

Rulings Panel

Breaches 2009-104, 2009-129, 2009-130, 2009-138, 2009-139, 2009-160, 2009-161, 2009-180, 2009-186, 2009-187, 2009-206, 2009-235, 2010-62, 201089

IN THE MATTER	of breaches of the Gas (Downstream Reconciliation) Rules 2008 and the Gas (Switching Arrangements) Rules 2008
BETWEEN	NZX Limited / M-Co <i>Reporting Entity</i> Gas Industry Company Limited <i>Reporting Entity</i>
AND	Nova Gas Limited The Auckland Gas Company Limited <i>Participants in Breach</i>
AND	Powerco Limited Vector Gas Limited Genesis Power Limited E-Gas Limited E-Gas 2000 Limited <i>Participants Joined as Parties</i>

Before the Rulings Panel: The Honourable Sir John Hansen KNZM

Decision: 19 July 2010

COSTS DECISION

[1] In my reserved decision I ordered that memoranda as to costs were to be filed within 20 working days.

[2] Memoranda as to costs were received from all relevant parties. However, Nova Gas/Auckland Gas purported to file a further memorandum, dated 5 July 2010, without leave.

[3] Mr Sherwood King, counsel for Powerco, usefully referred to the commentary to the High Court Rules Part 14.17 relating to test cases and novel points of law. There, the learned authors note:

The essence of a test case is that it raises a novel point or principle of law with ramifications going beyond the particular case. Conversely, if a case involves only the application of a settled law to a particular set of facts, it is not a test case: *Birkdale Service Station Ltd v CIR* [2001] 1 NZLR 293 (CA) at paras 81 and 85.

In the test cases the “tester”, even if successful, is invariably ordered to pay costs to the responding party or parties, or there is no order as to costs: *Securities Commission v Kiwi Co-op Dairies Limited* [1995] 3 NZLR 26; (1995) 1 BCSLR 80; (1995) 7 NZCLC 260,828 (CA); *Birkdale Service Station* (above), at para 81. The rationale for this costs outcome in test cases is that the judgment has value for the “tester” extending beyond the test case itself, and thus the “tester” should substantially bear the cost of obtaining the judgment.

[4] In my view, this is a classic “test case”. It raised a novel and difficult point of law, albeit a short one (given the narrowness of the point, I am more than somewhat surprised at the quantum of the costs submitted by the various parties). The real question is who is the “tester”? In this case, the allegations of breach were made by GIC, which means they must have considered the correct interpretation was that put forward by the investigator at the hearing.

[5] For the sake of completeness I note that GIC did not make submissions at the hearing, although represented.

[6] The other interested parties reached a similar conclusion in their submissions to the investigator. There were variations between them, but by and large they took the view that Nova/Auckland Gas were gas distributors in terms of the Act. In their memorandum of 24 March, GIC supported the investigator’s interpretation. The effective submission from the investigator and other interested parties was to the effect that Nova was supplying a bundle of services wearing the hat of distributor and retailer. That was the basis for the unsuccessful submission that Nova/Auckland Gas was a gas distributor for the private bypass network.

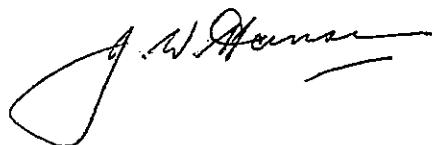
[7] Nova’s view was that applying standard statutory interpretation principles it was not a gas distributor. As recorded at [15] of the substantive ruling, counsel assisting submitted for a third alternative which, for reasons developed in my ruling, did not find favour.

[8] GIC and the other interested parties take the view that costs should lie where they fall. Nova/Auckland Gas submit that they have been the successful party in this case and essentially costs should follow the event. They also submit that they are entitled to costs for in-house counsel and cite authority to support that proposition. Certainly where in-house counsel appear, that is so. What is more rare is to award costs to in-house counsel who do not appear at the hearing.

[9] I am satisfied that the real “tester” in this instance was the investigator supported by GIC, who brought the breaches. They were supported by a number of industry participants. However, my view is that this was a difficult and novel point of law that certainly required clarification. To that extent it is a test case and is of real interest to all industry participants including those who did not elect to be joined and take part. I am of the view that the appropriate course in those circumstances is that costs should be met by GIC, who are funded by the industry in any event.

[10] However, I think the quantum of the claim put forward is too high. I have difficulty in assessing the exact amount of work done in the absence of time records, and as noted earlier, the point involved was an extremely narrow which, as Mr Palmer submitted, could be determined by the application of well established principles of statutory interpretation. At the end of the day that is how it was done.

[11] In the absence of accurate time-based records, I consider an appropriate award of costs in favour of Nova/Auckland Gas is \$12,500. I make no award for disbursements. In relation to the other parties, they will bear their own costs but will make an equal contribution with all industry participants to the costs awarded, because of the manner in which GIC is funded.



The Honourable Sir John Hansen KNZM

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