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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-002430
[2022] NZHC 1371

UNDER	The Commerce Act 1986
BETWEEN	TE KOMIHANA TAUHOKOHOKO/COMMERCE COMMISSION Plaintiff
AND	OCEANBRIDGE SHIPPING LIMITED First Defendant
	WILLIAM EDWARD SPEEDY Second Defendant

Hearing:	2 June 2022
Appearances:	J C L Dixon QC, F J Cuncannon and P I C Comrie-Thomson for Plaintiff J S Cooper QC and D A K Blacktop for Defendants
Judgment:	10 June 2022

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 10 June 2022 at 3.00 pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:…………………………

Introduction

[1] Te Komihana Tauhokohoko, the Commerce Commission (the Commission), asks the Court to impose pecuniary penalties of $4.6 million on the first defendant, Oceanbridge Shipping Ltd (Oceanbridge) and $100,000 on its managing director, the second defendant, William Speedy, for admitted contraventions of ss 27 and 30 of the Commerce Act 1986 (the Act).

[2] This judgment is being released contemporaneously with the judgment in *Te Komihana Tauhokohoko/Commerce Commission v Mondiale Freight Services Ltd*.[1] There is considerable overlap between the two judgments.

The anti-competitive conduct

[3] Oceanbridge is a large transport and logistics company. Mr Speedy is, and has at all material times, been its managing director. He established the company in 1981 and is its ultimate beneficial owner.

[4] The international freight forwarding industry undertakes the logistical arrangements necessary for the international movement of goods, by air or sea, from their origin to their destination. Participants in the industry include:

(a) exporters;

(b) importers;

(c) shipping and air lines; and

(d) freight forwarders.

Exporters and importers commonly utilise the services of an international freight forwarder.

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1 *Te Komihana Tauhokohoko/Commerce Commission v Mondiale Freight Services Ltd* [2022] NZHC 1370.

[5] Freight forwarders compete with each other to supply some or all of a range of freight forwarding services, including:

(a) arranging for the carriage of a customers' freight by sea or air, including booking space with shipping and/or air lines;

(b) organising the collection of freight from exporters at origin, its delivery to the carrier, its collection from the carrier at destination, and its delivery to the importers;

(c) preparing and processing the necessary documentation; and

(d) carrying out incidental services such as customs clearance, warehousing, and domestic transportation.

[6] Freight forwarders can supply either or both:

(a) retail freight forwarding services; and

(b) wholesale freight forwarding services.

[7] Sea freight container services are supplied on either a full container load basis or a less than container load basis. Wholesale freight forwarders often seek to combine freight from different customers as well as from retail freight forwarders so that they can provide a more economical freight service and so that containers can be filled and shipped on a regular and scheduled basis. The ability of wholesale freight forwarders to consolidate freight enables retail freight forwarders to present options to their customers that they would not otherwise be able to offer. There are resulting efficiencies and cost savings.

[8] There are more than 300 retail freight forwarders operating in New Zealand (ranging from large multinational providers to smaller New Zealand-focused operators). There are at least 10 wholesale freight forwarders operating in this country.

[9] Oceanbridge provides retail international freight forwarding services direct to importers and exporters and wholesale international freight forwarding services to other retail freight forwarders.

[10] In the course of supplying its wholesale freight forwarding services, Oceanbridge reached arrangements with seven counterparties with whom it was otherwise in competition for the supply of retail freight forwarding services. Oceanbridge was endeavouring to address practical concerns it perceived were associated with the supply of wholesale services by it to the counterparties. It wanted to provide confidence to the counterparties that it would not use confidential information obtained in the course of providing its wholesale freight to solicit their customers. The arrangements were entered into in this context.

[11] The arrangements included provisions that contravened the restrictive trade practice provisions in the Act. The contravening arrangements were either “one-way” or “two-way”:

(a) under the one-way arrangements, Oceanbridge agreed not to compete with the counterparties in the supply of retail freight forwarding services to the customers to whom the counterparties were supplying retail freight forwarding services, whether or not the counterparty was using Oceanbridge’s wholesale freight forwarding services in relation to all of the counterparties’ customers’ freight forwarding requirements; and

(b) the two-way arrangements also provided that the counterparties would not compete with Oceanbridge by supplying retail freight forwarding services to customers to whom Oceanbridge was supplying retail freight forwarding services.

Some contravening arrangements were one-way arrangements; some were initially one-way arrangements before becoming two-way arrangements; others were two-way arrangements from the outset. Tenders were excluded from the contravening arrangements.

[12] The contravening arrangements were entered into on various dates — with one counterparty not later than 9 March 2009, with another counterparty on 7 July 2011, with a third counterparty on 17 June 2014, with a fourth counterparty on 13 May 2015, with a fifth counterparty, a one-way arrangement in August 2015 and then a two-way arrangement in September 2016, with a sixth counterparty in September 2016 and with a seventh counterparty, a one-way arrangement not later than 22 May 2017, a two-way arrangement not later than 20 March 2018 and a customer specific arrangement in August 2017. Most of the contravening arrangements were entered into following prompting by the counterparty.

[13] Oceanbridge gave effect to the contravening arrangements by:

(a) not competing with the counterparties' customers, either generally or in relation to what are known as specific trade lanes or certain international freight forwarding services; and

(b) on occasion, refraining from approaching customers it was aware were the counterparties customers and declining to provide quotes to the counterparties' customers.

[14] Oceanbridge also gave effect to specific contravening arrangements through a range of conduct, including:

(a) providing assurances to counterparties that it would not approach, provide quotes to, and/or otherwise compete for specific counterparties customers;

(b) advising the counterparties of occasions when it had refrained from approaching, providing quotes to, and/or otherwise competing for counterparties' customers;

(c) communicating with the counterparties regarding whether either it or a specific counterparty was supplying retail freight forwarding services

to specific customers, to determine whether those customers could be competed for;

(d) contacting a counterparty when that counterparty quoted or otherwise approached one of its customers;

(e) communicating with a counterparty regarding instances where it approached, provided quotes to or otherwise competed for the counterparty's customer;

(f) communicating with one counterparty regarding how the counterparty and it should respond to requests to provide quotes from customers to whom the other party was supplying retail freight forwarding services, including by discussion allocation of trade lanes between it and the counterparty in respect of specific customers and sharing pricing information that either it or the counterparty intended to quote to the customer; and

(g) on occasion:

(i) discussing "cover pricing" with counterparties; and

(ii) quoting, on four occasions, cover prices to customers to whom counterparties were supplying retail freight forwarding services.

[15] It entered into and gave effect to one of the contravening arrangements from a date not later than 9 March 2009 until 2 April 2021, to a second arrangement from 7 July 2011 to August 2014,[2] to a third arrangement from 17 June 2014 to August 2016, to a fourth arrangement from 13 May 2015 to December 2019, to a fifth one-way arrangement from August 2015 to September 2016 and to a subsequent two-way arrangement from September 2016 to 2 April 2021, to a sixth arrangement from

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2 Although dates prior to December 2011 are irrelevant for the purpose of assessing the appropriate pecuniary penalties — see below at [21]–[23].

September 2016 to 2 April 2021, and to a seventh arrangement with a counterparty, initially a one-way arrangement, from May 2017 to March 2018, and then a two-way arrangement from March 2018 to 2 April 2021 with a customer specific arrangement in August 2017. On 2 April 2021, Oceanbridge emailed all of its freight forwarder clients, including the counterparties, confirming that it would not enter into, participate in or give effect to any contravening arrangements and that it would act independently in determining how it would compete in the markets it operates in, including who it supplied services to or required them from and at what price it did so. As a result, all contravening arrangements with remaining counterparties were then terminated.

[16] Oceanbridge admits that it contravened the Act by entering into and giving effect to the contravening arrangements, which contained provisions with the purpose, effect or likely effect of:

(a) allocating the persons, or classes of persons, to whom Oceanbridge and the counterparties supplied retail freight forwarding services; and

(b) controlling and maintaining the price of retail freight forwarding services supplied to customer.

[17] Mr Speedy admits that he was aware of and endorsed the approach that led to the contravening arrangements with the counterparties being entered into and then given effect to. He knew that that Oceanbridge was in competition with each of the counterparties. He understood that entering into and giving effect to the contravening arrangements would allocate the customers to whom Oceanbridge and each of the counterparties supplied retail freight forwarding services and he knew that the competition between Oceanbridge and the counterparties included competition on the price at which retail freight forwarding services were offered to customers. He also knew that this competition would be lost (except in relation to tenders) as a consequence of the contravening arrangements. Mr Speedy was also directly involved in Oceanbridge entering into and giving effect to one of the contravening arrangements.

Relevant legislative provisions

[18] Sections 27 and 30 are in Part 2 of the Act, dealing with restrictive trade practices that substantially lessen competition.

[19] Section 27 provides that no person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

[20] Prior to amendment in 2017, s 30 was directed at price fixing. A provision of a contract arrangement or understanding was deemed, for the purposes of s 27, to have the purpose, or to have or be likely to have the effect of substantially lessening competition in a market if the provision had the purpose, or was likely to have the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of the price for goods or services.

[21] Section 30 of the Act was substituted, from 15 August 2017, by the Commerce (Cartels and Other Matters) Amendment Act 2017. Section 30 now directly prohibits the entry into, or giving effect to, "cartel provisions" (as defined in s 30A). It is no longer necessary to refer back to s 27. The 2017 amendments included a nine-month transitional arrangement whereby persons that gave effect to any pre-existing provision in a contract, arrangement or understanding, were required to comply with the former ss 30–33 of the Act as though those provisions had not been repealed and were still in force.[3]

[22] There is a long stop provision in the Act. Section 80(5) provides that no proceedings may be commenced 10 years or more after the matter giving rise to the contravention.

[23] The Commission's statement of claim was filed on 17 December 2021. Two of the contravening arrangements were entered into prior to that date. The entering into of these arrangements falls outside the limitation period. Liability for entering into the remaining five contravening arrangements post December 2011 arises under

[3] Commerce Act, Schedule 1AA, clause 2.

s 27, via s 30, other than for a single two-way arrangement, for which liability for entry arises under s 30(a). Liability for giving effect for the contravening arrangements arises under s 27, via s 30, for three of the arrangements, for an arrangement that was initially a one-way arrangement but became a two-way arrangement and for the customer specific arrangement. It arises under s 30(b) from 15 May 2018 onwards for the remaining four contravening arrangements and for one two-way arrangement.

[24] Section 80 of the Act confers on the Court jurisdiction to impose pecuniary penalties for these breaches. Relevantly, the section (as amended in 2017) provides as follows:

> **80 Pecuniary penalties relating to restrictive trade practices**
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> (1) If the court is satisfied on the application of the Commission that a person—
>
> (a) has contravened any of the provisions of Part 2; or
>
> …
>
> (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or
>
> …
>
> the court may order the person to pay to the Crown such pecuniary penalty as the court determines to be appropriate.
>
> (2) The court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the court considers that there is good reason for not making that order.
>
> (2A) In determining an appropriate penalty under this section, the court must have regard to all relevant matters, in particular,—
>
> …
>
> (b) in the case of a body corporate, the nature and extent of any commercial gain.

> (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 any other case, the greater of the following:
>
> (i) $10 million:
>
> (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 readily be ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.

Recommended penalties

[25] Under s 80, it is for the Court to impose the appropriate pecuniary penalty in respect of any contravention of the provisions of Part 2 of the Act. However, as was confirmed by the full bench of this Court in *Commerce Commission v New Zealand Milk Corporation Ltd*, there is no objection to the parties making submissions and presenting a joint view as to the appropriate penalty, nor to such view being reached as a result of negotiations that represent what could be described as a settlement.[4] The Court has acknowledged its role in ensuring the efficacy of negotiated resolutions and the significant public interest in bringing about the prompt resolution of civil pecuniary penalty proceedings.[5] As Hansen J observed in *Commerce Commission v Alstom Holdings SA*:[6]

> … the task of the court in cases where a penalty has been agreed between the parties is not to embark on its own inquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range … there is a significant public benefit when corporations acknowledge

4 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC).
5 See *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC); and *Commerce Commission v Ronovation Ltd* [2019] NZHC 2303 at [24]–[26].
6 *Commerce Commission v Alstom Holdings SA,* above n 5, at [18] (citations omitted).

> wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[26] The Court must be satisfied that the penalty proposed is within the appropriate range, having regard to the objectives of the Act and the circumstances of the case before it.[7] If it is not so satisfied, the Court can decline to impose the penalty recommended by the parties and impose the penalty it considers is appropriate. It is not necessary that each step in the methodology proposed by the parties is accepted by the Court. Rather, as is the case with sentencing appeals in the Court's criminal jurisdiction, it is the final pecuniary penalty that matters.[8]

[27] The approach normally adopted when analysing penalty recommendations broadly follows the established approach adopted in criminal sentencing, but recognising that this analogy can only be taken so far. This is because the primary objective of imposing penalties for breach of the Act is deterrence. In the criminal jurisdiction, deterrence is only one of a number of objectives of sentencing identified in the Sentencing Act 2002 and it will not necessarily be the dominant consideration in any given case.[9]

[28] The approach which has commonly been adopted is to:[10]

(a) determine the maximum penalty;

(b) establish the appropriate starting point range that will achieve the objective of deterrence; and

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7 *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45]; and *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-4014-5490, 22 December 2010 at [37].

8 *Commerce Commission v Air New Zealand* [2013] NZHC 1414 at [27].

9 See *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC); *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [12]; and *Commerce Commission v New Zealand Diagnostic Group Ltd*, above n 7, at [14].

10 See *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097, [2014] NZCCLR 1 at [35]; and *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360 at [34].

(c) adjust the starting point to increase or decrease the penalty on the basis of any considerations specific to the defendant whose penalty is being considered.

[29] This approach has been adopted by the Commission in this case and it is endorsed by the defendants. I consider that it is appropriate and I address each of the above factors in turn. I also consider comparable cases in an endeavour to ensure a degree of consistency between like cases involving broadly similar contraventions.

Maximum available penalties

[30] I have set out above s 80(2B) of the Act.

[31] For Oceanbridge, the maximum penalty that can be imposed is the greater of $10 million, or three times the commercial gain obtained by it or, if commercial gain cannot be readily ascertained, 10 per cent of its turnover.

[32] In the present case, the contravening arrangements created the potential for commercial gain, but it is common ground that any commercial gain obtained from the contravening arrangements is not readily ascertainable. There are also difficulties with making a turnover calculation, due to the amendments to the Act in 2017, and the periods over which the contravening arrangements were in place. The Commission has submitted that, in the circumstances, it is preferable to calculate turnover in accordance with s 80 as it stood prior to the 2017 amendments. It also submitted that it is appropriate to treat Oceanbridge's conduct as involving 12 separate breaches of the Act. This involves treating the entry into and giving effect to the unlawful arrangements with each party as a separate breach, treating the customer specific arrangement with one of the counterparties to a contravening arrangement as a separate breach, but disregarding entry into those arrangements which fall outside the 10 year limitation period provided for in s 80(5) of the Act.

[33] Oceanbridge did not dissent from this approach.

[34] Oceanbridge's revenue in the 2020 financial year was substantial. Ten per cent of this figure, multiplied by 12, would result in a maximum penalty in the hundreds of millions of dollars.

[35] The maximum penalty that can be imposed on Mr Speedy, pursuant to s 80(2B)(a) is $500,000. Again, the Commission submits that it is appropriate to treat Mr Speedy's conduct as involving 12 separate breaches and again he did not dissent from this approach. This results in a maximum penalty for Mr Speedy of $6 million.

The appropriate starting point

[36] The paramount objective in sentencing under the Act is to impose a penalty that provides both general and specific deterrence. Pecuniary penalties should not be seen as a licence fee for contraventions of the Act; the deterrence objective is only served if anti-competitive behaviour is profitless.[11]

[37] In addition to the overarching need for deterrence, relevant factors identified in other cases and applicable in this case include:

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

(b) whether the conduct was deliberate or not;

(c) the role of the defendants in the impugned conduct;

(d) the seniority of the officers involved;

(e) the duration of the contravening conduct;

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

(g) the extent of any loss or damage suffered by other persons as a result of the contravening conduct;

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

(h) the importance of the market;

(i) the market share and/or degree of market power held by Oceanbridge; and

(j) the size and resources of Oceanbridge.

[38] Generally, in cases of this type, the Courts look at the conduct overall and assess the appropriate penalty for the conduct in the round, rather than attempting to assess separate penalties for separate breaches. The Commission adopted that approach in its submissions, although emphasising that it is important not to lose sight of the number of unlawful arrangements involved in this case. The defendants did not disagree.

(i) The nature and seriousness of the contravening conduct

[39] The Commission pointed out that customer allocation arrangements such as those in issue, distort competition. By allocating customers, cartel members attain a degree of market power over their allocated customers. This can result in restricted output and increased prices. A reduction in rivalry between competitors can also result in lower levels of innovation and in inefficiencies.

[40] Here, Oceanbridge reached separate unlawful arrangements with seven different counterparties. The contravening arrangements removed the direct competition that would otherwise have existed between Oceanbridge and the counterparties. The steps taken by Oceanbridge (and the counterparties) to monitor the contravening arrangements led to some customers being misled, particularly on those occasions when cover pricing was used to give effect to certain of the unlawful arrangements.

[41] Ms Cooper QC for Oceanbridge submitted that, to succeed, Oceanbridge needed to attract as much volume from wholesale customers as it could to ensure that it could offer part container load services on a competitive basis. A freight forwarder is required to provide confidential and commercially sensitive information on its customers and their shipments to the wholesale freight forwarder. There is the

potential for the wholesale freight forwarder to use the information provided to approach the retail customer. It was argued that Oceanbridge simply recognised that wholesale customers might be reluctant to use its services if they thought that it might use the information given to it as a wholesale freight forwarder to approach the customers directly. It was argued that, for this reason, Oceanbridge adopted a strategy of focusing its sales efforts on increasing overall volume on the services it provided, and that the contravening arrangements arose in this context, as a result of counterparties seeking assurances from Oceanbridge that it would not seek to solicit their customers directly. It was argued that where Oceanbridge and the counterparties went wrong, was in the exchange of the assurances that gave rise to the arrangements or understandings that breached the Act.

[42] The Commission acknowledged that the contravening arrangements arose in the context of efforts made by the defendants to address what they perceived to be practical concerns associated with the provision of wholesale freight forwarding services by Oceanbridge to the counterparties. It nevertheless however pointed out that the arrangements were not a lawful way of addressing the perceived concerns and that they were wider than was necessary.

[43] The contravening arrangements were not a lawful way of addressing the concerns raised about confidentiality and I agree with the Commission that the arrangements went further than was necessary to provide confidence to the counterparties that commercially sensitive information would not be misused. I also note that some of the arrangements, which were initially one-way arrangements, became two-way arrangements and that cover pricing was used in some cases to give effect to the arrangements. I acknowledge the submission made for the defendants that there were only four instances of cover pricing used over a relatively lengthy period, but in my judgment, the use of cover pricing was particularly egregious. Cover pricing is inherently deceptive, because customers are likely to believe that they are being offered a competitive price.

[44] The Commission also acknowledged that Oceanbridge's conduct was not the worst conduct of its type, but argued that it was nevertheless a serious breach of the Act because it was engaged in and endorsed by persons at the highest level within

Oceanbridge, it went on over a lengthy period, and because Oceanbridge is a large company, operating within a large and important market.

[45] I agree with the Commission's submissions. The transgressions were multiple. They were endorsed by Mr Speedy — a person at the highest level in Oceanbridge. They occurred over a number of years. Oceanbridge is a large company, operating in an important market. The use of cover pricing — albeit on a limited number of occasions — was serious.

(ii) Deliberateness of the conduct

[46] The defendants deliberately gave effect to the contravening arrangements, albeit that they did not realise they were thereby breaching the Act. Ignorance is of course no excuse. Oceanbridge acknowledges that it did not have, but ought to have had, adequate systems and training in place to ensure that staff, including senior staff, were aware that such conduct contravened the Act.

(iii) The role of the defendants

[47] Oceanbridge accepts that it was an active participant in the contravening arrangements and Mr Speedy accepts that he was aware of and endorsed the approach that led to all of the contravening arrangements being entered into and then given effect to. As I have noted above, he knew that Oceanbridge was in competition with each of the counterparties; he understood that entering into and giving effect to the contravening arrangements would allocate customers and that competition would be lost.

(iv) The seniority of the officers involved

[48] As noted, Mr Speedy established Oceanbridge. He was at all material times its managing director and its ultimate beneficial owner. Other senior personnel within Oceanbridge were also involved. I agree with the Commission that this is an aggravating feature.

(v) The duration of the contravening conduct

[49] Although the individual contravening arrangements were entered into on different dates and were given effect to over different periods, the overall duration of the unlawful conduct was substantial. One contravening arrangement was given effect to over a period in excess of 10 years. Other arrangements were given effect to for periods ranging from two years two months to five years eight months. The Commission acknowledged that Oceanbridge and Mr Speedy ceased engaging in the unlawful conduct when they became aware that it was unlawful. To the extent that the contravening arrangements had not already come to an end, they were terminated by Oceanbridge on 2 April 2021.

(vi) The potential for gain/harm

[50] While the commercial gain/harm cannot readily be ascertained, all accept that the unlawful conduct created the potential for gain by Oceanbridge and for harm to customers, because the contravening arrangements largely removed the possibility of direct competition between Oceanbridge and the counterparties. I say largely because the contravening arrangements excluded tenders, with the result that customers who sought freight forwarding services through a tender were not subject to the arrangements.

[51] The defendants submitted that the potential for commercial gain was limited. Oceanbridge's business model was referred to and it was pointed out that the contravening arrangements only removed competition between Oceanbridge and the relevant counterparties. They did not remove competition between Oceanbridge's counterparties themselves or for the balance of the 300 retail freight forwarders that compete in New Zealand. It was argued that any retail customer had plenty of other freight forwarders from whom they could seek freight forwarding services.

[52] With respect, I am not sure that this argument advances matters. The unlawful conduct created the potential for commercial gain to Oceanbridge and the potential for harm to customers, because the contravening arrangements removed competition. It is possible that customers were charged more by counterparties for retail freight forwarding services than they would have been charged if Oceanbridge had actively

competed to supply those services. Wholesale freight forwarders that did not engage in the same conduct may not have been competing with Oceanbridge on a level playing field. That others remained in competition simply highlights the pernicious effect of the contravening arrangements. There was a potential gain for Oceanbridge and Mr Speedy, as the ultimate beneficial owner, stood to benefit personally from any commercial gain that might have arisen.

(vii) Importance of the market

[53] The international freight forwarding industry is crucially important to the New Zealand economy. The cost of freight is an important, even critical, input for the importers of many goods and services supplied throughout New Zealand, as well as for New Zealand exporters.

(viii) Oceanbridge's market share and degree of market power

[54] Oceanbridge considers that, in terms of its New Zealand operations, it is the third or fourth largest wholesale freight forwarder in New Zealand and around the 10th largest retail freight forwarder in New Zealand. It considers that it is the fifth largest freight forwarder in New Zealand overall.

[55] Oceanbridge is clearly an important freight forwarder in this country, operating in both the wholesale and retail markets. While there are a large number of other participants in the freight forwarding industry, Oceanbridge was a significant operator in the New Zealand market and it is reasonable to assume that it would have had a degree of influence, albeit not as much influence as others.

(viiii) The size and resource of Oceanbridge

[56] This is relevant because it informs the Court's assessment of the effect of the conduct.

[57] Oceanbridge has five offices and a large number of employees in New Zealand. Subsidiaries have offices and a number of employees in Australia. Oceanbridge provides a large number of quotations per week, across both its wholesale and retail

operations. Its revenues were substantial throughout the relevant period. The revenues it derived from the counterparties were not insignificant.

(x) Comparable cases

[58] I was referred to a number of cases, so that I could endeavour to ensure parity of treatment with others who have been involved in similar breaches of the Act.

[59] In relation to Oceanbridge the Commission referred in particular to:

(a) *Commerce Commission v Air New Zealand*.[12] This case involved an understanding between Qantas and Air New Zealand regarding the timing and rates for the imposition of fuel charges on the trans-Tasman market and an understanding with a number of other airlines relating to fuel and security surcharges. The case also involved collusion on a relatively small aspect of pricing, although there was competition on underlying freight charges. The starting point for the penalty imposed was $9 million to $9.75 million, with an effective starting point of around $9.4 million. The starting point in *Air New Zealand* reflected a goal of "specific deterrence" to take into account Air New Zealand's size, its financial resources and its position of influence in the New Zealand air cargo services market. These factors do not apply to the same extent in Oceanbridge's case; and

(b) *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*.[13] The conduct in this case was described as "hard core" cartel conduct. It involved price fixing engaged in by the most senior management of three suppliers of wood preservative chemicals. They shared price information, altered prices at much the same time and in the same amounts and arranged bids so that they did not compete for each other's customers. There was also exclusionary conduct, under which all took steps to prevent or hinder a new entrant coming into the marketplace.

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12 *Commerce Commission v Air New Zealand*, above n 8.
13 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, above n 9.

The starting point penalty adopted was $5.7 million for the price fixing conduct, with an additional $1.5 million for the exclusionary conduct. This case involved much more serious breaches of the Act than those undertaken by Oceanbridge.

[60] In relation to Mr Speedy, inter alia the Commission referred to:

(a) the *Koppers* case.[14] The Court determined that a starting point range for the general manager responsible for the conduct of $150,000 and $170,000 was appropriate, noting that his conduct was the most serious of the various defendants who had admitted liability; and

(b) *Commerce Commission v Hodgson*,[15] where the Court determined that $60,000 was an appropriate starting point for conduct undertaken by a group general manager in a company. He was involved in or a party to overarching understandings involving anti-competitive behaviour. The conduct was serious, particularly given the corporate entities involved. It was described by the Court as being deliberate and sustained.

[61] Other cases were referred to by counsel. All are fact specific. Some were decided under now repealed provisions imposing a lower penalty regime. They provide general guidance and assist in ensuring parity of treatment with others involved in similar contraventions, but the starting points adopted and the penalties ultimately imposed are not directly applicable to the present case.

[62] In considering comparable cases, I have also taken into account the penalty hearing in *Te Komihana Tauhokohoko/Commerce Commission v Mondiale Freight Services Ltd* and the pecuniary penalties there recommended by the parties. I held the penalty hearing for this case immediately before the penalty hearing for the present case.[16] I heard from counsel in both cases as to the similarities and differences between the admitted contraventions. I agree with counsel that the differences

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14 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* HC Auckland CIV-2005-404-2080, 4 October 2006.

15 *Commerce Commission v Hodgson* [2014] NZHC 649.

16 *Te Komihana Tauhokohoko/Commerce Commission v Mondiale Freight Services Ltd,* above n 1.

between Mondiale's contraventions and Oceanbridge's contraventions are not particularly significant. Mondiale entered into nine contravening arrangements; Oceanbridge entered into seven. The Mondiale contraventions were of rather longer average duration than the Oceanbridge contraventions. While there were some differences in the arrangements, they were relatively limited, and in practical terms, do not seem to have made any significant difference. There are differences in the size of the two companies and in their market share and revenue. Overall, I am satisfied that the starting point proposed by the Commission for Oceanbridge, and endorsed by its counsel, is consistent with the starting point proposed for the contraventions by Mondiale.

[63] While the Commission proposed a rather higher starting point for Mr Speedy's case than it proposed for the individuals involved in Mondiale, this was because Mr Speedy accepted that he was aware of and endorsed the approach that led to Oceanbridge entering into the contravening arrangements, that he knew that Oceanbridge was in competition with the counterparties and that he understood the effect of entering into the contravening arrangements. He appreciated that competition would be lost as a consequence. He was also Oceanbridge's managing director.

Proposed starting point

[64] The parties submitted that the appropriate starting points for the offending in issue in this case should be as follows:

(a) Oceanbridge — $6.9 million to $7.3 million; and

(b) Mr Speedy — $130,000 to $170,000.

[65] Taking into account the various aggravating features I have noted above and the pecuniary penalties imposed by the Courts in broadly comparable cases, I agree with the starting points recommended.

Adjusting the starting points – mitigating factors

[66] I accept that there are mitigating factors — some general and some specific to each of the defendants.

[67] First, the defendants have not previously been found to have contravened the Act. Nor have they previously been warned for conduct that the Commission considered likely to breach the Act.

[68] Secondly, and as discussed above, Oceanbridge ceased its unlawful conduct on 2 April 2021 in response to the Commission's investigation by emailing all of its freight forwarder clients, including the counterparties.

[69] Thirdly, the defendants cooperated with the Commission throughout its investigation. By way of example, Oceanbridge made employees available to be interviewed by the Commission on a voluntary basis and it responded promptly and fully to all of the Commission's requests for information.

[70] Fourthly, both defendants took a responsible approach when they became aware of the Commission's view that their conduct breached the Act. They promptly indicated a willingness to settle the issues prior to the Commission completing its investigations. Mr Speedy took full responsibility as the managing director of Oceanbridge.

[71] Fifthly, Oceanbridge acknowledged that it ought to have had adequate systems and training in place to ensure that its staff, including senior staff, were aware of their obligations under the Act. Such training is now given and the appropriate systems are in place.

[72] Taking these various mitigating factors into account, I agree with the Commission and with counsel for the defendants, that a 35 per cent discount is appropriate. Such a discount is consistent with that given in previous cases.

Conclusion

[73] The pecuniary penalties agreed to between the Commission and each of the defendants are approved. They are condign and they accord with the Act's purpose of promoting competition and the objective in imposing pecuniary penalties — namely specific and general deterrence. I accept there will have been stress on Mr Speedy and that what occurred will have had an adverse effect on his reputation. Although this will be common in such cases, the Court has been prepared to accept that it is an additional sanction and deterrent.[17]

[74] I impose pecuniary penalties for the admitted breaches of the restrictive trade practice provisions contained in ss 27 and 30 of the Act as follows:

(a) $4.6 million against Oceanbridge; and

(b) $100,000 against Mr Speedy.

[75] Each defendant is to pay the pecuniary penalty assessed against it or him to the Commission.

[76] The parties are agreed that costs should like where they fall and I so order.

Confidentiality orders

[77] There is material in the agreed statement of facts and in the submissions filed by the parties which the parties agree is confidential and commercially sensitive. I have not repeated that material in this penalty decision. Counsel for Oceanbridge sought that confidentiality orders should be made by the Court, because the material contains commercially sensitive information about its financial performance, its operations and its market share. It was submitted that the information is specific and confidential to it and that it is not otherwise publicly available.

[78] The Commission accepted that confidentiality orders were appropriate and I note that the file was sealed by Gardiner AJ on 1 March 2022.

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[17] *Commerce Commission v Prices Pharmacy 2011 Ltd* [2020] NZHC 1176 at [52].

[79] I accept the submissions made on behalf of Oceanbridge and I order as follows:

(a) the information shaded in yellow in the marked up copies of the agreed statement of facts and the Commission's penalty submissions is not to be published in the news media or on the internet or on any other publicly available database;

(b) the Court file is to be sealed. It is not to be searched or accessed without leave from a High Court Judge.

Wylie J

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