

BETWEEN

TELECOM MOBILE  
LIMITED

Appellant

AND

THE COMMERCE  
COMMISSION

Respondent

Hearing 9 February 2006

Coram Elias CJ  
Blanchard J  
Tipping J  
McGrath J  
Sir Thomas Eichelbaum

Counsel A R Galbraith QC, J B M Smith and M C Smith for Appellant  
T Arnold QC, T Sissons, and K S Grau for Respondent

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**CIVIL APPEAL**

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10.04 am

Galbraith If the Court pleases I appear with Justin Smith and Martin Smith for the appellant.

Elias CJ Yes Thank you Mr Galbraith.

Arnold If the court pleases, I appear with Mr Sissons and Ms Grau for the respondent.

Elias CJ Thank you Mr Solicitor. Yes Mr Galbraith.

Galbraith Yes thank you. The case doesn't actually include a copy of the Act so if any member of the Court needs a copy of the Act, we did bring some along as I had trouble finding it. It's in the reprinted statutes.

Blanchard J It's in the bundle of authorities.

Elias CJ It's in the bundle of authorities.

Galbraith Oh, it's in the bundle of authorities is it. I never got that far.

Elias CJ Tab 5. It's the appellant's bundle of authorities.

Galbraith Yes, yes I realise that, I realise that. The second perhaps comment I'd just make before I commence is that the submissions I'm about to make have a slightly different emphasis from those which are in the written submission but Your Honours will see that as we go along.

Tipping J Does that mean they're really quite different from those in there?

Galbraith They're a little different, a little different.

Elias CJ Can you encapsulate the difference quickly for us Mr Galbraith.

Galbraith Yes I was going to.

Elias CJ Yes.

Galbraith I mean obviously what we say overall is that Justice France was correct and the Court of Appeal were incorrect. What we say in respect of section 12(1) is that it is a true contracting out provision and you find it in lots of statutes and I'll have a bit more to say about that.

Elias CJ I'm sorry, it's a true?

Galbraith Sorry, section 12(1) is a true contracting out provision.

Elias CJ Yep.

Galbraith And you'll find it in lots of statutes and the Solicitor-General in his submissions for the Commerce Commission (commerce commission) has referred to some of the other statutes where you do find it. What we say in respect of the Telecom contract provisions is that it's certainly arguable that they're caught by section 12(1). It's arguable they may not be. But it's arguable they are caught by section 12(1) but whether they are or not is of no moment in respect to the issue which the Court of Appeal was deciding and the High Court was deciding which was whether section 12(2) applies. So while I'll have some more to say about 12(1), because obviously one has to look at section 12 in its entire context, it's not the focus of these submissions.

The issue on appeal as I say is whether 12(2) applies and what I'll be saying is that 12(2)'s to deal with a different situation or different situations to that which are dealt with by 12(1) and 12(2) is to deal with, as it says, transactions, contracts or arrangements which have the

purpose or effect of defeating, evading, avoiding etc. And what that means is that you're looking at contracts which take the transaction out of the Act. It's no longer a transaction which is in terms of the Act a door to sale, at trade premises or one which is initiated by the vendor. You have some provision which takes it out of the Act and in that way defeats, avoids, evades the operation of the Act.

Elias CJ It's not a door to door sales agreement.

Galbraith It's not a door to door sales agreement.

Elias CJ Yes, yes.

Galbraith And so that's the essence of the argument.

Elias CJ Yes.

Galbraith Now we had a.

McGrath J Is the underlying assumption it's a device to take the transaction out of the Act.

Galbraith Yes. It may be for example, it may be something which doesn't in fact have a specific provision in the contract to take it out. It could be a provision saying this contract is deemed to be entered into at the trade premises of the vendor for example.

Elias CJ Mm.

Galbraith But it may not have that. What it may do is have 24 one-monthly contracts all less than \$40 or whatever the financial limit is under this Act. But in fact it's an overall transaction which should in normal circumstances provide for a 24-mth term of one transaction. So that's the.

Elias CJ Or it might be, it might affect application of part of the Act, for example the provisions as to restitution of goods it occurred to me. Because section 12(2) is not, doesn't give a remedy simply to a purchaser.

Galbraith No. It gets a bit awkward, at least in my submission, if one doesn't look at the words of 12(2) more as absolutes. Because once you start getting down to fine distinctions, and I'm not saying that in a pejorative way about what the Chief Justice just said to me, it gets a wee bit difficult. What it doesn't say in 12(2), it doesn't say that it catches modifications. It talks about evasion, defeating, avoiding, I forget the other word, preventing I think. But it doesn't talk about.

Elias CJ But it's the provisions of the Act.

Galbraith It's the operation of the Act.

Tipping J The operation.

Elias CJ Oh the operation of the Act.

Galbraith The operation of the Act.

Elias CJ Yes.

Galbraith Whereas 12(1)'s talking about provisions.

Elias CJ Yes.

Galbraith And so that's the essence of what we're now saying. We had perhaps a slightly more sophisticated approach in the written submissions but I actually think it's, or the one thing I do agree with the Court of Appeal, I think it's rather more straightforward than that.

Elias CJ Are you maintaining your three degrees of gravity.

Galbraith No.

Elias CJ No.

Galbraith No. I think that's a sophistry which doesn't get one to the right conclusion.

Tipping J What do you mean in this submission in relation to taking the transaction out of the Act.

Galbraith It means that, what I'm saying Your Honour is that if you have a provision, because in a contract you can provide for anything, you can provide in a contract that black is white. Between the parties, if you contract that, that's the position. So you can contract that as I say, that this transaction is deemed to have taken place at the trade premises of the vendor. Or for the purpose of this contract, the residence of the purchaser should be deemed to be the trade premises of the vendor. Or lots of other things one can think of that one could include in the contract. And for the purposes of the contract, that's the agreement between the parties.

Tipping J But the subsection says all these words, or preventing the operation of this Act in any respect.

Galbraith Yes well that would take it outside the Act because you then have an agreement between the parties that their contract in fact wasn't entered, sorry was entered into at trade premises. And of course the Door to Door Sales Act only applies to contracts which are not entered into at the trade premises of the vendor. So I want to expand on the argument

and we've sort of jumped right into the deep end of it. But the purport of section 12(2) or what it's attempting to deal with, are structurings or agreements which avoid, which is the word there, avoid the contract coming under the terms of this Act. And so in that way of course prevent the operation of the Act. And that's why you've got a very, if I can use this term, a rather, whereas the Act itself, where the Act applies, has quite a sophisticated penalty, or I shouldn't say penalty, sorry, remedy regime.

Elias CJ It's restitutionary arrangements.

Galbraith Yes, yes. And 12(2) doesn't.

Elias CJ Yes.

Galbraith It simply says you get all your money back, it applies whether the contract's been fully performed or is still to be performed. So the contract could be subject to limitation, could have been performed two years ago and the person's entirely happy but they still get all their money back, don't have to return the goods, doesn't provide for that. Nothing about fair wear and tear because it just doesn't apply. It's a, section 12(2) is a stand alone in my submission. It's a stand alone to capture what Justice McGrath put to me, what you might describe as devices to avoid the Act.

Elias CJ Well you characterise what I was putting to you as an over refinement but in fact it's much wider than that. Because it's anything which defeats the operation of the Act. It doesn't even on its face need to be a contract between the parties which is why I put to you.

Galbraith True, true.

Elias CJ An agreement which, to dispose of property which otherwise under the scheme of the Act would pass in the restitutionary provisions.

Galbraith Yes I'm sorry Your Honour, I didn't actually pick up the subtlety of what you were pointing out to me. No, Your Honour is quite correct. Yes and I accept that. So that's the thrust of what I want to say.

Elias CJ This is quite a different argument than you've advanced in your written submissions. I don't know whether the Solicitor - General has had an opportunity to consider it.

Galbraith No the Solicitor - General hasn't because actually when he rang me yesterday I denied I was even appearing in this case today.

Elias CJ In the case.

Galbraith But we straightened that out after about five minutes. He was a little bit stunned at my immediate response. So no, the Solicitor - General hasn't.

Tipping J This really cuts across the whole point of having written submissions in advance.

Elias CJ Yes.

Galbraith Your Honour I've got to, I mean if I'd thought of this argument at the time we put the written submissions in, it'd be in the written submissions. But unfortunately.

Tipping J Well I thought of it and didn't think you were raising it.

Galbraith Ah well, Your Honour probably put it more in focus better than I had at that stage.

Elias CJ Well that is the other point, that members of the court have had to consider some of these points.

Galbraith I apologise. There's not much.

Elias CJ Well we just don't expect it really from senior counsel Mr Galbraith.

Galbraith No, I'm sorry.

Elias CJ We do encounter it frequently unfortunately.

Galbraith I do apologise.

Elias CJ Anyway, the Solicitor - General can tell us if he needs any time to consider the argument but you can advance it.

Galbraith Yes. Thank you. Now before I perhaps go back into that argument can I just say a few things about the background facts. You would have picked some of this up from the judgments but it probably doesn't have all of the factual background there and I'm not pretending to, I don't want to traverse all that. As you know, what was being marketed was a 24 month mobile airtime service agreement with for most subscribers effectively a free phone, not for all but for most. And that I think depended on a trade in of an older phone. There was some free airtime involved in this. Now the only reason I'm explaining that is that there is no complaint here that the transaction that people entered into was in some way an unsatisfactory transaction. It was a, with the use of the vernacular, a good deal. And I think that appears to be.

Blanchard J Is this a commercial.

Galbraith No, no, I wasn't, it sounds like that. But all I'm, the point I want.

Blanchard J We get enough commercials.

Galbraith No, the point I really want to come to making Your Honour is that the Court of Appeal did get excited about the fact that people hadn't had the opportunity of the 7 day cooling off period. Now that's correct. But one has to look at it in the context of what this was about when one looks at the penalty which then flows if section 12(2) applies in the way the Court of Appeal sees it as applying. And they see it as applying to all, as it was before that Court, 14-odd thousand subscribers getting their money back effectively or getting the opportunity of getting their money back. I can tell you from the bar that in fact further research has indicated it's more like 22,000 subscribers getting their money back. Now that is in relation to a, again if I use the term, a deal which on the face of it was a perfectly, an advantageous deal which most of those subscribers have enjoyed for the full period of the 24 months and some through extensions and rolling into other contracts have continued to enjoy. So it just comes back to the proportionality of that sort of interpretation or that approach to section 12(2) as against the consequence which flows. The point that the chief justice was making to me that under the operation of the Act where it operates, it's more of a restitutionary, a balancing provisions of section 9 and 10 whereas section 12(2) isn't at all. section 12(2) just simply says, get your money back whether you, even if you enjoyed it, took the full benefit of it, perfectly happy with the transaction, you get your money back. So that's really the purpose, not so much to make the commercial Your Honours, I was referring to that.

The telemarketing, the court knows about. The terms are set out on page 16 of Vol 1 of the case on appeal. As you'll be aware from the discussion in the court below, the practical reason why there was a provision saying if you open the package then you're deemed to have accepted the terms is in a broad sense that you had to have some point at which the terms were accepted because of telemarketing the customer hadn't seen the terms until they arrived in the post.

Tipping J But isn't that what is in essence the problem here.

Galbraith Yes I agree. No that is, if there is a problem, that is the problem.

Tipping J If there is a problem, that's.

Galbraith I'm just explaining though.

Tipping J That's precisely it.

Galbraith Yes. But I'm just explaining.

Tipping J That people were misled into thinking that they couldn't open the parcel without as it were losing any right to reject.

Galbraith Yes. I accept that. All I'm explaining is why that's there. It wasn't there to mislead, it was there because it could have said next Friday you would be deemed to have accepted the terms of the first.

Tipping J Well it had the effect of misleading Mr Galbraith,

Galbraith Sorry?

Tipping J You'd accept that, wouldn't you. It'd have the effect objectively of misleading.

Galbraith Telecom's accepted the Fair Trading Act allegations. Telecom doesn't appeal those. So it's been accepted that it's misleading in terms of the Fair Trading Act.

Eichelbaum J Wasn't that a provision that defeated the operation of the Act.

Galbraith Well could I come to that Your Honour. Because that really is leaping before we've gone through the argument. But the short submission is no, it doesn't.

Tipping J Well no great surprise.

Galbraith Well it doesn't for one reason, of course, section 12(1) prevents it. So I mean that's, if there was a short answer to it, that's the short answer.

Blanchard J That's a little glib though.

Galbraith No, with respect Your Honour, I don't believe it is.

Blanchard J Well you said earlier, you've got to read the two subsections together.

Galbraith No I said you've got to consider both submissions in determining what each applies to.

Tipping J Well that would be to read or effect right out of the Act.

Galbraith No, no it would not at all Your Honour.

Tipping J Well I'd just put you on notice that I need some persuasion of that. You may wish to defer it.

Galbraith Well I've already addressed that Your Honour but I'll do it in more detail. But the point is that if you have a provision such as the ones I was discussing, or a structuring such as I was discussing, that does have the effect of defeating the operation of the Act because the Act doesn't apply. So with respect it's not correct to say that a provision which purports to modify a provision of the Act defeats the operation



of the Act. It doesn't with great respect. But I'll come to that in due course.

So all I was trying to explain at the moment was that.

Elias CJ If it's part of the door to door sales agreement.

Galbraith Yes, yes.

Elias CJ Yes.

Galbraith Yes, yes I agree.

Tipping J But if it is in law a transaction which is covered by the Act, are you really saying that the only effect of this 12(2) is to catch what my brother McGrath called devices.

Galbraith Um, well that is what 12(2) is about. It's about.

Tipping J A sham in effect. A sham?

Galbraith No, no they're not shams at all Your Honour.

McGrath J That's the trouble isn't it, they're not shams.

Galbraith They're not shams, that's the point. They're contracts, completely valid contracts. This Act doesn't make these contracts illegal or anything like that at all. With great respect to Your Honour, those are perfectly valid contracts which may say, deemed to be at the trade premises, or define the trade premises in some way or structure it with 24 one-monthly contracts. They're entirely valid, lawful contracts. This Act doesn't say they're illegal. Doesn't avoid them. What it does though in section 12(2) is it imposes a negative consequence. And unless one looks at the scheme of the Act which I'm trying to get to, of what happens where the Act does operate and then contrast that with section 12(2), with respect one wont interpret the operation of section 12 correctly.

But if I could just go back to what I was saying about opening the package. The reason for that, I mean it could have been, it could have said on the Friday following the date you get these terms you're deemed to have accepted them or it could have said a whole lot of other things, it had to have some point at which the purchaser was taken to have accepted the terms. Because as I say the purchaser wouldn't have seen the terms till they arrived in the post. Now the reason that it had opening the package as the cut-off point is because once the package is opened then if it is returned Telecom have a whole new problem, they've got to start from scratch, repackage etc and I can't describe all the difficulties with that. But if the court was at all interested, Justin Smith could.

Elias CJ Well that's all background really isn't it.

Galbraith It's only background.

Elias CJ Because the case turns on the interpretation and scheme of the legislation.

Galbraith Yes, yep. Yes it does.

Elias CJ And whatever Telecom intended by it is.

Galbraith Irrelevant.

Elias CJ Is irrelevant.

Galbraith Yep I agree.

Eichelbaum If it had said this contract will take effect next Friday.

Galbraith Mm hm.

Eichelbaum That gives the purchaser the opportunity of looking at the phone.

Galbraith Oh yes, that's right.

Eichelbaum And trying out the goods.

Galbraith That's right.

Eichelbaum And the provision that the purchaser couldn't do that without breaking the seals was fundamental to the arrangement and it was fundamentally a breach of the Act and defeated the Act in terms of 12(2) with respect.

Galbraith Well no with respect Sir, next Friday would have equally defeated, defeated or if you want to use that term, I don't agree that it does.

Eichelbaum Yes it would have, yes I agree.

Galbraith But it would be contrary to the Act because you wouldn't have seven days.

Eichelbaum Yes.

Galbraith And so, because by definition.

Elias CJ But it's not in dispute now.

Galbraith No it's not.

Elias CJ        Although it was until now.

Galbraith      Yes.

Elias CJ        That this is in breach of the Door to Door Sales Act.

Galbraith      It's not in dispute at all.

Elias CJ        Yes. So we start with that.

Galbraith      So.

Elias CJ        And now the consequences are a matter of statute.

Galbraith      Consequences are a matter of statute. And the only point I was going to make at the end of what I will truncate was that if the Court of Appeal's correct, then on the numbers which we now understand, we're talking about 22,000 customers who've had their phones and used their services for that period of time, getting all their money back whether they're happy or unhappy. And the odds are I think in reality that the vast majority of them are perfectly happy with what happened, however much there may be a breach of the Act.

And the effect of course of the orders in the court below which are there be advertising, inviting them to effectively apply to have their money back is that if you're on a free option, you get your money back for the thing you've already enjoyed, the odds are you're going to write in and say, please send me a cheque. So that's how 12(2) would apply on the interpretation below.

So the short question is, as the Chief Justice keeps bringing me back to, is whether 12(2) does dictate that result. It's not an answer to, or what obviously Telecom says among other things is that it would be surprising if the legislature intended that result which in the circumstances, the factual circumstances, the background circumstances I was talking about, seems on the face of it disproportionate to any "harm" that may have been caused. The Commerce Commission's short response to that is, well if you hadn't breached the Act then it wouldn't be a problem. That's not really an answer because one has to look at 12(2) and consider what the legislature's intent was in providing the consequence which it does. Which is money back, nothing to do with restitution at all, you just get everything back.

Obviously in reaching a view as to what the correct interpretation of section 12(2) is, we need to understand what the Act, how the Act does in fact operate. Can I just note, and Your Honours will have read all this, but just note a couple of features. As Your Honours are aware, it only applies to credit contracts that are not made at trade premises. It's a very limited range of contracts that it applies to. So if you had a

straight one-off transaction door to door, it doesn't apply. It's only a credit contract and it's got some financial limits in it also.

It doesn't make the contracts which don't comply illegal. There's nothing to stop you entering into one of these contracts. One of the effects of that of course is that it excludes the illegal contracts act so you don't have the discretionary remedy regime under the illegal contracts act.

It doesn't either create defences according to the fair trading act, defences for entering into non-complying contracts. So there's nothing like that. There is an offence section but it has nothing to do with entering into contracts.

The Commerce Commission's submissions talk about it imposing the obligations in section 6. In one sense that's correct. It says that if you have one of these contracts it should contain the requirements of section 6. But the consequence of not having that info which is required in section 6 of course is that the contract then becomes unenforceable under section 5. So again it's really just the same point I made a moment ago. It's not that it's required in the sense that if you don't put it in it's illegal or there's an offence created, you can't do it. It's just if you don't do what section 6 requires, then it's unenforceable so far as the vendor's concerned so you suffer that consequence.

It's perhaps just, without dwelling on it, worth noting that the section 6(1) requirements are not just the cooling off period. There is of course, there are of course requirements as to effective interest rates etc which one can understand in terms of a credit contract arrangement.

As the court will know, section 7 gives the purchaser the right to cancel within 7 days. If they've got the requisite notice under section 6(1). If the purchaser cancels then sections 9 and 10 apply which, as Your Honour the Chief Justice has said, effect a restitutionary type of regime. Now one can argue how it's weighted but it is a weighting. And so for example if goods are consumed in the normal course of, sorry, if they're goods that are consumed in the normal course of activity, then the purchaser has to give a credit for that consumption. Or if there's been something other than fair wear and tear there's a credit. And the purchaser's got to return the goods etc. So it's a restitutionary type regime that applies on cancellation.

If the notice of the cooling off period's not given, then as I said, the contract's unenforceable under section 5(1) by the vendor. In that circumstance of notice not being given, and this is in my respectful submission important, the consequence or the if you like to call it the remedy which the Act actually provides under section 7(3) is that the purchaser then has the right to cancel within 30 days. There's no other consequences. The section 5(1) consequence and the purchaser has a right to cancel within 30 days. Nothing in the Act about whether the

purchaser has to know, not know anything at all. It's simply that what the legislature has chosen in this particular very confined context of these transactions is that if you haven't given the notice so the purchaser doesn't have notice they've got the 7 day right, then the only right they have under the Act is the 30 day rt. And there's no revival of their right to cancel if they get to know later on except under section 8 which we'll come to in a moment.

Eichelbaum So that if by, whether by accident or by design, the vendor manages to keep from the purchasers their rights of cancellation for the period in excess of a month, then the purchasers lose that remedy on your interpretation of section 12.

Galbraith If we just, let's leave section 12 aside for the moment Your Honour.

Eichelbaum Yes.

Galbraith That's certainly up to section 12, that's how the Act operates.

Eichelbaum Yes.

Galbraith And that's there's a specific remedy, if you call it a remedy, there's a specific right which the legislature has conferred. And one could speculate about why it's limited in that way. But one can I think quite readily think of a number of sensible reasons why that might be. One of the sensible reasons would be the vendor still can't enforce the contract of course because section 5(1) still applies. So the vendor's got that disadvantage. But it gets much harder to apply restitutionary type adjustments once you start getting out beyond 30 days, 60 days, 90 days, five years. I mean what's it going to be. How are you going to adjust fairly between the parties five years down the track. And my respectful submission is that one's got to recognise what the Act's about. It's, I don't want to diminish it, but it's only about a 7-day cooling off period. It's not about life and death. And so 30 days out, the legislature has decided, well that's it.

Tipping J That's in response to a mere failure to notify.

Galbraith Look let's just leave 12(2) aside for the moment.

Tipping J No I'm not talking about section 12(2). I'm saying that you lose your rights if there is a mere failure to notify. In other words if all that has happened is there's been a failure to observe section 6, then you will lose your rights. But it doesn't trench on where there is something more.

Elias CJ A concealment.

Tipping J Well yes, either.

Galbraith Well that's section 12 you're talking about. The Act.

Tipping J I'm just, yes I know I'm indirectly talking about 12(2) but we, the consequence of the expiry of the month I'm putting to you Mr Galbraith only happens when there's a breach of section 6 simplicitor.

Galbraith Well the right to cancel only arises, I'll start again. Section 7 is only about cancellation in relation to the cooling off period. Put it that way. That's all it's about.

Tipping J Mm.

Galbraith So that's all it deals with. I mean it's not surprising that's all it deals with. That's all it's about. I don't think with respect we should be trying to read things into.

Tipping J The Parliament must have intended that if the 7 day period, you weren't told about.

Galbraith Yep.

Tipping J You had a month.

Galbraith That's right.

Tipping J And somewhere or other during that month it presupposes that you've got to hear about your right.

Galbraith No. It doesn't say that at all.

Tipping J No, no, it doesn't say it but it must clearly.

Galbraith No it can't possibly Your Honour. Because the easiest thing in the wide world would have been to put a revision in saying that you've got a right to cancel 30 days after you first find out about it. Or put a revision in saying the vendor is obliged if at any time it realises it hasn't given the notice to give notice.

Tipping J No, no. We're at cross purposes. All I'm saying is you're not going to cancel within the month are you unless you happen to get to know about your right to do so.

Galbraith Well that's correct and the legislature has accepted that. It hasn't gone on, if we just leave 12(2) aside for the moment, it hasn't gone on, presumably for very good reasons, to say that when you do know you get another right to cancel. Because one good reason seems to me it gets very difficult to then apply the restitutionary regime of section 9 and 10 because that might be five years down the track. And how are you going to do anything about that then. And how are you going to know the person would have cancelled back five years before. And so

with respect Your Honour is reading an intention into this Act which I with respect can't get from there.

Tipping J What intention do you say I'm reading in. Because I.

Galbraith Well you're reading in an intention that people have to know, that the legislature intended some remedy, some remedy under the Act that.

Tipping J Well I'm just saying Mr Galbraith in ruminating on the fact that as a practical proposition, you're not going to be able to exercise your one month right.

Galbraith Sure.

Tipping J Unless you happen to get to know.

Galbraith Mm hm.

Tipping J And I'm just ruminating on where that might sort of fit into the whole picture.

McGrath J Mr Galbraith can I, I'm sorry, you may not want to answer this question, but I'd just like to put to you how section 8 fits into this.

Galbraith Alright, could I.

McGrath J No but can I just, the proposition that you're saying is that after 30 days rights are lost.

Galbraith Yes.

McGrath J But isn't the reality that even after that time, a vendor who wishes to enforce the contract.

Galbraith Yes.

McGrath J Basically must give a notice.

Galbraith Yes.

McGrath J That reawakens the right to cancel.

Galbraith Yes, yes.

McGrath J I mean at all stages, isn't it the position that at all stages during the length of the contract.

Galbraith Yes.

- McGrath J A vendor who wants to enforce must first give the opportunity to cancel to a purchaser.
- Galbraith Yes, that's absolutely right. That's absolutely right. And I'll come to section, well perhaps we'll finish with section 7 for the moment. But what the Act provides at the moment, subject to section 8, which we'll just come to, is that there's 30 days and that's the end of it. After that if the parties cheerfully go on with their contract, that's fine. Nothing in the Act prohibits that. But what it does mean, was the point that His Honour Justice McGrath's making to me, what it does mean, the vendor's going on with the risk that the vendor can't enforce the contract. That's the risk the vendor's taking.
- McGrath J At any stage the purchaser could just say I'm not going to pay any more.
- Galbraith That's right, that's right.
- McGrath J And I just, I think with respect you're causing a little confusion by suggesting that after 30 days rights are lost. Because you've got to read section 8 I suggest in the whole context. And section 8 really means that the purchaser's rights continue beyond then because there must always be an opportunity if ever it sought to enforce the contract.
- Galbraith Well I wasn't saying that rights were lost. All I was saying is that what the Act provides is that there is a, the purchaser can cancel up to 30 days. That's what the legislature has provided.
- McGrath J Sorry, I may have misunderstood that.
- Galbraith Now, yes. But the legislature doesn't say, and if the purchaser hasn't because the purchaser didn't know, what I've already said, I'm not going to repeat that. But neither does it say, if it doesn't happen because the purchaser doesn't know, the contract's now void and no effect and you can't, you continue it you're going to be locked up in jail or anything like that at all. The parties can cheerfully go on either in ignorance because neither of them realise they're in breach of the, that there's been a failure to comply with the Act or perhaps one of them knows and one of them doesn't know. Or one of them's a lawyer and one of them's not a lawyer or whatever else, can cheerfully go on performing the contract but the vendor has got the problem that under section 5(1) the vendor can't enforce the contract and as Your Honour quite rightly says, if the purchaser at some stage down the track either doesn't pay because they just don't pay or they don't pay because they end up in a dispute with the vendor or whatever else, the vendor's at risk. Now section 8.
- Elias CJ Sorry, before you, what does enforce mean.
- Tipping J Mm, that's an interesting question.



Galbraith Sorry?

Elias CJ What does enforce mean?

Galbraith Oh you mean unenforceability.

Tipping J Mm.

Elias CJ Yes. Is it simply compel through legal action or is it accept payment.

Galbraith I.

Elias CJ Or require payment.

Galbraith Well.

Tipping J For example could you get the phone back.

Galbraith Um, no. No you couldn't get the phone back.

Tipping J You couldn't get the phone back, you couldn't get the money. So in effect the purchaser keeps the phone and doesn't have to pay any money.

Galbraith That's right.

Tipping J By dint of the unenforceability.

Galbraith That's right. But if the purchaser does send the phone back or pay the money, which was the question that the Chief Justice was asking me, then that's fine. There's nothing to prevent that happening. The legislature hasn't set out to stop the parties performing the contract if they choose to.

Tipping J But if that view of unenforceability is taken Mr Galbraith, there is then a de facto cancellation. Because your client is in an impossible position.

Galbraith No.

Tipping J You can't get the money and you can't get the phone.

Galbraith No but what will happen is, well you cant get the phone. But what will happen is that if, as has happened, it's with respect Your Honour not correct, because what happened here, as I was trying to describe earlier on, was that people cheerfully went through their 24 month contracts paying their money. A lot of them are still clients of Telecom, still paying their money and that's fine.

Tipping J But what if they tumble to the fact after two months that your client can't enforce the contract.

Galbraith Sure.

Tipping J And they're a bit hard nosed, they'll say I'm keeping the phone and I'm not paying you anything. And there's nothing you can do about it.

Galbraith Nothing you can do about it. That's right.

Eichelbaum Does property pass under an unenforceable contract.

Galbraith It's only, it's not an unenforceable contract. It's the vendor can't enforce under section 5(1) Your Honour. That's the provision which.

Tipping J So you've got the phone.

Galbraith Yep.

Tipping J But the vendor can't enforce any of its executory rights.

Galbraith That's right.

Elias CJ Which is perhaps another reason why there, why section 12 is directed at a different contract.

McGrath J Mr Galbraith, the impression I got on reading the Act was that section 8 was there to counter the disadvantage my brother Tipping refers to.

Galbraith Yes exactly.

McGrath J And what would happen is that a vendor unable to enforce who was having a purchaser who wasn't paying, would effectively give the notice and thereby compel the purchaser to elect either to continue with the contract in which case it was validated, or to cancel. But, and this is the point I think that my brother Tipping's concerned with, if there was an election to cancel, my understanding was there were provisions for restitution that came then to apply.

Galbraith Yes. Because the section 9 and 10 provisions then apply.

Elias CJ Yes.

McGrath J Yes.

Galbraith What section 8 is an option, I mean the vendor's otherwise sitting there.

Elias CJ Yes.

Galbraith If the purchaser reneges, cant do anything about it. So section 8 provides an option to the vendor for the benefit at the choice of the vendor. What the vendor's got to weigh up is if I give this notice, is the purchaser likely to cancel or not. Which way am I better off.

Tipping J But isn't it better to give the notice.

Galbraith Sorry?

Tipping J Because then if it's cancelled you'll get the phone back. And if it's not cancelled you'll simply carry on as normal.

Elias CJ Well it depends what stage the contract is at doesn't it.

Galbraith That's right, that's right.

Elias CJ I mean in the present case I don't imagine there's any question of Telecom wanting to give notice under section 8 because of the restitution consequences of cancellation.

Galbraith Telecom would be mad to give notice under section 8.

Elias CJ Yes.

Galbraith And that may apply in many circumstances.

Elias CJ Yes.

Galbraith I mean you take the situation of the lawnmower man who enters into a contract to mow your lawns but gets paid up front and he's going to mow your lawns, or she's going to mow your lawns for six months and mows lawns for X months sort of thing and then you don't pay. You're not going to get into a cancellation argument. Because one of the problems about services such as lawn mowing is under 9(6) in fact you don't get credit for services you've provided.

Elias CJ No.

Galbraith So the poor old lawnmower man who's kept your lawns nice and trim for umpteen months then ends up having to give all the money back and you've had the free services. I mean it's.

Tipping J Is this all introductory to the concept that section 12(2) is really dealing with collateral transactions that aren't really the.

Galbraith Yes.

Tipping J The substance of the door to door sales.

Galbraith Yes that's the point I was making. That it's contracts which are outside the Act which.

Tipping J Collateral to the substantive contract if you like.

Galbraith Well.

Tipping J Perhaps collateral's not a very good word.

Galbraith No collateral's not the right word.

Tipping J Conceptually separate from.

Galbraith Well they've moved what could have been a door to door sales transaction outside the Act, that's one.

Tipping J What could have been.

Galbraith Well it could have been if the contract didn't agree for example that, well it wasn't split into 24 one-monthly contracts under \$40. If it hadn't.

Tipping J You mean instead of what was genuinely of contract at a \$500 they've made it.

Galbraith Yeah.

Tipping J 500 contracts of 1 dollar

Galbraith Oh, yeah, \$1, yes. Or \$10 or \$20 or whatever.

Tipping J Or 50 of \$10.

Galbraith Yes that's right.

Tipping J That sort of thing.

Galbraith Mm.

Blanchard J As Justice McGrath said, a device.

Galbraith Yeah, a device.

Elias CJ I don't think it's simply confined to device.

Galbraith No, no it's not.

Elias CJ It may catch devices.

Galbraith Yes.

Elias CJ But it must be broader than that.

Galbraith Yes.

Elias CJ That's why I suggested a sale to a third party.

Galbraith Yes.

Elias CJ Of goods that you'd otherwise have to restore.

Galbraith Yes.

Elias CJ Or perhaps a refinancing.

Galbraith Yes.

Elias CJ So that you're relying on the refinance contract rather than the enforcement under the Door to Door Sales Act. Something like that.

Galbraith I accept Your Honour's point before. I think that is correct. I think, but it, and device um.

Tipping J But it talks about money paid as part of any such transaction. Or under any such contract or arrangement may be recovered.

Galbraith Hang on, we're at 12(2) now are we.

Tipping J 12(2), I'm sorry, we keep coming to it Mr Galbraith. I know you want to keep off it.

Galbraith Well I'd like to get to 12(1) first if I may.

Tipping J But alright, well look forget it and let's leave the barrage until you get there.

Galbraith Okay. But that's the point of section 8 and there'll be many circumstances and I'll come back to section 8 later on. But for example with respect the Commerce Commission's submission in my respectful submission is not correct when it says that section 8 is some sort of remedy for section 12(2).

Elias CJ Or indeed the query about the emphasis on encouraging recourse to section 8.

Galbraith No, yes.

Elias CJ I find it difficult to see any such intention in the scheme of the Act.

Galbraith

No well that was going to be my respectful submission when I came to that. It doesn't actually fit or work. Because one of the things is that 12(2) applies, as I say, even if the contract's expired and fully performed etc. And how one can then think of cancellation in relation to something that doesn't exist any more. I mean I suppose one could have a section that perceives that but I can't find that in the Act.

In any event, if we can come forward to section 12 now and just talk about 12(1) for a moment. Section 12(1) is a pretty standard provision. You find that in lots of Acts. And the Commerce Commission in their submission has referred in paragraph 21 to a number of sections, not all of which actually are the section 12(1) provision but I can just note that the Employment Relations Act has a 12(1) provision. The Credit Contracts Act has a 12(1) provision. The Employment Contracts Act has a 12(1) provision. And those three Acts, unlike this Act, only have 12(1).

Now the reason for 12(1) is, as I said before, is simply to prevent contracting out. Because you can contract, I mean between the parties they can contract in any way they like. And what it says is that the provisions of the Act shall have effect notwithstanding any provisions that are contrary in any agreement. So if you had a provision in the agreement which says that the terms of the Door to Door Sales Act as it applies to this contract shall be varied to provide only three days right of cancellation or if it says 30 days, it won't have any effect. It won't alter the effect of the terms of the Act. Or if it had a provision which tried to amend the restitutionary provisions, again it wouldn't affect the operation of the provisions of the Act.

And so in my submission 12(1) is the classic no-contracting out provisions. And when you look in the other Acts you'll find, as in my respectful submission applies in this Act, you won't find penalties attached to 12(1). 12(1) generally in Acts stands on its own. Certainly in those Acts which I've referred to.

So the consequences if you have a provision which is caught by 12(1), is simply that the Act continues to operate. It doesn't affect the operation of the Act at all. And so, and I'll come back to the Telecom provisions here, but if you interpret the Telecom provisions as being to the contrary of the provisions of the Act, then too bad, it doesn't help, the provisions of the Act still take effect. And the Telecom contract is under the Door to Door Sales Act. And the Act operates in its terms in respect of the Telecom contracts.

So that's what 12(1) provides. 12(2) is less regularly found or equivalent of 12(2) less regularly found in legislation. And it's usually found in circumstances where, or it seems to me at least reading through it, more complicated provisions. And I noticed in the Residential Tenancies Act you'll find the provisions are rather more complex. There isn't a 12(1) provision. There's a much more

complicated section 137(1) provision. And there's offences provisions which are attached to it. You create an offence, an offence is created if you do some of these things.

And why for example you don't find a 12(2) in the credit Contracts Act seems to me to be because in the Credit Contracts Act what a credit contract is is defined in terms that in effect you can't get around. I mean it's a contract which provides credit and there's about two pages of definitions which capture you. But here of course what you've got under the Door to Door Sales Act, you've got a situation which it's relatively easy to get around. Because the Door to Door Sales Act applies only where you have a contract that doesn't take place at trade premises and there's restrictions on the amount of money, less than \$40 is basically excluded etc, so you can see it's quite easy to get around that in a contract by saying, by deeming the purchaser's premises to be trade premises for the purposes of the contract or by breaking up the contract into less than \$40. There's plenty of ways you can get around it. You can't get around the credit contract under the Credit Contracts Act. It's either a credit contract or it's not. And it's pretty hard to see, if you're giving credit, how you can structure it in any way that you're not giving credit.

So it seems to me that's the reason that you, in the Credit Contracts Act, you only find the equivalent of section 12(1) but in this Act you find the equivalent of section 12, you find section 12(2).

Galbraith So it seems to me that's the reason that you, in the Credit Contracts Act you only find the equivalent of section 12(1) but in this act you find there's the equivalent of section, you find section 12(2).

McGrath J This Act's really applying ... to sales of goods is it not.

Galbraith And services.

McGrath J And services. But sales of goods and services.

Galbraith It got extended to services.

McGrath J Now, just if I can put, if you had a device that basically set up the transaction so that there was no sale of goods involved but possession of the cell phone passed for a period, would that be the sort of device you mentioned. In other words if there was a renting, a leasing of a cell phone. But no transfer of property such as would be necessary to constitute a sale of goods.

Galbraith Look I'd have to go back and look at the definition to see whether that was in fact caught or not. But assuming that that wasn't caught by the definition, the answer is yes.

McGrath J      Whats in my mind Mr Galbraith is that you've cited some, or the submissions you did put in, have cited some of the old Stabilisation of Prices Regulations cases.

Galbraith      Yes, yes.

McGrath J      And one of the devices that it seems from reading those cases that was entered into was to, fairly early on, was to lease cars rather than to sell them. And issues arose, and ultimately new regulations had to be made.

Galbraith      Yes.

McGrath J      But I wondered whether there might be, 12(2) might cover that sort of thing. In other words something that wasn't actually going to involve a sale of goods or the provision of services but basically just a leasing of goods, a bailment of goods or whatever you like. And that they wanted to avoid lawyers setting up transactions in that way because the Act wouldn't operate on them.

Galbraith      Um, yes Mr Smith's just pointed out to me the definition actually does catch leasing and hiring and bailing of goods. But I'm sure that.

McGrath J      Does it, yes, oh well that's an answer to that.

Galbraith      But I think the principle that Your Honour's putting to me is absolutely correct. It's trying to stop, in inverted commas, smart ways of avoiding the Act which is what it says.

McGrath J      The real issue in the, I mean it seems to me that's actually fairly clear and it's probably the principal purpose.

Galbraith      Yes.

McGrath J      But the real issue in the appeal that the Solicitor - General's raising is whether it also goes further because of the way ... is expressed.

Galbraith      I accept that. But if we can just, if you don't mind, just make sure we get the thrust at least of section 12 clear first. It, in my respectful submission, is intended to catch just the sort of situation that His Honour Justice McGrath was talking about. Attempts to avoid the operation of the Act by taking the transaction outside the terms of the Act by as I say the terms of the agreement which was entered into or by a structuring.

Tipping J      But it doesn't require it to take it out of the Act as a whole. It's the operation of the Act in any respect.

Galbraith      Ah.



Tipping J It's not just confined to attempts if you like to just get round the whole Act.

Galbraith Yep.

Tipping J It's attempts to get round any part of the Act.

Galbraith Yes. Well attempts to, it's not attempts, it's a transaction.

Tipping J Well I use that in a loose sense.

Galbraith That's right. For the purpose or having the effect of, all of those things.

Tipping J Yes.

Blanchard J In any way.

Tipping J In any way?

Blanchard J Yes, directly or indirectly.

Tipping J Or indirectly.

Galbraith Yes. I've described to you with what seems to me the ways in which one does avoid the operation of the Act. The difference and the reason that it doesn't apply in respect to an omission for example of, say there was just a simple omission of the notice of right to cancel. Is that, that is still caught, expressly caught, by the provisions of section 6, section 5. And section 7(3) for that matter. The Act provides for how that is to be dealt with. It doesn't, an omission doesn't avoid the operation of the Act because the Act operates, the Act specifically contemplates what happens if you don't give the 7 day notice, then you get a section 7(3) right. It can't, with respect I can't see how one can argue that omitting the notice which you're meant to give under section 6(1) in any way avoids the operation of the Act because the Act deals with that situation.

Tipping J Provides for that.

Galbraith Yes.

Tipping J That's why I suggested it some time ago, that it doesn't catch pure omissions, it catches something more.

Galbraith Well then the difficulty Your Honour has is in deciding what's more. Because it catches, I mean what is the more? If you say you've got 30 days to cancel, which isn't what the Act says, um.

Tipping J Yeah but say it just.

Galbraith It doesn't affect the operation of the Act at all.

Tipping J Say it isn't a pure omission. Say it is something which doesn't just omit the right info, it positively gives the wrong info.

Galbraith So?

Tipping J Which is really this case.

Galbraith Well you've got the Fair Trading Act for that.

Tipping J Well maybe you have got the fair trading act for that. But.

Blanchard J You didn't have when this Act was passed.

Galbraith Um, no you didn't at that stage. But you do have it now. But there's nothing in this Act about giving the wrong information.

Tipping J But that has the effect on its face of preventing the operation of the Act because it puts people off the scent.

Galbraith But it doesn't prevent the operation of the Act as the Act provides for. That's something collateral behind the scenes. There may be all sorts of influences. I mean are you going to enquire to see whether the customer is a lawyer or works for the Commerce Commission. Or has had previous dealings with the Door to Door Sales Act.

Tipping J Well it could have been you yesterday by the sound of it Mr Galbraith.

Galbraith Could have been, could have been. But that's the point. I mean once you start getting into this realm of, well that may mislead, deceive, something or other, you're into a whole subjective realm. And that's not what this Act is about. It doesn't deal with knowledge. It doesn't deal with knowledge. It doesn't deal with that at all.

Tipping J It deals with effect.

Blanchard J And purpose.

Tipping J And purpose.

Galbraith Purpose and effect in section 12(2), yes it does. But that in my respectful submission is an objective test and we're now getting into subjective in what the Court is speculating about. And that is where I touch base again with what we've said in our written submissions that the way that Courts approach these sort of provisions is objectively not getting involved in some subjective exercise as to whether there has in fact been deception or whatever else it might be. And it's the same with the Fair Trading Act of course too. That's how it works in the

Fair Trading Act. Deceptive conduct is judged objectively. Nothing to do with intention or anything.

Tipping J But isn't there conceptually a marked difference between simply omitting the 7 day notice and say giving them a 3 day period.

Galbraith Well.

Tipping J Actually expressly getting it wrong. Whether advertently or inadvertently.

Galbraith Well if the person doesn't know that there's a Door to Door Sales Act because they're not given the schedule for example which has the notice provisions in it, how on earth is that less misleading than telling them there is a Door to Door Sales Act, you've only got three days. I mean it just with respect, I can't, and this is why I think Your Honour's then getting into a sort of subjective type area when that's not what this Act is about. Because if a person doesn't know they've got a right to cancel at all, why is that a better situation than they know they've got a right to cancel or believe they've got a right to cancel in 3 days. I can't with respect see the distinction. I can't see a valid distinction in any case.

And the Act doesn't deal with that. The Act operates. That's what section 12(1) says. If you have your three day thing, it doesn't count. If you put 30 days in it doesn't count.

Tipping J Well it would, it would bind you contractually.

Galbraith I agree with that. It doesn't count under the Act.

Tipping J It doesn't count under the Act.

Galbraith It doesn't affect the operation of the Act.

Tipping J No, no.

Elias CJ It's really a question of the scope of section 12 isn't it. And one of the points that seems strange given the earlier scheme of the provisions is that section 12(2) makes a transaction unenforceable except in that, in the respect of money paid over. Whereas the earlier provisions don't because they're enforceable by the purchaser.

Galbraith Yes.

Elias CJ If the purchaser wants to enforce the provisions, they can. Here, you know, it's inconsistent.

Galbraith Yes. Well, and it's interesting too. I mean also the point Your Honour's making makes another point I was going to make. That the

reason you get unenforceable in section 12, which actually is a different unenforceable than the section 5(1) unenforceable.

Elias CJ Yes, yes.

Galbraith Is because the Act is still cheerfully applying to any breaches of section 6(1) and section 5(1) applies. When you get to the sort of contract I was talking about, that takes it outside the Act, then of course section 6, section 5 don't apply. So if you're going to do, you've got to do something about them 12. Which is why in 12 you have an unenforceable. And it's a blanket unenforceable as Your Honour rightly puts to me. So it's because the Act.

Elias CJ And the recoverability applies equally to the vendor.

Galbraith Yes, yes. And the Act isn't operating here. Which is why as I say you've got to have an unenforceable. But in all the examples that have been with respect given to me, the Act is operating and section 5 makes it unenforceable in the limited way that it is. So if you have your three days or your 30 days or whatever else you have, the Act is still operating and section 6 and section 5 apply. What you're dealing with in section 12 is where section 6, sorry ss.6 and 5 don't apply, because you've taken it outside the Act. The Act is not operating.

Blanchard J But you cant take it outside the Act because of section 12(1).

Galbraith No you can Your Honour with respect.

Blanchard J Well your attempt to take it outside the Act is of no effect.

Galbraith No, no.

Blanchard J Under section 12(1).

Galbraith No, the provision to the contrary, if you have a provision which says that the, well let's take the simple one which has nothing to do with 12(1). You've re-structured in 24 one-mthly contracts. 12(1) has no bite on that at all, it's nothing to do with the provision in it at all. And my respectful submission is if you have a provision in your contract which says the purchaser's home for the purpose of this contract is deemed to be the trade premises of the vendor for whatever reasons, that's not contrary to the provisions of the Act at all. The Act doesn't deal with, doesn't prevent that. 12(1) is where you try and have your three days instead of your 7 days. That's fine, 12(1) deals with that. But 12(2)'s dealing with a different circumstances. And that's why, as I say in a lot of the Acts, you won't find a 12(2), or equivalent of the 12(2) because you cant so easily, as I said before, I'm repeating myself, in the credit contracts act, you cant so easily take a credit contract and make it not a credit contract. You can very easily in a contract make what was truly factually a Door to Door Sales transaction, you can very

easily by contract stop it being a Door to Door Sales transaction. And so that's why you've got 12(2) there and it's to deal with that sort of, it's to deal with that circumstances.

Tipping J      Wouldn't that be caught by 12(1) also.

Galbraith      No.

Tipping J      Why not.

Galbraith      Well with respect Your Honour because it's not contrary to the provisions of the Act. It's a.

Tipping J      Notwithstanding, this Act should have effect notwithstanding any provisions to the contrary.

Galbraith      Yes.

Tipping J      In other words you're trying to get out of it by pretending it was in the different sale venue.

Galbraith      Well you've contracted, you've contracted, which you can always do, you can contract to say black is white. You can contract, with respect Your Honour you can. You can contract always for your own definitions of anything in a contract.

Tipping J      Yes of course you can.

Galbraith      Yes.

Tipping J      But if it amounts to a provision to the contrary.

Galbraith      But there isn't a.

Tipping J      Of the reality then surely you'd be struck down.

Galbraith      But there isn't a provision to the contrary in the Act.

Tipping J      No it's a provision to the contrary in the agreement. It's saying something that is designed to take it out of the Act.

Galbraith      Yes.

Tipping J      To get round the Act.

Galbraith      Yes.

Tipping J      But the Act doesn't allow it because if 12.

Galbraith The Act does allow it. The Act does allow it. The Act doesn't prohibit, as I've said before, it doesn't prohibit anything being done at all.

Tipping J Well it simply.

Galbraith The Act has no prohibitions, it doesn't make things illegal, it doesn't do any of that at all. The Act simply applies a consequence to a contract or agreement which comes within the terms of the Act. If you by your contract take it out of the terms of the Act then the Act doesn't apply. That's what 12(2)'s about. 12(1)'s about the sort of example Your Honour gave me where you try and change the terms of the Act. You say 3 days. And that's contrary to the provisions. That's a provision to the contrary of the provisions of the Act.

McGrath J So your argument Mr Galbraith is really that you, under subsection (1) you cant contract against the terms of the Act.

Galbraith No.

McGrath J Under subsection (2), if you do something smart.

Galbraith Yeah.

McGrath J That takes your transaction outside the terms, well that's going to be ignored.

Galbraith Yeah. And you've only got to look at the Credit Contracts Act, that provision which is a section 12(1) provision, to see that's exactly what the legislature generally does. It has a non-contracting out provision in relation to effectively the terms of the Act. That's what 12(1)'s about. It's not some great expansive catch all. And 12(2) is for the situation that 12(1) doesn't deal with. And that's why, as I said before, I'm repeating myself again, that's why 12(2) has to provide, there's two reasons: has to provide for unenforceability and it provides for a wider unenforceability than 5(1) and it also provides for a different remedy than that which you get under the Act. And it's because it's dealing with something different. Whereas under the Act if you, I'm repeating myself.

McGrath J Literally really, only 12(1) on that argument is a contracting out provision.

Galbraith Yes. Yes Your Honour's quite right.

McGrath J Mm.

Galbraith A classic construction out provision.

McGrath J So is the heading any use to us in interpreting subsection (2).

Galbraith Um, well it's certainly, it's the same heading you'll find in all these other Acts with a 12(1) underneath it. And I think it's used a bit generically.

Elias CJ Well it's about avoidance by contract.

Galbraith Yes, yes.

Elias CJ In a general sense.

Galbraith Which is what we're dealing with.

Elias CJ Yes.

Galbraith It's what we're dealing with here. Now subject to the point that His Honour Justice Blanchard quite correctly made to me that the Fair Trading Act wasn't there when this was first passed, of course now if there is deceptive conduct then there are provisions under the Fair Trading Act that deal with those. And it's just perhaps a little bit interesting to note that accepting the fact that it wasn't there when this Act was passed, but under the Fair Trading Act conduct, which I would have with respect thought was more serious than an omission to give notice of a cooling off period or even a three day instead of seven day provision, you've got to for compensation under, first of all there's offences attached to it, and secondly for compensation you've got to show loss or damage. Now it seems to me slightly surprising that one would therefore assume that in this Door to Door Sales legislation, long before, some time before the Fair Trading Act was thought of that the.

McGrath J Yes, that's quite important isn't it.

Galbraith Yes, I agree.

McGrath J If you're trying to sort of bring in a ... .. argument.

Galbraith Except that there seems a lack of proportionality in any case. If the interpretation which the Court of Appeal adopted is correct, you'd get totally wanged with, for something that may be, depending on how Your Honours view it, a mere omission. Certainly something which may be inadvertent. Which has no consequences, causes no loss or damage except the fact that a few people who might have cancelled, they might have lost that opportunity. The vast majority of people in reality who wouldn't have cancelled haven't lost anything at all and have got value for money.

Now that's as I say, that's not how the legislature certainly has approached it subsequently. And I agree it's subsequently. But I would submit with respect that that's not how the legislature would

have intended to approach it back in 1967 when this Act was passed either because you end up with arbitrary and quite disproportionate results if 12(2) means what the Court of Appeal thought it means.

Tipping J Well this money that can be recovered under 12(2), if it is, and forgive the word, but if it is designed to catch collateral sort of arrangements and you know what I mean by that word in the very loose sense Mr Galbraith.

Galbraith Yes.

Tipping J It presupposes that the money has passed under that collateral agreement rather than under the head agreement.

Galbraith Well.

Tipping J And that seems to me to be a rather, in other words you paid something in order to get round the Act.

Galbraith No well in the circumstances I'm talking about, I mean the money which has passed is the money that would have passed, there's only one agreement. I mean there may be the circumstances that her honour's talking about which is a different circumstances. But the bulk of the circumstances I'm talking about, there's only ever one agreement. There's the agreement that was entered into, my house, somebody coming along and selling me Encyclopaedia Britannica, which is where this all of course started from in the first place. Probably none of Your Honours are old enough to remember it but I can remember that.

Tipping J That's a very charming thought Mr Galbraith.

Galbraith But I mean that's where it all started from. But if they'd been clever, and when they'd got me to sign up for the Encyclopaedia Britannica they'd stuck some provision in saying your house for the purposes of this should be deemed to be the trade premises of the travelling salesman or whatever it might be, you've then taken it out of the Act but you've only got one contract. And you're only paying, I'm only paying for the Encyclopaedia Britannica under that one contract. That's the money that's got to be refunded. That's got to be refunded whether I've kicked the Encyclopaedia Britannica, thrown it in the fire, whatever's happened under 12(2). There's no adjustments at all. And it might be, subject to limitation period, because I'm not quite sure what the limitation period is under 12(2), but whatever it is, it might be years down the track that I get all my money back. And that's what I say, while it's true Fair Trading Act came later, it's perhaps an indication that Parliament wouldn't have thought that that's a fair deal just in a circumstance where there was an inadvertent omission of information. But.



Tipping J It's not an offence is it to enter into a 12(2).

Galbraith No.

Tipping J That's another slightly odd dimension in what is an altogether rather difficult piece of legislation.

Galbraith But it does indicate, but that is important Your Honour it seems to me because as I said before it's an offence to deceive under the Fair Trading Act even though, as Your Honours know, under the Fair Trading Act you can do it inadvertently. I mean it indicates, because it wasn't made an offence here, that, I don't want to diminish the significance of the cooling off period but it was a nice to have provision, not a necessity, not somebody's going to, as I said before, die because you don't have it. And it's not the most serious thing in the statute book. There are a lot more serious.

Tipping J Perhaps it was not made an offence because it was recognised that these things could well happen inadvertently.

Galbraith Well inadvertently but also don't forget this. There's a two way street in this. I mean okay, you do get the Encyclopaedia Britannica in return for your money. And if you don't get the Encyclopaedia Britannica or you get something which is shoddy goods or you whatever else, there are other remedies you have. I mean if the problem is you've been sold a pup, then there are other remedies in law for that. This is only about a cooling off period and that other bit of info about the credit info. That's all this Act's about. As I say, I'm not trying to diminish it but it's not the most significant and it's not something to which, from which harm necessarily flows or follows. I mean quantifiable harm in any case, necessarily flows or follows. And yet what you've got here in 12(2) is a, I'll use this term, a very crude penalty provision. I mean that's a very, there is no limit or measure on that penalty provision at all. It's just bang, every single penny, whatever you've enjoyed out of it, has got to be given back.

Elias CJ I'm not sure that it's a penalty provision at all.

Galbraith No, alright. But it could only be.

McGrath J It's just a very severe deterrent.

Galbraith It's a very severe deterrent you might say. But in a lay sense Your Honour. I think Your Honour's right legally. But in a lay sense, it would be a penalty for the lawnmower man for example whose mowed your lawns for the whole year and you've had the lawns mowed and then he has to give you all the money back. That's pretty penal. He's lost all that time. He doesn't get compensated for it. And you've had all the benefit.

McGrath J The Chief Justice's point, there's no punishment intended here.

Galbraith No, no.

McGrath J All that they're trying to set up is a strong deterrent. You don't get the section 10 benefit, this is your argument isn't it.

Galbraith There's no balancing.

Elias CJ I'm not sure that section 12(2) can be read as a deterrence provision in any event because it's not clear that it only affects the vendor.

Galbraith No, no.

Elias CJ And that's really why I keep talking about some of these other possibilities.

Galbraith Yes.

Elias CJ If you had a back to back finance agreement, it might be that the money advanced by the financier could be recovered.

Galbraith Yes. But in the simple case, as I say my lawnmower example, I mean he's mowed the lawns for the whole year and he loses.

Tipping J In practical terms the effect of 12(2) is going to bite far more harshly on vendors than on purchasers.

Galbraith Yep.

Tipping J The idea that it's, this whole thing has been drafted in a whole rather sort of blunt way, it's not a sophisticated piece of coherent legislation.

Galbraith No.

Tipping J I mean for example, it's interesting that under the definition of sale they expressly say that it, in my translation, that it applies to executed and executory contracts.

Galbraith Yes.

Tipping J Bargain ... sales and sales and delivery in the old sale of goods terminology.

Galbraith Yes.

Tipping J Now that's interesting in the sense that they've expressly brought both in. But that's again a very blunt instrument because you might think that different consequences will flow depending whether it's executed or executory.

Galbraith Well I agree with Your Honour, and blunt's probably a better term than the one I used. Well I think blunt is a better term than the one I used. But it is very blunt and therefore it can have disproportioned effects if it is interpreted too broadly. And quite arbitrary effects.

Tipping J How do we read it down Mr Galbraith.

Galbraith You don't have to read it down.

Tipping J But you really are asking us to read down 12(2) from its literal words. You really are. Because I mean parche any point of view to the contrary, just on the face of it it seems to cover a situation like this.

Galbraith Well in my respectful submission you don't. If you give the words there the, it seems to me, rather absolute meaning that they have, they are words where they're talking about defeating, evading, avoiding or preventing.

Tipping J In any way and in any respect.

Galbraith And my respectful submission is that nothing which has happened here has stopped the Act operating. The Act has operated. Sections 6(1), 6(1)(5), 7, 9, 10, 8 all operate. Nothing's stopped them operating at all.

Tipping J But it would have the effect of operating.

Galbraith The Commissioner alleges that. I mean I agree with them. They're quite right. It does operate.

Tipping J That view makes it virtually meaningless.

Galbraith No it doesn't at all. Because the sections all operate. That's what the Act wants the, that's what the Act is intended to do. It's intended to apply to these contracts. It does apply to these contracts. There's no a shadow of dispute between the Commerce Commission and us. The Door to Door Sales Act 1967 applies to these Telecom contracts. It operates. That's what the Act wants to do. It doesn't want to go off and catch something else or do something else to them. It wants to do what it does to them. Which it does under sections.6, 5 etc etc etc. And I mean that's just really the short and long of it. What with respect the Court is wanting it to do and what the Commerce Commission are wanting it to do and what the Court of Appeal wants and decided it wanted to do, was in some way catch Telecom with another consequence because by its actions it may have made it less likely that people worked out that they had rights under the Act. And that's what you're trying to catch them for. But the Act applies to these contracts. It's just that people mightn't have figured it out. Telecom didn't figure it out as it turns out.

Eichelbaum But by failing to give the purchasers the critical information.

Galbraith That's right.

Eichelbaum That they are entitled to a cooling off period.

Galbraith Yes.

Eichelbaum That is, it may not be preventing, but I suggest to you it is defeating, evading or avoiding.

Galbraith Well with respect it doesn't Your Honour because the Act applies. The Act applies to these contracts. They have the 30 days. They may not have known that they had it but they had the 30 days. Now if you want to catch people for misleading and deceptive conduct then you provide for that. But that's not what this provides for.

Can I just, I'll come back to that point. But can I just talk about some of the.

Tipping J Just, would you just pause before you move off this.

Galbraith Yep, sure.

Tipping J Because this is getting close to the heart of it I suspect, of this revised argument of your client's.

Galbraith Yep.

Tipping J How could this ever operate if your argument is accepted. Because the Act will always apply according to its terms.

Galbraith No it won't Your Honour. It won't because the contract that section 12(2) is intended to deal with is outside the Act. That's why the Act doesn't apply to it. section 6, 5, whatever have nothing to do with a contract which is deemed to have taken place at trade premises or which is under \$40 or any of those things. That's what it's to catch. Otherwise the Act applies.

Tipping J But if it's outside.

Galbraith But they're two distinct.

Tipping J If it's outside the Act, this provision makes it inside the Act.

Galbraith No, no it doesn't at all. Well it makes it inside section 12(2).

Tipping J Yeah.

Galbraith But it doesn't make the Act apply to it, the rest of the Act doesn't apply, 12(2) applies to it. Of course 12(2) applies to it. I mean if 12(2) doesn't apply to it.

Elias CJ Sections 9 and 10 don't apply to it.

Galbraith 9 and 10 don't apply.

Tipping J Mm.

Elias CJ Yes.

Galbraith But not only 9 and 10.

Elias CJ No but that's the, that's.

Galbraith Well 9 and 10 certainly don't.

Elias CJ Yes.

Tipping J But I think 12(1), the Act should have effect to a situation which in law the Act covers, irrespective of any provision in any contract to the contrary.

Galbraith Well sorry, this was the discussion I had with Justice Blanchard before. With respect that's not correct because as I say, to take the easy example, if you break it down into one-monthly contracts of under \$40 the Act doesn't apply to it. And section 12(1) has nothing whatever to do with that. section 12(1) is a standard non-contracting out provision. So if you had the provision which Your Honour was talking about, where you put three days instead of 7 days or whatever else, then 12(1) applies. But if you have a provision which takes the contract outside the Act, then 12(1) doesn't apply. And it's outside the Act if it's deemed not to be a trade premises, if it's deemed the purchaser initiated the transaction, if it's less than \$40, if it's a whole swag of things, if it's a whole swag of things and that was the point I was trying to make about the difference between this Act and the Credit Contracts Act. Because of the way this Act, the way it's, the way the application of this Act is defined, in terms like a contract which takes place not at trade premises, a contract effectively for more than \$40 and it's got it the other way round, it excludes less than \$40, it's relatively easy to structure a contract which gets outside the terms of the Act. Under the credit contracts act where you don't get section 12(2) it's jolly hard. Because a credit contract is a credit contract. I mean it's very difficult to see how one can structure an alternative contract giving credit which isn't a credit contract. I mean just is impossible. And that's why you don't find a 12(2), in my respectful submission, in the credit contracts act. And unless the Court recognises what seems to me a pretty evident distinction and it's a distinction made and one can see it in

these other Acts and why there's this distinction, then with respect section 12(2) will be incorrectly interpreted.

Tipping J I think I'm starting to see the point Mr Galbraith and it's no doubt my fault for being a bit slow.

Galbraith Well it obviously took me a while otherwise it would be in the written submissions.

Tipping J Well that's comforting. You're saying that 12(1) simply by its, in a situation where the contract in effect expressly does something that is contrary to the Act.

Galbraith Yep.

Tipping J It doesn't bite on a perfectly legitimate contract that has been so structured that it's not within the Act.

Galbraith Exactly, that's the difference.

Tipping J Right, yes.

Galbraith And so that's why I say what's happened here is caught by the Act, the Act operates on it because it is a Door to Door Sales contract. It can't get out of the Act. That's all there is to it. And the Commerce Commission and us both agree on that.

Can I just deal with a couple of other points. There are a number of problems with, in my respectful submission, the Commerce Commission approach to section 12(2) but one of the things in the Commerce Commission's submissions or two of the things in the Commerce Commission submissions which in my respectful submission are wrong is that the Commerce Commission seems to regard 12(2) as being part of the application of the other provisions of the Act. In my respectful submission it's a stand alone provision to deal with just what His Honour Justice Tipping was putting to me a moment ago. And for example you'll see in the Commerce Commission's submission at paragraphs 23 and 35 it talks about where 12(2) applies, the purchaser cancelling. But this has got nothing, 12(2)'s got nothing to do with cancelling. It doesn't require the purchaser to cancel at all. It may be a contract which has been long concluded. Nothing left to cancel. Because there isn't a contract any more. And so it just indicates what the Commerce Commission are trying to make 12(2) do is not what 12(2) does. It doesn't, it's not a provision as to how these other provisions of the Act applies. It's a provision dealing with things outside the Act.

And similarly you'll recall, and one of Your Honours brought this up with me, there's the Commerce Commission proposition that 12(2) creates an incentive to give notices under section 8. Now with great

respect 12(2)'s got nothing whatever to do with section 8. Quite apart from the point that Your Honour the Chief Justice makes to me. Because expressly by its terms section 8 only applies where there has been a failure to comply with the requirements of section 6(1). And if you've got a contract which is outside the Act it doesn't have to comply with section 6(1) so there's been no failure. It's nothing to do with section 6(1) at all.

S.12(2) in my respectful submission only applies to contracts which are not subject to section 6(1) requirements. In other words the Act doesn't operate on those contracts. And that's why, as I said before, 12(2) has to have its own unenforceability provisions. And as you know, under section 8, if you do give the notice and the purchaser doesn't cancel, then quite expressly the consequence is only that the section 5 unenforceability provision comes to an end. Nothing to do with the section 12(2). So giving a notice under section 8 doesn't help you under section 12(2) at all. They're completely different unenforceability provisions.

McGrath J Mr Galbraith, I'll just come back. Did I understand you to say that section 12(2) applies to completed contracts. So it may be just a.

Galbraith It seems to me it does.

McGrath J Isn't the obligation to repay just simply a qualification of unenforceability. And doesn't that rather imply it only applies when they're in existence. Otherwise your argument really would seem to me it applies for ever, 20 years down the track.

Galbraith Mm, well certainly, well that would be more favourable to Telecom Your Honour's position so that's.

McGrath J It's not my position, it's really just trying to work out what you're meaning.

Galbraith No, sorry, sorry, yes. Well I've taken the view that it does apply to.

McGrath J It applies indefinitely.

Galbraith And certainly that's the Commerce Commission view because most of these contracts have long expired of course.

McGrath J Can I then come back to cancellation. I want to know when on your argument, and this is really triggered by what you've just said, when is Telecom off the hook from the risk of cancellation. Is it off the hook once the contract has expired?

Galbraith Yes, in my submission yes.

McGrath J The day before there still could be cancellation.

Galbraith Yes.

McGrath J And with all of the consequences.

Galbraith Yes.

McGrath J Thank you.

Galbraith Yes in my submission, that's right.

Tipping J I wonder if, could I just ask for clarification, or confirmation, that this is the essence of your position Mr Galbraith. And I've tried to put this in extremely simple terms which may not do full justice but I just want to find out if I'm on the right track vis a vis your argument. 12(1) doesn't bite on a contract which has been so structured that it is outside the Act.

Galbraith (Nods) Mm hm.

Tipping J Yes. 12(2) bites on contracts and arrangements etc that have been artificially structured so as to get round the Act.

Galbraith That's fair. I think that's fair. I mean in a, to put it simply.

Tipping J In the most simplistic of ways.

Galbraith Yes, I think that's fair in a simple statement Your Honour. And perhaps just to complete what I'm saying about how section 8's got nothing to do with 12(2), apart from the fact of course section 8 has absolutely no reference to 12 and 12 has no reference to section 8, the notice required under section 8 which was quite specifically stated in the section, would be completely useless in a section 12(2) situation. I mean the poor old purchaser getting that notice in a 12(2) situation wouldn't have a clue what was going on. Because the specifics of the notice simply are to deal with a failure to give the original notice of cancellation. But a 12(2) situation where you've got a contract which has been structured to get outside the Act, I mean it just doesn't fit.

So the point I'm labouring to make is that section 12(2) is a stand alone. It has nothing to do with the, in my respectful submission, with the operation of the Act other than it has a consequence if you, as His Honour Justice Tipping's just put to me, artificially structure, and I use that term structure in a general sense Your Honour, structure the transaction to get it outside the Act, to avoid the operation of the Act.

Blanchard J If that's the case Mr Galbraith, why did they put, or having the effect of, into this subsection. Why didn't they rely just on purpose.

Galbraith I don't, the short answer is I don't know.



Blanchard J Which you would say would have to be looked at objectively.

Galbraith Yes. As Your Honour will know from I think the High Court judgment, probably the Court of Appeal judgment too, having the effect of was added just I think, I have to be careful, somewhere during or after the Select Committee process. It was one of those bright ideas, late in the piece bright ideas in any case, during the Parliamentary process.

Blanchard J Do we know anything about that. Is there any Hansard material on it.

Galbraith I don't think so Your Honour. It's mentioned in one of the judgments below.

Blanchard J Yes it's mentioned in Ellen France J's judgment.

Galbraith Yes it is. And that's the limit of my knowledge at the moment Your Honour.

Blanchard J So no-one's looked at Hansard.

Galbraith No I think people have looked at Hansard because I've spoken to my learned junior Mr Smith about that. And I understood Hansard had nothing to.

Tipping J I think you could probably reconcile it with this artificial structuring. Because it means that you don't have to prove purpose of getting round the Act. The artificiality if you like, it's enough if it has the effect of getting round the Act.

Galbraith Yes and if you look at a clause such as those I'm talking about or the 24 one-monthly contracts or whatever else, I mean I guess you can.

Elias CJ Well you don't have to worry about the prediction test.

Galbraith No you don't have to worry.

Elias CJ On which nothing mercifully has been said this morning.

Galbraith Um, no it hasn't.

Tipping J But the vice, the vice is some contrivance that either has the purpose or has the effect of getting round the Act where the reality is that the Act should be applied.

Galbraith Yes.

Tipping J That's presumably the vice to which you say this provision is directed.

Galbraith Yes, yes. That's what I would say Your Honour.

McGrath J The effect of that, or the effect of adding effects Mr Galbraith is really to bring this provision into line with the hire purchase stabilisation provisions that were in operation and that might have had, which were being the subject of interpretation.

Galbraith Well that is correct because this is around about the same era of course. And you often find this of course. I mean this is a fairly standard sort of form, purpose of and having the effect of. It's a catch all to, as Her Honour the Chief Justice says, make it, avoid often the necessity of having to try and get into establishing what objective purpose is. But it would be pretty easy either way. If you had a provision in the contract which said the purchaser's premises should be deemed to be the trade premises of the vendor for the purposes of this contract, I think you can make objectively a pretty good call either way on it. It seems to me in any case.

Elias CJ Can I just take you back, I'm sorry.

Galbraith That's alright.

Elias CJ This is the matter you were discussing with Justice McGrath about whether the contract has to be on foot under 12(2). It does seem to me that it must be on foot because the provision deals with unenforceability except in respect of recovery.

Galbraith Mm.

Elias CJ So the structure really does seem to be an existing contract if I use my example of the refinancing arrangement perhaps, yep.

Galbraith That, I hadn't thought of that. To be honest about it, I hadn't thought of it. I think that's certainly a, well certainly there's a logic to that because. But if that is, and if that is correct, I don't mean but, and if that is correct.

Tipping J Unenforceability, sorry. Unenforceability is an inapt word for a fully executed contract.

Galbraith Yes it is, yes. And what I was going to say, and if that's correct, then it seems to me it possibly supports what I've been saying just in a general sense in that it indicates that this legislation's not concerned with the fact that people actually go ahead and perform these jolly contracts. That's so be it if they do. It's only.

Tipping J But it would have the advantage too if one read it that way of bringing the shutter down at a defined point.

Galbraith Yes it would.

Tipping J        Rather than having it sort of hopelessly open ended.

Galbraith        Yes it would.

Elias CJ         Sounds like the Public Works Act.

Galbraith        Yes. Well that is hopeless.

Elias CJ         Is that a convenient place to.

Galbraith        Yes, look I'm sorry, I'm going on.

Elias CJ         You still have some further.

Galbraith        Just a little bit. Only a few minutes.

Elias CJ         Yes, yes. Alright, we'll take the morning adjournment now thank you.

Court adjourns 11.34 am

Court resumes 11.53 am

Elias CJ         Thank you.

Galbraith        And just the last thing which I'll say is really unfortunately repeating something I said before. But if one doesn't interpret 12(2) in something akin at least to the way that I've submitted it's appropriate to interpret it, and one instead sees it as some sort of catch all provision which sweeps up anything which in any respect in any way at all might affect the operation of the Act, then one's plunged into completely undefined waters and what would have to happen in every case is it would have to end up in Court until the Court decided whether it fell, I'm not sure which side of any line there is because there's no line defined for that. And so in my respectful submission it is a provision which should be interpreted as a stand alone dealing with a substantive matter such as those which I've described and which the Chief Justice has described. And not trying to have a double effect, double up on the section 12(1) scope of that particular provision which as I say is a common provision which appears in a great number of statutes. I think at this stage, it's probably sensibly all I should say.

Elias CJ         Yes, thank you Mr Galbraith.

Galbraith        Other than that, I've apologised to my learned friend.

11.55 am

Elias CJ         Mm, thank you. Yes Mr Solicitor. It does seem to me as though much of your submissions have been agreed with and that it just goes down to the wire on the scope of section 12.

Arnold I think that's right. Although it's also right that the matter's been presented in a way that wasn't really foreshadowed in the written submission and of course that's what my submission responded to.

Elias CJ Yes. Is it, would you like some further time to consider the matter Mr Solicitor. Or are you happy to proceed.

Arnold Well I really am hesitant to delay the hearing. On the other hand, there are some issues that have come up in the discussions with the Bench that I think do merit some further reflection. I wonder if it would be helpful if I were to proceed and depending on how the argument developed, I might be given the opportunity just to file something further in writing to try and meet the argument that my learned friend has put this morning.

Elias CJ Yes of course, if you need that, or if you need a bit of time to reflect, we can take a longer adjournment if that would suit you. But of course you will have the opportunity to put in any further material that you would want to in response.

Arnold Thank you Your Honour.

11.57.12 am

**Telecom v Commerce Commission**

**9.2.06**

**Part 3**

11.57.12 am

Arnold Thank you Your Honour. We need Your Honours to go back to the purpose of the legislation. It's consumer protection legislation. It attempts to protect consumers in two ways: by creating a cooling off period and by effectively requiring vendors to advise consumers of their rights. Those two elements are the fundamental elements of the operation of the Act.

Now my learned friend has put it to you that the Act continued to operate in relation to these agreements and therefore this was not a section 12(2) issue. But with respect, that is to take a very narrow view of the operation of the Act. And a view which is not consistent with the language of section 62 which, as Your Honours have already noted, is wide, talking about in any respect, directly or indirectly and so on.

The operation of the Act that continues is this: my learned friend would say that notwithstanding that these consumers were not advised of their rights, they still had the right to cancel within a 30 day period because

that's the right granted by section 7(3) of the Act. And it's true if any of them had known that, they might have been able to exercise it.

But their ability to exercise that right would of course depend upon Telecom receiving the cancellation in the same way. And of course Telecom's agreements were not consistent with that right of cancellation and as the Court of Appeal said, Telecom continued even after it knew that it had a problem, it continued to enforce its agreements or operate under the agreements as if they were enforceable.

Now to say then that those agreements were still covered by the operation of the Act is with respect to diminish the important elements that underlie the Act. That is the ability to cancel, to have a cooling off period and the right to be advised of that. So the operation of the Act that my learned friend talks about is with respect very limited indeed.

If I could make a second point. My learned friend put the proposition to you that this Act really is not terribly serious. The effect on Telecom is disproportionate and my learned friend mentioned the 22,000 customers. But consider this Your Honours. My learned friend is right. A vendor can literally drive a bus through this legislation. Because a vendor puts out statements about rights which are inconsistent with those contained in the Act. I'm not saying, I'm not talking about at this point being misleading, deliberately or inadvertently. I'm simply saying the statement is completely inconsistent with the rights.

And doesn't give consumers the opportunity to cancel after the 7 day period because it doesn't advise them. Yes consumers have a right to cancel within 30 days but they're not advised so most would not know about it. Doesn't use the section 8 procedure to seek to rectify it. Continues to operate the contracts in accordance with their terms as if those terms were fully enforceable by it. That's the approach it takes.

Now part way through let us say one of these contracts which involves in Telecom's case the sale of goods and the provision of services, part way through let's say a customer does become aware that, or does try and cancel, exercise the right to cancel. From the point of view of the vendor in that situation you're in a relatively limited risk situation. Because of course if the vendor does not pay, you simply stop providing services. What have you lost, well you've sold the phone. And there may be some argument about whether the person can return that but you're not interested in it anyway because the evidence is once the seal is broken, the phone is useless according to Telecom. So a vendor in Telecom's position, if my learned friend is right, faces very little risk at all. Certainly the thing is not enforceable but that depends on consumers knowledge and understanding that. And if the vendor acts in a way that is inconsistent with unenforceability, then for most consumers of course that would be the end of it. If a consumer does

happen to take service and not pay, then the remedy is simple: you cut off the service.

So if my learned friend is right, why would a vendor comply with this legislation. Because if you can get through to the end of your contract as a vendor, you have in fact made the contracts on your terms. The contracts have been performed on your terms. You're left whole at the end of the period. You face no risk of any sort at all. And that is the outcome.

Now in my submission that cannot possibly have been what Parliament intended. And the answer to it does lie in section 12(2). And in the plain language of section 12(2).

Elias CJ Does your argument though also depend on the view you take of the obligation in respect of section 8. Because on one view the vendor has already not complied with the legislation. That's done.

Arnold Yes.

Elias CJ And certain consequences then follow.

Arnold Yes.

Elias CJ When you say why would a vendor comply with the legislation, you must be suggesting as you do in your submissions, that it is part of the legislative scheme that the vendor should give notice under section 8. And yet there's no obligation to give notice under section 8 imposed.

Arnold When you say should, I'm not suggesting that there's a legal obligation. But in terms of the consumer protection purpose of the legislation, yes they should. It is desirable that they do so. And one would hope that a vendor having learnt that it had inadvertently let us say, failed to fulfil its obligations at the outset would then seek to rectify the position. Of course a choice which Telecom had in September 2002 and much of the complaint relating to the 22,000 people of course arises as a result of its failure to utilise that procedure. I digress.

One way of looking at section 12(2) is that it does create an incentive for a vendor who finds that they have not complied with the Act in significant respects, to utilise the section 8 procedure. But no you don't have to. But if you don't, then you face the risk of the application of section 12(2). That's a perfectly logical structure. It's one which the language in my submission of section 12(2) suggests. And it fits with the consumer protection purpose of the Act.

Tipping J If there were a breach of section 12(2), would the giving of a notice under section 8 cure that breach as it were. It doesn't seem that it's

structured in that way. It cures the section 6 default. But not any section 12 vice.

Arnold Well with respect it must because when you utilise section 8 you're bringing the Act into operation in precisely the way that the Act envisages. And you're saying well, we should have given you this advice at the outset. We failed to do that. But we are now giving you that choice.

Tipping J But the problem I have Mr Solicitor is, and I can understand the force of that from a common sense point of view, but 8(3) simply says that the giving of the notice following lack of cancellation simply means that section 5 ceases to apply. It doesn't say that section 12 also ceases to apply.

Arnold But you're then left in a situation where somebody who has utilised the Act as intended is said to be defeating, hindering or preventing the operation of the Act by the.

Tipping J No they're not. Put it this way. Section 8 is a way you can abrogate your sin of omission.

Arnold Yes.

Tipping J Under section 6. But it doesn't seem to be couched as a way in which you can purge your sin under section 12(2). That's why I don't think a simple omission to perform section 6 counts for a breach of section 12(2). Counts as a breach of section 12(2).

Arnold Section 12(2) has to be read in its context. And I certainly accept what Your Honour said earlier that in some respects this Act is drafted in a sense rather bluntly. And so one does have to try and understand how it was that section 12(2) was intended to operate. The logic as I understand it of the position that Your Honour has put to me is that once you have entered into any contract which falls within section 12(2), that's the end of it. There is no way of remedying the situation.

Tipping J Well nothing can alter (a) the fact that you've done the naughty thing and (b) the fact that the statute provides for general enforceability as opposed to lack of enforceability by the vendor. Now quite what the significance is in that distinction I don't know but they don't march wholly together.

Arnold The difference in language, there is certainly an issue there and one of the issues to be determined really is whether enforceability, unenforceability under 12(2) really does mean unenforceability by either party or whether it's a provision which really operates to the benefit of the purchaser which the purchaser could in effect waive. And there are those sort of statutory provisions.

Eichelbaum There is a contrast between section 12 and section 5 though isn't there.

Arnold Yes.

Eichelbaum Section 5 is specific.

Arnold Yes in the language.

Eichelbaum In that respect.

Arnold Yes. I have to accept that one just says unenforceable and the other unenforceable by the vendor.

Tipping J As well as the fact that one has the money repayable and the other doesn't under its terms.

Arnold Well no. One has the money repayable if the right to cancel is exercised, that's so.

Tipping J Well one has the money contingently repayable. The other has the money absolutely repayable.

Arnold If one takes a situation where the contract is still running, and the vendor has failed to give notice under section 6, the purchaser has failed to, through lack of knowledge, to exercise the 30 day cancellation right and the vendor has not availed itself of the section 8 procedure. So assume that situation. As I understand my learned friend's argument, the purchaser will have lost the right to cancel. It will be gone. Now there is a slight difficulty there just to interpolate because the effect of the vendor advising the purchaser of the right to cancel under section 6(1) is that the purchaser is forced to make an election. If he or she does not advise of cancellation, then the contract's good. That doesn't follow though from the 30 day, the expiration of the 30 day period. That 30 day period expires, you cannot treat that as a confirmation by the vendor obviously.

So then you get into the section 8 procedure and if that is utilised the vendor has to make a choice and if he or she doesn't make the choice within what will generally be 7 days, then the contract is confirmed. So the failure to exercise the right to cancel has different consequences depending on which provision you're operating under.

Now we're positing a situation where the vendor hasn't exercised the right to cancel. I'm sorry, the purchaser hasn't exercised the right to cancel. The vendor hasn't advised under section 6(1) and hasn't utilised section 8. Now in that situation my learned friend seems to be saying the vendor cannot enforce but the purchaser cannot cancel. The purchaser's lost the right to cancel.



In my submission one can utilise 12(2) in that situation and the purchaser would be quite free to say I don't want to treat the contract as unenforceable, I don't want my money back, I'm perfectly happy to go ahead. And that's what would happen.

Elias CJ If that was so though why couldn't the purchaser simply rely on section 12(2) instead of cancelling during the period when he has the ability to cancel. I don't want to muck around with all this, the consequences of cancellation, I'll just take my money back thank you and keep the goods.

Arnold That's why section 12(2) has to be read in its context. There are processes provided here and while they are working, the purchaser is within those confines. The question is, what do we do in this, one would hope, very unusual situation of a vendor not advising under 6, the purchaser not knowing of the right under 7(3), the vendor not utilising section 8 to fix the thing up, what happens then. And in my submission, it's my submission it's perfectly, I mean whatever one does with this Act, one has to do some, there has to be some interpretative exercise. My learned friend is effectively suggesting that Your Honours read down, in my submission, the effect of section 12(2), ignoring its very clear, plain language. And he does that by trying to create this structure, this relationship between 12 and 1.

My submission is that when we're in this category of case that we are now in, one has an obligation to look at the Act and to make it work in accordance with its purpose. And one can do it without any great straining or twisting of language. One can, and that gets back to the section 8 argument that I was making earlier, although I do accept, obviously that section 8(6) or whatever it was, does talk about, ah 8(3), unenforceability under section 5 and not section 12 and that is a difficulty I confront. But.

Tipping J I wonder Mr Solicitor if you've confronted another possible difficulty. Which is allied but I think slightly different. And it is that the legislature has given express attention to what should happen if there's a failure to observe section 6. It has said 1 it's unenforceable by the vendor and 2 the purchaser now has a month to cancel rather than what would have been the 7 days had the section been observed. The legislature has accordingly given the remedy unsatisfactory as it might be in some lights, but it is inconsistent for section 12(2) to be seen as operating without restraint as to time against a specific remedy that has been given to cover this contingency.

Arnold What section 7(3) does is give a vendor an absolute right to cancel for a 30 day period. It then, at the expiration of that 30 day period, the Act provides for an alternative step that the vendor can take to fix the position. That's the section 8.

Tipping J No I'm looking at it from the purchaser's point of view. Let's forget the vendor for the moment. What can the purchaser do if there's a failure to perform section 6 by the vendor? He can cancel within a month. If you say he's also got remedies under section 12(2), the one month is a dead letter.

Arnold No, with respect it isn't. And that was the point of my earlier answer. The 30 days is one of the triggers, it's one of the periods before which a vendor cannot attempt to rectify the position. In other words when one looks at the way section 8 works, it's got four elements that must be met. One of them is that the 30 day period must have expired.

Tipping J Yes.

Arnold So the effect is to give the purchaser an absolute right to cancel in that 30 days. There's nothing the vendor can do to put that purchaser on election.

Tipping J To stop that, mm.

Arnold But then, so that's the purpose of the 30 days. But when that's expired, the vendor can then, if it wishes, trigger this process to cure the position. But in my submission that's the logical explanation for it. It doesn't lead to the result that therefore the purchaser has lost forever the right to cancel.

Tipping J Well has right to cancel as such as opposed to invoke section 12, is contingent on the vendor electing to serve a section 8 notice which is not obligatory.

Arnold Well in the terms of which you've put the question, yes.

Tipping J Yes. So therefore the purchaser's right to cancel is lost on the expiry of the one month unless he's given another chance by a section 8 notice. Now my point is, if Parliament meant the right to cancel to be lost after one month, subject to that contingency I grant you, it would be quite inconsistent to say that you can achieve the same purpose under section, the purchaser can achieve the same purpose, as of right, under section 12(2) without reference to time. That's my problem.

Arnold Yes, no I understand the problem. And the way you put the question to me that I agreed to was to set aside 12(2). But obviously in terms of the structure of the Act that I'm arguing for, one can't set aside 12(2) in that way. Because it does provide a mechanism for dealing with the class of case that we are presently concerned with. That is a person who, you know, doesn't do the section 6, the 7 and the 8.

Tipping J Mm. So as a purchaser in the facts we're considering, you have two as of right remedies. Under section 7(3) you can cancel within one

month, and under 12(2) you can effectively cancel without limit as to time. That is the effect of your submission I think.

Arnold That's the way in which, yes, you can read section 12(2) and the earlier procedures so that they operate coherently and it does no violence to the language of section 12(2) because the language of section 12(2) is expressed very broadly. I agree entirely with my friend that it would cover cases where somebody tries to structure a transaction so as to avoid the operation of the Act completely. But it isn't limited to that on its face, on its wording. And that really is the situation that we are in in this case.

Elias CJ It's very odd though in terms of the structure that you would obtain if you were a purchaser a more advantageous result in the normal transaction under section 12(2) than under the immediate remedy provided under section 7 and so on.

Arnold Well no Your Honour. The right that you have as a purchaser is to cancel.

Elias CJ It's not a right to cancel though under section 12(2). It's simply a right to, in fact I will need you to at some stage come onto the language of section 12(2).

Arnold Yes.

Elias CJ In terms of enforceability except in relation to moneys paid. But it's really a right to receive back moneys paid rather than a right of cancellation.

Arnold Well I mean the agreement would come to an end.

Elias CJ Yes well.

Arnold Whether one talks about that as a cancellation or not.

Elias CJ The agreement's unenforceable so effectively it's come to an end. But that is, the right to receive all payments you have made in the normal sort of transaction like the one we're talking about here with a vendor and purchaser, that is a more advantageous position than is achieved under the scheme of sections 9 and 10.

Arnold Well with respect not by much. I mean there is a prohibition on payment for services. So if the person cancels the contract, even though you've provided services, you get all the money back.

Elias CJ Yes.

Arnold The difference is the timing isn't it. That at least under the provisions in 6, 7 and 8, certainly 6 and 7, there'll be a relatively confined time

frame within which the purchaser will have used the goods and been able to access the services. Seven days if you've advised them properly, 30 days if you haven't. Under the section 8 process, that could occur at any time in the life of the contract.

Elias CJ

Yes.

Arnold

Which may be months later or theoretically I suppose a year later if the vendor decided. Now if that happens of course the purchaser has all those same rights that in effect has got the services for nothing if he or she chooses to cancel and has had the use of the goods and the exceptions which apply to purchasers and circumstances in which they have to pay are very limited. And it talks about goods which are consumed in use. But that's about it really.

Elias CJ

Well but you see if one is thinking about say the Encyclopaedia Britannica rather than the sort of contract we have here in which the service provided is a substantial part of the package and the goods supplied are actually I imagine in the scheme of things quite a trivial amount. But it has to apply to all.

Arnold

Yes.

Elias CJ

In the case of the well thumbed Encyclopaedia Britannica that gets returned, clearly the purchaser would be much better off under the section 12(2) regime than under the section 9 and 10 regime. Which seems strange.

Arnold

Well in what respect Your Honour?

Elias CJ

Because under the section 9 and 10 regime, if the goods have been damaged or whatever, some compensation has to be paid when they're returned. And there's the obligation to return them.

Arnold

Yes but that's damage beyond damage in normal use. I mean all of that is bound round by quite tight restrictions. When one works through those, and perhaps we should look at them, but when one works through those provisions, the obligation on a purchaser to pay is extraordinarily limited. But I accept Your Honour's point, there are circumstances where purchasers do have to pay. Absolutely.

Elias CJ

Mm.

Arnold

I can't deny that.

Elias CJ

Yes.

McGrath J

Is this section 10 subs (7) you're referring to.

Arnold Yes. So if you look at section 10(7), where the goods are of a kind that are consumed or depleted in quantity in normal use, the purchaser's liable. And it's slightly odd because the purchaser, as I've said, is not liable in relation to the provision of services. But then in 8, the purchaser should also be liable to pay compensation to the vendor for any damage done to the goods or for loss or destruction thereof while the goods have been in custody of the purchaser other than damage arising from the normal use of the goods or loss or damage arising from the circumstances beyond it's control.

Eichelbaum Under section 12(2) Mr Solicitor, does the purchaser, is the purchaser obliged to give the Encyclopaedia Britannica back.

Arnold I had certainly assumed he would be, yes.

Tipping J Well I think that's an important point. Because frankly I think there is a discosonance on the face of it between the consequence of a section 7 cancellation and and a section 12(2) whatever one might call it. That in the one case you have to give it back and in the other you don't. If you're reading the section as you invite us to do in the sort of strict literal terms, it doesn't make any provision for exchange of goods. It's just money passing. I think that might have been possibly the point behind Sir Thomas's question.

Arnold Yes.

Tipping J And I might have perhaps jumped in a bit too quickly. But that I think is a real problem in the structure of this whole set up if there is a choice of remedies for a simple omission.

Arnold Well we're talking about a simple omission. And I certainly do make the submission that that's not this case of course.

Tipping J Oh yes, that's a different matter.

Arnold Yes.

Tipping J You may well get home on the facts of this case as an addition plus.

Arnold Yes.

Tipping J But you're taking the high ground at the moment that a breach of section 6 gives rights under section 7(3) and under 12(2).

Arnold That's so and, well let's come to section 12(2) and consider how it works. And first we need to step back and again look at what the Act is doing. And as my learned friend has said and as was said in the written submission that we filed, this Act doesn't prohibit transactions. All it does is say if you want to enter into a certain type of transaction which is negotiated in certain circumstances, then this is the way we

want you to do it and if you don't do it in this way the vendor can't enforce it.

Now that's different of course from other enactment's which prohibit certain types of transaction. And that must bear on the way one looks at section 12(2). In a case where the legislation prohibits a particular type of transaction, clearly a provision like section 12(2) has the purpose of trying to capture transactions which achieve in substance what the legislation prohibits although they don't offend any particular provision of the Act. And there are many examples of exactly that sort of thing and in the credit stabilisation cases that His Honour Justice McGrath referred to earlier, one will see statements made by the Judges of the Court of Appeal that the particular provision in that case, Regulation 8 I think it was, had that purpose. It was designed to catch transactions which sought to achieve in substance what the legislation prohibited while not offending any specific provision of the legislation.

McGrath J You said then what the legislation prohibited.

Arnold Yes.

McGrath J Did you intend to say that.

Arnold Yes, if you achieved in substance what the legislation was designed to prevent, although you didn't breach.

McGrath J I'm more comfortable with that language, yes.

Arnold Yes, although you didn't breach any individual section within the Regulations or the Act. But here we have to look at section 12(2) in its context. And it talks about having the purpose or effect in any way directly or indirectly, defeating, evading, avoiding, preventing the operation of this Act in any respect. Now we have to ask then, what is the operation of the Act. What does that term mean. And in my submission, going back to my opening remarks, the fundamental purpose of this Act as I said wasn't to prohibit transactions, it was simply to say if you're going to enter into certain transactions which arise in certain ways, there are some things you must do. And some rights we're going to give consumers. Now what are the fundamental things. The right to cancel and everything associated with that. And the right to be informed. It's the right to cancel and importantly the right to be informed of it that lies at the heart of the operation of this Act. That's what it's all about. Without that it has no purpose.

Now in this situation we have a company which has constructed agreements which it now accepts are governed by the Act but which were inconsistent with the Act in fundamental ways. Now it is true, as I accepted earlier and as my learned friend said, aspects of the Act would continue to operate if a consumer happened to know of it and if

Telecom was prepared to accept the validity of the points made by the consumer.

But in the fundamental respects that consumers were not advised of their rights, then in my submission the structure of those transactions, the way that they were presented to consumers in all of the documentation, fits absolutely within that language. One doesn't have to strain anything.

The language of purpose or effect of course relates back to the transaction, the contract or the arrangement. Your Honour's are in the fortunate position here of having the documentation. One can look at it and ask what is it's effect. One doesn't have to go into any subjective analysis. One simply looks at the terms and reaches a view about whether it had the effect of directly or indirectly defeating, evading or avoiding the operation of the Act. If it did, section 12(2) applies.

Now Your Honour Justice Tipping has raised this question of omission. I suppose another way of putting it is, well will every breach of the Act fit within that language. Will it be, can one say of it that it will have the effect in any way of directly or indirectly defeating, evading, avoiding or preventing the operation of the Act. Well clearly the answer to that must be no, not every breach will.

Clearly for example a breach which is capable of being dispensed with under section 6 subs (2) would not on any view of it surely meet this definition of avoiding the operation of the Act because such a breach must be minor and it must be a breach which doesn't cause prejudice to the purchaser. So those sorts of breaches are certainly not going to fall within this language.

At the other extreme, in my submission, are cases such as the present which plainly fall within it. The question is, is there anything in the middle.

Now it's difficult to think of cases in the middle. I've certainly had difficulty thinking of cases in the middle but I certainly do want the Court to be clear that it is not the commission's argument that any breach of the Act will bring you into section 12(2). Clearly.

Tipping J

Well I have the difficulty that if that is the argument, I would have thought prima facie at the very least the tenor of the submission would have an effect directly contrary to that. I agree with you about 6(2) because they don't effectively become breaches if they're excused. But anything else surely by parity of reasoning has to be equated to an omission to comply. Anything else will be worse than that if anything. It'll be a higher level. I can't conceive of a breach that would be as you say in that hybrid position of being caught by section 6 if you like but not caught by section 12(2).

Arnold Well it's difficult to think of one because by definition you're talking about a breach which is serious and which does have prejudice attached to it. We know that, I mean the prejudice isn't necessarily the key to it because of course these rights operate in particular cases whether a consumer is prejudiced or not. The fact is the consumer's just given certain rights and there it is. But if one looks, asks the question, well does this transaction or contract or arrangement have the effect, does it meet that language, that becomes the answer and that's the assessment that has to be undertaken. And if the answer to that is yes, then section 12(2) applies.

Tipping J But it seems a little curious that Parliament was giving specific attention to the section 6 scenario and providing expressly for what would happen in the case of a failure to observe section 6 but at the same time it was giving a remedy provision which was more advantageous to purchasers to cover exactly the same situation by dint of section 12(2).

Arnold Well that goes back to the earlier question of whether in effect the vendor has an election. It's difficult to sort of imagine how this might work. But it does get back to the section 8 argument in effect that it would certainly be my submission that when you look at the scheme of the Act, it must be the position that a vendor who might be at risk under section 12(2) will be able to utilise the section 8 procedure to cure the problem. That may not be true in every case. And if for example the transaction was one which was structured so as to achieve in substance what the Act seeks to prevent but at the same time not infringe any individual provision, that analysis might not apply.

But it's very difficult I must say to see realistic examples of that type of thing bearing in mind that this Act is not prohibiting transactions outright. It is simply saying there's an approved way of doing things. In other words, it really is a rather different beast in a sense from some of the other statutes which have this type of provision in them.

And my submission is that you do have to look at it in the context of what it is that this Act is trying to achieve.

Eichelbaum I just wonder Mr Solicitor to what extent we are helped by the rather draconian consequences of invoking section 12(2). Because undoubtedly, if you put a very trite proposition, 12(2) will apply in some cases and in those cases it seems to be an absolutely blunt instrument.

Arnold Yes.

Eichelbaum Regardless of the point of time at which it's invoked, what payments have been made, what considerations have passed, how used the goods may be, how well thumbed the Encyclopaedia may be, there's only the one remedy.



Arnold Yes, taking the view Your Honour that the only thing it allows for is in effect the reversal of the money flows under the contract, it doesn't affect anything else. It is a pretty blunt remedy. It certainly will apply to some transactions. And as I think what my learned friend is saying is that if you entered into an arrangement and I think he gave the example of trying to structure a thing so that you've brought everything below \$40.00, you did a whole lot of transactions.

Eichelbaum Yes.

Arnold If you did that, you're going to fall within 12(2) but if you simply put in your contract the Door to Door Sales Act doesn't apply, you fall within 12(1).

Eichelbaum Yes.

Arnold And I don't understand what the difference is between those situations in terms of the way this legislation should work. I mean it just seems to be a random outcome which happens to suit my learned friend's position.

Tipping J Well what they've done is they've banged into the same section two classic formulations. Each of them sort of fairly well known in their own right so to speak. Certainly in those days. And we've got to try and make some sense of it.

Arnold I don't know if this helps, and this will be a matter that I'll address in the supplementary written submission perhaps, but one can see them in some sense as complementary. The first provision is just saying that what this Act is going to apply, whatever to the contrary you try and do in your document. But the second is saying, as well, if you really do try and defeat the operation of this Act, there's this consequence on top of it.

Elias CJ Isn't that really what Mr Galbraith's arguing. That is the way to read section 12.

Arnold But I think, well I understood his argument to be that if you fell under 12(1) you did not, could not, fall under 12(2).

Elias CJ Oh I see, yes, okay, yes.

Tipping J I think he was trying it. I think I was tackling him on that and he did seem to be quite keen on maintaining the purity of the two streams.

Arnold Well I think that is the logic of his position, that they must be, you fall into one or the other, but you can't fall under both. But one can look at them as trying to effect two different things can't one.

Tipping J Well both is trying to unshackle yourself somehow fm the Act. There can't be any question about that. That's the broad overarching concept.

Arnold Yes.

Tipping J Mirrored by the heading I suppose. You're trying to somehow or other get yourself out of some obligation or some consequence of the Act. I you do it rather more simply, the other you do it rather more subtly I suppose.

Arnold Well even taking that, I mean, is this attempt of Telecom simple or subtle? From a consumer's point of view, one might have thought it's really subtle because what they've done is set up an elaborate structure of cancellation rights and all sorts of things with stickers and it all looks terribly detailed and legal. Is that really in some way different fm creating a whole bunch of transactions of less than \$40.

Tipping J But the essential difference between you and Mr Galbraith it seems to me is you're saying that section 12 is a breach provision. At least 12(2). He's saying it's a provision designed and having the effect of operating only on attempts to get round. That seems to me to be the essential difference between you.

Arnold I think with respect that's right. Except that I'm not saying that simply by using the term breach you bring yourself within 12(2). I come back to the language of 12(2) and say the test you must meet is whether it can be said what you've done has the purpose or effect as set out in 12(2).

And some breaches will not have that effect and some will. And breaches which are capable of being dispensed with under section 6(2) are obvious examples of a breach which do not have the effect set out in section 12(2). So I'm not arguing that any breach brings you in there at all.

Tipping J I know you're not but my worry is that the effect of your submission is that it inevitably will.

Arnold Well no with respect it doesn't because we've seen a class.

Tipping J Yes we've been through that I suppose

Arnold Yes.

Tipping J I don't, I'm sorry, I'm just being repetitive Mr Solicitor.

Arnold Yes.

Elias CJ Mr Solicitor I haven't in fact looked at the original documents. Perhaps you could just give me a reference to the page in the case.

Arnold Yes. One of the, well a useful way of.

Elias CJ This is in relation to the cancellation device.

Arnold Yes.

Elias CJ I'd like to see.

Arnold Perhaps a useful way of picking those up is that they are set out quite extensively certainly in the judgment of Justice Ellen France.

Elias CJ Yes I saw them there but you had said we have the advantage of the documents, I just wonder where they were.

Arnold Oh I see. Oh okay, well let me give you the, I'll just get you the precise references.

Elias CJ Yes and come back to it, it's not important. I'd just quite like to look at it.

Arnold But when I say we have the advantage of the documents, I'm simply making the point there which was emphasised in the some of the hire purchase cases that you know the difficulty that arose in Newton's case (**Newton v Commissioner of Taxation of the Commonwealth of Australia** [1958] AC 450 (PC)) and other tax cases is that often there is no document which sort of sets out.

Elias CJ Yes, yes.

Arnold Fundamental arrangements. That you have to try and infer what it was all about from the events that occurred. Now we're not in that situation.

Elias CJ No I understand that.

Arnold We have a document which clearly sets out the way Telecom saw these contracts, the way it presented them to its customers and had acted in accordance with them.

So in my submission the section 12(2) does go further than, well the language of devices was used. And with respect yes it will cover what we might think of as devices but that seems to draw in some sort of intentional element and if one goes back to the language, my submission is that one just looks at that and asks the question, well does it apply. Does the particular contract or arrangement or transaction fit within that description.

Tipping J Was there any Court discussion at or around, or obviously before the passing of the Act, about the meaning or effect of provisions such as

12(2) that one might reasonably infer the legislature was wanting to adopt that for the purposes of this Act. My brother McGrath mentioned during the course of the morning adjournment a decision in a tax case called Almiger which apparently touched upon such issues apropos of the old section 108 of the Land and Income Tax Act. Now does that, can we get any sort of guide as to what Parliament might have been driving at by putting this in apropos of some discussion in the Courts.

Arnold Well the danger with that, my learned friends seek to obtain that kind of guidance from the hire purchase cases.

Tipping J Yes.

Arnold Which do discuss Regulation 8 which is very similar to section 12(2). And they do so by reference to tax avoidance provisions.

Tipping J I'm not worried about the predication business.

Arnold No.

Tipping J I'm not inviting you to go down that fascinating road.

Arnold No, no, but they do, they certainly do make the point, Their Honours make the point that these, the provisions that they were looking at in the hire purchase regulations were designed to capture arrangements which had the purpose or effect of achieving in substance what the Act said should not be achieved. But at the same time not offending any individual provision.

Now in my submission, that analysis may well have been entirely appropriate in those particular contexts where you had outright prohibitions on certain types of agreement. But we're in a different context. This Act does not prohibit anything. It simply says, as I've said before, if you're going to do this sort of transaction, if you're going to do it in this way, that is other than at your normal place of business and that sort thing, then here's how it is to happen.

So it's got a rather different perspective or slant if you like. And section 12.

McGrath J Mr Solicitor could, sorry.

Arnold Sorry.

McGrath J No, but please just.

Arnold I was just going to say and section 12(2) has to be interpreted in that context. Which is a different one.

McGrath J Yes. I accept that you make a point, and this is contrary to something I rather implied in an earlier question I asked you, I accept that the Hire Purchase Credit Sales Regulations were expressed in prohibitory terms. And it was in that context for example in the Carroll case (**Credit Services Investments Ltd v Carroll** [1973] 1 NZLR 246) Justice McCarthy spoke of the objectives of that type of Regulation as being to stop devices and other forms, he used the word device.

Arnold Mm.

McGrath J But if I can come back to the Almiger case, since it's mentioned and this is a case I'm afraid of the Court doing what Mr Galbraith has already done to you, but what I wondered about the Almiger case is that the first instance decision of Justice Woodhouse was actually delivered in 1966, round about the time when it seemed to me this Bill was being introduced and later touched up with the introduction of effect. And the language of justice, and of course as you will know, Almiger was the first, it was the case that really breathed new life back into section 108 of the anti-avoidance provision. And I wondered whether in sort of general terms there might be some purpose connection between that provision which is not expressed as a prohibition section 108 of course of the anti-avoidance provision, and what we have in this case. So that the language of Justice Woodhouse which you have an opportunity perhaps to look at over the lunch period, would offer some sort of guise, talking about, not using the word device but nevertheless making the same sort of point.

Arnold I'll certainly do that Your Honour. But if I could make this comment. In my submission the tax avoidance provision is not really different in character from the prohibitory type, or the prohibition in the hire purchase context. The reason is this: that the tax avoidance provision seeks to make void provisions which reduce tax in ways that are quite illegitimate. And I know there's a big argument about the illegitimate, but just for the sake of explanation. And so the big issue in the tax avoidance cases is to make the choice between legitimate tax mitigation activities and illegitimate tax avoidance activities. And the Newton test was developed to assist in that and the business purpose test and all that sort of thing.

McGrath J But.

Arnold But when, at its heart, the tax avoidance provision is still a prohibitory provision. What it is doing, it's not like this provision which says yes you can make these sorts of contracts, you just have to do it in this way. It's still in other words a prohibitory situation.

McGrath J Isn't it the case with the anti-avoidance provisions that they also say you can enter into agreements and arrangements of that kind that have that purpose or effect, but they won't have any fiscal consequences. Just as in the Door to Door Sales Act.

Arnold Oh I see what you mean, yes.

McGrath J They're saying they wont have any consequences.

Arnold Yes.

McGrath J In terms of applying the earlier provisions of the Act, reading sections 5, 6 and 8 together.

Arnold Well again the, I'd still make the submission that there's a difference in character between something which says if you enter into this type of transaction, it's void as against the commissioner. And something which says you can enter into these transactions, that's fine but you just have to do it in a certain way. And if you don't do it in that certain way then you can't enforce it. Because at the end of the day, at least so far as the Commissioner's concerned, the transaction is treated as effectively non-existent, whatever the parties may think of it. But here, this is really a manner and form type of Act. It simply says here's how you go about doing it.

McGrath J Thank you.

Elias CJ Is that a convenient time to take the lunch adjournment.

Arnold Yes, I'm sorry Your Honours.

Elias CJ Thank you.

Court adjourns 1.02 pm

Court resumes 2.22 pm

Elias CJ Thank you, yes Mr Solicitor.

Arnold Thank you Your Honour. To deal with matters left over from before lunch. First in relation to documentation, Your Honour the Chief Justice asked about that. There are examples of it throughout the volumes but case on appeal Vol 2 at page 115A sets out a letter that a customer would receive. And it says your phone is enclosed and as you will see it's been delivered in a sealed box. By breaking the seal you agree that you've accepted the terms and conditions of the Telecom mobile service agreement that accompanied this letter. Before you open the box we need you to confirm. And then it sets out the monthly fee, \$84.00, free minutes and then the charges that will apply. So we're not, and this is a 24 month contract so we're talking about reasonably sizeable amounts of money.

And then there was a packing slip which is over the page although Your Honours will find a clearer version of that at page 188 which will give you the very important wording about returns and so on.

And then if you go back to page 116A, there's a further piece of documentation which says, please note that if you have broken the seals on the phone package we, we may be unable to process your credit and the phone will be returned to you.

And then at page 176 is a network connection agreement, the print of which is small but if I could draw attn to two elements of it. The first, at paragraph 12, which is at the bottom of the second column from the left hand side. And it provides that if you do not pay our charges or meet any responsibilities you have to us or any other Telecom company we may disconnect or restrict any service at any time. For example we may put a toll bar on your phone. We will try to contact you before doing this. And so on.

So the remedies that are set out there for failure to meet charges involve not simply the mobile service but other services taken from Telecom.

And then at paragraph 27, ending the agreement you have with us, do you want to end the agreement you have with us. And that's at the far right hand column at the bottom. Please call. Unless we've both agreed to the contrary, the agreement, can't quite.

Tipping J      End I think, end?

Arnold          Will stop. Yes. And the charges will stop one month after we consider your notice of termination.

Blanchard J    After we receive.

Arnold          We receive your notice of termination. Disconnection and other charges may apply as set out below. Early disconnection. If you're on a term contract and you choose to disconnect earlier, there's a fee of \$100 plus GST, plus \$10 plus GST per month for the months remaining of the contract term.

And then you will see at page 190 correspondence from one of the companies involved to one of the Telecom's customers basically saying, look you've signed up for this agreement. You've signed documentation which acknowledges that if you break the contract after entering into it you accept full liability and here it is.

So the rights that people were advised of in the documentation is clearly inconsistent with the rights that existed under the Act.

The second point, Your Honour Justice McGrath raised the Almiger case. And if I could go back to the point that I was making before the lunch break, as the Court of Appeal noted in the hire purchase cases, one has to exercise real care with taking even identical language from one statute and applying it in another. And the Court noted that that was part curly so where one was dealing with a fiscal statute and a non-fiscal statute.

But I wondered if I could illustrate the point by reference to an issue that arose in the hire purchase cases because it does show the difficulty of seeking to come up with if you like a general view of clauses of this nature. And this is the point. The Hire Purchase Regulations as you know, sought to limit the ability to purchase vehicles unless people paid pretty significant deposits. And at one point a mechanism was developed which it was thought could get around the Act and I don't use that in any pejorative sense. It just sought to avoid the operation of the Act, a lease to own sort of arrangement and the Court said no.

McGrath J Or not to own, yes.

Arnold Yes. But then there was the second case, the Carroll case, involved in arrangement where it was a straight leasing arrangement and at the end of the period the lease provided that the person using the vehicle had no right to purchase and undertook not to attempt to purchase through agents or trustees or in any other way.

Now it was argued by the person who used the vehicle in that case, I'll call him for the sake of argument the purchaser, that the agreement was invalid because he had gone into it with the intention of attempting to purchase the vehicle which was the subject of the lease. And therefore he said the anti-avoidance provision applied.

Now the Court of Appeal rejected that and said no, in a case of that sort under these regulations, both parties must have the intention. Otherwise the person who is providing the vehicle, who let us assume had undertaken steps to ensure that they did not run foul of the legislation, in other words they weren't trying to avoid it in the sense of achieve in substance what it prohibited. They were simply trying to avoid running foul of it because they didn't want to enter into transactions which were unenforceable. And the Court said in that situation, both parties have to have the intention to effect the purchase or whatever it is, to achieve in substance what it is that the Act prohibits.

Now obviously that analysis doesn't apply to this provision. It makes no sense. This provision, this version of the same language, is simply directed at the vendor's activities. And obviously the purchaser won't have an understanding of this.



McGrath J I agree that you can't say that a particular clause will operate in one way, because it operates in one way in one case it's going to operate the same way in another. You're getting into comparing apples with oranges. But isn't it the case that if you stand back and look at the overall purpose of the provision, you're doing that to guide you in interpreting its language, that you can see the same purpose in these provisions. And that is the purpose of not allowing devices or particular forms of a transaction to set it up in a way that the Act doesn't apply to it. It seems to me that's slightly different to what the Judges were saying in the caution they were expressing in several of those cases that you can't apply the way that the sections operated in one case to the circumstances of a different case.

Arnold In a broad sense Your Honour, with respect, yes I agree. But it really does depend on what follows from that. And it's certainly the Commission's submission that what Telecom did here falls within the language of section 12(2). What I'm not quite clear about is whether the way Your Honour has put the proposition to me would allow for the possibility that something of the nature that occurred here could fall within that language.

McGrath J I think the real issue becomes, in this case on this point, whether the purpose of clause 12(2) is simply to say that if you structure transactions with the intention of avoiding the Act's application to them so they're not particular type of sales to which the Act applies, then basically that will be rendered unenforceable. Whether the purpose stops there or whether the purpose that the words of the Act applies to goes wider. And I'd suggest that your argument is that it does.

Arnold Yes.

McGrath J And that the language that has been used of avoiding, evading and so forth aptly applies to what actually happened here given the fact that the info that was given was so wrong compared with what should have been given.

Arnold Yes.

McGrath J But I think it's, all I'm saying I suppose is that I don't, well the question I think has to be whether section 12(2) has a purpose of that wide a scope.

Arnold Mm.

McGrath J Or whether it has the more narrow purpose that Justice McCarthy was talking about for example.

Arnold Yes, yes.

McGrath J In the Carroll case.

Arnold Yes, well thank you for that Your Honour. With respect that is the question. And my answer to it is that interpreted in the context of this Act, section 12(2) must have that wider purpose.

McGrath J Yes, yes.

Arnold And some of those features that I was emphasising earlier about what the Act is trying to do obviously go to that point.

Now there's one further point arising out of this morning's interchange that I did want to return to. And that was the question that Justice Eichelbaum put to me about whether the goods would have to be returned under section 12(2). And I said yes. On reflection, and I said yes because I was thinking of it in the context of a purchaser in a sense electing to utilise that remedy. But I accept that the section talks only about the return of money. And if one looks at this contract as an unenforceable contract it's true but a valid contract, then I think the traditional position would have been that property would be capable of passing under the contract. So depending on how the contract dealt with that, then it may well be that the purchaser would have the right to keep the telephone in this case. And it may only be the money that's returnable.

But let's assume that that is the case. It's clear that again, as Your Honour noted, Parliament intended that that result would apply in certain cases. The question is, is this such a case. In other words, it may be in some senses a harsh result. But it is one that Parliament intended should happen. And that then does get back to the proposition of the relationship between section 12(1) and section 12(2).

The fourth point to make at this stage is that I addressed Your Honours before the break on the question of the relationship between section 8 and section 12(2). And I wonder if it's helpful to look at it in this way. My learned friend has suggested that people might enter into ingenious mechanisms seeking to avoid the operation of the Act entirely. In other words to get their agreement right out of the coverage of the Door to Door Sales Act.

Now one has to accept that that is possible although the incentives to do that in relation to the Door to Door Sales Act, bearing in mind that it was a form and manner type Act, are much less than they are in other situations. But one has to accept it's possible that somebody could try and structure things as a whole series of transactions of less than \$40. It seems odd but it could happen. Now in those circumstances, obviously it's difficult to see how section 8 could play any role at all. Because the whole structure of the transaction is designed to ensure that the Door to Door Sales Act doesn't apply and what would bring it

in is in effect the language of the anti-avoidance provision, section 12(2).

But in my submission, there will be cases, and this is one of them, where the conduct at issue and the transactions do fit fairly within the language of section 12(2) but nevertheless where it would have been possible for Telecom to rectify the position if it had chosen to do that. And it could have done that through the section 8 process.

Now I accept the difficulty that arises from the language as I said earlier of section 8(3). But if one looks at it conceptually, a person who seeks to utilise the section 8 procedure is submitting to the operation of the Act. In other words, whatever the initial intention was when the contract was formulated, that is to avoid the operation of the Act, the person has in fact gone back to the process and sought to comply.

Tipping J Can you suggest a policy reason consistent with your argument why Parliament did not make the giving of a section 8 notice obligatory upon becoming aware of the fact that you'd fallen foul of section 6.

Arnold Well on my, on the interpretation which I'm advancing to Your Honours, there is a very real incentive for parties to use section 8. That incentive is the operation of section 12(2).

Tipping J So it's a sort of circular argument in a way isn't it.

Arnold Well it's not a circular argument. Your Honour is asking me about the scheme of the Act and about logic. And answer I'm giving is that one doesn't need to make the use of section 8 compulsory. One can leave it at the choice of the vendor. As indeed in a sense compliance with section 6 in the first place is left.

Blanchard J If you do use section 8, presumably section 12(2) simply drops away because the transaction no longer has the purpose and is no longer unenforceable.

Arnold Yes, that's the interpretation I'm submitting to Your Honours. That at that point the transaction doesn't fall within the language of section 12(2). That's precisely the point. But just going back to Your Honour Justice Tipping, and I don't want to labour the point, but simply to say that if section 12(2) is interpreted as interpreted as interpreted by the Court of Appeal, it does operate as a powerful incentive for people to utilise section 8. They still have the choice and they can choose to run the risk if they wish. And that's what Telecom has done. But at the end of the day, if they do so, section 12(2) will cut in and have the effect that is set out in it.

Tipping J I understand the argument. It really depends in part anyway on the point my brother's just made about how you in effect are purging yourself from 12(2) by giving a section 8 notice.

Arnold Yes.

Blanchard J There would be the additional incentive.

Tipping J If that were.

Blanchard J To use section 8.

Arnold That's precisely the submission.

Tipping J If that, yes.

Arnold That that is the way in which one can create the relationship between the 12(2) process and the section 8 process. It operates as a powerful incentive. And I mean, when one stands back and looks at the alternative which my learned friend is putting to you, I mean let us put ourselves, I don't want to say in Telecom's position, but in the position of somebody, a vendor who finds itself as Telecom did in September 2002 having a decision to make about what it did. Do we just go ahead and allow these contracts to run their course in the hope that people, I mean we may improve our behaviour for the future, but we've got a bunch of people signed up here. Do we just let those contracts go their course until termination. And really hope that people don't cotton onto this. Or do we say, I'm sorry we've got it wrong. We really do need to advise people of their rights and give them that choice. Now if that had been done in September 2002, then we would not be talking about 22,000 customers and all the financial implications that now apply. Because if you look at the timing, none of the contracts would have expired because the process had only been under way for about a year. And of course other contracts would not have been entered into.

So that, but if one doesn't take the interpretation, my learned friend is right, then what happens? He says this case is governed by section 12(1). Under section 12(1) the Act applies and any consumer who happens to find out within the 30 day period that they can cancel can. Other than that, the vendor can't enforce the agreement but if you're providing services of this type, what does that matter. If somebody doesn't pay you, you just don't provide the service any more. Well there's no consumer protection in that. Even worse, all the incentives are to do precisely what occurred in this case, whether deliberately or not doesn't matter. But the incentives are to simply organise things in a way that suit you for your business convenience. Make sure you do it in a way that falls within 12(1) and then providing consumers don't find out, you'll be fine.

Now with respect, there's simply no sense in which that kind of interpretation is consistent with the purpose of this Act and it does in my submission invite the Court to read section 12(2) as down in the sense of limiting it to this narrow class of transactions.

Eichelbaum I suppose you could take your argument a step further could you and say that section 12(2) is a very powerful incentive simply to get your documentation in compliance with the Act.

Arnold Absolutely Your Honour. I mean what again must be remembered in my submission is that companies have choices about the way they do business. This does not seek to prevent vendors from selling their goods or entering into contracts for services. It came from a concern about improper pressure being placed upon consumers in some situations. And it was an attempt to alleviate that pressure and just give consumers a time to sort of sit back coolly and say, golly, do I really want to do this. That's what it's all about.

Now Telecom or any other vendor are free to use this type of sale methodology if they wish. But surely the incentive should be to comply with the Act and if they choose to do business in this way, to make sure that they do it correctly and if they do make an inadvertent mistake that they use the mechanisms that the Act provides to fix the problem.

So with respect Your Honour, in my submission interpreting section 12(2) in that way does very much reinforce the underlying objective of the Act and reflect the choice that the vendor has made to do business in a particular way.

Elias CJ Mr Solicitor, why on that argument, would the legislation not have been drafted to permit cancellation within 7 days of becoming aware of the deficiency in the documentation. What is the purpose of this one month provision because it's done on the basis that there hasn't been disclosure by the vendor.

Arnold It's difficult to answer that, why the thirty day period was introduced. Whether it was thought that there would be better efforts at consumer information in making people aware of what their rights as consumers were so that people might exercise it. But the other way of looking at it in the context of the Act is, as I say, you cannot exercise, you cannot utilise the section 8 process prior to the expiration of the 30 days. And one can see it then as simply a mechanism which was created in circumstances where the vendor didn't meet it's obligations initially to give purchasers in effect an absolute right to put the vendor absolutely at risk in a sense. And then if that opportunity's not taken, as I imagine it rarely will be because people wont know about it, the vendor can come back later and try and force the issue and put you to our election and rectify the position.

Elias CJ I just query whether it's right to assume that people won't know about it and that is what Parliament had assumed. Because presumably part of the cooling off period is to enable people who are on reflection not happy with the position, to get advice. And that strikes me as perhaps one of the reasons why there is the 30 day period.

Arnold Yes, yes.

Elias CJ Where the vendor hasn't made disclosure.

Arnold So that you go to the.

Elias CJ Citizens Advice Bureau.

Arnold A lawyer or Citizens Advice Bureau or somewhere like that.

Elias CJ Yes.

Arnold And you get, yes, that could be.

Elias CJ Or the consumer institute.

Arnold Yes, yes.

Elias CJ Or to the Commerce Commission these days.

Arnold One could get. Yes, I accept that may be in part an explanation.

Elias CJ Which is effectively what happened isn't it. How soon, I can't remember, how soon after these agreements were entered into was the Commerce Commission notified.

Arnold Well there were a range of complaints made to it. The complaints made to it I think were early in September 2002. But the programme had been going for most of that year from recollection. So that there were customers who'd obviously signed up and were taking the service. Whether unhappy or not, they were. And then there were customers who were dissatisfied and did complain to the Commission. And that's how the whole thing started to roll. But I can give you, I mean the affidavits do.

Elias CJ No, don't bother to take time there.

Arnold Yes. I think the answer is it's there are various answers. In other words you can't say that everybody complains sort of right away.

Elias CJ Yes.

Arnold Yes, well my learned friend Mr Sissons has just pointed to one example which is an affidavit of Ms Mansell at 156 of the volume. But

she became concerned about her son who'd signed up to one of these contracts and it was on the 24<sup>th</sup> of July and then on the 27<sup>th</sup> of July a courier package came to the home. And then she a few days later rang the company Hapco which had handled the sale. And said I wanted to cancel my son's contract and then there was discussion. It didn't happen so she complained to the Commerce Commission. So that one happened more or less straight away. But the complaint to the Commerce Commission was more than 30 days later.

Elias CJ Well was that taken as a cancellation for the purposes of the Door to Door Sales Act. Because you don't have to give notice in any particular form do you.

Arnold It certainly wasn't by Telecom.

Elias CJ It wasn't treated by it.

Arnold No. Which is the key of course. And that really does go back to the point that my friend made earlier about you know, the Act still operates. But it only operates in a very unrealistic sense. If you do happen to find out you can cancel within the 30 days. But not only do you have to find out, you in a sense have to be sure that you're right. Because you've got to go to Telecom and say I want to cancel. And they're going to say to you, but you've broken the seal. You're not entitled to cancel. And you have to say, yes I am. The Door to Door Sales Act gives me that right.

So yes I accept the Act can operate but there are a number of conditions that have to be met. And it's not really effective. And certainly not operating in the way that Parliament had in mind if one accepts that view of it.

Excuse me Your Honours (Counsel confer).

So to summarise the position Your Honours, the Commission's submission is that when one looks at what occurred in this case, when one looks at the language of section 12(2), the Court of Appeal was with respect right. It's clear that it falls within the language of that provision.

That outcome does not do violence to the Act, taking it in context or looking at it from the point of view of its purpose. But rather it facilitates the purpose and it does fit with the overall structure.

By contrast, my friend's argument really does rob the Act of any bite because in this type of case, that is a vendor not complying under, meeting the obligations under 6, purchasers not knowing about their rights under section 7(3), the vendor not attempting to rectify the position through section 8, if my learned friend is right then a contract with a substantial services component like this one can simply run its

course. As long as consumers, well they've lost the right to cancel according to my friend and providing Telecom's in a sense prepared to hang tough. And as the Court of Appeal noted, it was. It treated these contracts as enforceable for their life.

Now that's not to say that Telecom didn't fm time to time, as the evidence reveals, treat people more generously than the contract would have required. But that doesn't meet the problem.

So the alternative interpretation that's been put to you really doesn't work. In other words one can't see why it is that section 12(1) and 12(2) should have such different spheres of operation and such different outcomes. And isn't consistent with the structure or the purpose of the Act.

Your Honours I have no further submissions.

Elias CJ Yes Mr Solicitor, there are just a couple of matters you could perhaps help me with. The first is I'm a little confused as to how this matter came before the Court. The Commerce Commission was invoking powers under the Fair Trading Act in seeking the declaratory and other relief that the Door to Door Sales Act had been breached. Can you just refer me to the provision in the Fair Trading Act that they were invoking.

Arnold Yes.

Elias CJ I don't want to take your time, it's just a loose thread in my mind.

Arnold Well there are two things. The breaches of the Fair Trading Act that are accepted are breaches under section 9.

Elias CJ Yes.

Arnold And section 13. So those are the breaches.

Elias CJ Yes.

Arnold And then the remedial provision is section 42. Or on the application of the Commission the Court is satisfied that a person has engaged in conduct constituting a contravention of any of the provisions of Parts 1 to 4, the Court may make either or both of the following orders. And then they're set out in A and B.

Elias CJ But this is effectively, or the part of the matter that's before us is effectively a form of enforcement of the Door to Door Sales Act. Is there any linkage between the Fair Trading Act and the Door to Door Sales Act.



Arnold As I understand it, it was accepted below that the linkage arose from the fact that if Telecom's arguments about the Door to Door Sales Act not applying were correct, then obviously there was no misrepresentation. If they were wrong, there was. And certainly in the Court of Appeal, if one looks at the Court of Appeal judgment, they've treated the answer to the advertising issue as depending upon the answer to section 12(2). The reason for that is the advertising is supposed to be corrective and to advise people that these contracts were entered into, they were not advised of their rights, they have the opportunity now to get their money back. That's the form of the corrective advertising.

Elias CJ Yes.

Arnold Now that depends then on the question of the meaning that is given to section 12(2). And if it is the case, as my learned friend argues, that these arrangements fall within section 12(1) and not section 12(2), then people will not be entitled to a refund and in fact Telecom will suffer no difficulty at all because these contracts, as my learned friend has said, are finished. Their 24 months is up. So Telecom will have.

Elias CJ Do the judgments below deal with this. I'm just trying to remember whether they.

Arnold If one looks at the Court of Appeal judgment at paragraph, the Court of Appeal judgment starts on page 77 of Vol 1. And yes. And if one looks at page 93 paragraph [53].

Elias CJ Oh yes, yes.

Arnold What is in issue is whether section 12 of the Door to Door Sales Act provides more extensive relief for customers or in particular for a right to recover from Telecom Mobile all payments which have been paid. This point's most helpfully discussed when we go to the fourth proposition. Now the fourth proposition is over the page at page 94. And that is should Telecom Mobile be required under the Act to engage in corrective advertising. And the provisions are set out there. And it was in that context that it became important to see whether the customers did in fact have a right to return of the funds. As I say, if they don't, then effectively Telecom's got away with it completely.

Elias CJ Yes I see. And it was conceded that there was the linkage between the two pieces of legislation.

Arnold Yes.

Elias CJ Yes.

Tipping J There was, can I just ask one small thing supplementary to that. There was right at the beginning in the notice of opposition to Summary Judgment, a pleading that the Commerce Commission lacked standing

to bring proceedings under the Door to Door Sales Act as it was put. Did that get dropped or is it being dealt with somewhere.

Arnold It was dealt with below. But it was then dropped.

Tipping J Right.

Arnold What I can't quite remember is whether it was maintained in the Court of Appeal (Counsel confer).

I think the answer is that it was in issue before Justice Ellen France. And she dealt with it but not thereafter.

Elias CJ Yes thank you. The other matter is, because of the way in which the matter has arisen, I'm not clear what the parties want us to do in the event of an outcome one way or the other. In other words what orders are being sought from this Court.

Arnold Well from the Commission's perspective Your Honours, if the judgment of the Court of Appeal is upheld, then in my submission the process contemplated by the Court of Appeal should then take place. And at the end of the judgment the Court of Appeal contemplates that the parties will seek to agree the terms of the advertising and so on and if there are any difficulties the Court said they can come back to us to have them considered.

Elias CJ And if the appellants succeed, the result is that the Summary Judgment application doesn't succeed and is there an underlying substantive proceeding to go to trial.

Arnold Well.

Elias CJ That's certainly what was sought in the notice of appeal.

Arnold It was sought. With respect to my learned friend, that seemed to me to be wrong that as I understand it is accepted that the Act applied and that Telecom did not comply with the Act.

Elias CJ Yes. So you're certainly entitled to your declaratory relief in respect of non-compliance of the Act.

Arnold Yes.

Elias CJ Yes.

Arnold The only issue is what follows from that.

Elias CJ Yes.

Arnold In this case. And that really does revolve around the return of the money and that revolves around the operation of section 12(2). And were it not for that, despite the fact that there would still be a breach of the Fare Trading Act, there probably would be no need for corrective advertising. Because you know, other than saying they've breached the Act, nobody has a remedy so. And that's because of the effluxion of time. I mean my learned friend is basically saying, as I understand it, once you survive the 30 days, the right to cancel has gone. The only problem you've got as a vendor is you can't enforce.

Tipping J The application for summary judgment, the substance of it is on page 26 of the Vol 1. And just glancing through it it would seem that declarations A and B can't really now be resisted. But C is problematical at least insofar as it talks about recovery of money. And paragraph 2 altogether is problematical.

Arnold Yes.

Tipping J So insofar as issues 1 C and 2 are concerned, they presumably have to be removed from any summary judgment and go to trial or be the subject of strike out application or whatever may further ensue.

Arnold Unless they go to trial. And go to trial on what Your Honour?

Elias CJ Well wont the customers have to make claims.

Tipping J I don't know whether there would be any point in it going to trial.

Arnold Well I'm not sure how they could.

Tipping J Because they would presumably, your clients would presumably, if our judgment went against them on both 1C and 2, be unlikely in the face of that to take it to trial. But we are in a summary judgment context. The onus would be on your client to decide what to do. And if they were bold enough to think they could get somewhere, we can't stop them.

Blanchard J Well Telecom have actually asked for the matter to be remitted to the High Court for progress towards trial.

Tipping J So I mean.

Arnold It's very difficult to see what the trial would be about. If it is true that the, I mean this appeal only relates to the in essence corrective advertising issue which depends upon 12(2). So if it's accepted that declarations 1A and 1B are properly made, the issue is then one of remedy. Now if the contracts are all finished, the only remedy available will be a remedy under 12(2). What else is there.

Elias CJ But who claims that. And where is it claimed.

- Arnold (Counsel confer). My learned friend, I'm sorry to be muttering like this, but my learned friend says that some of these agreements have been extended or rolled over. And so there may be an issue about whether what happens in relation to the extension or the rollover. Because they will still be subsisting. But with respect it's a little difficult to see why a purchaser, if my learned friend's interpretation is accepted, would bother in that situation either. They have no right to cancel. Maybe the advertising there should be.
- Elias CJ Well I don't know because on your argument Telecom even at this stage could give notice under section 8.
- Arnold Well I'm not, well there are two problems with that. The first one is there does seem to me to be an issue about whether an extension of a contract does in fact bring you. I mean what the Act talks about is a particular transaction. A transaction's entered into, it has a particular time frame. If the parties agree to put in place a new arrangement, that may itself be governed by the Door to Door Sales Act, depending on the circumstances in which it arose. But it probably won't be. So I'm not sure, to me anyway, there would be an issue about whether the extension would fall within the Act at all. And whether, and let's assume that it did. The second problem is, as I say, you're well beyond any 30 day period where there's a right to cancel. On my learned friend's argument, the only problem is that Telecom has a difficulty with enforcement. So perhaps they should be required to write to all their customers and say, by the way, we cannot enforce your agreements.
- Tipping J Mr Solicitor, isn't this becoming a little too complicated. They're saying that summary judgment was wrongly entered against them. They're now saying that that doesn't apply overall but it applies in some respects. Now if we agree with them in that respect, we will discharge the summary judgment in those respects, leaving it standing in the uncontroversial areas and then what happens next frankly with great respect I don't think I'm concerned with.
- Arnold That's right. Well I was simply responding to questions.
- Elias CJ That sounds very seductive.
- Tipping J But we've got to be very careful we keep our eye exactly on the right ball. The appeal is against the summary judgment. Now if in whole it's right, fine. If in whole it's wrong, fine. If it's wrong in parts and right in parts, well we'll act accordingly. But beyond that, have we got any jurisdiction to do anything.
- Arnold Well with respect Your Honour, the appeal is not against the summary judgment. The appeal is against one aspect of the summary judgment.

Tipping J        Alright.

Arnold            And that is the 12(2) aspect and that is the Fair Trading Act Your Honour.

Tipping J        Correct so the aspects that are not attacked will remain intact.

Arnold            Yes.

Tipping J        And if they are, the other aspects are successfully attacked, they will go.

Arnold            That's right Your Honour. And I think I was asked the question, then will it go back to trial. And my answer is, what is there to have a trial about. Because there's.

Tipping J        I don't know.

Arnold            There's nothing, I mean this is all about remedy.

Elias CJ         But one of the remedies granted by the Court of Appeal was to advertise to customers telling them that they may have a claim.

Arnold            Yes.

Elias CJ         Well are you saying that in fact why would they bother.

Arnold            No, no, no. All I'm saying is if, the proposition that was put to me was that the appeal succeeded.

Elias CJ         Mm hm.

Arnold            So the Court of Appeal's decision was reversed. And what happened then. And all I'm saying is that as I understand it.

Elias CJ         Oh, I'm sorry, yes, yes.

Arnold            There's really nothing of practical substance left.

Elias CJ         I was getting confused between.

Arnold            To be resolved. We've accepted that the Act wasn't complied with. We've accepted that there was misleading conduct in respect of people's rights. The fair trading, the advertising is all about remedy. And what Your Honours will be saying is that that remedy is not available. On the other hand if Your Honours think it is available and uphold the Court of Appeal, then the advertising will go ahead. And if there are issues about that the Court said below, come back to us.

Elias CJ         Yes.

- Eichelbaum Well I'm sorry if I'm complicating the issue. But could I just point out Vol 1 page 105. The only order apart from costs and apart from allowing the appeal made by the Court of Appeal was the order to engage in a corrective advertising exercise. Now what I think Counsel was saying was that, or perhaps the Court was pointing this out, that there are now some declarations about which there is no dispute but which in fact have never been made.
- Tipping J Yeah, I think that is strictly the position isn't it. They haven't actually been made. I think I had overlooked that.
- Eichelbaum No. The High Court Judge simply dismissed the summary judgment application. So speaking for myself, I wonder whether there is a case for, in the event that the appeal succeeds, remitting the judgment to the High Court which after hearing the parties would enter such judgment as it saw appropriate in the light of this judgment.
- Arnold Yes. I'm just looking at the paragraph 2 of the Court of Appeal's judgment. And the way in which the Court has put it is Her Honour found that Telecom Mobile had breached both the Door to Door Sales Act and the Fair Trading Act but she declined to grant relief sought by the commission. So the way Your Honour has put it to me is technically correct. But there are the findings of breach which have been upheld. But there doesn't appear to be a formal declaration of breach.
- Eichelbaum No. Well that was the point that I was seeking to bring out.
- Arnold Yes, yes.
- Tipping J The formal order of the Court as opposed to the reasons is exactly coincident with what's to be found at the end of the judgment.
- Elias CJ The Court of Appeal.
- Tipping J The Court of Appeal I mean.
- Arnold I'm sorry Your Honour. The formal order.
- Tipping J The formal order or judgment of the Court of Appeal on page 77.
- Arnold 77.
- Tipping J As opposed to the reasons is exactly as Sir Thomas has drawn attention to.
- Arnold Yes.
- Tipping J From the last part of the judgment.

Arnold Yes.

Tipping J And I had wrongly assumed that somebody had made by consent or otherwise the declarations as to the non-controversial part. But they haven't. So I agree now with, that the tidiest arrangement is to do what's been suggested.

Arnold Yes. Well I'm grateful to Your Honours because I also obviously proceeded on the assumption that, there being no challenge to those findings, they had effectively been reflected in a formal way. But that hasn't in fact occurred. So for my oversight I apologise.

Elias CJ Thank you, that's been very helpful. Do you wish to put in further submissions Mr Solicitor.

Arnold I wonder Your Honour.

Elias CJ You could simply reserve the ability to do so it that's.

Arnold Yes but would do so quickly. It's just a matter of sitting down and reflecting on what's happened.

Elias CJ Yes exactly.

Arnold And whether there are some points that maybe should have been made.

Elias CJ And perhaps. I don't know whether it's been made available to counsel, but it may be that it would be useful for you to review the transcript. That might expedite matters. Justice Tipping has a tidier mind than I do, suggests that you might give an indication of when you could notify us as to whether you will be putting in further submissions.

Tipping J And then if you do want to, in other words we know quite soon if you're not.

Arnold Yes, yes.

Tipping J But if you're going to, you tell us and then you have a further reasonable time to do so, it would seem might be tidy.

Arnold Well would it.

Elias CJ Could you perhaps give an indication of whether you would like to put in further submissions by the end of next week Mr Solicitor.

Arnold Well I was going to suggest Wednesday of next week, so yes.

Elias CJ That would be perfect, yes thank you.

3.23 pm

Elias CJ Yes Mr Galbraith.

Galbraith Yes, I'll be very brief. Really just out of fairness to Telecom, I don't think it's got any relevance. The Mansell situation which my learned friend referred to is discussed in an affidavit which you'll find in Vol 3 at page 358 paragraph 21. And while it's true that Mr Mansell suffered some problems dealing with Telecom's agent, as soon as Telecom was alerted they acted promptly and credited him and cancelled the contract in effect and credited the moneys.

Which really leads on to the other point. Despite my learned friend saying that Telecom will have got away with it completely, whatever that's meant to mean, of course the situation is that not everybody paid and performed their contracts all the way through. And of course unenforceability has operated under section 5(1) and Telecom have suffered in those circumstances from what the Act contemplates, which is they can't enforce it. So it's not correct to say they got away with it completely.

I'm really only pulling together what I've said before and actually taking up some of what Your Honours have said perhaps more clearly than me. But what the Act provides for in our submission is it does provide for what happens for failure to comply with its provisions where those provisions apply. And unless section 12(2)'s is interpreted as only applying where the Act doesn't otherwise apply, in other words if the Court accepts the Commission's argument instead of Telecom's argument, then you have a result contrary to the actual scheme of the Act unless you believe that the scheme of the Act is everything runs off section 12(2). Because that's in effect what the Commerce Commission are saying. The explanation for section 8 not requiring the vendor to give notice or not saying that the purchaser can cancel when they get to know about this is, oh well, section 12(2) gives the purchaser a remedy at any time. Or section 12(2) gives an incentive for the vendor to notify.

So what you have with great respect is a complete flip flop as I would read the scheme of an Act where a section buried under contracting out becomes the section which actually drives the effective operation of the Act.

And there are sensible reasons why there are time limits such as the 30 day time limit. And I adverted to them before. After 30 days, it's pretty unlikely anybody's going to be unhappy in any case and they're certainly not going to be unhappy because they've cooled off on the whatever they've transacted. Secondly, it starts becoming difficult to see whether the restitutionary regime under 9 and 10 is going to be effective. And certainly when five years later they added services to



the goods which were caught under this Act, Parliament could say, well we can pass section 9(6) which says you don't get compensation for services because the purchaser has to cancel within 30 days. And it's not too unfair. But if you start saying, oh this runs on forever, but you never get compensated for the services you've provided under section 9(6) then of course you're in a very different situation where effectively if section 12(2) has the interpretation which the Commission contends for, there's a free lunch. Not only one free lunch but free lunches for the whole period of time that the contract's allowed to continue.

And with respect that's completely contrary to the scheme of the Act which of course after the 30 days gives the vendor an option to decide whether or not the vendor had exercised the section 8 opportunity which the vendor is given.

Now there are a lot of other matters I addressed in submissions before which I don't want to repeat here. But as Your Honours have expressed much better than I certainly did, if the Commission's proposition is correct then the purchaser has in fact two remedies all the time for anything else but a section 6(2) situation. And those remedies have quite different consequences. And of course quite different incentives. And in most circumstances if the Commission were right, the remedy which the purchaser should undertake is a section 12(2) remedy, not the remedy which the Act goes to great, elaborate lengths to set out under sections 7, 8, 9 and 10.

And if you've received goods then it's much better to exercise the section 12(2) remedy because as my learned friend the Solicitor conceded, under section 12(2) you don't have to return the goods. So whether it's a well thumbed copy of the Encyclopaedia Britannica, or a work of art which hasn't been well thumbed and suffered no wear and tear and might have gone up in value, you're much better to hang onto it and get your money back under 12(2). Now that's a perverse incentive in my respectful submission.

And if services have been provided, and because if you cancel under 9(6), sorry if you cancel it all comes to an end, you're much better to let the contract run on and on and on and get all the services that the vendor keeps providing and then of course exercise a 12(2) remedy and get all your money back. Now that is a completely perverse incentive. A purchaser would be irrational in most circumstances to exercise the 30 day cancellation. Because you can do much better by keeping on getting and then get your money back at the end of the day.

So the submission or the interpretation advanced by the Commission with great respect is inconsistent with the scheme of the Act and quite simply doesn't make sense.

And it's no answer, as the Commission keeps suggesting that section 8 can solve a section 12(2) problem. And I addressed some of those reasons before. But one of the reasons it can't is that section 12(2), the section 12(2) problem arises as soon as the contract or transaction is entered into. Any transaction entered into or any contract or arrangement made immediately is unenforceable and the money can be repaid. So there's nothing in section 12(2), sorry in section 8, and we've already looked at it, that retrospectively remedies what is created as an avoidance situation under section 12(2). The only thing which is remedied is a section 5(1) unenforceability.

And if in fact you could use section 8 for section 12(2) which in my respectful submission you can't, again the purchaser's immediate response would be not to cancel under the section 8 notice but to claim your rights under section 12(2). And so how does that fit together. Does it mean that if a section 8 notice is served you can't then claim rights under section 12(2). And the incentive of course is it can't be.

Tipping J Well the Solicitor-General suggested that the serving of a section 8 notice in effect purged the problems or effects of section 12(2).

Galbraith Well section 8 doesn't say that. And section 8 as I said before, the sort of notice under section 8 is most, is completely inappropriate for a purging of a section 12(2) breach if I can use that term. Because it doesn't tell you what the breach was. It simply tells you you've got 7 days to cancel. So you're not being told about what your rights are in fact. And I can't with great respect believe that if Parliament thought section 12(2) was the primary remedial provision, that it would allow you to give a section 8 notice without telling the purchaser that in fact they had rights under section 12(2). It just doesn't make any logical sense in the context of the scheme of the Act.

So ironically, in my respectful submission, the commissioner's interpretation is the one which would prevent or defeat the operation of the scheme of the Act because as I say, it runs off 12(2), not all the other sections which constitute the scheme of the Act.

And in that respect if I can with respect adopt what His Honour Justice Tipping suggested which is that in effect the commissioner's case is that 12(2) is a breach, operates in a breach situation and it may also in the other, the avoidance situation, whereas our submission is that it's limited to a situation of avoidance.

And so for all of those reasons, in our respectful submission, section 12(2) is not engaged by what has happened here. And if it is interpreted in the way which we submit, then Telecom's infelicitous, or whatever other way one would like to describe it, terms in those letters which accompanied the mail out of the phone, didn't avoid the operation of the Act. It is quite clear that they didn't. And didn't engage in our respectful submission section 12(2) in which case we

agree that if we were successful in persuading this Court as to that, then the appropriate thing is the order that Sir Thomas Eichelbaum presaged, a remission back to the High Court to decide whether there is anything worth going forward and what's worth going forward and get those declarations made which there is no contest about. And that is that we breached the Act and there are breaches of the Fair Trading Act also which have been committed.

That's all I was proposing to say.

Elias CJ      Thank you.

Galbraith     Thank you.

Elias CJ      Thank you Counsel for your help. We will wait to hear from you Mr Solicitor and we will reserve our decision.

Court adjourns 3.34 pm