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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV 2015-404-2245
[2015] NZHC 2936

UNDER	Sections 27 and 30 of the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	ENVIRO WASTE SERVICES LTD First Defendant
	DARRELL ASKEW Second Defendant

Hearing:	13 November 2015
Counsel:	J C L Dixon and K C Francis for Plaintiff L O'Gorman for Defendants
Judgment:	13 November 2015
Reasons:	24 November 2015

REASONS FOR JUDGMENT OF HEATH J

Solicitors:
Meredith Connell, Auckland
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Counsel:
J C L Dixon, Auckland

Introduction

[1] The combined effect of ss 27 and 30 of the Commerce Act 1986 (the Act) is to render of no effect any "contract, arrangement, or understanding" that has the purpose, or the likely effect, of substantially lessening competition in a market. Those who engage (or attempt to engage) in conduct in contravention of those provisions may become liable to pay pecuniary penalties.[1] If the relevant anti-competitive behaviour were proved, this Court may order the person to pay to the Crown such sum as it determines to be appropriate, having regard to the available maximum penalties.[2]

[2] Enviro Waste Services Ltd (Enviro Waste) and the manager of its Nelson branch, Mr Darrell Askew, have each admitted allegations made by the Commerce Commission (the Commission) that they attempted to engage in conduct, contrary to ss 27 and 30 of the Act. Following those admissions, the Commission and Enviro Waste have recommended agreed pecuniary penalties: a penalty of $425,000 to respond to Enviro Waste's conduct, and one of $5000 to mark Mr Askew's. If those recommendations were approved, the parties agree that the costs of the proceeding will lie where they fall. In any event, Enviro Waste will contribute $25,000 towards the Commission's investigation costs.

[3] On 13 November 2015, after hearing argument, I approved the penalties with reasons to follow.[3] These are my reasons for doing so.

Agreed facts

[4] In August/September 2012, Enviro Waste was competing in a market for the collection of waste oil (including waste tallow) from businesses located in the upper South Island. At material times, Mr Askew was the manager of its Nelson branch, known as its "Bens Oil" Division.

[5] Waste oil collectors process, treat, and on-sell or dispose of such oil. The three main providers of those services in the relevant period, were Enviro Waste,

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1 Commerce Act 1986, s 80(1).
2 Ibid, s 80(2B), set out at para [29] below.
3 *Commerce Commission v Enviro Waste Services Ltd* [2015] NZHC 2829.

Transpacific Industries Group Ltd (Transapacific) and Fulton Hogan Ltd. [Redacted information about market share].

[6] The Commission accepts that neither Transpacific nor Fulton Hogan engaged in anti-competitive behaviour of the type committed by Enviro Waste and Mr Askew. Both Enviro Waste and Transpacific are now under new management, their shares having been sold to third parties unconnected to the events in issue.

[7] The anti-competitive conduct arose in respect of the market for the collection of waste tallow. This is used cooking oil and deep frying fat, primarily taken from deep fryers. Collection of such waste takes place from premises that general that generate that by-product; such as restaurants and takeaway food outlets.

[8] Transpacific was the main provider of collection services for waste tallow, in the upper South Island. Enviro Waste was a minor participant in that market. Enviro Waste had no plans to expand this area of its business.

[9] Transpacific was based in Christchurch. One of its trucks undertook a collection run in the Tasman region [frequency redacted]. During the relevant period, the total volume of waste oil collected per annum in the upper South Island was approximately [redacted] litres.

[10] Before September 2012, Enviro Waste and Transpacific had well defined customer bases. As a result, they did not compete aggressively for each other's customers. From time to time, Enviro Waste would purchase product from Transpacific. Also, it would collect waste oil from Transpacific's regular customers when the latter's collection barrels were full. Enviro Waste's policy was not to charge for or pay its customers to collect their waste oil. That service was provided free to those customers who needed to dispose of it.

[11] In October 2011, Transpacific employed [name redacted] as a waste oil collection driver. His run included [a number of South Island locations]. In late August or early September 2012, [he] was collecting waste oil in the Nelson area. [The driver] approached more potential customers than usual. [He] offered

[redacted] per litre for their oil in an attempt to attract them to switch their business to Transpacific.

[12] Around that time, Mr Askew was told that three or four of his existing customers had been approached by [the driver]. Transpacific had offered to pay [redacted] per litre to collect the waste. A number of those customers sought to cancel collections by Enviro Waste because it was not paying the customers to remove the waste.

[13] Mr Askew formed the view that, to remain competitive with Transpacific, Enviro Waste would have to start paying customers for its waste oil collection. This would have involved visits to existing customers to explain a change to Enviro Waste's market practices, and possibly the creation of new written agreements. Inevitably, those processes would have consumed much of Mr Askew's time.

[14] On 10 September 2012, Mr Askew learnt that a customer had cancelled one of Enviro Waste's services. At 10.10am that day, Mr Askew telephoned the Christchurch Business Unit Manager of Transpacific, Mr Matthews. He was responsible for both waste oil and waste tallow products. Mr Askew's purpose was to find out why [the driver] had been approaching Enviro Waste's customers and offering to pay for waste oil stored in containers provided by Enviro Waste. The telephone call lasted 8 minutes and 48 seconds.

[15] After stating that three customers had cancelled collections after being offered money for their waste oil by Transpacific, Mr Askew questioned Mr Matthews about what Transpacific was going to do. Unless Transpacific stopped approaching Enviro Waste's waste oil customers, he threatened that Enviro Waste would enter and compete with Transpacific in the waste tallow collection market, by putting [redacted] drums into the market (to be filled for collection) and paying customers for their waste tallow.

[16] After some discussion, Mr Askew expressed the view that Fulton Hogan was the real threat to both companies. Mr Matthews fobbed off Mr Askew by saying that the driver was "probably just trying to fill up his truck". Mr Matthews said that he

would speak to Transpacific's National Manager - Black Oil, Mr Hollands, and get back to Mr Askew.

[17] Later that day, Mr Matthews spoke to both Mr Hollands and [the driver]. He told them about the call he had received from Mr Askew. Mr Matthews advised Mr Hollands that Mr Askew had threatened to enter and compete with Transpacific in the waste tallow collection market.

[18] On the next day, 11 September 2012, Mr Matthews telephoned Mr Askew. They discussed the good relationship between their respective companies and a means of satisfying their requirements in their common markets. Mr Askew took it, from what Mr Matthews had said, that Transpacific had listened to its complaint and that Transpacific would not compete "hard" for Enviro Waste's customers. When Mr Hollands prepared a weekly management report for the Black Oil division on 17 September 2012, he recorded that Mr Askew was unhappy that customers had been taken from Enviro Waste in Nelson and Blenheim, and that he had told [the driver] to "ease off".

[19] On 25 September 2012, [the driver] was undertaking a collection run in Nelson. He was parked at the premises of one of Transpacific's customers. Mr Askew saw the truck and introduced himself to [the driver]. He began to ask about which customers [the driver] was visiting. Specifically, Mr Askew asked whether [the driver] was visiting one of Enviro Waste's customers that he had approached the previous week, [name redacted]. [The driver] said he was. Mr Askew responded by saying something to the effect that "we have an agreement that you don't touch our customers". [The driver] said that he had not been told that.

[20] Mr Askew made it clear to [the driver] that if the latter knew that a business was a customer of Bens Oil, then he should tell that customer that "Bens" will do the collection and that Transpacific was working with Bens Oil. Mr Askew told [the driver] that he would match Transpacific's price to waste oil customers, and the result could well be a price war for such customers. [The driver] again told Mr Askew that he had no knowledge of any such arrangements.

[21] Subsequently, [the driver] telephoned Mr Hollands, who told him to "carry on" competing in the market. When [he] went to [Enviro Waste's customer] premises to follow up an approach to pay for oil, he was told that Bens Oil was offering them "beer for oil".

[22] Mr Hollands sent his weekly management report to the General Manager of Transpacific's industrial division, Mr Forman, identifying a potential Commerce Act issue. Mr Forman telephoned Mr Askew. He told him that there was no arrangement in place between their respective companies, and that the market was "open slather". Mr Askew said that was different from what he had understood. He said:

> My understanding of it was, is the thing is that we haven't approached any of your customers ever since the time I've been here and you guys haven't done it to us. Everyone's just sort of gone along and worked in harmony.

Although Mr Askew did not know, Mr Forman was recording the telephone conversation. Those are the precise words used by Mr Askew.

[23] Mr Forman asked Mr Askew where he thought any agreement had been reached, and for how long. Mr Askew said that he had been with Enviro Waste for four years, but his Operations Manager had been there longer. Mr Askew said:

> ... he says we just don't touch your customers … to be respectful for their customers with [strength?] [sic]. If a customer rings up wanting to know about stuff, go and help them out, but if it's one of your customers and we just help them out to start off with. We've actually – I've actually thought that we've had an incredibly good relationship between our two businesses …. And where we want to complement each other rather than bloody go head-up against each other and it's just strange that all of a sudden that it just changed completely.

[24] Mr Forman reiterated that he was unaware of any arrangement or understanding. He told Mr Askew that his team had been told to operate on a commercial basis. Mr Askew responded that Enviro Waste would compete just as aggressively.

[25] Enviro Waste and Mr Askew accept that Mr Askew's conduct amounted to an attempt by both to enter into an understanding with Transpacific that they would

compete less aggressively for each other's existing customers in the relevant collection market and that Enviro Waste would not enter the waste tallow collection market itself.

[26] Enviro Waste accepts that it is vicariously liable for the actions of Mr Askew. Because the attempt failed, there was no actual commercial gain for Enviro Waste. Had it succeeded, there was the potential for some; though the actual amount cannot readily be quantified.

Should the penalty be approved?

(a) The Court's approach

[27] While the parties have agreed on an appropriate pecuniary penalty, it is necessary for it to be approved by this Court. The authorities make it clear that the Court should acknowledge the public benefits of prompt resolution of penalty proceedings by agreement. The approach that has been consistently adopted is for the Court to consider whether the amounts agreed are within an appropriate range, rather than to determine whether the penalty is the same as that which would have been imposed by the Judge who hears the penalty proceeding.[4]

[28] In determining the appropriateness of the agreed penalty, the Court approaches the exercise in a manner akin to a criminal sentencing. It is necessary to determine a starting point, by reference to the maximum penalties involved, and then to consider relevant aggravating and mitigating factors.[5]

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4 Generally, see *Commerce Commission v Alstom Holdings SA* HC Auckland CIV-2007-404-2165, 22 December 2008 (Rodney Hansen J) at para [18], applying a judgment of the Full Court of the Federal Court of Australia in *NW Frozen Foods v ACCC* (1996) 71 FCR 285; *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 (Allan J) at para [45]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-4590, 22 December 2010 (Allan J) at para [38]; *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011 (Allan J) at para [15] and *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at para [21] (Venning J).

5 For example, see *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at para [23].

(b) Factors relevant to penalty

(i) The maximum penalties

[29] Section 80(2B) of the Act sets out maximum penalties for breaches of Part 2 of the Act, in which ss 27 and 30 are to be found. That section provides:

> **80 Pecuniary penalties**
>
> …
>
> (2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
>
> (a) in the case of an individual, $500,000; or
>
> (b) in the case of a body corporate, the greater of—
>
> (i) $10,000,000; or
>
> (ii) either—
>
> (A) if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or
>
> (B) if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).
>
> ….

[30] There was some debate in the written submissions about whether the maximum penalty available to respond to Enviro Waste's contraventions was $10 million, or a figure calculated by reference to the formula set out in s 80(2B)(b)(ii). In oral submissions, Mr Dixon, for the Commission, was disposed to accept that the maximum penalty was $10 million. In case the point assumes some importance in another proceeding, I assume (without deciding the point) that the available maximum penalty is $10 million.

[31] So far as Mr Askew is concerned, the maximum pecuniary penalty available for his breach of the Act is $500,000.[6]

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[6] Commerce Act 1986, s 80(2B)(a), set out at para [29] above.

(ii) Culpability

[32] Both Enviro Waste and Mr Askew have admitted involvement in the attempt, for the purposes of this proceeding. Enviro Waste offered full co-operation with the Commission's investigation from the outset. Its assistance has expedited the Commission's investigation.

[33] Enviro Waste offered to settle the proceeding on terms acceptable to the Commission. Mr Askew made a similar offer. Neither Enviro Waste nor Mr Askew have previously been found to have contravened the Act.

[34] Neither the directors or senior management of Enviro Waste had any knowledge of the proposed arrangement. The attempt was made by Mr Askew, of his own initiative. Mr Askew could properly be described as a "mid level manager".

[35] The Commission accepts that Mr Askew's personal circumstances are relevant to the fixing of a penalty. I do not propose to explain those circumstances. It is enough to say that Mr Askew's unsophisticated and impulsive attempt to put an anti-competitive mechanism into place was driven by a desire to release stress from his employment, owing to difficulties faced by him in his family life. It is important that the attempt was not made to gain a pecuniary advantage for his employer.

[36] Enviro Waste has been under new ownership and management since April 2013. The new owners have taken financial responsibility for the penalty, even though they had no knowledge of the conduct or the investigation at the time they acquired Enviro Waste. A compliance programme has been initiated and implemented, with 80 key management staff being trained in the compliance requirements for the Commerce Act.

(iii) Mr Askew

[37] I deal first with Mr Askew's position. The Commission took a starting point of a pecuniary penalty in the range of $10,000 to $15,000 and applied a credit of between 45 percent and 55 percent to reflect mitigating factors. Its end result was a pecuniary penalty of $5,000, which Mr Askew is prepared to accept. Nevertheless,

he asked that his penalty be paid in three instalments, due to his current financial position.

[38] Mr Askew was the instigator of the attempt to engage both Enviro Waste and Transpacific in anti-competitive behaviour. The nature of the anti-competitive conduct is also important; this was a specie of price-fixing. The impact of price fixing can be serious.

[39] In mitigation, Mr Askew promptly admitted his wrongful conduct. Approaching Mr Askew's early admission of liability in a manner analogous to a criminal sentencing, a 25% credit would be given solely for that factor.[7] While ignorance of the law is no excuse, it is also clear that Mr Askew did not understand that the discussions in which he had participated could amount to conduct that contravened the anti-competition provisions of the Act.

[40] Mr Askew's personal circumstances at the time of his conduct are important. He was faced with personal difficulties of a type which would, inevitably, have impacted on the ability of any person carrying out duties in an occupation such as his. I am satisfied that Mr Askew's desire to manage stress was the primary reason why he decided to act as he did.

[41] I am satisfied that the proposed penalty of $5,000 is appropriate, and consistent with the authorities to which I was referred. Mr Askew's financial circumstances are also limited. For that reason, I accept that it is necessary for any penalty to be paid by instalments.

(iv) Enviro Waste

[42] So far as Enviro Waste is concerned, the Commission has chosen a starting point of a pecuniary penalty between $550,000 and $650,000. A credit for mitigating factors of between 30 percent and 35 percent has been allowed. The end pecuniary penalty suggested by the Commission is $425,000, with which Enviro Waste agrees.

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7 *Hessell v R* [2011] 1 NZLR 607 (SC) at para [75].

[43] In the context of a maximum penalty of $10 million, the mid-point of the chosen range, $600,000, represents 6% of the available maximum penalty. In light of the nature of the offending, I consider that to be an appropriate starting point.

[44] As with Mr Askew, a credit of 25% is appropriate for a prompt admission of responsibility. The fact that the conduct occurred without the knowledge or approval of Enviro Waste's directors and senior management is a significant mitigating factor, so far as corporate liability is concerned. Without going into the detail of other mitigating factors, an overall credit of between 30% and 35% cannot be gainsaid.

[45] In those circumstances, I am satisfied that the proposed pecuniary penalty of $425,000 is within range. I am also satisfied that its level is consistent with the authorities cited to me.

Result

[46] For those reasons, on 13 November 2015, I approved the recorded penalties and made the following orders:[8]

(a) I declare that Enviro Waste's conduct amounted to an attempt to contravene of s 27(1) of the Act through the deeming provisions of s 30.

(b) Enviro Waste shall pay to the Crown a pecuniary penalty in the sum of $425,000.

(c) I declare that Mr Askew's conduct amounted to an attempt to contravene s 27(1) of the Act through the deeming provisions of s 30.

(d) Mr Askew shall pay to the Crown a pecuniary penalty in the sum of $5000. That penalty shall be paid in three instalments. The first is payable on 26 February 2016 in the sum of $1500. The second and third payments shall be made on or before 27 May 2016 and 2 September 2016, each in the sum of $1750.

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8 *Commerce Commission v Enviro Waste Services Ltd* [2015] NZHC 2829 at para [3].

(e) No order as to costs.

P R Heath J