**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2022-485-29**
**[2022] NZHC 1864**

| | | |
|---|---|---|
| UNDER | the Commerce Act 1986 |
| BETWEEN | COMMERCE COMMISSION<br>Plaintiff |
| AND | OBJECTIVE CORPORATION LIMITED<br>Defendant |

| | |
|---|---|
| Hearing: | 30 May 2022 with further submissions on 21 June 2022 |
| Appearances: | J S Cooper QC, F J Cuncannon and P I C Comrie-Thomson for the Plaintiff<br>J H Stevens and G M Shewan for the Defendant |
| Judgment: | 29 July 2022 |

---

**JUDGMENT OF PALMER J**

---

*Solicitors/Counsel*
J S Cooper QC, Auckland
Meredith Connell, Wellington
Bell Gully, Wellington

## What happened?

[1] Objective Corporation Ltd (Objective) is a multinational software company, listed in Australia. In April 2019, Objective acquired 100 per cent of the shares of Omega Group Holdings Ltd and Alpha 88 Ltd, which offers a specialised building consent cloud-based software product called AlphaOne (now rebranded as Objective Alpha). In October 2019, Objective entered an agreement to purchase all the shares of Master Business Systems Ltd (MBS), which offers a specialised building consent software product called GoGet and had a 50 per cent interest in a joint venture that supplied a related cloud-based website portal, the Simpli Portal. These companies were each other's closest competitors in New Zealand for the supply of software for building consent authorities to assist in, and digitise, the building consent process.

## The proceedings

[2] Objective accepts that, given its first acquisition, its second acquisition contravened s 47 of the Commerce Act 1986 (the Act). Section 47 prohibits acquisition of assets of, or shares in, a business if "the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market". The market is the New Zealand market for the supply to building consent authorities of software for the digitisation of building consent processes. The Commerce Commission and Objective have settled these proceedings regarding the breach of s 47. They have agreed to recommend to the Court that it impose a final penalty of $1.54 million on Objective.

[3] I have not referred to commercially confidential information provided to the Court in this judgment. At the request of the parties, I order that the Court file is not to be searched or accessed without leave of the Court, after considering the views of the parties.

## Approach to Penalty

[4] Agreed penalty proceedings are in the interests of the parties and the Court, in enabling early disposal of the proceedings and avoiding costly litigation. As the High Court has noted previously in *Commerce Commission v New Zealand Milk*

*Corporation Ltd*, there is no objection to parties tendering a joint view on the appropriate penalty.[1] The agreed penalty approach in Australian proceedings was confirmed by the High Court of Australia in *Commonwealth of Australia v Director, Fair Work Buildings Industry Inspectorate*, on the basis the Court must satisfy itself that the submitted penalty is appropriate.[2]

[5] While the parties agree on a proposed penalty, the decision remains with the Court. The Court must be satisfied with the final figure proposed, within the appropriate range, having regard to the objectives of the Act and the circumstances of the case.[3] It is the final figure which matters, not each step of the proposed methodology used by the parties to reach it.

[6] Section 83(2) of the Act requires the Court to determine an appropriate penalty for breach of s 47 by having regard to all relevant matters, which is specified to include:

> (a) the nature and extent of the act or omission:
>
> (b) the nature and extent of any loss or damage suffered by any person as a result of the act or omission:
>
> (c) the circumstances in which the act or omission took place:
>
> (d) whether or not the person has previously been found by the court in proceedings under this Part to have engaged in any similar conduct.

[7] In *Commerce Commission v First Gas Ltd*, Mallon J accepted the approach taken by the parties, which was to determine the maximum penalty for the breaches, set a starting point in light of the object of deterrence, impose any uplifts in light of relevant factors, and then adjust the starting point for any considerations particular to the party concerned.[4] In light of the issues in this case, I suggest additional steps and do not count as a "step" determining the maximum penalty, which is set out in the statute:

---

1 For example, see *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC) at 733.

2 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46.

3 *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [37].

4 *Commerce Commission v First Gas Ltd* [2019] NZHC 231 [*First Gas*].

(a) Step 1: Establish whether divestment or a pecuniary penalty alone is the appropriate penalty.

(b) Step 2: In relation to a pecuniary penalty, establish an appropriate starting point for the offending which achieves the objective of general and specific deterrence, in light of the relevant factors.

(c) Step 3: Adjust the starting point to discount or increase the penalty on the basis of considerations specific to the defendant, including to account for additional breaches.

(d) Step 4: Review the totality of the penalty to check it is proportionate to the offending.

**The penalty here**

[8] I apply those steps to the unlawful acquisition here. At the time of the offending, the maximum penalty that could be imposed on Objective was $5 million. From 5 May 2022, s 38 of the Commerce Amendment Act 2022 increased that penalty. Because Objective's conduct occurred prior to that date, the previous maximum remains applicable.[5]

*First step: Divestment or pecuniary penalty?*

[9] A key issue in this case lies in this first step of deciding whether full or partial divestment is a viable alternative to relying on a pecuniary penalty alone. The Commission has examined whether divestment is viable, making specific information requests, undertaking interviews, and testing the information and issues arising with the assistance of independent software experts.

[10] The Commission decided not to pursue divestment because it considers it is unclear that divestment is practicable and, even if it was, the risk of an unsuccessful divestment was too high. It also considered there was a risk that an unsuccessful divestment might interrupt the supply of support and maintenance services to building

5 Legislation Act 2019, ss 11, 12 and 34.

consent authorities. Because of the reliance on key staff to operate and support each product, and the nature of the bespoke integration of GoGet and AlphaOne, the Commission considers it is unlikely a willing buyer could be found which could operate either one of the products successfully.

[11] On the basis of the information before me, I accept that the ongoing separate viability of divested firms is dubious given their dependence on key personnel who are retiring. The point of the acquisition was to use industry knowledge in development of the next product and that has occurred. And, while these products were each other's closest competitors, there are other competing products in the market. Thirty-five per cent of building consent authorities do not use the products at issue here. There is a limit to how much the Court can direct. I accept that divestment would not necessarily restore or maintain competition in the market and would pose risks for the maintenance of services to building consent authorities. I do not consider divestment is practically feasible and, therefore, it is not an appropriate penalty.

*Second step: starting point of size of pecuniary penalty*

[12] I accept that the penalty must be meaningful enough not to be a "licence fee" and to render the anti-competitive behaviour profit-less.[6] The key objective in imposing a penalty is general and specific deterrence.[7] Where divestment is not available or appropriate, the pecuniary penalty, alone, must serve as a sufficient general and specific deterrent.

[13] Miller J set the starting point in *Commerce Commission v New Zealand Bus Ltd* only by reference to deterrence, although he referred to other relevant factors.[8] The Court of Appeal did not disturb, but did not explicitly endorse, this approach.[9] In *First Gas*, Mallon J took into account a wider range of factors, as has the Court in cases under s 80 of the Act, with regard to restrictive trade practices.[10]

---

6 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [15] and [53].

7 *First Gas,* above n 4, at [46].

8 *Commerce Commission v NZ Bus Ltd (No 2)* (2006) 3 NZCCLR 854 (HC) [*NZ Bus*] at [20]–[21] and [27].

9 *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433.

10 *First Gas,* above n 4, at [47]; *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [20]; *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3

[14] I accept the estimated size of the unlawful gains that could be derived from the acquisition is an important relevant element to setting the starting point, where it can be reliably estimated. If a penalty is to be an effective deterrent, it should be higher than the estimated gains from the unlawful conduct. But those gains can be difficult to estimate. The mandatory relevant considerations in s 83(2) are also obviously relevant. And I agree with Mallon J that the further wider range of factors may be relevant. I do not consider that is affected by the difference in the factors specified as mandatory by ss 80(2A) and 83(2). Whether or not the wider factors are relevant depends on the circumstances of the particular case.

[15] I accept the relevant factors are:

(a) the importance and type of market;

(b) the nature and seriousness of the contravening conduct;

(c) whether the conduct was deliberate or not;

(d) the duration of the contravening conduct;

(e) the seniority of the employees or officers involved in the contravention;

(f) the extent of any benefit derived from the contravening conduct;

(g) the nature and extent of any loss or damage suffered by any person as a result of the contravening conduct;

(h) the market share/degree of market power held by the defendant;

(i) the role of the defendant in the impugned conduct; and

(j) the size and resources of the defendant.

---

NZLR 689 (HC) at [17]; *NZ Bus,* above n 8, at [20]; *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097, (2013) 13 TCLR 628 at [40]–[52]; *Commerce Commission v Unique Realty* [2016] NZHC 1064 at [31]–[39]; and *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [13].

[16] Here:

(a) I accept the market is an important market in an industry that is significant to New Zealand. The building industry has been in the national spotlight in recent years. So has the contribution or otherwise of the building consent process to the efficiency and cost of the industry.

(b) I accept the conduct was serious, as do the parties. The acquisition was part of a considered and concerted commercial strategy pursued over the course of at least a year. There was no application to the Commission for clearance or authorisation of the acquisition under ss 66 or 67. The deliberateness of the conduct is an exacerbating factor.

(c) At the time of the acquisition of MBS, its Managing Director told the Chair and Chief Executive of Objective, Mr Tony Walls, that the acquisition would effectively hand over the New Zealand market to Objective. There is evidence Mr Walls appreciated Objective had acquired a primary competitor to AlphaOne. The Commission accepts that Objective did not intend to breach the Act. But this knowledge should, at the least, have raised a red flag at Objective. Mr Walls' seniority exacerbates this.

(d) The parties agree the commercial gain realised, loss suffered or harm caused cannot be accurately quantified. It has resulted in the removal of competition between Objective and MBS. That competition would otherwise likely have continued for least the short and medium term, to the benefit of building consent authorities in terms of price, supply terms and service quality. But Objective has not implemented any price increases following the acquisition and over the course of the Commission's investigation. It is obviously difficult to estimate the harm done, or gain acquired, in which parts of the market, to what extent and for how long. But the size of the market and the total acquisition price is relevant to that. The total acquisition price of MBS was $5.4 million. And a material proportion of that price was

attributable to IT services. Objective's revenue from building consent software in New Zealand in the 2020 financial year was $3.8 million.

(e) As the Court of Appeal has stated, the size and resources of the defendant is relevant to deterrence. Objective is a large company, with global revenue of AUD 70 million in the year ended 30 June 2020 and net profit after tax of AUD 11 million and cash assets of AUD 51 million. Its revenue in New Zealand in the same year was AUD 8.2 million. And its revenue from building consent software was approximately NZD3.8 million. Objective should have known better.

[17] The previous two cases of pecuniary penalties under s 83 are:

(a) *New Zealand Bus*, where the starting point for an unintentional and uncompleted attempt at acquiring a bus company was $2 million.

(b) *First Gas* which involved acquisition of gas distribution assets in Papamoa. The Court accepted an appropriate starting point was $3.5 to $3.8 million for an unintentional but potentially permanent breach of s 47 by a large company where divestment was considered unlikely to restore competition.[11] A further uplift of $800,000 to $1.1 million was imposed for breach of s 27's prohibition of contracts substantially lessening competition in a market. The agreed recommended penalty, accepted by the Court, was the midpoint of the resulting range, at $3.4 million.

[18] I accept the unlawful acquisition here is more serious than that in *New Zealand Bus*, a transaction which was not completed. The conduct here is similar to that in *First Gas* in that it resulted in the removal of a key competitor, involved senior personnel, was unintentional, and divestment was not a viable option. The Commission submits the conduct in *First Gas* was more serious in there being a more complete and permanent elimination of competition, a reluctant seller, and a much larger defendant. I accept that.

---

11 *First Gas,* above n 4, at [41]–[51].

[19] The Commission submits an appropriate starting point is $2.2 million, within the appropriate range of $2 million to $2.5 million. Having regard to the considerations above, I agree.

*Third step: Defendant-specific adjustments*

[20] The Commission submits that there are two defendant-specific considerations relevant here. First, Objective has not previously contravened the Act or been warned for conduct likely to breach the Act. Second, Objective has cooperated throughout the investigation, volunteering information and discussing divestment with the Commission. In addition, Objective has acknowledged and accepted it contravened the Act at the earliest possible stage and has agreed to settle on terms acceptable to the Commission. The Commission submits that these factors warrant a 30 per cent discount from the starting point.

[21] Having regard to the 25 per cent discount in *First Gas*, and Mallon J's review of other discounts under various Acts in *Reserve Bank of New Zealand v TSB Bank Ltd*, I accept the proposed discount is justified.[12] It is analogous to the approach taken to sentencing in the criminal context where a 25 per cent discount is often justified by an early guilty plea and further discounts can be given for remorse.[13] Here, a 30 per cent discount sufficiently accounts for Objective's prompt admission of the breach and continued cooperation with the Commerce Commission. That discount results in a penalty of $1.54 million prior to any adjustments for totality.

*Fourth step: totality*

[22] Ms Cooper QC, for the Commission, submits that the Commission supports the proposed penalty because, while it accepts Objective did not intend to breach the Act, it is a large company and the conduct was serious. The acquisition resulted in the removal of competition that otherwise would likely have continued for at least the short and medium term and would have been beneficial to building consent authorities in terms of price, supply terms and service quality.

---

12 *Reserve Bank of New Zealand v TSB Bank Ltd* [2021] NZHC 2241 at [45]–[56].
13 At [51].

[23] Ms Stevens, for Objective, submits Objective has approached the matter responsibly and accepted responsibility from the earliest point. Objective's intention was to develop a product that would improve the quality of its specialised building consent and used its acquisition strategy to obtain the expertise to do so. It has followed through on that in creating a building consenting and assessment solutions centre in Palmerston North and in developing next generation solutions Objective admits it ought to have been aware of the competition implications of its conduct and accepts the market impacts in the short to medium term. Objective accepts the amount of the agreed penalty is appropriate and considers it accords with the jurisprudence on penalties. It submits that the extent of its cooperation with the Commission was significant and the size of the agreed penalty will have a significant impact in the context of its New Zealand-based revenue.

[24] I accept those submissions and do not make any adjustments to account for totality.

**Result**

[25] By consent, I order that Objective be subject to a penalty for breach of s 47 of the Act of $1.54 million.

Palmer J