Rulings Panel
Breaches 2009-49, 2009-65, 2009-89, 2009-94

IN THE MATTER	of breaches of the Gas (Switching Arrangements) Rules 2008
BETWEEN	Jade Software Corporation (NZ) Limited *Reporting Entity (2009-49, 2009-65 and 2009-94)*
AND	E-Gas Limited and E-Gas 2000 Limited (together E-Gas Group)
AND	Nova Gas Limited (*Reporting Entity 2009-89*)
AND	The Auckland Gas Company Limited
AND	Gas Industry Company limited.

Hearing: 4 February 2010

Appearances: J Kean – Investigator
J Eves for Gas Industry Company Limited
B E Ross for E-Gas Group
J Palmer for Nova Gas Limited and The Auckland Gas Company Limited

Before the Rulings Panel: The Honourable Sir John Hansen KNZM

Decision: 11 March 2010.

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[1] E-Gas admitted a total of 63 breaches of the Gas (Switching Arrangements) Rules 2008. The basic factual scenario is basically the same for all breaches. Customers signed gas supply agreements with Nova/Auckland Gas (both of which are hereafter referred to as "Nova") and authorised Nova to take all necessary steps to effect the switches, which Nova, in the main, did in accordance with the rules. Because of E-Gas' admitted breaches of the rules, the switchings were delayed, and in some cases, the customers were in fact never switched. As a consequence, three issues arise for determination in this matter.

i) The penalty to be imposed for the admitted breaches.

ii) Issues as to compensation:

1. The meaning of the term "compensation" in s 43X(1)(f) of the Gas Act 1992.

2. The level of compensation to be awarded following the definition of the term.

iii) The application for costs by Gas Industry Company relating to the hearing.

Penalty

[2] Ms Kean identified a number of aggravating factors:

i) Most fundamentally, was the principle that switches are to be completed within 23 business days in accordance with the Rules.

ii) There were multiple breaches, indicating a systemic problem with compliance.

iii) E-Gas did not accept responsibility for breach at the earliest possible opportunity.

iv) Nova maintains it has suffered loss as a result of the breaches.

v) Some of the breaches were severe, in that the switches were not resolved until well overdue.

vi) The breaches were not inadvertent, as E-Gas must be taken to be aware of the switching rules and the timeframe set out in

those rules, Ms Kean submitted that E-Gas chose to ignore them and she submitted the breaches were deliberate.

vii) Ms Kean submitted that E-Gas may well have benefitted from the breaches in that it retained customers that should have been switched.

[3] She did accept that there were a number of mitigating factors. The first of these was the admission of the breaches. The second was that E-Gas gave an undertaking to ensure compliance with the Switching Rules and put in place training for its staff. Thirdly, that E-Gas's compliance has improved significantly since these breaches.

[4] She submitted that the Rulings Panel should impose a civil pecuniary penalty of $300 per breach. She also submitted that it would be appropriate for the Rulings Panel to issue a public warning or reprimand to E-Gas on the basis of the aggravating factors set out above.

[5] On behalf of E-Gas, Ms Ross submitted the amount recommended by the investigator was excessive. She submitted it was two-thirds of the maximum that could apply, because in her view the $20,000 pecuniary penalty that can be imposed is for all of the offences, not per breach. She submitted that a number of the aggravating factors identified by the investigator have already been addressed by E-Gas, and stressed the greatly increased level of compliance displayed by E-Gas in relation to the switching regime. Her submission was that an appropriate level of penalty was $100 per breach, giving a total penalty of $6,300.

[6] The relevant legislative provisions are as follows:

> **43X Rulings Panel may make certain orders**
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> (1) A Rulings Panel may, after considering any complaint or matter referred to it in respect of any allegation that an industry participant has breached any gas governance regulations or rules,—
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> (a) decide that no action should be taken:

(b) issue a private warning or reprimand to an industry participant:

(c) issue a public warning or reprimand to an industry participant:

(d) impose additional or more stringent record-keeping or reporting requirements under or in connection with any gas governance regulation or rule:

(e) order an industry participant to pay a civil pecuniary penalty not exceeding $20,000:

(f) order an industry participant to pay a sum by way of compensation to any other person:

(g) order an industry participant that is found not to be complying with the gas governance regulations or rules to take any action that is necessary to restore it to a position of compliance:

(h) make an order terminating or suspending the rights of an industry participant under any gas governance regulation or rule:

(i) make orders regarding the reasonable costs of any investigations or proceedings:

(j) propose to the industry body or the Commission that it recommend to the Minister that a change should be made to a regulation or rule.

(2) In making any such decision, the Rulings Panel must take into account its previous decisions in respect of any similar situations previously dealt with by the industry body, the Commission, or the Rulings Panel.

(Gas Act 1992)

52 Rulings Panel may order payment of civil pecuniary penalty up to $20,000

(1) Section 43X(1)(e) of the Act provides for an order for a civil pecuniary penalty of an amount not exceeding $20,000 in any case where a participant has breached any provision of gas governance regulations or any provision of the rules.

(2) When ordering payment of a civil pecuniary penalty, the Panel must—

(a) take account of the level of civil pecuniary penalties it has previously ordered in any similar situations; and

(b) impose a civil pecuniary penalty that is commensurate with the seriousness of the case.

(3) In making that assessment, the Panel must have regard to the following matters:

(a) the severity of the breach:

(b) the impact of the breach on other participants:

(c) the extent to which the breach was inadvertent, negligent, deliberate, or otherwise:

(d) the circumstances in which the breach occurred:

(e) any previous breach of the rules by the participant:

(f) whether the participant disclosed the matter to the market administrator:

(g) the length of time the breach remained unresolved:

(h) the participant's actions on learning of the breach:

(i) any benefit that the participant obtained, or expected to obtain, as a result of the breach:

(j) any other matters that the Panel thinks relevant.

(Gas Governance (Compliance) Regulations 2008)

[7] I do not accept Ms Ross's submission that the civil pecuniary penalty of up to $20,000 is the maximum that can be imposed for these 42 breaches. I consider that s 43X(1) and Regulation 52(1) make it clear that the orders that can be made pertain to each individual breach. To determine otherwise would have meant in a case such as this, if E-Gas had only committed one breach it would face the same maximum penalty as if it had committed any number of breaches. I do not consider that is what the Act and the Regulations say, nor do I consider it to be the purpose of those responsible for the Act and Regulations.

[8] This is the first time that the Rulings Panel has been requested to impose a civil pecuniary penalty. There is therefore no guiding precedent. Ms Kean has referred to a small number of decisions issued by the Electricity Rulings Panel, but frankly I do not find that they are of a great deal of assistance.

[9] Despite the mitigating factors that are acknowledged, in particular the efforts of E-Gas to improve its compliance, these were sustained and deliberate breaches of the Regulations. I attach little weight to the accepted mitigating factor that E gas was new to regulatory regimes. While other industry participants have greater experience of these it is for E Gas to familiarize itself with the regime, properly train its staff and ensure the regulations are complied with. It failed to do so.

[10] The figure suggested by the investigator is a relatively modest response in the face of the very significant aggravating features. In my view the imposition of a penalty of only $100 per breach, as submitted by Ms Ross, would fail to recognise E-Gas's culpability for these breaches. Given this is the first occasion that the Panel has been called on to impose a civil pecuniary penalty, the relatively modest sum suggested by the investigator seems to me appropriate. That recognises the efforts that E-Gas has made to bring about compliance with the Regulations. Accordingly, on each breach I impose a civil pecuniary penalty of $300 for each breach, making a total of $18,900.00. Standing back and considering the penalty on a totality basis I am still satisfied that the overall culpability warrants a civil pecuniary penalty of this magnitude.

[11] Given the sustained nature of the breaches, I also concur in the investigator's submission that a public warning or reprimand should be made. Not only would this recognise the serious nature of the sustained breaches by E-Gas, but it would also act as a deterrent to other industry participants. Accordingly, the following reprimand is to be circulated to industry participants by email and be published as part of the Panel's determination on the website of the Gas Industry Company Limited:

> E-Gas admitted 63 breaches of the Gas (Switching Arrangements) Rules 2008, primarily r 69.2. E-Gas acknowledged the fundamental principle of the Gas (Switching Arrangements) Rules 2008, which is that switches should be completed within 23 business days in accordance with the Rules. The Rulings Panel has made the following orders under s 43X of the Gas Act 1992:

Compensation

[12] Nova seeks compensation pursuant to s 43X(1)(f). Nova submits that compensation in this case equates to loss of profits. On the other hand, E-Gas

submits that this is not the intention of the section. Ms Ross submitted that if that was the intention, the word "damages" would have been used rather than "compensation" in s 43X(1)(f). Essentially, she submitted the term is simply meant to be a sum that would reflect disbursements and out of pocket expenses suffered by an industry participant as a consequence of another's breaches of the Regulations.

[13] The Concise Oxford Dictionary defines "compensation" as:

> something given to compensate for loss, suffering, or injury. 2 something that compensates for an undesirable state of affairs. 3 the action or process of compensating.

[14] Mr Palmer submitted that s 43X provides a broad range of orders available to the Rulings Panel which are expansive and should not be narrowly constrained. He submitted that such an interpretation is enhanced by the restriction of remedies contained in s 43Y. He further submitted that the New Zealand approach to discretionary statutory remedies is flexible and that, seen in the commercial context of the Gas Act, compensation should be read widely.

[15] Ms Ross said the Rulings Panel should not make an award reflecting loss of profit except in exceptional circumstances that do not apply. She further said that such a claim should not be available in respect of customer contracts for which gas supply had not commenced, ie the contract was executory or conditional. Further, she maintained that if there was a contract with Nova the proper remedy was for Nova to pursue its contractual rights against the customer. She submitted that what was happening here was that Nova was cherry-picking remedies in a way that would not preclude it from later pursuing the customers with whom it had entered into a contract.

[16] Dealing with those latter submissions first. I do not accept them. If, in fact, compensation is awarded to reflect loss of profit under the Gas Act, the general law applying to damages would preclude Nova seeking to recover the same sum from customers with whom it had entered into contracts. Nova could not achieve double recovery.

[17] As well, it strikes me as fallacious to suggest that Nova is precluded from seeking loss of profits because the gas supply contracts had not commenced. This misses the vital point. The only reason they had not commenced was because of the deliberate actions of E-Gas in flouting the Regulations and refusing to effect the switch in accordance with the Regulations. I do not consider that E-Gas should be entitled to a benefit from its own deliberate breaches of the regulations.

[18] Turning to the more substantive issue, the meaning of compensation in s 43X(1)(f). In my view the dictionary definition supports Mr Palmer's submission, and I agree with it.

[19] Mr Palmer's submission regarding the approach to discretionary remedies in New Zealand is in my view correct. J W Turner states in *Statutory Discretions as to Relief and Remedies* in Blanchard (ed) *Civil Remedies in New Zealand* (Brookers 2003) preliminary proposal 454-455:

> In New Zealand, as in other common law jurisdictions, various statutes now provide a discretion as to remedies. These statutory leaf provisions have typically been interpreted widely to allow the Courts a relatively unfettered discretion to achieve a "just" outcome.
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> ...
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> The provisions in the New Zealand statutes are also very flexible in terms of the nature of remedy that the Courts can provide. The objective of the discretionary provisions is generally to overcome perceived problems with the rigidity or unfairness of strict, traditional common law rules. This more flexible approach to remedies is consistent with the general "basket of remedies" concept that the New Zealand Courts are increasingly tending to favour.

[20] I also consider that the provisions of s 43Y are an additional reason not to construe compensation "narrowly". That section reads:

> **43Y Restriction of remedies**
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> (1) The remedies provided for in section 43X and in any gas governance regulations and rules are the only remedies in respect of a breach of those regulations or rules.
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> (2) No one can bring an action for breach of statutory duty that arises out of, or relates to, a breach of those regulations or rules by an industry participant.

(3) This section does not limit the recovery of—

(a) a debt owing under any gas governance regulations or rules; or

(b) damages in tort other than breach of statutory duty, for breach of contract, or for any other wrong, that arises from any act or omission that is also a breach of those regulations or rules.

[21] The effects of subss (1) and (2) limits remedies available to parties who suffer loss as a result of statutory breach specified in s 43X. As Mr Palmer submitted "in other words, in relation to statutory breach, ordinary civil law rights are replaced by statutory rights".

[22] But for subss (1) and (2), an injured party would be entitled to claim loss of profits in the usual way. But subss (1) and (2) take that right away from the injured party so they are left with the powers of the Rulings Panel under s 43X(1)(f).

[23] The Gas Act is "an Act to make better provision for the regulation, supply and use of gas and the Gas Industry in New Zealand..."

[24] It is also clear that the compliance regulations were intended to put in place powers that would ensure compliance with industry processes. This was because the previous bilateral arrangements had not worked (GIC decision paper Switching and Compliance, 19 January 2007, paras 4.8-4.9).

[25] Again, I agree with Mr Palmer's submission that effective compliance includes the provision of effective remedies, particularly in circumstances where a specific provision takes away a right of action from an injured party.

[26] The expansive view of compensation, in my view, accords with the purpose of the Act and compliance regime. I am satisfied that "compensation" in the Act is wide enough to encompass real, and potential, loss of profit.

Mitigation

[27] Ms Ross argues that Nova has a duty to mitigate loss. She submitted that this would be quantified by reference to the difference between the profit which Nova would have realised on the original 15 contracts and the profit which it realised on subsequent contracts. She submitted that Nova's duty was to require it to on-sell the gas or to trade it on the wholesale market (ie the gas that would have gone to the 15 customers). She said this was readily quantifiable, but had not been done by E-Gas.

[28] On the other hand, Mr Palmer submitted that there was nothing in s 43X(1)(f) imposing a duty to mitigate, but in any event, even if there is such a duty there is nothing to suggest that Nova has failed in its obligation.

[29] It is true that s 43X(1)(f) does not specifically provide a requirement for a participant to mitigate any loss. Having said that, given the expansive interpretation of compensation, if clear steps to mitigate could have been taken but were not then the Rulings Panel would clearly take that into account in setting the final figure.

[30] The duty to mitigate is to take reasonable steps to mitigate loss consequent upon another party's wrong (*McGregor on Damages* 17ed 7-002—7-006).

[31] The issue of mitigation was discussed by Woodhouse J in *White v Rodney District* HC Auckland CIV-2009-405-001880, 19 November 2009. The standard of reasonableness is to be assessed with reference to the circumstances of a case and the characteristics of a claimant. In *White*, Woodhouse J stated:

> [26] ... The onus on the defendant includes an onus to demonstrate how the steps the defendant says should have been taken would have reduced the damage. In *Roper v Johnson* [(1873) LR 8 CP 167 at 184] the Court said:
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> > The plaintiffs having made out a prima facie case of damages, actual and prospective, to a given amount, the defendants should have given evidence to shew how and to what extent, that claim ought to be mitigated.
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> ...
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> [27] The duty of taking all reasonable steps, in the words of Viscount Haldane, requires consideration of all of the circumstances of the case, should not be assessed applying hindsight, and does not impose a high standard of reasonableness on the claimant...

[32] In Burrows, Finn and Todd *The Law of Contract in New Zealand* (3ed 2007) at [21.2.4]:

> The burden which lies of the defendant proving that the plaintiff has failed in his or her duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.

[33] It follows that any mitigation duty on Nova was to take reasonable steps, which does not impose high standards of reasonableness. That reasonableness must be assessed against the particular circumstances of the case and Nova's particular characteristics.

[34] The loss of profits claimed by Nova was formulated by Mr Teichert in his affidavit. Significantly, E-Gas's expert Mr Haywood endorses the formula, although takes issue essentially with the failure to apply a significant discount for unknowns, amongst other matters.

[35] In relation to supply cost, Mr Teichert's affidavit explains that Nova was not claiming any supply costs from E-Gas. As to lost profits (as distinct from supply cost), Mr Palmer submitted there were no meaningful steps or reasonable steps that Nova could have taken. The basis for that submission is in the second affidavit of Mr Teichert at paragraph 29, which was summarised by Mr Palmer as:

a) at any one time there is a limited amount of uncontracted gas demand for which gas retailers compete;

b) as an active competitor in the gas market Nova is constantly engaged in customer acquisition and retention activities; it is acquiring new demand all the time in various market sectors, in various locations and on a range of terms;

c) all new demand is incremental demand for Nova; Nova has spare capacity to supply whatever demand it is able to acquire in the relevant market sectors;

d) therefore, substitution of one loss GJ of demand for another GJ of demand is not mitigation; Nova only sells one GJ of gas, when it should have sold two GJs.

[36] Mr Palmer referred to authority that supported this position. The first is the case of *W L Thompson Ltd v Robinson (Gunmakers) Ltd* [1955] Ch 177. In that case Thompson dealt with refusal to accept delivery of a Vanguard motor car which the defendants had agreed to buy. The sale price was fixed by manufacturers so the margin was minimal for the dealer. Following refusal, the plaintiffs mitigated their loss by persuading the supplier to take the car back. The defendants argued they were only liable for nominal damages, since the plaintiffs could have sold the car to another customer or could have returned the car to the supplier. Upjohn J disagreed, commenting the principle to be applied is a clear one. In applying *Re Vic Mill Ltd* [1913] 1 Ch 465 he stated:

> True, the motor car in question was not sold to another purchaser, but the plaintiffs did what was reasonable, they got out of their bargain with George Thompson Limited, but they sold one less Vanguard and lost their profit on that transaction.

[37] Upjohn J determined the plaintiffs' loss was the loss of the bargain. That principle was affirmed in New Zealand by Asher J in *Commerce Commission v Avanti Finance* (2009) 9 NZBLC 102,662. At [38] Asher J quoted Trietel *The Law of Contract* (12ed 2007) at 20-099:

> The injured party is, however, required to mitigate in this way only if the new transaction would be a true substitute for the old one. Where, for example, a customer wrongfully repudiates a contract for the provision of services at a time when the injured party has spare capacity, then the possibility of that party's making another contract with a new customer will not be taken into account: such a new contract will not be a true substitute for the broken contract since the injured party would, but for the breach, have been able to perform both contracts.

[38] I accept that this is directly applicable in this case. In my view, there has not been a failure by Nova to mitigate.

Causation

[39] I accept the submission of Nova that there is a direct causal link between E-Gas's admitted breaches and Nova's loss. If E-Gas had complied with the rules the switches would have been completed in terms of the rules; Nova would have become the responsible retailer on the registry for each of the lost customers; and supply commencement pre-condition under Nova's supply agreement with each customer would have been satisfied. In other words, Nova would have become the gas supplier to each of the lost customers on the applicable switch date, in accordance with the regulations.

[40] Mr Teichert has analysed Nova's losses as $39,075.35. He sets out his methodology in some detail in the affidavits filed by him. As already noted, the independent expert retained by E-Gas broadly endorses the lost profit calculation. However, Mr Haywood did raise issues relating to the contract term and the wholesale price. Mr Palmer submits that absent evidence to the contrary, the Panel should assume that each of the lost customers would have complied with the terms of the relevant gas supply agreement. It should not be assumed they would breach their contract. Nova urged on the Rulings Panel the approach of the Court of Appeal in *Newbrook v Marshall* [2002] 2 NZLR 606, where the Court held:

> [30] Where there are variables involved, as usually occurs in assessments of business profits or losses, if precise figures had to be proved few plaintiffs could succeed. Where... it is established that a particular factor was causative but its precise contribution to the loss could not be correctly calculated in precise dollar terms, a more robust approach is required of the courts... As Lord Mustill said in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* at p269, "the assessment of damages often involves so many unquantifiable contingencies and unverifiable assumptions that in many cases realism demands a rough and ready approach to the facts". Speaking more formally in *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91, the Privy Council concluded, at p106, that "the ends of justice would be best served if they [Their Lordships] were to fix a new figure of damages, as best they can upon the available evidence, such as it is".

[41] That statement of law is well established. I of course accept it. However, given the consumer-driven nature of the new compliance regime that enhances and endorses the ability of customers to switch from gas providers, I consider it appropriate to build in a contingency figure in settling the final award of

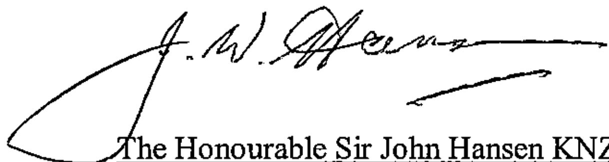
compensation. To my mind an appropriate figure is one of 15 per cent. Accordingly, in terms of compensation, I order that E-Gas pay to Nova the sum of $33,214.05.

[42] As between E-Gas and Nova, memoranda as to costs are to be filed within seven working days of the handing down of this ruling.

Gas Industry Company Limited's costs

[43] Gas Industry Company seeks reimbursement of direct external costs. It makes no effort to receive its own internal costs. These relate to the costs of the investigator's involvement and the Rulings Panel's expenses in relation to the hearing. The exact quantum would need to be fixed following the handing down of this decision.

[44] The Panel certainly has jurisdiction to make an order pursuant to s 43X(1)(i). The investigation and the Rulings Panel involvement has only been occasioned by the admitted breaches of E-Gas. I can see no reason why Gas Industry Company should not be awarded a sum to cover these outgoings. Accordingly, the cost of the investigator's involvement and of the Rulings Panel's expenses are to be paid by E-Gas to the Gas Industry Company Limited. Gas Industry Company should, within seven days, submit a finalised account for approval by the Rulings Panel.



The Honourable Sir John Hansen KNZM

Rulings Panel.