IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2118
[2020] NZHC 1716

UNDER	the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	INTERNATIONAL RACEHORSE TRANSPORT NZ Defendant

Hearing: On the papers

Counsel: D A Laurenson QC, F J Cuncannon, K R Muirhead and P I C Comrie-Thomson for Plaintiff
J C L Dixon QC, A D Matthews and A M W Stewart for Defendant

Judgment: 16 July 2020

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 16 July 2020 at 10.30 am pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Meredith Connell, Wellington
Matthews Law, Auckland

Counsel: D A Laurenson QC, Wellington
J C L Dixon QC, Auckland

Introduction

[1] International Racehorse Transport NZ is a firm trading in partnership ("IRT Partnership"). The Commerce Commission alleges, IRT Partnership admits, and the parties seek declarations to the effect that between 2 October 2009 and 28 October 2018 ("relevant period") the partnership breached ss 27 and 30 of the Commerce Act 1986 ("Act").

Sections 27 and 30 Commerce Act 1986

[2] Section 27 prohibits a person, the definition of which is sufficient to include a partnership, from entering into a contract, arrangement or understanding containing a provision which has the purpose, effect or likely effect of substantially lessening competition in a market. IRT Partnership's breach of s 27 was by virtue of s 30 which, until August 2017, deemed a provision of a contract etc to have the purpose, effect or likely effect of substantially lessening competition if it had, amongst other things, the effect of controlling the price at which parties to the contract etc, otherwise in competition with each other, would supply services ("price fixing").

[3] In August 2017, and subject to specific transitional provisions, s 30 was amended to prohibit, amongst other things, a party giving effect to a "cartel" provision, such provision being defined to include price fixing. Very broadly, the effect of the amendment was to prohibit price fixing directly, rather than via s 27. Hence IRT Partnership's breach of s 30.

Background

[4] What follows is a summary of the parties' agreed statement of facts. I record the only parties who have participated in compiling the agreed statement are the Commission and the partners of IRT Partnership as of 28 October 2018. Accordingly, other parties said to have been involved have not been heard, and any reference to what they may or may not have done is essentially an allegation, derives solely from the understanding of the Commission and the said partners, and must be read in that light.

Partners/Services

[5] In the period with which I am concerned, the partners of IRT Partnership comprised International Racehorse Transport (N.Z.) Ltd as to a two-third share, and Bloodstock 2000 Ltd until 31 May 2016 and thereafter Cole IRT Ltd, each as to the remaining one-third share. Bloodstock 2000 Ltd ceased trading on 31 May 2016, has been removed from the Register of Companies.

[6] At all material times, IRT Partnership and an unrelated competitor ("ABC") provided equine airfreight services domestically and internationally. Equine airfreight services are those required to transport a horse by air from point A to point B, domestically or internationally ("services"), from the time the horse enters the airport of origin until it departs the destination airport.

Joint venture

[7] The Commission and IRT Partnership agree IRT Partnership and ABC were parties to a joint venture pursuant to which they controlled the prices at which they would provide the services domestically and trans-Tasman and thereby breached s 27, via s 30, and more latterly s 30 in its own right.

[8] A predecessor of IRT Partnership first formed the joint venture with ABC on or about 1 May 1989, entering into what is referred to as the "Overarching Agreement" and a separate "Transportation Agreement". The purpose, effect or likely effect of the Overarching Agreement was to control the retail prices to be quoted and/or charged and the discounts to be given for the services. Likewise, the effect or likely effect of the Transportation Agreement, updated and amended from time to time, was to set the prices to be charged on specified flight sectors and to prohibit discounts except by mutual agreement.

[9] It is agreed the joint venture was not without benefit to customers. The consolidated volume, and the pooling of the joint venturers' skills and resources, for instance professional grooms, allowed for regular, consistent, frequent and scheduled services.

1 June 1999 onwards

[10] The predecessor partnership wound down or was dissolved on or about 1 June 1999, and IRT Partnership, then comprising the partners referred to in [5] above, succeeded to its place in the joint venture, and adopted and gave effect to the Overarching Agreement.

[11] Subsequently, IRT Partnership and ABC agreed "Rate Agreements" in each of November 2010, July 2011, July 2012, November 2013, May 2015, November 2016, and April, July and November 2017. The Rate Agreements were price schedules detailing the sums intended to meet the costs for the relevant sector, plus a profit component, and to provide the discounts that could be given. The agreements were revised from time to time to reflect changes in costs.

[12] It was not inevitable IRT Partnership and ABC would charge customers the agreed prices, but that was the general consensus and, at the very least, the agreed prices/discounts were the starting point for discussions with customers.

[13] IRT Partnership and ABC also engaged in *ad hoc* discussions to vary prices and discounts as circumstances required, for instance for a large shipment or on a charter flight.

Investigation

[14] The Commission commenced its investigation of IRT Partnership's actions in February 2018. The Commission advised IRT Partnership of this in late-June 2018. The Commission commenced this proceeding in early-October 2019.

[15] In late-October 2018, IRT Partnership and ABC entered into revised and compliant arrangements as to the allocation of costs between them, rather than profit, as was the effect of their prior agreements.

Other relevant facts

[16] Other relevant facts are as follows. First, directors of the partners of IRT Partnership, and its Senior Operations Manager, were all involved in the day-to-

day management of IRT Partnership; in giving effect to the Overarching Agreement; and in entering into and giving effect to the Rate Agreements.

[17] Secondly, the Commission and IRT Partnership have not agreed the financial impact the conduct of the joint venture had on prices charged to customers. The parties agree such a resource intensive exercise is not required in the circumstances of this case.

[18] Thirdly, although IRT Partnership did not seek its own legal advice regarding the Overarching Agreement or the Rate Agreements, it knew ABC had done so and ABC shared its advice, to the effect the various agreements were lawful, on at least two occasions. The Commission accepts IRT Partnership's reliance on this legal advice indicates it did not necessarily intend to breach the Act. Equally, IRT Partnership acknowledges it should have been more careful to ensure compliance, and to obtain its own advice from time to time.

[19] Fourthly, the first iteration of the partnership entered into the joint venture with ABC, fearing for its survival if it did not do so. The advantage to the partnership in the first instance was at least a share of the profit derived from its own volumes. The strength of this rationale diminished over time, however, and had ceased to be material by October 2009, being the start of the relevant period in this case.

[20] Fifthly, IRT Partnership has co-operated fully with the Commission throughout, including by acknowledging and accepting it had contravened the Act at an early stage of the proceeding.

[21] Sixthly, IRT Partnership has not previously been found to have contravened the Act, nor previously been warned for conduct the Commission considers likely to breach the Act.

[22] Lastly, IRT Partnership has arranged competition law compliance training for its staff and strengthened internal policies and protocols for engaging with ABC and other competitors.

Breach

[23] The Commission and IRT Partnership agree:

(a) the Overarching Agreement was a contract, arrangement or understanding containing a provision with the purpose, effect or likely effect of controlling the price at which each of IRT Partnership and ABC supplied the services in competition with each other; and

(b) each Rate Agreement was a contract, arrangement or understanding which had the effect or likely effect of controlling the price at which IRT Partnership and ABC supplied the services in competition with each other; and

(c) by entering into and giving effect to these various agreements, IRT Partnership breached ss 27 and 30 of the Act.

Relief

[24] The parties seek declarations to the effect set out below but ask the Court to refrain from imposing a pecuniary penalty pursuant to s 80(1) of the Act.

[25] There is no objection to parties presenting a joint proposal to the Court as to what is a suitable remedy in the circumstances of a particular case. As Venning J said in *Commerce Commission v Carter Holt Harvey Ltd*:[1]

> … there can be no objection to a joint view of the parties on submissions as to penalty nor to such a view being reached as a result of negotiations so that it represents what could be described as a settlement. Such settlements are in the interests of the parties, the community and the judicial system, enabling as they do early disposal of the proceedings and encouraging a realistic view of culpability and penalty. They also avoid the need for a full hearing.

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1 *Commerce Commission v Carter Holt Harvey Ltd* [2014] NZHC 531 at [30]. See also *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414 at [23]; and *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097 at [34].

[26] However, it is always necessary for the Court to be satisfied what is proposed is suitable on the facts of the particular case. Conduct in breach of ss 27 and 30 of the Act is serious, and even more so if it occurs over an extended period.

Pecuniary penalty

[27] The Commission has made it clear that in the usual course of events it would seek both a declaration of breach and the imposition of a pecuniary penalty for conduct such as that IRT Partnership has admitted. That the Commission is not doing so is due to the following.

[28] First, the Commission is satisfied IRT Partnership would be unable to pay a pecuniary penalty. Independent expert evidence, commissioned before the full effect of COVID-19 on economic conditions was felt, indicated IRT Partnership would be unable to pay a penalty.

[29] IRT Partnership's financial position and outlook has worsened since. New Zealand was previously a "hub" for horses from Chicago destined for Australia, those horses having to be quarantined in New Zealand before being transported to Australia. Direct flights between the Chicago and Australia now mean that source of revenue has ceased. In addition, another large customer is facing financial difficulties and can no longer be relied upon to generate income. Further, the international travel restrictions occasioned by COVID-19 mean diminished revenue. All quarantine business has ceased for the foreseeable future.

[30] Secondly, employees would lose their positions and an effective monopoly in the provision of the services might result if IRT Partnership ceased to trade. Such an outcome cannot be discounted, indeed is clearly possible, if a pecuniary penalty were imposed.

[31] The parties accept none of these matters is determinative, and the Court might impose a pecuniary penalty regardless, particularly if a defendant's conduct has been egregious and the Court considers a penalty required for deterrence purposes.[2]

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2 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC) at [34].

[32] In this case, however, the Commission acknowledges IRT Partnership's conduct is not so egregious as to require the imposition of a pecuniary penalty, and the need for deterrence in this case can be met by declarations.

Declarations

[33] The Act does not include specific provision for the Court to make a declaration if a defendant has a breached the Act. However, it is well established the Court may do so in the exercise of its inherent jurisdiction, and pursuant to the Declaratory Judgments Act 1908.[3] The Court of Appeal confirmed this in *Telecom Corporation of New Zealand Ltd v Commerce Commission*:[4]

> [303] … The starting point is that the High Court has jurisdiction to grant declaratory relief, as all counsel accept, even though that remedy is mentioned nowhere in the Commerce Act… [Sections 75 and 76] say nothing about which Court can grant declaratory relief. Nor do the sections purport to permit declaratory relief only if tied to an application for or an order of specific Commerce Act relief. Indeed, such a construction of the Commerce Act would be contrary to s 2 of the Declaratory Judgments Act…

[34] The Court's discretion to grant declaratory relief is broad, but not unfettered. The test is whether a declaration is required in the interests of justice on the facts of the case:[5]

> As to the exercise of that discretion, I doubt if there has been a more concise and (with respect) insightful statement than that of Viscount Radcliffe in *Ibeneweka v Egbuna*:
>
> > "[The] two primary considerations [are] that the power to make declarations is conferred, surely not by accident, in wide and general terms, and that what is conferred is a discretion to be exercised according to the facts of each individual case.
> >
> > …
> >
> > [I]t is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making.

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3 *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 (HC) at 611.
4 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 278.
5 *Kung v Country Selection NZ Indian Association Inc* [1996] 1 NZLR 663 (HC) at 665-666 (citations omitted).

> This kind of approach is very like the approach of a Court to equitable remedies, the broad question being whether justice requires a declaration. A wide range of factors will then be relevant: whether a plaintiff has a sufficient interest in the proceedings; whether an issue is now moot; and the practical utility of issuing a declaration…

Submissions

[35] The Commission and IRT Partnership agree it is in the wider public interest to make the declarations they seek. Such declarations will confirm IRT Partnership engaged in conduct in breach of the Act; will assist the Commission to educate both the public and commercial sector about the forms of conduct likely to breach the Act, particularly in relation to joint ventures which have been the subject of relatively few cases under the Act even though they are a common form of commercial arrangement; will deter contraventions of the Act; and promote the purpose of the Act, which is:

> **1A Purpose**
>
> The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.

[36] The parties also agree there is practical utility in the Court making the agreed declarations as such will promote the speedy and inexpensive resolution of the proceedings.

[37] Venning J referred to many of these considerations in *Commerce Commission v ANZ Bank New Zealand Ltd*, when he said:[6]

(a) there is public interest in a Court declaring a defendant's conduct to be in breach of the Act rather than such breach being admitted and acknowledged in a private settlement;

(b) a declaration may be placed in front of the Court again in the event of any future breach;

(c) the public nature and effect of the Court's declaration acts as a deterrent to other parties engaging in similar conduct; and

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6 *Commerce Commission v ANZ Bank New Zealand Ltd* [2015] NZHC 1168, (2015) 14 TCLR 71 at [18].

(d) a declaration confirms to the public and the commercial community the Commission will enforce the Act where appropriate.

Discussion

[38] I accept the circumstances of this case do not require the imposition of a pecuniary penalty, and to impose one at the present time might have undesirable consequences, not only for the partners but their staff and their customers. I also accept that a declaration itself, without more, may serve the public interest and, in this case, the declarations proposed will meet the objectives identified in [35] and [36] above. I note also there is precedent for this approach. In *Commerce Commission v PGG Wrightson Ltd*, the defendant had ceased trading in New Zealand and was unable to pay a pecuniary penalty.[7] In granting the declaratory relief sought, Courtney J recognised that a declaration on its own "would serve the purposes of deterrence and assisting the Commission in its ongoing educative function".[8]

Result

[39] I make the following declarations:

(a) IRT Partnership gave effect to the Overarching Agreement:

(i) between, on, or around 2 October 2009 and 14 May 2018 in contravention of s 27, by virtue of s 30, Commerce Act 1986; and

(ii) between 15 May 2018 and 28 October 2018 in contravention of s 30 Commerce Act 1986.

(b) Prior to 14 August 2017, IRT Partnership entered into the Rate Agreements in contravention of s 27, by virtue of s 30, Commerce Act 1986.

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7 *Commerce Commission v PGG Wrightson Ltd* [2017] NZHC 2584.
8 At [21].

(c) On or after 15 August 2017, IRT Partnership entered into the Rate Agreements in contravention of s 30 Commerce Act 1986.

(d) Prior to 15 May 2018, IRT Partnership gave effect to the Rate Agreements entered into between 2 October 2009 and 14 August 2017 in contravention of s 27, by virtue of s 30, Commerce Act 1986.

(e) On or after 15 May 2018, IRT Partnership gave effect to the Rate Agreements entered into between 2 October 2009 and 14 August 2017 in contravention of s 30 Commerce Act 1986.

(f) On or after 15 August 2017, IRT Partnership gave effect to the Rate Agreements in contravention of s 30 Commerce Act 1986.

[40] I make no order as to costs, the parties having agreed they are to lie where they fall.

Peters J