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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2019-485-739
[2021] NZHC 2279

UNDER	The Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	SPECIALISED CONTAINER SERVICES (CHRISTCHURCH) LIMITED First Defendant
AND	GRANT TREGURTHA Second Defendant

Hearing: 24 August 2021 (VMR)

Counsel: L C A Farmer and C M Cattin for Plaintiff
B Sanders and S F Lomaloma for Defendants

Judgment: 1 September 2021

JUDGMENT OF ELLIS J
(PENALTIES)

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[1] The first defendant, Specialised Container Services (Christchurch) Limited (SCS Christchurch), is a shipping container depot operator in Christchurch. SCS Christchurch is part of a group of companies called The Specialised Group (TSG). Those companies operate container depots around New Zealand, with head office and administrative services provided by Pinnacle Corporation Limited (Pinnacle).

[2] Mr Tregurtha, the second defendant, is a director and shareholder of SCS Christchurch, and he held responsibility for its commercial decision-making.[1] Mr Tregurtha also has commercial responsibility for each of the facilities operated by TSG.[2]

[3] This judgment concerns pecuniary penalties sought by the Commerce Commission in relation to an admitted attempt to enter into a price-fixing agreement by both defendants, contrary to pt 2 of the Commerce Act 1986 (the Act).

[4] The defendants have filed notices of admission and entered into a settlement agreement with the Commission. The parties agree that:

(a) the appropriate pecuniary penalty to be imposed on SCS Christchurch should comprise:

(i) a starting point of between $500,000 and $650,000;[3]

(ii) a discount of 20 per cent;

(iii) an end point of between $400,000 and $520,000;

(b) the appropriate pecuniary penalty to be imposed on Mr Tregurtha should comprise:

(i) a starting point of between $25,000 and $30,000;

(ii) a discount of 20 per cent;

(iii) an end point penalty of between $20,000 and $24,000; and

(c) the defendants should pay costs to the Commission of $12,500.

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1 Mr Tregurtha is: (a) a director of SCS Christchurch, (b) a 25 per cent shareholder of SCS Christchurch, (c) Pinnacle's Managing Director, and (d) a 25 per cent shareholder of Pinnacle.

2 At all relevant times, Mr Tregurtha acted as SCS Christchurch's agent for the purposes of s 90 of the Commerce Act 1986.

3 Although the Commission's proposed range was initially $550,000 to $650,000, Mr Farmer was content to adopt the slightly broader range proposed by Mr Sanders for the defendants.

[5] SCS Christchurch does not have the financial ability to pay a penalty in the agreed amount; it closed its gates in October 2019. The Commission accepts this and agrees that SCS Christchurch's penalty should be reduced to $62,500. This will be satisfied by Pinnacle putting SCS Christchurch in funds for this amount.[4]

[6] The parties seek the Court's approval of the agreed final penalties. They also ask the Court to express a view as to whether the appropriate starting point for SCS Christchurch's penalty lies at the lower or upper end of the $500,000 to $650,000 range that has been agreed.[5]

Background

[7] Goods to be shipped by ocean vessels overseas may be loaded into intermodal freight containers. When the vessel arrives at its destination port, the containers are unloaded from the vessel and transported to their ultimate destination so that the goods can be unloaded from the container.

[8] Once that is done, the empty container will likely be transported to a container depot for storage until its owner—a shipping company or exporter—requires it for another shipment. Container depots also offer maintenance services including surveying, washing and repairing containers (Container Depot Services). Container depots are, for practical reasons, located proximate to ports.

[9] The relevant market in this proceeding is the market for Container Depot Services in Christchurch.

[10] In late 2017 to early 2018, SCS Christchurch and Lyttelton Port Company (LPC) (SCS Christchurch's biggest competitor in the Container Depot Services market) were both planning to implement a Vehicle Booking System (VBS) at their

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4 Shortly before the commencement of this proceeding, on 1 November 2019, SCS Christchurch ceased operating. SCS Christchurch does not earn income. As at 31 March 2020, the value of its realisable assets was greatly exceeded by its liabilities. The Commission and SCS Christchurch have therefore agreed that the penalty imposed on SCS Christchurch, and costs, should be paid by Pinnacle (as the ultimate head office of TSG) on SCS Christchurch's behalf.

5 Although this disagreement is not ultimately material (in light of the settlement reached), there are important matters of principle at stake.

respective container depots.[6] A VBS comprises online software that can be used to manage traffic in and out of container depots by enabling transport companies to book time slots within which to pick up or drop off containers. Typically, a container depot will charge its customers (shipping lines and transport companies) a fee each time the customer books a time slot using the container depot's VBS.

[11] On 10 October 2017, LPC announced to its customers that it intended to implement a VBS at CityDepot. On 12 January 2018, LPC publicly announced that it proposed to charge a VBS Booking Fee of $5.50.

[12] In November 2017, SCS Christchurch also decided it would implement a VBS. On 24 January 2018, SCS Christchurch publicly announced to its customers that it proposed to charge a VBS Booking fee of $6.50.

The anti-competitive conduct

[13] Section 30 of the Act prohibits entry into and giving effect to a cartel provision (as defined in s 30A).

[14] The anti-competitive conduct in this case is the defendants' attempt to enter into an arrangement or understanding with LPC that they would each charge customers the same or similar price for their VBS Booking Fees.

[15] The attempt took place on 9 January 2018 during a single phone call made by Mr Tregurtha to the General Manager for Inland Ports at LPC (Sean Bradley). During that call, Mr Tregurtha raised with Mr Bradley:

(a) LPC's plans for a VBS in Christchurch;

(b) SCS Christchurch's plans to introduce a VBS and its intention to charge a VBS Booking Fee of $6.50 per time slot;

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6 The TSG already had some experience with VBS elsewhere in the country.

(c) his knowledge that $6.50 was the "going rate" for VBS Booking Fees in Auckland and Tauranga; and

(d) the desirability of all Container Depot operators in Christchurch charged the same or a similar VBS Booking Fee.

[16] Mr Tregurtha then asked Mr Bradley if LPC would be willing to charge the same or a similar VBS Booking Fee as SCS Christchurch for bookings in Christchurch. Mr Bradley responded that LPC would not be entering into discussions regarding price, because SCS Christchurch was LPC's competitor.

[17] There was no further discussion; that was the end of the matter.[7]

Admissions

[18] Both SCS Christchurch and Mr Tregurtha have admitted that they attempted to enter into a contract, arrangement or understanding with LPC that the companies would each set their respective VBS Booking Fees at the same or similar rate, in breach of s 30 of the Act. They therefore also accept that they are liable to pay a pecuniary penalty under s 80(1)(b) of the Act.

Penalty

[19] Under s 80(2B)(a) the maximum available penalty in relation to Mr Tregurtha's conduct is $500,000. Under s 80(2B)(b), the maximum penalty that can be imposed on SCS Christchurch is the greater of: $10 million, or either three times the commercial gain obtained from the breach (if readily ascertainable) or 10 per cent of the company turnover from trading within New Zealand (if commercial gain is not readily ascertainable). Here:

(a) there was no actual commercial gain to SCS Christchurch, because there was only an *attempt* to reach an agreement in breach of the Act; and

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[7] In February and March 2018, LPC and SCS Christchurch implemented a VBS at their respective Container Depots in accordance with their previous public announcements. In other words, LPC introduced a $5.50 VBS Booking Fee, and SCS Christchurch introduced a $6.50 booking fee.

(b) based on the financial information provided to the Commission and the evidence before the Court, 10 per cent of SCS Christchurch's annual turnover in the accounting period in which the contravention occurred did not exceed $10 million; so

(c) the maximum penalty available to the Court in relation to SCS Christchurch is $10 million.

[20] There is no dispute that the parties to proceedings such as this may agree to an appropriate penalty and then ask the Court impose a penalty in that amount. The Court recognises that this approach is in the interests of the parties and the community because it saves time and cost by resolving matters as early as possible.[8] As Rodney Hansen J observed in *Commerce Commission v Alstom Holdings SA*, the Court should play its part in promoting such resolutions by accepting penalties that are within the proper range, and a defendant should not be deterred from a negotiated resolution by the fear of it being rejected because it is different from the penalty the Court might otherwise have imposed.[9]

[21] That said, an analogy has been drawn with sentence appeals in the criminal context: while there may be room for debate as to the appropriate starting point and credit for mitigating factors, the ultimate issue is whether the penalty recommended to the Court is within the available range.[10] Parity—if comparisons with other cases are possible and a mechanistic approach is avoided—potentially has a part to play.[11]

[22] As a matter of principle, in cases of attempts: "the objective of deterrence suggests that condemnation through penalty is as important in cases of unsuccessful attempts", particularly where the conduct was deliberate.[12] And while in attempt cases it may be relevant to penalty that no harm in fact eventuated, the potential for harm

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8 See for example *Commerce Commission v New Zealand Milk Corporation* [1994] 2 NZLR 730 (HC); and *Commerce Commission v Air New Zealand* [2013] NZHC 1414 at [23].

9 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].

10 See for example *Air New Zealand*, above n 8, at [27]; *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21].

11 *Telecom Corporation of New Zealand v Commerce Commission* [2012] NZCA 344.

12 *Commerce Commission v Roadmarkers Waikato (1981) Ltd* HC Auckland CL 1/97, 25 June 1998 at 5.

can also be taken into account.[13] As Mr Farmer pointed out, the Australian courts have similarly emphasised that:[14]

(a) the paramount objective of deterrence in penalty setting for anti-competitive conduct applies equally to attempts as it does to consummated agreements; but

(b) attempts can be viewed as somewhat less serious offending, primarily because they cause little harm (and provide no gain).

[23] I start from the well-recognised position that in assessing penalties for this kind of conduct, the primary purpose is both general and specific deterrence.[15] But the other matters relevant to assessing the conduct's seriousness (and, so, to establishing an appropriate starting point) can include:[16]

(a) impact on the market;

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

(c) whether the conduct was deliberate;

(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;[17]

(g) the extent of any loss or damage suffered by any person as a result of

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13 *Commerce Commission v Christchurch Transport Ltd* HC Christchurch CP72/98, 21 August 1998 at 8.

14 See for example *Australian Competition and Consumer Commission v George Weston Foods Ltd* [2000] FCA 690, (2000) ATPR 41-763; and *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* [2003] FCA 336, (2003) ATPR 41-937.

15 *Telecom Corporation*, above n 11, at [53].

16 See for example *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC) at [17]; and *Telecom Corporation*, above n 11, at [13].

17 Where the anti-competitor is a body corporate, s 80(2A) specifically requires the Court to consider the nature and extent of any commercial gain.

(h) the contravening conduct;

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

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

(k) the size and resources of the defendant.

[24] The discussion of those factors that follows applies equally to both defendants, unless stated otherwise.

Impact on the market

[25] Because the agreement here was not concluded, there was no impact on the market. Nonetheless, I am prepared to accept that potential impact (like potential harm more generally) is relevant. At the time the attempt was made, three key firms competed for the provision of Container Depot Services in Christchurch:

(a) LPC, with 70 per cent market share;

(b) ContainerCo, with 20 per cent; and

(c) SCS Christchurch, with 10 per cent of the market.

[26] Mr Farmer submitted, and I accept, that such markets are of general importance to all New Zealanders; as citizens of an island nation, we rely heavily on importing and exporting facilities. Anti-competitive conduct in such markets risks increasing costs to New Zealand importers and exporters, thereby reducing New Zealand's trading competitiveness. Container Depot Services form an integral part of the chain involved in the import and export process. I acknowledge that these are not insignificant matters.

The nature and seriousness of the contravening conduct

[27] Conduct breaching s 30 is serious and, by and of itself, deemed to be anti-competitive and unlawful.[18]

[28] Here, it is accepted that a purpose of Mr Tregurtha's call to LPC was to reach an agreement on the VBS Booking Fee that SCS Christchurch and LPC would each charge transport operators for Container Depot Services. So, Mr Farmer said, it is different from the conduct in *PGG Wrightson*, where the illegality occurred as a corollary of what began as an innocent discussion about facilitating industry implementation of regulatory change.[19]

[29] That said, the attempt was a brief one-off, unsophisticated, and did not involve an attempt to enter into an agreement with all participants in the market.[20] For that reason, I place little additional weight on Mr Farmer's point that the attempt was almost "complete"; in my view, that is largely a function of its simplicity and does not add meaningfully to its seriousness.[21] I do accept as relevant, however, that it was by no action of Mr Tregurtha or SCS Christchurch—but rather by dint of the business integrity of LPC—that a price-fixing agreement was not concluded.

Whether the conduct was deliberate

[30] The conduct was deliberate, in the sense that it was an intentional attempt to reach an agreement with a competitor in relation to the price charged to customers for VBS Booking Fees. But the Commission very fairly accepts that the defendants did not deliberately set out to contravene the Act.

The duration of the contravening conduct

[31] Again, this factor has less relevance in the absence of any concluded agreement. And as noted earlier, the duration of the efforts made to secure the

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18 As from April 2021, intentional breaches of s 30 are punishable by up to seven years' imprisonment.

19 *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360.

20 I acknowledge that (if successful) it would nonetheless have resulted in prices being set by anti-competitive means across 80 per cent of the market.

21 And in any event, the potential harm is considered separately below.

agreement could not have been briefer. There is no evidence to suggest that Mr Tregurtha made any further effort to continue his conversation with Mr Bradley.

Whether the conduct was initiated or condoned by senior management.

[32] It is accepted that the seniority of the people involved is an aggravating factor because senior staff have the power to influence the culture within their companies. Here, Mr Tregurtha is one of two directors of SCS Christchurch, as well as a 25 per cent shareholder. I accept that this makes the conduct more serious than a case involving the conduct of relatively junior employees or mid-level managers.[22]

Potential commercial gain to, and harm caused by, the defendants

[33] As already noted, there was no actual commercial gain here but the *potential* for such gain (had the attempt been realised) can be relevant.[23] The absence of a consummated agreement "reflects no credit upon the defendants, since only the business ethics of others prevented the conclusion of a price fixing arrangement."[24]

[34] Here, if LPC had agreed to charge the same VBS Booking Fee as SCS Christchurch requested, they would no longer compete on this aspect of price to attract and retain customers. If they had agreed to charge the same rate of $6.50 per time slot, LPC's customers (some of whom may have switched to SCS Christchurch) would have paid $1 more per booking slot to pick up or drop off a Container at LPC's Container Depot.

[35] The confidential evidence before the Court is that if the attempt had succeeded, and LPC charged the same VBS Booking Fee as SCS Christchurch, the resulting agreement would have added a significant amount in additional costs to customers.[25]

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22 Compare for example *Commerce Commission v Prices Pharmacies 2011 Ltd* [2020] NZHC 1176; and, most relevantly *Commerce Commission v Enviro Waste Services Ltd* [2015] NZHC 2936 (discussed further, below).

23 See for example *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010; and *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011.

24 *Commerce Commission v Christchurch Transport Ltd* HC Christchurch CP72/98, 21 August 1998 at [8].

25 If a consummated agreement had been reached at a similar rate, that would still constitute an unlawful interference in market conditions for the setting of price, and accordingly customers can be expected to have paid more than if set in a competitive market.

If LPC and SCS Christchurch's customers passed these costs onto their own customers, there would be the potential for an increase in the cost of goods that are shipped, which could be expected to affect:

(a) New Zealand consumers by way of higher costs to purchase goods from overseas; and

(b) New Zealand businesses by way of a reduced competitiveness in overseas markets.

[36] Businesses associated with the Lyttelton Port may also have been affected. Transport companies, importers, and exporters could have chosen to import to and/or export from another port where the associated costs were lower. If this happened, other entities associated with the Lyttelton Port in Christchurch would also have suffered loss.

The market share held by the defendant

[37] As noted earlier, at the time of the attempt, SCS Christchurch held only 10 per cent of the market share for Container Depot Services in Christchurch.

The role of the defendants in the impugned conduct

[38] Mr Tregurtha's conduct (and therefore that of SCS Christchurch) was directed at reaching an agreement to fix prices; that is, to facilitate the setting of prices other than by competitive process and at higher levels. Mr Tregurtha had no support, encouragement or assistance from others; as the sole person involved in the attempt, his position is analogous to that of (what the cases term) a "ringleader".

Other cases

[39] In order to assess the appropriateness of the agreed penalty, in light of the factors discussed above, it is necessary to have some regard to any relevant comparator cases.

[40] The most useful comparator for that purpose is Heath J's decision in *Commerce Commission v Enviro Waste Services Ltd* (discussed further below).[26] That is because it is the only decision within the last 20 years (and since the relevant penalties were significantly increased, in 2001) to have dealt with penalties in an attempt case.[27]

[41] As here, the maximum available penalty in relation to Enviro Waste was $10 million. The maximum available penalty in relation to Mr Askew (Enviro Waste's middle manager who was responsible for the infringing conduct) was $500,000. And as here, the defendants in Enviro Waste had undertaken a relatively unsophisticated and informal attempt to arrive at an anti-competitive arrangement with another competitor in a regional market.

[42] But there were also some relevant differences—in terms of aggravating and mitigating features—between that case and this. More particularly:

(a) SCS Christchurch's conduct involved a one-off incident, whereas Enviro Waste's was marked by several events;

(b) Enviro Waste attempted to induce agreement by using threats;

(c) Enviro Waste had a larger market share than SCS Christchurch;

(d) The conduct of Mr Askew (and therefore of Enviro Waste) was driven by Mr Askew's difficult personal circumstances and his desire to reduce his own stress while preserving existing market share, rather than by any more blatant desire for financial gain;

(e) Mr Tregurtha is a director and shareholder of SCS Christchurch and was responsible for all of SCS Christchurch's commercial decisions

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26 *Enviro Waste Services Ltd*, above n 22.

27 I agree with Mr Farmer that the older attempt cases are of limited comparative assistance here. Their analysis in setting an appropriate starting point does not reflect the more recent, structured approach to the penalty setting exercise undertaken under s 80. In particular, the relevant factors that are now routinely considered by the Courts in determining an appropriate starting point are not a feature of those cases. As well, they were decided at a time when the earlier statutory maximum of $5 million for corporate defendants applied.

and commercial relationships, whereas Mr Askew was a mid-level manager of Enviro Waste; and

(f) the nature of the Container Depot market is arguably more important nationally than the waste tallow collection market with which the Court was concerned in *Enviro Waste*.[28]

[43] In *Enviro Waste,* Heath J approved a starting point range of between $550,000 and $650,000 for Enviro Waste and a starting point range of between $10,000 and $15,000 for Mr Askew. In doing so, he did not expressly consider relevant factors of the kind discussed above. But, in terms of aggravating and mitigating circumstances, he:

(a) noted that Enviro Waste and Mr Askew had admitted their involvement, offered full cooperation with the Commission from the outset, and offered to settle the proceedings;

(b) as regards Enviro Waste:

(i) noted that the new owners took full financial responsibility for the penalty and had implemented a compliance programme;

(ii) approved an end penalty of $425,000, which reflected the agreed discount of 30 to 35 per cent for admission of liability and to reflect that the conduct occurred without the knowledge of Enviro Waste's directors and senior managers.

(c) as regards Mr Askew:

(i) noted that he was described as a "mid-level manager" who had made an unsophisticated and impulsive attempt to reach an anti-

[28] Waste tallow is used cooking oil and deep-frying fat generally from restaurants and takeaway outlets.

competitive agreement in order to avoid stress at work, due to difficulties in his family life;

(ii) noted that he was not motivated by money; and

(iii) approved a reduced penalty of $5,000 (representing a discount of 50 to 67 per cent) on account of his cooperation and personal circumstances.

Starting points: discussion

[44] I agree with the Commission that, after taking into account the similarities and differences between this case and *Enviro Waste*, the conduct of SCS Christchurch warrants a similar starting point range to that adopted in *Enviro Waste*. I would, perhaps, cast the range a little wider (as Mr Sanders urged) and so place it at between $500,000 and $650,000. That range can be usefully cross-checked by reference to the other ("consummated") cases to which Mr Farmer referred me.[29]

[45] As far as Mr Tregurtha is concerned, it has not been suggested that there is no good reason to impose a penalty on him, and nor is the existence of any such reason obvious to me. And I agree with the position arrived at between the parties, which is that he is somewhat more culpable than Mr Askew in Enviro Waste and so warrants a somewhat higher range of starting point. Although Mr Tregurtha's conduct was unsophisticated and consisted of a single phone call of short duration:

(a) Mr Tregurtha is a director and shareholder of SCS Christchurch whereas Mr Askew was a mid-level manager; and

(b) Mr Askew's conduct was driven by the impact his personal circumstances was having on his performance at work, rather than by a desire for financial gain.

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[29] Mr Farmer referred me to *Commerce Commission v Lodge Real Estate* [2017] NZHC 1875; *Prices Pharmacies 2011 Ltd*, above n 22; and two Australian decisions: *Australian Competition and Consumer Commission v George Weston Foods Ltd* [2000] FCA 690, (2000) ATPR 41-763; and *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* [2003] FCA 336, (2003) ATPR 41-937.[29]

[46] I therefore agree with the parties that an appropriate and available starting point for Mr Tregurtha is within the range of $25,000 to $30,000.

Adjustments: discussion

[47] Once the starting points have been approved, it is necessary to consider the proposed adjustments to those starting points having regard to any relevant factors that are specific to SCS Christchurch or to Mr Tregurtha.

[48] As far as SCS Christchurch is concerned, the following points seem relevant:

(a) The company has not previously been found to have contravened the Act nor ever been warned by the Commission in respect of conduct likely to breach the Act.

(b) Its cooperation with the Commission's investigation was limited. While Mr Tregurtha, on his own and on SCS Christchurch's behalf, did attend a voluntary interview with the Commission in July 2019, he refused to answer questions around the purpose and nature of his call to Mr Bradley. In correspondence with the Commission, SCS Christchurch first denied that price was discussed on the call.

(c) A discount can nonetheless be justified for SCS Christchurch's admissions of liability because of the concomitant "benefit to the community by the early disposal of proceedings." The admissions did, however, come relatively late in the piece, after discovery had been provided.

[49] In light of these factors, I accept that the proposed discount of 20 per cent is appropriate. That would result in a final penalty range of between $400,000 and $520,000.[30]

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[30] A 20 per cent discount is consistent with the adjustments made to the starting points of other defendants who have sought resolution with the Commission at a similar stage of proceedings. See for example *Prices Pharmacies 2011 Ltd*, above n 22.

[50] But as noted earlier, SCS Christchurch no longer operates its Container Depot. It does not earn income and, as at 31 March 2020—following termination of the lease—the value of its realisable assets was greatly exceeded by its liabilities. The Commission acknowledges that SCS Christchurch is unable to pay any penalty but for Pinnacle putting it into funds and that the interests of justice will not be served by ordering an impecunious party in SCS Christchurch's position to pay a penalty that it is unable to meet.[31]

[51] Pinnacle has agreed to put SCS Christchurch in funds to enable it to pay a penalty of $62,500. In the circumstances just described, I approve that as the final penalty to be imposed on SCS Christchurch.

[52] As far as Mr Tregurtha is concerned, essentially the same mitigating points referred to in [48] above pertain. I agree with the parties that a discount of 20 per cent is also appropriate to recognise those factors. I therefore approve the agreed end penalty of $24,000 as appropriate here.

Costs

[53] As noted at the outset, the parties are also agreed that:

(a) SCS Christchurch should pay costs to the Commission in the sum of $12,500 (which the parties acknowledge is less than the scale costs to which the Commission would otherwise be entitled); and

(b) Mr Tregurtha not be ordered to pay costs to the Commission.

[54] In the circumstances, I agree that is appropriate.

Result

[55] For the reasons set out above, I make orders:

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[31] There is some precedent for this approach. In *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361 (at [56]), Asher J observed that, in addition to the reductions applied to the penalty for conventional mitigating factors, there should be a further deduction to make the penalty realistic and to accord with Rural Livestock's means to pay.

(a) imposing the recommended penalties of:

(i) $62,500 in relation to SCS Christchurch; and

(ii) $24,000 in relation to Mr Tregurtha; and

(b) that SCS Christchurch is to pay costs to the Commission in the sum of $12,500.

[56] There will also be an order that the confidential documents held on the Court file (including the unredacted versions of the submissions made by the parties and the affidavit of Ms Angela Gestro) are not to be searched or accessed without leave of a Judge.

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Rebecca Ellis J

Solicitors:
Meredith Connell, Auckland for Plaintiff
Darroch Forrest Lawyers, Wellington for Defendants