SET 3 WGL

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 535/90

BETWEEN ROTHMANS OF PALL MALL (NZ) LIMITED

Plaintiff

A N D HER MAJESTY'S ATTORNEY-GENERAL

Defendant

Hearing: 21 June 1990

Couunsel: Mr RJ Craddock QC and Mr RM Gapes for Plaintiff
Mr JJ McGrath QC and Mrs MT Scholtens for Defendant

Judgment: 28 June 1990

JUDGMENT OF ROBERTSON J

On 16 December 1987, a document headed "Agreement" was signed between David Francis Caygill, Her Majesty's Minister of Health, on behalf of the Government of New Zealand and Rothmans of Pall Mall (New Zealand) Limited (the plaintiff) and WD & HO Wills (New Zealand) Limited.

The document (like five previous documents between the same or similar parties) dealt with the regime to apply in respect of cigarette advertising in New Zealand. It provided inter alia that the plaintiff would furnish to the Department of Health, information about the carbon

monoxide and nicotine levels for all locally manufactured cigarettes which the Department of Health was to be at liberty to publish. It also agreed to comply with an attached code for the marketing of tobacco products.

Clause 5.1 provided :

"5.1 This agreement shall replace the Existing Agreement"

That was an agreement dated 17 July 1985.

Clause 4.1 of the present document provided :

"4.1 This agreement shall continue for three years from the date hereof, and thereafter be subject to renegotiation on notice of six months prior to the end of the three year period, from the Minister or from the Manufacturing Companies."

In essence the plaintiff's case is that the document of 16 December 1987 is a legally enforceable agreement creating mutual rights and responsibilities.

The plaintiff specifically contends that pursuant to clause 4.1 the plaintiff, within the stipulated period having given notice of a desire for renegotiation, was entitled to such renegotiation. Accordingly it seeks a declaration that :

(i) Each party is under an obligation to

afford to the other reasonable co-operation in order to bring about re-negotiations;

(ii) Each party is under an obligation not to impede or prevent such re-negotiations;

(iii) Each party is required to enter into such re-negotiations in good faith.

In an agreed statement of facts it was accepted that on 21 December 1989, the Minister of Health publicly announced the Government's intention to prepare legislation which would effectively bring an end to tobacco advertising and sponsorship within New Zealand. On 7 March 1990, the plaintiff advised the Government through the Minister that they intended to give notice in terms of the agreement. The Minister responded in a letter of 17 April 1990 which, inasmuch as it is pertinent, notes :

> "... the intention of the Government to implement a statutory regime prohibiting the advertising of tobacco products in New Zealand and sponsorships by tobacco companies and related companies in New Zealand. The statutory prohibitions are intended to come into force on the expiry of the agreement dated 16 December 1987."

Further on 11 May 1990, the acting Minister of Health in a media statement noted :

> "The marketing code between the Government and the tobacco companies is a voluntary agreement subject to mutual consent ... The Government ... has decided not to exercise its options to renew the existing agreement which expires in December. Instead legislation will soon be

introduced as a more effective curb on promotion of this addictive drug."

The Smoke Free Environments Bill has been introduced into the House and is presently before a select committee.

The Solicitor General argued on behalf of the defendant that the document of 16 December 1987 was merely a political statement, neither intended to be, nor in law, binding on the parties. He further submitted that if it was an agreement it was not legally binding because the only consideration moving from the Crown was an undertaking that Parliament would not further legislate. He contended that such an undertaking was invalid as neither the Minister nor the Government can fetter Parliament's sovereign right to legislate. It was further argued that if there was otherwise a lawful agreement the provision for re-negotiation was unenforceable. The defendant submitted that the words carry no real obligation. Being nothing more than an agreement to negotiate, they were too uncertain to impose any binding obligation on the parties.

Finally, it was submitted that if the Court should find against the defendant on all of the stipulated issues it should nonetheless not exercise its discretionary power to make a declaration inasmuch as to do so would be an unwarranted interference by the Courts in the legislative process.

I am not attracted to the Solicitor General's first argument that this was not a legal agreement. I accept Mr Craddock's submission in response that one would expect that contracts entered into by Ministers would be consistent with Government policy but that does not rob them of legal effect. I am unable to accept that when the Government merely wishes to make a political statement it would do it in a form which has all the hallmarks of a contractual agreement.

The document is headed "Agreement". It precisely defines the parties. In a preamble it sets out the history of the matter between the parties and their respective positions or postures, and then uses the time honoured phrase "it is agreed as follows". Thereafter there are noted clear obligations which the manufacturing companies accept in respect of product analysis and marketing. The agreement is specifically expressed to be in replacement of an existing agreement. It speaks in clause 6.1 of the nature of the liability of the manufacturing companies. It is expressed to be for a specified term. I accept that the document was not completed under seal, but in my judgment it flies in the face of every clear sign and signal to suggest that this was merely a vehicle for espousing a political position or policy.

I respond to the Solicitor General's submission by asking the rhetorical question, if the Minister did not intend to make a legal agreement, why use the form of an agreement simply to make a policy statement?

The defendant's view is that the matter was not a commercial agreement or contract. That of course is not the position from the point of view of the plaintiffs. There could be nothing more commercial than an arrangement which regulated or controlled their ability to market. I adopt the assertion of the learned authors of Aranson & Whitmore, Public Torts and Contract, page 204 :

> "There can be no doubt that in dealing with alleged Government contracts the Courts are sometimes more reluctant to find an intention to create legal relations. In a case of an agreement about business affairs the onus of showing no intention to create legal relations is a heavy one. In Government affairs it seems that the onus is reversed."

In this case the document in my view is to be categorized as an agreement about business affairs. The fact that there is a Government policy and a proper public health concern as the basis of the arrangement does not rob it of its essential qualities as a commercial transaction. The onus which therefore I find on the Government is clearly not discharged in this case.

I do not find the decision of the High Court of Australia in Administration of Papua New Guinea v Leahy

[1961] 105 CLR 6 to be of assistance. In that case Leahy was seeking to reap the benefit of a Government policy on tick eradication. He was not being placed in a position in which his normal business activities were being circumscribed or impeded. He gave up nothing.

I similarly distinguish because it is of like character the case involving the action of a Government withdrawing from an administrative arrangement for the deduction of union dues in retaliation for industrial non-cooperation: Administrative and Clerical Officers Association, Commonwealth Public Service v Commonwealth (1979) 53 ALJR 586. There the Court was also influenced by the absence of any agreement as to duration and termination in reaching the decision that the arrangement was not contractual.

I was referred also to the opinion of McTiernan J in South Australia v The Commonwealth [1961] 108 CLR 130, 148 where His Honour said :

> "In my opinion, neither of these agreements constitutes an obligatory contract. It does not produce legal rights or obligations. It is apparent from their terms that they embody plans for construction of publicly-owned railways. The carrying out of these intended works is a matter of governmental policy. The promises on either side are of a political nature, and both parties would understand at the time the agreements were made, that this was the true nature of the promises. Their performance necessarily requires executive and further parliamentary action. It is a matter for the discretion of the respective governments to take such action if and when they

> see fit to do so. It is not contemplated by either agreement that its performance could ever be the subject of a judicial order. The real nature of the agreements is that they are political arrangements between South Australia and the Commonwealth for co-operation between them on projects of national importance. That is made clear by the recitals to the agreement in the Schedule to the Act of 1949 and it is also shown by the terms of both agreements. I cannot think that in entering into these agreements the parties contemplated that they were entering into obligations cognizable in a court of law."

The document before me is not to be categorized in that way. It placed heavy restrictions upon the plaintiffs. It spoke in terms of obligation and duty. Nothing said or done during the many years which this and its predecessors were operative indicated a political as opposed to a legal flavour.

There was some argument on the extent to which the Court should have regard to post-execution activities. In International Ore and Fertilizer v East Coast Fertilizer [1987] 1 NZLR 9, Cooke P delivering the judgment of the Court of Appeal noted at 18:

> "In New Zealand the question of the admissibility of subsequent conduct of the parties as an aid to interpreting the contract has been kept open."

The plaintiff points particularly to letters written by the Minister of Health on 31 August 1988, where in response to complaints about the activities of the Toxic Substances Board and referring to the document of 16

December 1987 the Minister said:

> "For its part the Government is bound by the agreement."

And in a further letter of 14 September 1988, the Minister said :

> "I would like to assure you that I fully recognise that the Government is bound by the agreement signed on 16 December 1987"

And in the same letter :

> "I would like to repeat my assurance that the Government is bound by the agreement of 16 December."

After I had drawn it to counsels' attention, Mr Craddock included within the same compass, the Minister's explanatory note on the Smoke Free Environments Bill which states, inter alia :

> "At present there is in force an agreement between the manufacturers in New Zealand of tobacco products and the Government relating to the advertising of tobacco products and certain related matter. Part II of the Bill is intended in large part to replace the agreement. For that reason Part II is expressed to come into force on 16 December 1990, the day after the date of expiry of the present term of the agreement."

I was reminded of the traditional rules for interpreting a contractual agreement and what the Court may or may not do to give effect to the intention or

supposed intention of the parties as summarised in Chase Securities Limited v GSH Finance (Pty) Limited [1989] 1 NZLR 481. I do not find it necessary to rely on the letters or the explanatory note to conclude that the only reasonable and objective inference is the document is an agreement, but I am encouraged to find that that was not only the view of the plaintiff, as vigorously submitted in this Court, but the basis upon which the holder of the office of Minister of Health has consistently conducted himself in private and public with regard to the matter. I would add, furthermore, that the post-execution evidence in this case was brought to show an intention to be bound, and not for the purpose of demonstrating how the document was to be interpreted. Whether that makes a difference to the admissibility of the evidence I need not decide.

It was next argued that the agreement lacked contractual force on account of the absence of consideration. The learned Solicitor's submission was that the only matter which could be considered in the nature of consideration moving from the Crown, is the statement in the preamble :

> "(e) That the agreement is intended to be in lieu of further legislative or regulatory restrictions on the marketing of tobacco products ... while the agreement is current."

I note that nowhere in the operative provisions of the agreement are there any obligations or undertakings by the

Crown. I am not prepared to decide this point by reference to a narrow legalistic approach and prefer to look at the document as a whole and the irresistible inferences which flow from an overall reading.

The competing principles to be weighed on the nature of the apparent consideration are summarised by Mason J in Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth of Australia (1977) 139 CLR (HCA) 54, 74 :

> "Public confidence in Government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the Government or on public authorities. And it would be detrimental to the public interest to deny to the Government or a public authority power to enter a valid contract merely because the contract affects the public welfare. Yet on the other hand the public interest requires that neither the Government nor a public authority can by a contract disable itself or its officer from performing a statutory duty or from exercising a discretionary power conferred by or under a statute by binding itself or its officer not to perform the duty or to exercise the discretion in a particular way in the future. ... To hold otherwise would enable the executive by contract in an anticipatory way to restrict and stultify the ambit of a statutory discretion which is to be exercised at some time in the future in the public interest or for the public good."

It is argued that in this case the only possible consideration would be an undertaking not to impose a statutory or regulatory regime so long as the agreement was in force and its obligations on the manufacturers were being met.

Consideration may be described as the price paid by the plaintiff for the defendant's promise; or alternatively, the conferring of a benefit on the defendant by the plaintiff in return for the defendant's promise. The position of both parties in this agreement must be looked at in terms of promisor and promisee. The plaintiff, Rothmans, promised the Government that it would provide specified information and abide by the code attached to the agreement. What benefit flowing from the Government accrued to Rothmans in return for the promise? In my judgment, the benefit can only be an undertaking - partly express, partly implied - that the Government would not move to introduce legislative or regulatory measures during the currency of the agreement. Viewed from the Government's point of view, Rothmans conferred on it a benefit when it agreed to restrict its sale and marketing of tobacco products in the way outlined in the code. With what did the Government buy that promise? Again, the answer can only be, a commitment not to legislate or regulate. Standing back and looking at the substance of the transaction, it is clear that the essence of the deal was that the Government would not legislate because it had obtained a commitment from the tobacco companies to abide by the code. I find unconvincing Mr Craddock's submission that consideration could be found in the idea that the Crown gained a "good deal", and also gained flexibility and political benefits.

It is elementary that the executive may not restrict the legislative competence of Parliament by contract. As it is said in Currie, Crown and Subject (1953) at 52-53 :

> "However amply the executive Government may purport to bind the Crown, its contracts, like those of a subject, are liable to be overriden by subsequent legislation. ... Any moral obligation arising from the circumstance that under a parliamentary system the executive Government in power effectively controls the course of legislation does not create a legal obligation. Moreover, there can be no distinction between an undertaking to refrain from promoting legislation and one to promote legislation; 'in a legal sense, there can be no such thing as contracting for the future exercise of a legislative power.' (Holmes v Rolleston (1873) 2 NZCA 287 at 294)."

Since the only promise given by the Government which could be said to amount to consideration is one which is without any value (the executive being unable to bind the legislature by contract), the contract must fail.

Although it is not strictly necessary to do so in the light of the finding on consideration, I turn to address briefly, two other submissions made by the defendant; one relating to agreements to agree, the other to matters relating to the exercise of the discretion.

It was submitted by the Solicitor-General that clause 4.1 was an "agreement to agree", and therefore unenforceable. I was directed to the leading judgments in this area, including Courtney and Fairbairn Limited v

Totaini Brothers (Hotels) Limited [1975] 1 All ER 716, and Mallozzi v Carapelli SPA [1976] 1 Lloyds Rep 407. In my judgment clause 4.1 is not in the same class of clause as those considered in those cases. In Courtney the question was whether an agreement to negotiate a price for a building contract, without machinery provisions, could be enforceable. In Mallozzi, a charter party contained a clause which provided for the first or second port of call to be agreed between the parties once the ship had passed through the Straits of Gibraltar. It will be apparent that in both cases, there was a need for agreement to be reached in order to give effect to the main purpose of the contract. By contrast, in the present case, it is the right of renegotiation in itself which was seen as a valuable right. There was no need for agreement to be reached; the contract did not provide for agreement to be reached. Clause 4.1 in no way determines what the outcome of any negotiation should be. In essence, the parties contracted for a right to be heard before the agreement expired. That was seen as a benefit per se conferred by the contract. For these reasons I am of the view that the "agreement to agree" cases are distinguishable, and that the contract would not be unenforceable on that ground.

The final substantive argument raised by the Solicitor-General was that in any event the Court should refuse to grant relief because to do so would be to enter into an area which is properly the preserve of Government

and in respect of which the Courts should be reluctant to meddle. He submitted:

> "In this case the declarations sought are intended to put pressure on Ministers and officials to engage in actions said to be required under a contract. The implicit purpose of the plaintiff is to cause the Government to act in a manner that would not be inconsistent with it continuing to promote the passage through Parliament of the Smoke-Free Environments Bill. The purpose thus is to inhibit the passage of legislation. It is submitted that inevitably must be the effect of the making of declaratory Orders by the Court.

In his notes of arguments on behalf of the plaintiff, Mr Craddock as his final submission said:

> "The plaintiff does not seek by these proceedings to fetter the consideration by Parliament of legislation; but Parliament is entitled to know that the legislation will be in breach of this agreement."

I questioned Mr Craddock about the ultimate assertion because it appeared to me that it did not necessarily follow from the earlier premise. Nothing on the face of the contract precluded legislation which took effect after the expiry of the term. Similarly, there would be no breach in introducing legislation which was to take effect on the expiration of the stipulated term. There is nothing in the agreement which gives any indication as to what the relationship is to be after the expiry date. The agreement is neutral and silent thereon. The only matter contemplated is a right to re-negotiate, and in my

judgment a plain reading of the words does not suggest that the Government exercising other options at the same time is acting in a way which is inconsistent or improper.

In my judgment the constitutional position in New Zealand (as in the United Kingdom) is clear and unambiguous. Parliament is supreme and the function of the Courts is to interpret the law as laid down by Parliament. The Courts do not have a power to consider the validity of properly enacted laws. I am reminded of what was said by Lord Simon of Glaisdale in Pickin v British Railways Board [1974] AC 765, 798:

> "The system by which, in this country, those liable to be affected by general political decisions have some control over the decision-making is parliamentary democracy. Its peculiar feature in constitutional law is the sovereignty of Parliament. This involves that, contrary to what was sometimes asserted before the 18th century, and in contradistinction to some other democratic systems, the courts in this country have no power to declare enacted law to be invalid. It was conceded before your Lordships (contrary to what seems to have been accepted in the Court of Appeal) that the courts cannot directly declare enacted law to be invalid. That being so, it would be odd if the same thing could be done indirectly, through frustration of the enacted law by the application of some alleged doctrine of equity."

That position is not restricted to the end of the law making process, but applies to steps necessarily preliminary to it. I respectfully adopt the summation of the position of McGechan J in Turner and Growers Exports Limited & Ors v Moyle (Wellington CP 720/88 15 December 1988) :

> "The important point is that under no circumstances will a Judge wish to appear to be attempting to influence the course which controversial legislation currently before the House should take."

Although I am of the view that in a strict and theoretical sense the Court could have made a declaration with regard to the force and effect of the agreement between these parties (if it had been a legally enforceable document) in all the circumstances I would have been unwilling to do so. I am forced to conclude (not least because of the manner in which both parties presented their submissions) that in this case, such a circumscribed approach would inevitably be misconstrued and used for jockeying and political advantage by the plaintiff. Hence there would be an appearance of interference and meddling even although that would not have been the Courts intention or desire.

In Rediffusion (Hong Kong) Limited v The Attorney General Hong Kong [1970] AC 1136, Lord Diplock in the majority judgment of their Lordships in the Privy Council noted at 1155 :

> "When considering an action claiming relief in the form of discretionary remedies only, it is thus important to distinguish between the jurisdiction of the Court to entertain the action at all. That is to embark upon the enquiry where the facts exist which would entitle the Court to grant the relief claimed, and a settled practice of the Court to exercise its discretion by

> withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction not a denial of it."

The reality of this case as noted above, is that notwithstanding the fact that the Government were formerly prepared to maintain an arrangement with the tobacco companies to have them subjected to a form of voluntary restraint rather than statutory or regulatory inhibition, it now has determined that the matter will be dealt with legislatively. Even if the agreement which expires on 15 December 1990 had been legally enforceable, the only right remaining thereunder, was a right to renegotiation with the Government. There is nothing akin to a right to a renewal of the agreement on any terms. The agreement provided nothing more nor less than an opportunity to meet and discuss the possibility of a continuing voluntary regime.

Courts cannot divorce themselves from reality. To declare that there was a right to such a meeting would be a fruitless exercise. Those who took part in the meeting and negotiation on behalf of the defendant would do so in the knowledge that there is before Parliament a bill which would make any negotiations a sham. The fact that the declaration of the right to the meeting could be misinterpreted as an interference with the Government's right to introduce and progress legislation, would be to

have the process of the Court abused. One can readily understand the desire of the plaintiff to have continuing dialogue with the defendant in this controversial area. Equally however, the supreme and exclusive right of a Government to legislate must be recognised. For the Court to lend its weight to a particular position by declaring that there should be a negotiation, when such negotiation cannot be fruitful, would in my judgment be imprudent.

I should note for completeness that a substantial portion of the argument for the plaintiff centred upon the Court's ability to imply terms necessarily required to make an agreement work. Reliance was placed on the decision of our Court of Appeal in Devonport Borough Council v Robbins [1979] 1 NZLR 1 which adopted the five conditions laid down by Lord Simon of Glaisdale in BP Refinery (Westernport) Pty Limited v Shire of Hastings (1977) 16 ALR 363. No challenge was advanced to the principles enunciated and had it been necessary I would have had no difficulty in concluding that the Court could have implied basic ground rules to put into effect the clear operational terms of the arrangement.

I however am of the view that the agreement was never legally enforceable and accordingly the plaintiffs cannot obtain relief. The question of costs is reserved.

J.

Solicitors

Simpson Grierson Butler White, Auckland for Plaintiff
Crown Law Office, Wellington for Defendant

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