the other. I understand from Ms Burn's affidavit that, if price control is not instituted, the consequences for the public will be that the price per 9kg bottle of gas will increase by $6.60c compared to the situation whereby the new prices come into effect.

[25] Mr Manarangi puts this on the basis that it is a cost of around about plus 6cents per day per gas bottle which he suggests is not a particularly onerous cost for the public to bear. I've been advised from the bar that the monthly cost to Toa Gas if the new price control levels come into effect is around about $15,000.00. Assuming a delay of ten weeks that amounts to approximately $37,500.00. In other words, if I refuse the Interim Order, the costs to Toa Gas would be around about $37,500.00 between now and a hearing date. The question of any Interim orders that might need to be addressed beyond there will of course be addressed at the conclusion of such a hearing. Therefore I do not need to be concerned about them. My concern simply reflects the ten weeks between now and then.

[26] Therefore, it comes down to a balance between the costs to Toa of around about $37,500.00 balanced against the cost to the public through increased costs of purchasing gas at retail.

[27] Toa has given evidence that its assets are around about $500.000.00. I do not know how that sum is made up. I am aware that there are a group of companies available that trade broadly under the Toa label. Mr Manarangi has made submission to me that I should disregard any other legal entities and focus only on the applicant.

[28] The Crown has drawn attention to the various cross-interests and business structures that exist within the Toa Group. I do not think I am able to get into these in any detail.

[29] However, I am satisfied, on the totality of the evidence, that Toa Gas is able to absorb a cost of $37,500.00 without going out of business. If I had reached a contrary view that would be significant in my determination. Nevertheless, I am satisfied that Toa will not go out of business if it continues to meet the market for the next ten weeks and absorbs the costs that I have discussed. I accept that there will be not the scope for Toa to recover those funds from any other party in the future.

[30] In considering the balance between the public and private interests. I have also given consideration to the privative clause in s.22C of the Act which provides that the decisions of the Tribunal are not to be reviewed. I have heard argument on

the scope of this clause and the range of authorities that suggest that judicial review continues to prevail in the face of such a clause. I am satisfied that the clause does not completely exclude judicial review in this case. I am also conscious that, because argument has been brief, full consideration has not been given to the clause.

[31] Nevertheless, the legislative direction that a decision of the Tribunal should not be reviewed must be brought to account in considering an application for Interim relief. If I take that, couple it with my assessment between the public and private interests as above, and bring to account the consumer protection focus of the legislation, I reach the conclusion that interim relief should be refused.

[32] I believe that Toa will survive the imposition of these costs. I do not see that the public should be the effective funder of any interim relief.

[33] Therefore I refuse the application for Interim Injunction. It is an important component of my decision that the substantive application will come on for hearing in December. If, for any reason, that expectation fails, then I expect it will be necessary to review this Interim decision.

[34] It will now be necessary for the parties to prepare for the hearing. There has been an exchange of affidavits. I believe that counsel should confer and produce a consent timetable which enables the matter to be prepared properly and to be fully argued in the first week of December. I do not think it will be useful if I were to try and devise a timetable at this stage of the day.

[35] The question of costs is reserved. Leave is reserved to the parties to apply for any further directions.

Tom Weston, CJ