IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2023-409-333
[2024] NZHC 3070

BETWEEN	COMMERCE COMMISSION Applicant
AND	EAGLE M.A.N GROUP LIMITED Respondent

Hearing: 11 October 2024

Appearances: N F Flanagan and C R Andic for Applicant
J B Hamlin and C L Webber for Respondent

Judgment: 28 October 2024

JUDGMENT OF CHURCHMAN J
(Redacted)

INDEX

Introduction

[1] Following an investigation, the Commerce Commission (the Commission) brought proceedings against Eagle MAN Group Ltd (Eagle MAN) on 25 March 2023 alleging breaches of ss 17, 45E, and 45G of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) due to conduct between 11 October 2015 and 22 August 2022.

[2] After discussions, Eagle MAN admitted to the allegations. The remaining issues to be determined concerns the scope of the breaches under s 45E and 45G and what form of penalties should be imposed.

Background

[3] Eagle MAN is an incorporated company with one director, Mr Noli Alea. It began trading on 11 October 2015, being first incorporated as Eagle M.A.N. Limited on 21 October 2015 before changing its name to Eagle M.A.N. Group Limited on 15 April 2016. The company operated a small to medium sized lending business which provided loans both from its two physical branches in Christchurch and online via its website and Facebook page. Its clientele was primarily Filipino temporary workers and recent immigrants to New Zealand.

[4] Over the relevant period, Eagle MAN charged:

(a) Establishment fees of $30, $50 or $70 between March and August 2021, which increased to $120 in around August 2021 and then $250 in around August 2022.

(b) Various discretionary fees including Change Fees, Statement Fees, Default Fees, Letter Fees, Wage Assignment Fees, Direct Debit Cancellation Fees, Credit Agency Fees, Collection Agency Fees and External Collection Costs.

(c) Interest charges of 109.50 per cent, 127.75 per cent, or 182.50 per cent per annum prior to 16 November 2020, or interest charges of 49 per cent from 16 November 2020.

[5] Between 1 May 2020 and 16 November 2020 (the Sample Period), 222 loans were entered into with 174 borrowers with a total value of principal of $468,300 and a total amount to be repaid of $657,908.70.

[6] Over the s 45E breach period (1 May 2020 to 22 August 2022), Eagle MAN entered into 726 loan agreements with 351 borrowers, with the amounts payable comprising $1,950,300 principal and $594,747.09 in costs of borrowing.

[7] On 12 January 2021, the Commission opened its investigation into Eagle MAN, following a review of 20 sample borrower files obtained from Eagle MAN pursuant to a statutory notice issued on 20 October 2020 as part of a monitoring project into high-cost credit providers.

[8] During the course of the investigation, Eagle MAN provided information to the Commission by way of responses to statutory notices, voluntary requests for information, document requests, and interviews. These included the statutory notice issued 20 October 2020 (the First Notice) and another issued 22 June 2022 (the Second Notice).

The sampling

[9] Under the First Notice, the Commission requested a sample of 20 borrower files covering the time period 11 May 2020 to 24 July 2020, comprised of files from the first two borrowers who entered into high-cost consumer credit contracts on 10 randomly selected dates.

[10] Under the Second Notice, the Commission requested a sample of 20 borrower files for the first two borrowers and last two borrowers who entered into high-cost consumer credit contracts in each month from June to October 2020.

[11] A further four borrower files were requested on 9 December 2022, taken from the period between 8 June 2020 and 11 August 2020.

[12] From these requests, the Commission received borrower files for 44 borrowers relating to 226 separate loan agreements (the Sample Borrower Files).

[13] On 15 June 2021, the Commission set out in a letter to Eagle MAN its preliminary view on whether Eagle MAN had breached provisions of the CCCFA. In a letter dated 24 August 2021, Eagle MAN accepted that it had likely breached ss 45E, 45F and 45G of the CCCFA.

[14] In a letter dated 4 November 2022, the Commission advised Eagle MAN that it had concluded its investigation and decided to issue proceedings against Eagle MAN for breaches of the CCCFA.

[15] From its investigation, the Commission found that 26 of the 44 Sample Borrower Files (amounting to 50 contracts) breached s 45E of the CCCFA by containing consumer credit contracts that provided for an amount recoverable that would result or was capable of resulting in the maximum costs of borrowing being exceeded, and/or by accepting a payment or debiting a fee to borrower's accounts which resulted in the maximum costs of borrowing being exceeded.

[16] It also found that for four of the 44 Sample Borrower Files, Eagle Man had breached s 45G of the CCCFA by entering into a high-cost contract with a borrower at a time when that borrower had entered into two or more high-cost contracts with Eagle MAN in the preceding 90 days.

[17] Eagle MAN has accepted that these breaches occurred.

[18] The Commission asserts that, based on a mathematical extrapolation from the Sample Borrower Files, approximately 103 borrowers and 218 individual loan

agreements disclosed breaches of s 45E, resulting in borrowers entering into contracts that provided for costs of borrowing of approximately $183,000 after the maximum costs of borrowing had already been exhausted and actually paid approximately $251,000 in costs of borrowing after maximum costs of borrowing had already been exhausted.

[19] As with s 45E, the Commission, by extrapolating from the sample, states that approximately 17 borrowers and 13 individual loan agreements disclosed breaches of s 45G and as a result of these breaches, borrowers paid $20,200 in costs of borrowing on loans entered into in breach of s 45G.

[20] Eagle MAN disputes the representative nature of the Sample Borrower Files and denies that the breaches disclosed by the Files can be extrapolated across the loans entered into by Eagle MAN in the Sample Period and s 45G breach period to give the representative figures set out above.

[21] The Commission also found that between 11 October 2015 and 16 March 2021 (the Relevant Disclosure Period), various versions of Eagle MAN's standard disclosure statements did not contain the information required by s 17 of the CCCFA. This included omitting the unpaid balance, the annual interest rate as a percentage, and the trading name of the creditor. Eagle MAN has entirely accepted that the breaches of s 17 occurred as alleged by the Commission.

Orders sought

[22] The Commission seeks the following orders against Eagle MAN:

(a) An order that Eagle MAN pay pecuniary penalties pursuant to s 107A of the CCCFA for its breaches of ss 45E and 45G;

(b) A declaration that Eagle MAN contravened s 45E and 45G;

(c) A declaration that during the Relevant Disclosure Period Eagle MAN breached s 17 of the CCCFA by failing to provide key information relevant to the contract set out in Sch 1 of the CCCFA; and

(d) Costs.

Legal principles

[23] The purposes of the CCCFA are set out in s 3 and include:[1]

> (a) to promote the confident and informed participation in markets for credit by consumers; and
>
> (b) to promote and facilitate fair, efficient, and transparent markets for credit; and
>
> (c) to protect the interests of consumers under credit contracts, consumer leases, and buy-back transactions of land, both when those agreements are entered into and for their duration; and
>
> (d) to provide remedies for debtors, lessees and occupiers (including consumers) in relation to oppressive credit contracts, consumer leases and buy-back transactions of land and oppressive conduct by creditors under credit contracts, lessors under consumer leases, and transferees under buy-back transactions of land.

[24] To achieve these purposes, the CCCFA, among other means, provides for the disclosure of adequate information to consumers under consumer credit contracts, and provides rules about interest charges, credit fees, default fees, and payments in relation to consumer credit contracts.[2]

[25] Section 17 of the CCCFA provides that:

> (1) Every creditor under a consumer credit contract must ensure that disclosure of as much of the key information set out in Schedule 1 as is applicable to the contract is made to every debtor under the contract before the contract is entered into.
>
> (2) Every creditor under a consumer credit contract must ensure that a copy of all of the terms of the contract not disclosed under subsection (1) (other

---

1 Credit Contracts and Consumer Finance Act 2003 [CCCFA], s 3(2).
2 Section 3(3)(b) and (c).

than terms implied by law) is given or sent to every debtor under the contract before the contract is entered into.

[26] The key information set out in sch 1 to the CCCFA includes the trading name of the creditor,[3] the unpaid balance as at the date specified in the disclosure statement accounting for every payment made by the debtor on or before that date and specifying the amount and description of each advance, charge, or payment accounted for in the unpaid balance,[4] and the annual interest rate or rates under the contract expressed in terms of a percentage.[5]

[27] Prior to 2019, the CCCFA did not provide for civil pecuniary penalties, and instead only provided for fines. It also did not contain provisions relating to high-cost consumer credit contracts. However, on 19 December 2019 the Credit Contract Legislation Amendment Act 2019 was enacted which introduced a number of new provisions, including ss 45E, 45G and 107A. Sections 45E and 45G came into force on 1 June 2020.

[28] A high-cost consumer credit contract is a consumer credit contract that:[6]

(a) provides for an annual interest rate of 50 per cent or greater;

(b) under which the weighted average annual interest rate applied to the unpaid balance is or is likely to be 50 per cent or greater on any day during the term of the contract; or

(c) under which the total rate of interest charges that may be applied cumulatively to the same part of the unpaid balance in the event of a default in payment or the credit limit being exceeded is or is likely to be 50 per cent or greater.

[29] Section 45E of the CCCFA provides that:

---

3 Schedule 1(aa).
4 Schedule 1(b)–(c).
5 Schedule 1(g).
6 Section 45C.

(1) The maximum costs of borrowing that are recoverable under a high-cost consumer credit contract and all related consumer credit contracts is an amount equal to the first advance.

(2) A consumer credit contract must not provide for an amount to be recoverable that will result in that maximum amount being exceeded or that is capable of resulting in that maximum amount being exceeded.

(3) No person may be a creditor under a contract that contravenes this section or accept a payment, or debit a fee or charge to the debtor's account, that will result in that maximum amount being exceeded.

…

(5) In this section,—

costs of borrowing, in relation to a consumer credit contract, means any or all of the following costs:

(a) a credit fee:

(b) a default fee:

(c) interest charges:

(d) charges for an optional service:

(e) fees or charges passed on by the creditor (other than default fees).

…

first advance means,—

(a) in respect of a high-cost consumer credit contract that has no related consumer credit contracts, the first advance (excluding any credit fees, charges for optional services, and fees or charges passed on by the creditor) under that high-cost consumer credit contract:

(b) in respect of a high-cost consumer credit contract that has 1 or more related consumer credit contracts, the first advance (excluding any credit fees, charges for optional services, and fees or charges passed on by the creditor) under the earliest high-cost consumer credit contract in the series

[30] This means that, if an initial loan of $100 is made to a borrower, the interest and fees charged on that loan cannot exceed $100, as that is the maximum cost of borrowing. Additionally, if a further loan is taken from the same creditor by the same borrower to help pay the initial debt, the total interest and fees charged across both loans cannot exceed $100.[7]

---

[7] See the useful example scenario set out at the end of s 45E of the CCCFA.

[31] Section 45G specifies that no creditor may enter into a high-cost consumer credit contract with a debtor who has entered into 2 or more high-cost consumer credit contracts at any time within the preceding 90 days, except where the creditor proves they have complied with s 9C in respect of the requirement to make reasonable inquiries, and where they had reasonable grounds to believe that the debtor had not entered into two or more high-cost consumer credit contracts during the relevant period.

[32] Section 107A provides that:

> **107A Pecuniary penalties**
>
> (1) The court may, on the application of the Commission, order a person to pay to the Crown the pecuniary penalty that the court determines to be appropriate if the court is satisfied that the person—
>
> (a) has contravened any of the following provisions:
>
> …
>
> (v) subpart 6A of Part 2 (provisions relating to debtors under high-cost consumer credit contracts):
>
> …
>
> (2) In determining an appropriate penalty under this section, the court must have regard to all relevant matters, in particular,—
>
> (a) any exemplary damages awarded under section 94(1)(c); and
>
> (b) the nature and extent of the contravention; and
>
> (c) the nature and extent of any loss or damage suffered by any person because of the contravention; and
>
> (d) any gains made or losses avoided by the person in contravention; and
>
> (e) the circumstances in which the contravention took place (including whether the contravention was intentional, inadvertent, or caused by negligence.
>
> (4) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
>
> (a) in the case of an individual, $200,000; or
>
> (b) in any other case, $600,000.
>
> …
>
> (5) Where conduct by any person constitutes a contravention of 2 or more provisions referred to in subsection (1)(a), proceedings may be instituted under this Act against that person in relation to the contravention of any 1

> or more of the provisions; but no person is liable to more than 1 pecuniary penalty under this section in respect of the same conduct.

[33] Pecuniary penalties are available in respect of the breaches of ss 45E and 45G but not in respect of the breaches of s 17.

[34] In any pecuniary penalty proceedings, the standard of proof is that applied in civil proceedings[8] (the balance of probabilities).

[35] As noted in *Gault on Commercial Law,*[9] the Commerce Act 1986 has long provided for pecuniary penalties, with Gilbert J finding in *Commerce Commission v Property Brokers Ltd* that "the accepted approach is to establish an appropriate starting point having regard to the maximum penalty, and then adjust this starting point to take account any aggravating or mitigating factors specific to each defendant".[10] Duffy J acknowledged in *Commerce Commission v Vector Ltd* that conventional sentencing principles are to be adopted when fixing pecuniary penalties.[11] There is no reason to doubt that the overall objective for pecuniary penalties under the CCCFA is the same as under the Commerce Act, namely deterrence.[12]

"Representative" contraventions

Expert report

[36] Both parties have sought supporting evidence from experts concerning the Commission's approach to extrapolating Eagle MAN's contraventions across its loan book, with Dr Glenn Boyle providing evidence for the Commission and Dr David Baird providing evidence for Eagle MAN.

[37] The experts have filed a joint report setting out where they agree and where they differ. Both agree that the Commission would have ideally used random sampling of borrowers. However, they consider that there are potentially offsetting biases in the Commission's analysis meaning biases causing the estimated breach rate to be too

---

8 CCCFA, s 107B(a).
9 Ian Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Thomson Reuters) at [FC6.02A].
10 *Commerce Commission v Property Brokers Ltd* [2017] NZHC 681, [2017] NZCCLR 14 at [4].
11 *Commerce Commission v Vector Ltd* [2019] NZHC 540 at [30]–[31].
12 *Gault,* above n 9, at [FC6.02A(4)].

high may be offset by other biases causing the estimated breach rate to be too low. Both consider the bias due to over-representation of large borrowers to probably be small, and state that any bias due to over-representation of early borrowers (those from June to July 2020) is difficult to identify because they are unable to observe the population.

[38] Dr Boyle undertook an analysis of the sampling period and post-sampling period, and following Dr Baird's suggestion, used the population sub-period weights in estimating the breach rate, which yielded an alternative breach rate of 41 per cent, down from the Commission's estimate of 43 per cent. Dr Boyle considered that given the minor nature of the reduction, and that the use of population weights does not necessarily improve the accuracy of the estimate, there was no strong justification for making any change. Dr Baird considered that the fact the population estimate is close to the original sample estimate indicates that the sample proportions were close to the population proportions, but does not justify using the sample proportions when a better estimator is available.

[39] In terms of their disagreements, Dr Boyle's view is that the sample taken by the Commission is sufficiently representative to allow the inferences it makes regarding breach rates. In contrast, Dr Baird believes that non-random sampling may create an unknown bias in the results and therefore some allowance should be made for that in the statement of results. He believes that consideration should be given to the adoption of, for example, the 75 per cent confidence limit as a counter to any possible upward bias in the Commission's estimated breach rate. However, Dr Boyle's view is there is no clear evidence of significant upward bias and so considers no such adjustment is warranted.

Submissions

[40] Mr Hamlin for Eagle MAN submits that there are issues with the Commission's treating of the Sample Borrower Files as representative and extrapolating additional contraventions, losses, and commercial gains across Eagle MAN's loan book. He states to identify the contraventions of ss 45E and 45G the Commission used a "convenience sampling method" by taking the first two borrowers on days specified

by the Commission to identify 44 borrowers who had entered into high-cost credit contracts.

[41] Mr Hamlin submits that the Commission should have used a full random sampling method. He refers to Dr Baird's view that the non-random sampling may have created an unknown bias in the results and that some allowance should be made for this in the statement of results.

[42] Mr Hamlin acknowledges that it is now accepted by both parties that the sampling was sufficiently representative to establish the overarching scope and scale of Eagle MAN's contraventions of the CCCFA, and that the specific number of contraventions cannot be identified without reviewing each borrower file, which would involve a disproportionate burden to its probative weight. He submits that the sampling exercise has provided an indication of the potential scope and scale of any loss or gain but does not permit it to be identified specifically.

[43] Mr Hamlin disagrees with the Commission's assertion that Eagle MAN has admitted commercial gain in the general vicinity of $270,000 and submits this is not a case where the Court can estimate gains as an exercise of judgement based on the facts. He states the admissions as to the scope and scale of the contraventions do not enable the Commission to extrapolate loss or commercial gain in the manner it has because ss 45E and 45G contraventions can occur without any actual "loss" or "gain" at all. This is because a contravention can occur simply for loans providing for fees/interest greater than permitted or the charging to an account of an amount exceeding the maximum allowed. Mr Hamlin submits that on the facts of this case, the scale and scope of the contraventions are not sufficient to establish loss and gain in a way that can be compared to the starting point, let alone adopted as a benchmark to be doubled to ensure deterrence.

Analysis

[44] The onus lies on the Commission to demonstrate that on the balance of probabilities the figures it has extrapolated from the Sample Borrower Files accurately represents the number of contraventions and the sum gained from these contraventions. It is important to note that, in circumstances where two experts do not

agree but have not been subject to cross-examination it is not for the Court to undertake a detailed exercise of statistical analysis. It must do its best to make sense of the conflicting evidence.

[45] The experts for both parties accept that best practice would have been to use simple randomised sampling to ensure an unbiased survey, rather than the semi-random sample selected by the Commission. Despite their disagreement as to whether the Sample Borrower Files are sufficiently representative to enable the Commission to draw the inferences it has, Dr Boyle and Dr Baird are largely in alignment with their findings.

[46] I particularly note the exercise undertaken by Dr Baird using the population sub-periods, which arrived at a breach rate only two per cent less than that from the approach used by the Commission.

[47] I accept the submissions of Mr Hamlin that the extrapolations from the Sample Borrower Files provides an indication of the scope and scale of the contraventions and associated losses or gains, and that specific and exact figures cannot be drawn from the sample. However, I am satisfied the statistical analysis is sufficiently representative to support a finding that somewhere around 103 individual borrowers and 218 credit contracts breached s 45E, and that somewhere in the vicinity of 17 borrowers and 13 loan agreements breached s 45G, with the breaches combined resulting in gains in the general vicinity of $270,000. The approximate nature of this figure will be taken into account in the determination of the penalty.

Maximum penalty

[48] The Commission contends that the maximum penalty under s 107A of $600,000 is the maximum in respect of each act or omission. In his oral submissions, Mr Flanagan submitted that there were 50 breaches of s 45E and four breaches of s 45G, meaning the maximum penalty for each category of breaches was $30 million and $2.4 million respectively.

[49] Any approach to fixing a pecuniary penalty based on the assumption that the starting point in this case should be a maximum penalty of $32.4 million is clearly

unrealistic. Such an approach also abandons the task of the fixing of the penalty to the whim of the regulator seeking the penalty as the regulator may choose to rely on one representative breach to attempt to calculate all the customers affected by the breach as the Commission has done in this case. Typically, with breaches of the type encountered here there will be large numbers of affected transactions, sometimes thousands or even tens of thousands if large financial institutions are involved.[13] Often each individual instance of breach may only involve a relatively small sum. On the approach advocated by Mr Flannagan, if a breach affected 1000 customers, the maximum penalty would be $600 million. That is clearly an unrealistic way to approach setting the maximum penalty.

[50] Mr Hamlin submits that s 107A(5) provides that where conduct constitutes a contravention of more than one provision, a defendant is not liable for more than one civil pecuniary penalty in respect of the same conduct. He submits that s 107A(5) is substantially the same as s 506 of the Financial Markets Conduct Act 2013 (FMCA), and refers to cases where this has been considered.[14] He consequently argues that the maximum penalty for Eagle MAN's conduct overall is $600,000. The flaw in that approach is that it conflates conduct which might breach two different provisions (which is the subject of s 107A(5)) with conduct which amounts to separate breaches of the same provision (which is the situation here).

[51] In *TSB Bank,* where s 107A was applied for the first time, Jagose J adopted the Commission's categorisation of the breaches, which were divided into 13 categories based on the types of fees imposed, with thousands of fee charges and loan or credit card accounts affected falling within each of those categories.[15]

[52] The circumstances in this case are fundamentally different given the means by which the number of breaches has been estimated make it difficult to categorise these breaches, as the exact nature of each breach is not sufficiently known outside those in the Sample Files.

---

13 In *Commerce Commission v TSB* [2024] NZHC 2400 some 42,000 customers were affected.

14 *FMA v AIA New Zealand Ltd* [2022] NZHC 2444; and *FMA v ANZ Bank New Zealand* [2021] NZHC 399, (2021) 16 TCLR 28.

15 *Commerce Commission v TSB Bank,* above n 13, at [23].

[53] In *FMA v ANZ Bank New Zealand Ltd,* Muir J held that because the two breaches of the FMCA in that case occurred over substantially the same period of time and resulted from similar deficiencies in ANZ's processes and systems, the maximum penalty was to be assessed against that for a single breach.[16]

[54] I consider that Muir J's approach in *ANZ Bank* is preferable in the circumstances of this case, as the breaches of ss 45E and 45G occurred over substantially the same period, and resulted from similar deficiencies, namely the charging of excessive fees and interest on loans. In my view the breaches of the Act which occurred here are best regarded as having a common cause (failure in the part of the defendant to take adequate steps to inform itself of its obligations under the Act) and to be regarded as one overall act or omission with the maximum penalty available under s 107A(3) being $600,000. With that established it is now necessary to consider what approach best reflects the direction in s 107A(2) as to the 'relevant matters' that must inform a determination of the appropriate penalty.

Approach in *TSB Bank*

[55] Mr Flanagan submits that the Court should not adopt the approach set out in *Commerce Commission v TSB,* where breaches of ss 9C and 41 of the CCCFA were placed into bands of low (six to 35 per cent), moderate (36 to 65 per cent) and high (66 to 95 per cent) seriousness within the $600,000 pecuniary range, with each breach assessed and placed into bands.[17] He states there are two issues with this approach:

(a) Firstly, the number of breaches in many such cases is determined by the plaintiff. Each breach could be charged or pleaded as more or less depending on the approach taken, even though the scale and scope of the conduct is the same. He argues the maximum penalty would therefore not necessarily be a firm base on which to anchor penalty.

(b) Secondly, an identical approach to FTA penalties is said to have been expressly rejected by the Court of Appeal in *Steel & Tube,*[18] with a more

---

16 *FMA v ANZ Bank,* above n 14, at [42].
17 *Commerce Commission v TSB Bank*, above n 13, at [25].
18 *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549, (2020) 15 TCLR 743.

conventional and synergistic approach taken that weighed all relevant factors.

[56] Mr Hamlin disagrees with Mr Flanagan and submits that the approach taken by Jagose J in *TSB Bank* was a straightforward application of the general principle of sentencing that penalties at or near the maximum are reserved for cases at or near the most serious of their type. He states Jagose J's approach is similar to that commended by Mallon J in *RBNZ v TSB Bank Ltd*[19] concerning AML/CFT contraventions, and notes that Muir J also set out AML/CFT cases by bands based on seriousness in *FMA v ANZ Bank New Zealand Ltd.*[20] Although Mr Hamlin acknowledges an approach tied to the maximum penalty risks a "framing effect" conditioned by decisions of the prosecutor or plaintiff, he contends this is dealt with by the application of the totality principle, as noted by the Court of Appeal in *Steel & Tube.*

[57] I do not accept Mr Flanagan's reasoning that the approach taken in *TSB Bank* by Jagose J was incorrect and followed a methodology that had been rejected by the Court of Appeal in *Steel & Tube.* The sentencing bands utilised for charges under the Fair Trading Act were rejected in *Steel & Tube* on the basis that the categorisation rested on the offender's state of mind to the potential exclusion of other factors, with the bands set out as "inadvertent, careless or wilful" conduct.[21] The use of bands generally was not criticised, although they were not used in determining the starting point in that case.

[58] I accept Mr Hamlin's submissions that such bands have been adopted for imposing penalties in respect of similar types of conduct, such as breaches of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. I also accept that the concerns raised by Mr Flanagan in respect of a framing effect by taking an approach tied to the maximum penalty can often be sufficiently addressed through making adjustments for totality.

---

19 *Reserve Bank of New Zealand v TSB Bank Ltd* [2021] NZHC 2241 at [43].
20 *FMA v ANZ Bank New Zealand,* above n 14, at [80].
21 *Steel & Tube,* above n 18, at [89].

[59] However, as noted above, there are significant differences between the facts in *TSB Bank* and those in this case, with the conduct here sufficiently connected in time and nature to regard a penalty of $600,000 as being the maximum, in contrast to *TSB Bank* where an aggregate maximum penalty of $7.8 million across 13 categories of breaches was adopted. There is consequently less utility in applying bands in the manner adopted in *TSB Bank.* Such a rigid approach of placing the conduct within three bands can also inhibit the ability of coming to a starting point that properly takes into account all relevant factors.

[60] As a result, I consider that determining an overall starting point based on the breaches as a whole, rather than placing each breach or type of breaches into a band to come to a total starting point, is the appropriate approach in this case.

Starting point

Nature and extent of contraventions

[61] In respect of the nature and extent of the contraventions, Mr Flanagan submits that the breaches were systemic, arising from system failures, and took place across Eagle MAN's entire loan book. On the basis the Sample Borrower Files were representative, the breaches were widespread, with non-compliance inherent in Eagle MAN's lending practices. He states that every loan made from 1 May 2020 also breached the relevant disclosure requirements with the standard form initial disclosure statement inadequate in a large number of respects.

[62] Mr Hamlin submits that the number of contraventions, affected loans, and affected borrowers was comparatively low, with only 26 borrowers identified as affected by contraventions of s 45E and four borrowers identified as affected by contraventions of 45G. He states the highest estimate from the Commission supports 312 loans affected by breaches of s 45E and 17 affected by breaches of s 45G, which is small when compared to *TSB Bank* or other cases prosecuted under the CCCFA in the District Court. Mr Hamlin submits virtually all CCCFA cases involve "systemic" offending, and the contraventions of ss 45E and 45G took place over a relatively short time period, given the amendments came into force on 1 May 2020 and 1 June 2020.

[63] It is clear that, as in many cases under the CCCFA and similar regimes such as the FMCA, Eagle MAN's breaches were systemic, occurring across its loan book and affecting around 40 per cent of its borrowers, according to the Commission's statistical extrapolation. This high proportion of borrowers contrasts with some of the cases referred to such as *FMA v ANZ Bank,* where only 0.3 per cent of ANZ's relevant policyholders were affected,[22] or in *FMA v AIA,* where it was noted that "only a very small percentage" of policyholders were affected.[23] However, the overall number of affected borrowers, slightly over 100, is modest compared to the breaches in *TSB Bank* where some 42,000 customers were affected.

[64] The period over which the contraventions occurred was also relatively short, being just over two years for the s 45E breaches and around six months for the s 45G breaches, in comparison to six years for *TSB Bank* and four in *Steel & Tube.* However, the weight to be given to the short period of contravention is lessened by the fact Eagle MAN only became aware of its contraventions because of it being reviewed by the Commission as part of its monitoring project into the high-cost credit industry.

Nature and extent of any loss, damage or gains

[65] In regard to the nature and extent of any loss or damage suffered by any person because of the contravention, Mr Flanagan states that for the s 45E breaches in the Sample Borrower Files the Commission calculated the excess costs of borrowing actually paid of approximately $125,000, with the s 45G breaches resulting in approximately $6,000 in additional costs of borrowing. Mr Flanagan states that extrapolating the samples to the full loan book results in a commercial gain of approximately $270,000. He further submits this does not capture the full extent of the harm, given the loans were made to people in vulnerable situations and who may not have understood what they were signing up to.

[66] Mr Hamlin submits that Eagle MAN accepts the Sample Borrower Files are a representative sample of all Eagle MAN's files for borrowers it provided high cost contracts within the sample period in that they sufficiently reflect the overarching

---

22 *Financial Markets Authority v ANZ Bank,* above n 14, at [72].
23 *Financial Markets Authority v AIA,* above n 14, at [69].

scope and scale of the breaches under ss 45E and 45G. He states it is open to the Court to conclude that the actual loss or gain was on a gross basis likely higher than $125,000. However, he contends that this admission cannot be used to indicate the commercial gain over the entire sample period or loan book, as the Commission has sought to do.

[67] As discussed above, the $270,000 figure cannot be treated as an exact sum, but rather an estimate of the likely commercial gain of Eagle MAN. Although this is inherently much less than that in *TSB Bank* where customers were overcharged by $3.6 million in total, it is close to the nearly $200,000 in overcharges in *FMA v ANZ Bank,* where a penalty of $280,000 was imposed. It is also relevant that the borrowers were vulnerable. Inherently people who seek high-cost credit contracts are likely to be in a vulnerable financial position, where they are obliged to resort to paying very high interest rates and fees in order to obtain credit. People in vulnerable financial positions are more greatly affected by excessive interest charging such as occurred in this case.

Circumstances in which the contravention took place

[68] In relation to the circumstances in which the contravention took place, Mr Flanagan submits the conduct is inherently serious and deserving of a significant pecuniary penalty, as it occurred across Eagle MAN's loan book and was a result of its failure to put in steps to comply with the CCCFA. He submits that whilst Eagle MAN is not a large business with significant financial resources to ensure its lending was compliant, this case is not about inadequate compliance measures, as there were no effective compliance measures in place at all.

[69] Mr Hamlin submits that the contraventions were inadvertent and arose due to Eagle MAN not being aware of its obligations because of reliance on inadequate advice and being unaware of amendments to the CCCFA in 2020. He submits the Commission is plainly wrong to describe the contraventions as reckless conduct, as there was no conscious appreciation of the risk of contravention. He notes Eagle MAN took steps to obtain initial compliance by engaging two business advisors and took steps to change its behaviour once the true position was drawn to its attention.

Mr Hamlin also submits the impact of the vulnerability of the affected consumers on the seriousness of the contraventions is overemphasised, with no evidence put forward as to the vulnerability of the borrowers. He contends that the customers' vulnerability is not a distinguishing factor from other cases.

[70] It is agreed between the parties that Eagle MAN's conduct was not a deliberate breach, but was due to a lack of understanding around the relevant laws, in particular the recent changes to laws concerning high-cost credit contracts. However, whilst not wilfully breaching the CCCFA, Eagle MAN was to a degree reckless in its reliance on the advice of largely unqualified persons on how to conduct its business and ensure it was compliant.

[71] A reasonable person would have appreciated the risks in relying on the legal advice of someone who worked with lawyers but was not themselves a lawyer, or general business advice from someone merely described as being "involved in a company". Although the steps to seek advice do point to at least an intention to be compliant, the fact Eagle MAN had no effective compliance measures in place, and thus likely would have continued its contraventions but for the Commission's investigation, is clearly an aggravating factor.

Deterrence

[72] In terms of deterrence, Mr Flanagan contends that given CCCFA's provisions are designed to protect vulnerable borrowers, and that the harm caused goes beyond the financial harm caused by the money paid, the commercial gain must be wholly stripped by the fine so that financial incentives do not exist to offend. The starting point therefore should be significantly above the net gain to meet deterrent aims.

[73] Mr Hamlin submits that in a case involving a small business such as Eagle MAN, there is less need to require that the penalty exceed the commercial gain. He refers to Miller J's decision in *Commerce Commission v New Zealand Bus (No 2),* in which the Court stated it would be wrong to assume that penalties must do all the work to achieve deterrence, that other factors deter including cost and uncertainty of

litigation and stigma, and that it is not invariably necessary that penalties eliminate unlawful gains.[24]

[74] In *DIA v Ping An Finance,* Toogood J observed that:[25]

> [92] …the overriding objective of a pecuniary penalty is deterrence, including of other persons who might be tempted to breach the Act…Deterrence is achievable only if the penalties address the financial gain or incentive that was, or could reasonably have been, obtained from the breach of the Act…pecuniary penalties must "deter the unscrupulous from taking a calculated business risk" and their significance must be such that "having regard to particular gains which might be involved, it is in effect commercial suicide to seek those gains via contraventions".

[75] Deterrence can be specific in deterring the particular creditor from similar conduct in the future, and general in deterring other creditors from engaging in such conduct. As in *FMA v AIA,*[26] specific deterrence is not necessary in this case as Eagle MAN's breaches were not intentional, although reckless, and it immediately took steps to rectify its lending practices once it became aware of its breaches.

[76] Different approaches have been taken in the case law over whether fines or pecuniary penalties need to be set at levels that eliminate commercial gain in order to achieve deterrence. In *FMA v ANZ Bank,* Muir J accepted the submission that to achieve deterrence it will generally be appropriate for the starting point to be set at a level substantially higher than the commercial gain of the defendant, to ensure the penalty is not seen merely as a cost of doing business.[27]

[77] In *Telecom Corporation of New Zealand Ltd v Commerce Commission,* the Court of Appeal found that Parliament, by increasing the available penalties under the Commerce Act, had sought to send a stronger signal that the deterrence objective will only be served if anti-competitive behaviour is profitless.[28] I note that since it was enacted, penalties for body corporates under the CCCFA have increased from $30,000

---

24 *Commerce Commission v New Zealand Bus Ltd (No 2)* HC Wellington CIV-2006-485-585, 29 September 2006 at [30].

25 *Department of Internal Affairs v Ping An Finance (Group) New Zealand Company Ltd* [2017] NZHC 2363 at [92] citing *Australian Communications and Media Authority v Mobilegate Ltd A Company Incorporated in Hong Kong (No 4)* [2009] FCA 1225, (2009) 180 FCR at [32].

26 *Financial Markets Authority v AIA,* above n 14, at [90].

27 *Financial Markets Authority v ANZ Bank,* above n 14, at [55].

28 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [53].

or $200,000 to $600,000. However, the Court in *Telecom* also referred to its findings in *Carter Holt* that higher penalties are required to deter affluent parties compared to 'indigent' ones, but cautioned placing too much weigh on this factor.[29]

[78] In *New Zealand Bus (No 2)* Miller J commented that penalties do not always need to eliminate unlawful gains and that there are other deterrent aspects to a penalty than merely its amount. In that case the Court considered that the starting point of a penalty should be the estimate of the defendant's potential unlawful gain, and gave discounts that resulted in the penalty being brought down from $2 million to $500,000.

[79] Although the imposition of a penalty is in itself a deterrent due to the factors identified by Miller J in *New Zealand Bus (No 2),* I consider that a penalty that removes most of the commercial gains of Eagle MAN is necessary in this case to present a sufficient deterrent to creditors providing high-cost credit contracts and ensure such recklessness as occurred in this case is not repeated by other creditors. Not doing so risks, as Muir J noted in *ANZ Bank,* penalties being regarded as merely a business cost.

Comparable cases

[80] Mr Flanagan submits that in light of the relevant considerations, a starting point in the range of $500,000 to $550,000 is appropriate, which is approximately double the financial gain. He relies on a number of Financial Markets Authority cases to support this starting point.[30]

[81] Mr Hamlin submits most cases involving a $600,000 maximum penalty have involved a starting point in the range of $70,000 to $160,000. He refers to a number of "Mobile Trader" cases[31] where vulnerable consumers are targeted with a range of non-disclosure, inadequate disclosure, unreasonable fees and misleading conduct. Mr Hamlin submits that the contraventions in this case are less serious than the Mobile Trader cases which involved more borrowers and a higher degree of vulnerability. He

---

29 At [55]–[56] citing *Carter Holt Harvey Building Products Group v Commerce Commission* (2001) 10 TCLR 247 (CA) at [94].

30 *FMA v ANZ Bank New Zealand Ltd,* above n 14; *FMA v AIA New Zealand Ltd,* above n 14; and *Financial Markets Authority v Hill* [2024] NZHC 1353.

31 *Commerce Commission v Macful International Ltd* [2017] NZDC 18615; *Commerce Commission v Best Buy* [2017] NZDC 13575; and *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165.

also submits the authorities cited by the Commission do not assist the Court as the conduct in those cases was factually different, involving large corporations and significantly greater contraventions, affected parties, potential gains and losses, as well as involving contraventions of a different civil pecuniary penalty regime with different objectives and higher penalties.

[82] There are aspects of both sets of cases referred by each counsel that differentiate them from the circumstances of this case. The FMA cases concern much larger multinational corporations such as ANZ Bank and AIA, and more affected parties, although not greatly so, being 186 customers in *FMA v ANZ Bank* and 383 in *FMA v AIA New Zealand* respectively. Although the total financial harm in *FMA v AIA New Zealand* amounted to around $418,000, in *FMA v ANZ Bank* the harm was less than this case, as noted at [67] above.

[83] The Mobile Trader cases concern the imposition of fines for offences rather than civil pecuniary penalties, which serve a different purpose. As noted by the Law Commission, pecuniary penalties are not as severe as criminal penalties as they do not carry the stigma of criminal conviction.[32] The Law Commission also considered that criminal sanctions have greater emphasis on denunciation,[33] and noted that they tend to carry lower maximum financial penalties due to their additional punitive effects which include stigmatisation and, at times, imprisonment.[34] I am therefore reluctant to give too much weight to the starting points adopted in the Mobile Trader cases. However, they do concern businesses and conduct of a similar scale to that in this case.

Appropriate starting point

[84] Whilst Mr Flanagan seeks a starting point in the range of $500,000 to $550,000, Mr Hamlin submits that a penalty in the range of $75,000 to $125,000, or around 12.5 to 21 per cent of the maximum would be appropriate, and suggests a starting point of $100,000.

---

32 Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at [4.7].
33 At [4.17].
34 At [4.21] and [16.28].

[85] In light of the above considerations, I consider that a starting point of $300,000 is appropriate in this case. A starting point lower than this would be inadequate to provide sufficient general deterrence to creditors providing high-cost credit. The starting point is set above the estimated commercial gain of Eagle MAN rather than at the same level, as in *New Zealand Bus (No 2),* in recognition of some of the aggravating factors of Eagle MAN's conduct, particularly the high rate of contraventions across Eagle MAN's loan book, the lack of any effective compliance measures, and the reckless reliance on the advice of unqualified persons on how to ensure its business was compliant.

[86] The reason why a starting point in the range suggested by Mr Flanagan is not adopted is due to the fact the contraventions were not deliberate, they are estimated to have only affected a relatively small number of customers compared to other cases, and that there were at least some attempts at ensuring compliance through seeking advice. These tell against a finding that the conduct was such as to attract a penalty near to the maximum available.

Discounts

Submissions

[87] In terms of adjustments to the starting point, Mr Flanagan accepts there should be a discount for cooperation, but submits it should be limited by the fact Eagle MAN's conduct came to light as a result of the Commission's proactive monitoring project, with Eagle MAN not self-reporting any issues. He also notes that Eagle MAN's admissions came soon before the hearing. In light of this context, Mr Flanagan submits a discount of no more than 20 to 25 per cent is warranted.

[88] Mr Hamlin submits that a discount of 30 per cent would be appropriate. He states that Eagle MAN acknowledged that it had contravened the CCCFA throughout the investigation, made no less than four offers to remediate potential consumer harm during the investigation, with the earliest being on 24 August 2021, and admitted aspects of the claim in its statement of defence dated 25 August 2023.

[89] Mr Hamlin also points to the fact Eagle MAN cooperated with the Commission, with Mr and Mrs Alea attending voluntary interviews and Eagle MAN ceasing taking on loans for two months at the Commission's suggestion and complying with voluntary requests for information. Mr Hamlin states the position of Eagle MAN is analogous to that of a criminal defendant who, though remorseful and accepting responsibility for their actions, enters a guilty plea but disputes facts relied on by the prosecution resulting in the prosecution substantially altering its position to one more favourable to the defendant.

[90] Counsel submits that the Commission's proposed discount is inconsistent with the Court's statement in *RBNZ v TSB Bank Ltd* that a discount of 30 to 35 per cent is regularly approved by the Court in circumstances where the defendant has cooperated with the Commission, provided an early admission of contravention, and taken steps to remedy the contraventions.[35] He refers to a number of other decisions which he submits support a discount as high as 35 per cent.[36]

Analysis

[91] I am satisfied that a discount for cooperation should be made. I do not accept Mr Flanagan's submission that any discount should be restricted by Eagle MAN's failure to self-report. As previously mentioned, Eagle MAN was not aware of its contraventions until it was informed by the Commission from its investigation, and so could not have self-reported on issues it was not aware of. Eagle MAN's failure to ensure proper compliance measures has already been considered in the setting of the starting point, and to restrict its discount for the same reason would amount to double counting.

[92] Eagle MAN was clearly cooperative with the Commission throughout its investigation. As outlined in the brief of evidence of Ms Watrin for the Commission, Eagle MAN cooperated through engaging in discussions to explore resolution of the issues that had arisen, made offers of remediation, attended voluntary interviews on

---

35 *RBNZ v TSB Bank Ltd,* above n 19, at [31]–[32].

36 *Property Brokers Ltd,* above n 10, at [13]–[14]; *Commerce Commission v Hutt and City Taxis Ltd* [2021] NZHC 2543 at [28]–[29]; *Commerce Commission v Enviro Waste Services* [2015] NZHC 2936 at [32]–[33] and [42]; and *Commerce Commission v Ronovation Ltd* [2019] NZHC 2303.

19 March 2021 and 16 July 2021, voluntarily provided information and documents in response to Commission requests, and continued to do so after the Commission indicated it would be commencing penalty proceedings against Eagle MAN. Although there were delays in the provision of some of this information, these appear to be inadvertent and not deliberate attempts to frustrate the investigation.

[93] Despite Mr Flanagan's submission, Eagle MAN's admission did not occur just before the hearing, with its first acceptance of breaching the CCCFA being on 24 August 2021, prior to the conclusion of the Commission's investigation. In each of its statements of defence filed on 25 August 2023, 27 March 2024 and 8 October 2024, it admitted its breaches, but contested their extent. It can fairly be said it admitted to its breaches early.

[94] Following the investigation Eagle MAN took steps to bring its business practices into compliance, including by implementing revised disclosure information, ceasing to offer high-cost loans, removing itself from the high-cost loan market, investing in lending and investment software, and undertaking compliance audits.

[95] In *RBNZ v TSB Bank,* Mallon J determined that a 20 per cent discount in that case would be insufficient, noting that such a discount was granted in *DIA v Qian DuoDuo,* where the defendant had inaccurately represented the nature of its relationship with money remitters and the parties had failed to agree on the penalty.[37] It was also acknowledged in that case that analogies can be drawn to early guilty pleas in criminal proceedings, where discounts of up to 25 per cent have been awarded.[38]

[96] I find that the factors above warrant an overall discount of 30 per cent, in acknowledgement of Eagle MAN's early admission, its clear cooperation with the Commission, the steps taken to bring its conduct into compliance, and its willingness to remediate. Although Mr Hamlin referred to offers to remediate, Eagle MAN can't get any credit for those as it has not actually made any remediation payments.

---

37 *RBNZ v TSB Bank Ltd,* above n 19, at [45]–[47] citing *DIA v Qian DuoDuo Ltd* [2018] NZHC 1887 at [163].

38 *RBNZ v TSB Bank Ltd,* above n 19, at [51].

Defendant's ability to pay

Submissions

[97] Mr Hamlin submits that Eagle MAN's ability to pay is also a relevant consideration. He states the Court can infer from the evidence of Mr Alea that Eagle MAN's position has deteriorated over the three years of investigation and proceedings, with it ceasing high interest lending from 16 November 2020 and new lending entirely from 20 May 2024.

[98] Mr Hamlin also states that a significant portion of Eagle MAN's money has been used to support and expand a related business, Kabayan, which is unable to repay the loans as it has neither the income nor the equity to do so, with Mr Hamlin noting [redacted]

[99] Mr Hamlin submits that case law suggests a high threshold before the Court will impose a penalty that jeopardises a firm's solvency and contends this threshold has not been met in this case.

[100] He says that this is because Eagle MAN has not acted deliberately or recklessly, the impact of its contraventions was not the worst of its type, the conduct did not target vulnerable communities or individuals, it cooperated with the investigation and accepted responsibility from the outset and is unlikely to contravene in the future given Mr Alea's remorse and the changes made to business practices.

[101] Mr Hamlin submits that, based on the considerations above, Eagle MAN would be able to sustain a penalty of $36,000, in payments of $500 per fortnight for three years, which is what Mr Alea has been presently drawing down as a shareholder advance.

Analysis

[102] The financial information provided by Eagle MAN is not sufficiently detailed and up to date to establish with certainty exactly what its current ability to pay is. The latest information is for the financial year ending 31 March 2023, which is a year and a half ago. However, I accept that it indicates a general trend of losses in recent years,

due to Eagle MAN ceasing trading in high-cost loans in late 2020 and then lending in general in mid 2024. This indicates that Eagle MAN's net assets will inevitably have deteriorated from the [redacted] it held as at 31 March 2023.

[103] I also accept that Eagle MAN's assets, mostly comprised of loans, are not liquid and not of the kind against which it can borrow, and that much of these are loans to Kabayan which are unlikely to be repaid in the near future.

[104] Some pecuniary penalty cases refer to s 40(1) of the Sentencing Act 2002 which provides that in determining the amount of a fine the court must take into account the financial capacity of the offender. Although the Sentencing Act does not govern pecuniary penalties,[39] this principle has been recognised as being applicable, with penalties increased or decreased based on financial capacity.[40] In *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd,* Williams J noted that there was Australian authority for the proposition that a penalty of a quantum that would put a defendant out of business may be imposed in "egregious circumstances".[41]

[105] In *ACCC v Leahy Petroleum Pty Ltd,* the Federal Court of Australia noted previous findings that the court should not be concerned by the effect of a penalty on the defendant's ability to trade where it has survived through breaching its obligations, although the ability to pay remained a relevant factor to be considered.[42]

[106] I do not consider that such "egregious circumstances" as existed in *Leahy Petroleum* are present in this case, given Eagle MAN's breaches were not deliberate. However, I consider concerns around imposing a penalty that would jeopardise Eagle MAN's ability to trade, if not its solvency, are tempered by the fact Eagle MAN has itself ceased providing new loans. I also note Eagle MAN's remediation offers indicate an ability and willingness to pay an amount in the realm of the penalty in this case, with its offers in 2022 ranging from $210,000 to $231,197.

---

39 *Steel & Tube,* above n 18, at [102].

40 See *Commerce Commission v Hutt and City Taxis,* above n 36, at [30]–[32]; and *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2011] NZCCLR 19 at [57].

41 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 at [34] citing *ACCC v Leahy Petroleum (No 3)* [2005] FCA 265, (2005) 215 ALR 301 at [66].

42 *ACCC v Leahy Petroleum (No 3),* above n 41, at [56] citing *Schneider Electric (Australia) Pty Ltd v ACCC* (2003) 127 FCR 170 at 173.

This is of course qualified by the fact Eagle MAN has incurred significant costs recently, including legal fees, investment in ensuring compliance as well as having lost most of its revenue stream.

[107] A suggestion that the penalty should be reduced to a figure as low as $36,000 is unrealistic and would require much more current and detailed evidence of inability to pay than has been provided to the Court. It would also be insufficient to reflect the purpose of general deterrence for other high-cost creditors. Such a penalty could be regarded as merely amounting to a cost of doing business for Eagle MAN. I regard that the 30 per cent discount imposed adequately accounts for Eagle MAN's ability to pay.

[108] A 30 per cent reduction from the $300,000 starting point results in a penalty of $210,000, which I round down to $200,000 in partial recognition of Eagle MAN's limited ability to pay.

[109] Eagle MAN sought the ability to pay any penalty off on an instalment basis and a direction that the penalty does not bear interest. That was not opposed by the Commission. I therefore direct that the penalty be paid in 20 equal monthly instalments commencing on 20 November 2024. Provided the monthly payments are made on or before the 20th of each month no interest shall accrue. However, interest shall accrue on all overdue payments at 10 per cent per annum.

Result

[110] I make declarations that Eagle MAN:

(a) contravened s 45E(2) and (3) of the CCCFA by providing high-cost credit contracts that provided for costs of borrowing in excess of, or capable of being in excess of, the maximum costs of borrowing, and by accepting payment or debiting a fee or charge to the borrowers' accounts that would result in the maximum costs of borrowing being exceeded;

(b) contravened s 45G of the CCCFA by entering into high cost credit contracts with borrowers at a time when those borrowers had entered into two or more high cost credit contracts with Eagle MAN within the preceding 90 days;

(c) breached s 17 of the CCCFA by failing to provide key information relevant to contracts set out in sch 1 of the CCCFA during the Relevant Disclosure Period;

[111] I impose a penalty of $200,000 under s 107A of the CCCFA on Eagle MAN for its contraventions of ss 45E and 45G.

Costs

[112] Mr Flanagan for the Commission did not make any submissions regarding costs. However, Mr Hamlin submitted that a 2B award of costs should be made to Eagle MAN. He argues this is justified in the event that the Court imposes a penalty significantly lower than that sought by the Commission, as this would render the Commission the unsuccessful party in the proceeding.

[113] He further notes that Eagle MAN had accepted its contraventions and that a pecuniary penalty would be imposed since the proceeding was filed, and contends that the Commission substantially increased the cost of the case due to its positions on the representative contraventions and its refusal to engage with evidence of Eagle MAN's ability to pay.

[114] Since a penalty of an amount between those sought by the parties has been imposed, no party can be said to have been completely successful in the proceedings. Costs will therefore lie where they fall.

Suppression and access restriction

[115] The financial circumstances of Eagle MAN and Kabayan are detailed in the defendant's submissions, the brief of evidence of Mr Alea, and parts of the common

bundle of documents. Financial information regarding Eagle MAN and Kabayan is also included in this judgment.

[116] Mr Hamlin submits that Eagle MAN seeks a suppression order in relation to the financial information in this judgment, and an order under r 5 of the Senior Courts (Access to Court Documents) Rules 2017 that the court file and any document in it may not be searched, inspected or copied by anyone without the permissions of the Judge and without the parties have an opportunity to be heard on any application. Mr Hamlin refers to *Commerce Commission v Canterbury Industrial Scrubbing Ltd*[43] as supporting the making of such an order.

[117] To grant a suppression order in these proceedings I must be satisfied that there are specific adverse consequences that a sufficient to justify an exception to the fundamental principle of open justice.[44] Such orders are commonly made in civil proceedings for reasons of commercial sensitivity.[45]

[118] I accept Mr Hamlin's submission that the financial information in this judgment is confidential and commercially sensitive and would impact Eagle MAN and Kabayan's ability to conduct their business. The parts of the judgment sought to be suppressed will be redacted.

[119] Rule 5 of the Senior Courts (Access to Court Documents) Rules provides that a judge may direct that judgments, orders, documents, or files of any kind may not be accessed without the permission of the judge. In *Commerce Commission v Canterbury Industrial Scrubbing Ltd* such an order restricting access to the court file was made due to the confidential and commercially sensitive information concerning the defendant on the file. I consider that the same circumstances are present in this case, and so grant the order sought.

Churchman J

Solicitors:
Meredith Connell, Auckland for Applicant
Anderson Lloyd, Christchurch for Respondent

---

43 *Commerce Commission v Canterbury Industrial Scrubbing Ltd* [2024] NZHC 1596.
44 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].
45 *Terminals (NZ) Ltd v Comptroller of Customs* [2012] NZHC 447.