IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2023-485-11
[2023] NZHC 2005

UNDER	the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	NGB PROPERTIES LIMITED Defendant

Hearing: 30 June 2023

Appearances: J C L Dixon KC and F J Cuncannon for the Plaintiff
J D Every-Palmer KC for the Defendant

Judgment: 28 July 2023

JUDGMENT OF COOKE J
(Penalty)

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[1] The defendant, NGB Properties Limited (NGB), is a property holding company. It has the same shareholders and two common directors as Juted Holdings Ltd (Juted). Juted is the operating entity of the Mitre 10 MEGA store at the Gate Pa Shopping Centre in Tauranga.

[2] The Mitre 10 branded group of companies operates throughout New Zealand in competition with other retailers, but particularly Bunnings Ltd (Bunnings).

[3] In late 2018 Bunnings acquired a property at 1148 and 1150 Cameron Road located near to the Mitre 10 MEGA in Tauranga (the Gilmores site). The Gilmores site adjoins 1170 and 1176 Cameron Road (the Cameron Road site). Together the Gilmores and Cameron Road sites are large enough to establish a Bunnings Warehouse which would be able to fully compete with the Mitre 10 MEGA store. On 8 November

2019 Juted purchased the Cameron Road site, nominating NGB as purchaser. Juted's acquisition prevented Bunnings fully competing with its Mitre 10 MEGA store.

[4] After its acquisition of the Cameron Road site on 3 July 2020 NGB gave a covenant in relation to that site the purpose of which is to prevent the site from being used for a competitive hardware business by future owners. NGB has admitted that the entry of this covenant contravened s 28 of the Commerce Act 1986 (the Act).

[5] The issue before the Court is the penalty that should be imposed for this admitted breach under s 80 of the Act. The parties have agreed to a penalty of $500,000 and have presented submissions in support of it.

Agreed facts

[6] For the purposes of the penalty hearing the parties have presented an agreed statement of facts. For the purpose of this judgment I will focus on the facts that I consider material for the purposes of determining the penalty notwithstanding that the parties agreement as to the facts is a little more extensive.

[7] As indicated, there is competition between Mitre 10 and Bunnings for the provision of hardware and home improvement supplies. There are various categories of stores involved in this competition, including competition between larger stores including "Mitre 10 MEGA" and "Bunnings Warehouse".

[8] There is a market for retailing of hardware and home improvement goods by such warehouses within central Tauranga. The parties have not agreed the precise bounds of that market, although it is accepted that there is some competition arising outside of central Tauranga, and also from other smaller retailers inside and outside central Tauranga. The closest Bunnings retail store to the Mitre 10 MEGA in Tauranga was in Mount Maunganui some 10 kilometres away.

[9] Between October and November 2018 Bunnings acquired the Gilmore site for $7,900,000 (approximately $930 per square metre). It is 500 metres away from Mitre 10 MEGA. That site was big enough for a Bunnings home improvement store,

but not big enough for a Bunnings Warehouse. To establish a Bunnings Warehouse the adjoining Cameron Road site would need to be acquired.

[10] In April 2019 Bunnings submitted a conditional offer of $4,398,000 ($757 per square metre) to the owner of the Cameron Road site. The vendor did not accept the offer, and advised that the site would be listed for sale. Juted became aware that Bunnings was trying to acquire the site. It then made its own offer of $6,500,000 ($846 per square metre) but again the vendor did not accept.

[11] The Cameron Road site was then publicly listed for sale in October 2019. The listing agents appraisal was that the site would obtain between $9,217,000 and $11,521,000. On 7 November 2019 Bunnings submitted a conditional offer of $6,530,550 ($850 per square metre). The following day Juted made an unconditional offer of $10,800,000 ($1,406 per square metre). Juted's offer was calculated with reference to:

(a) the listing agent's appraisal;

(b) the amount it expected Bunnings to offer, and to exceed that amount;

(c) the maximum amount Juted calculated it should pay before it would be better to let Bunnings acquire the site.

[12] Juted also made some alternative offers for each of the two individual titles that made up the Cameron Road site, namely:

(a) for 1170 Cameron Road only at $6,800,000 ($1,560 per square metre); and

(b) for 1167 Cameron Road only for $6,100,000 ($1,430 per square metre).

[13] Bunnings and Juted were the only parties to submit offers. The vendor accepted Juted's offer. NGB was incorporated and then nominated as the purchaser.

[14] After acquisition NGB considered various options including:

(a) Selling all or part of the site.

(b) Developing the site as a Mitre 10 MEGA, or as mixed use alongside storage for Mitre 10 MEGA Tauranga and/or

(c) Land banking all or part of the site.

[15] On 7 April 2020 the Board involving the Juted and NGB directors considered a proposal that an encumbrance be lodged on the site to "stop Bunnings building". The directors approved doing so. At the time:

(a) there was some concern that the site might need to be sold on an emergency basis in light of uncertainty surrounding the impact of COVID-19 and the first lockdown, and that Bunnings might be able to acquire the site at "fire sale" rates;

(b) NGB was aware there was already an encumbrance registered against the Cameron Road site preventing the site being used as a service station or for sale of petroleum products;

(c) NGB sought the views of one of its directors, who was also a lawyer, and NGB was not aware that the encumbrance might breach the Act;

(d) NGB acted in an open and transparent way;

(e) NGB thought there were many other sites where Bunnings could establish a Bunnings Warehouse; and

(f) the encumbrance was a "one-off", and NGB did not otherwise attempt to restrict a Bunnings Warehouse from being established.

[16] On 8 June 2020 an entity named Encumbrance 1170 Cameron Ltd was incorporated, and an encumbrance was registered against the title to take effect "until discharge". Under it NGB gave the following covenant:

> 5.1 The Encumbrancer covenants with the Encumbrancee that it will not use, lease, licence, or permit to be used, leased or licenced any portion of the [Cameron Road Site] including any buildings currently existing or to be erected on the [Cameron Road Site] for the purpose of carrying out:
>
> (a) the business of a hardware and home improvement retail and/or trade store regardless of its store format and size, including car parking for a neighbouring property for such a business; and/or
>
> (b) any business the primary activity of which is the retail and/or wholesale of hardware and home improvement products and supplies in relation but not limited to automotive and garage, bathroom, building, camping, electrical hardware, flooring and tiling, gardening, hand tools, hardware, heating and cooling, homeware, kitchen and appliances, laundry and cleaning, lighting, outdoor furniture and barbeque, painting and decorating, pet care, plumbing, power tools, safety and security, wardrobes and storage, and timber and workshop, etc.

[17] In July 2020 NGB entered an agreement to sell the Cameron Road site for $10,800,000 subject a due diligence condition, but that sale was not completed.

[18] In September 2020 the Commission received a complaint regarding NGB's acquisition of the Cameron Road site, and the encumbrance, and it advised NGB it had opened an investigation on 19 October 2020.

[19] In December 2020, or January 2021 a real estate agent acting on behalf of NGB approached Bunnings about purchasing the Cameron Road site. NGB did not receive a response to that approach.

[20] In March 2021 NGB entered negotiations for the sale of the Cameron Road site to a property developer, but the sale was not completed.

[21] On 31 March 2021 the encumbrance on the Cameron Road site was discharged in response to the concern raised by the Commission.

[22] In March NGB also entered into a sale and purchase agreement for the sale of the Cameron Road site to Kāinga Ora for $10,800,000. The sale was completed on 21 July.

Agreed admissions

[23] Section 28 of the Act materially provides:

> **28 Covenants substantially lessening competition prohibited**
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> (1) No person, either on his own or on behalf of an associated person, shall—
>
> (a) require the giving of a covenant; or
>
> (b) give a covenant—
>
> that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> …
>
> (4) No covenant, whether given before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect of substantially lessening competition in a market is enforceable.
>
> …

[24] NGB admits that it contravened s 28(1) of the Act by giving the encumbrance on 3 July 2020. That is because it contained a covenant, and that covenant had the purpose of substantially lessening competition in a market. That was because it had a substantial purpose to prevent Bunnings from establishing a home improvement warehouse across the combined site.

[25] NGB has also made a number of other admissions relevant to penalty which have been provided to the Court as part of the parties' agreement.

[26] The relevant market concerns the retailing of hardware and home improvement goods to retail customers. It is an industry that is of some importance within the Tauranga region involving annual sales in tens of millions of dollars. At all material times there is a lack of alternative suitable sites in central Tauranga for a home improvement warehouse.

[27] The lodging of the encumbrance was a deliberate strategy to prevent access to an essential input for Bunnings and any other potential rival of Mitre 10 MEGA Tauranga, increasing barriers to entry into, and expansion in the market. The conduct was moderately serious.

[28] The encumbrance reflected a deliberate strategy to prevent the establishment of a Bunnings Warehouse on Cameron Road by preventing the use of the Cameron Road site for a hardware or home improvement store (or even carparking for a hardware or home improvement store on a neighbouring site) thereby preventing competition that Mitre 10 MEGA Tauranga would face from a new Bunnings Warehouse 500 metres away on Cameron Road.

[29] NGB is a holding company with no employees of its own. But the decision to lodge the encumbrance was devised and decided upon at the Board level of the group.

[30] It is relevant, however, that NGB obtained legal advice from one of Juted's directors and their firm before lodging the encumbrance. NGB did not intend to breach the Act.

[31] There was also no commercial gain obtained from the breach. That is because NGB owned the Cameron Road site at all times during which the encumbrance was in effect. Accordingly, no other party would have been able to develop a multi-category hardware or home improvement store on the Cameron Road site even in the absence of an encumbrance. The purpose of the encumbrance was nevertheless to protect Mitre 10 MEGA's revenue stream from competition from a Bunnings Warehouse in the event that circumstances resulted in the sale of the Cameron Road site. If the encumbrance had not been removed in response to the Commission's concerns, there was a potential for commercial gain or benefit to NGB.

[32] The encumbrance was also capable of causing harm because there was potential for customers to have been materially worse off. Its purpose was to prevent the potential entry of a Bunnings Warehouse on the combined site. That in turn would prevent Bunnings from providing an offering that better met its customer's needs, resulting in reduced choice for customers in central Tauranga, and lead to higher travel costs for consumers than would otherwise be the case for those customers who needed to travel out of central Tauranga to Mount Maunganui to shop at the closest Bunnings.

[33] The encumbrance, had it taken effect, would also have protected Mitre 10 MEGA Tauranga from more effective competition, enabling it to sustain prices for at

least some products that were higher, and/or lead to quality and service outcomes that were lower, than would have prevailed if Bunnings had been able to open a Bunnings Warehouse on the Cameron Road site.

[34] Whilst the parties do not have data on market share, they note that Bunnings is Mitre 10's closest competitor and the closest Bunnings to Mitre 10 MEGA Tauranga is approximately 10 kilometres away in Mount Maunganui, outside central Tauranga. Mitre 10 MEGA Tauranga therefore may have a degree of market power, although it does have existing constraints on it, including from Bunnings Mount Maunganui, specialist stores, trade stores, and general merchandise retailers.

[35] The Court has been provided with data showing the turnover of NGB in 2019 and 2020, and its net profit after tax.

[36] NGB cooperated with the Commission in its investigation by providing information, and one of its directors attended an interview voluntarily. NGB voluntarily moved the encumbrance in response to the Commission's concerns and has not registered any other restrictive covenants.

[37] NGB acknowledged and accepted it had contravened the Act at the earliest possible state of the proceedings, and it has agreed to settle the proceedings in terms acceptable to the Commission. It has not been found to have previously contravened the Act, nor has it previously been warned by the Commission in respect of conduct likely to breach the Act.

Approach to agreed penalties

[38] As is reasonably common the parties have presented the Court with an agreement on the penalty that should be imposed on NGB. The approach that the Court should adopt in those circumstances is well established.[1] The Court should

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[1] See *Commerce Commission v Hutt and City Taxis Ltd* [2021] NZHC 2543 at [12]; *Commerce Commission v Ronovation* [2019] NZHC 2303 at [23]–[26]; *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18], see also *NW Frozen Foods v Australian Competition and Consumer Commission* (1996) 71 FCR 285; *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-

consider whether the proposed penalty is within the appropriate range rather than embarking on its own independent inquiry. This recognises the significant public benefit when parties acknowledge wrongdoing, thereby avoiding time consuming and costly investigation and litigation. The Court should play its part in promoting responsible resolutions of proceedings under the Act.

[39] The Court must be satisfied that the final figure proposed meets the objectives of the Act in the circumstances of the case before it. It is not necessary that each step of the proposed methodology is accepted by the Court so long as it is satisfied that the recommended penalty is appropriate.

[40] The penalties for breaches of s 28 are addressed in s 80. Under s 80(2A) the Court must take into account all relevant matters and the nature and extent of any commercial gain. The established approach for assessing the penalty is to:[2]

(a) determine the maximum penalty;

(b) establish an appropriate starting point for the offending that will achieve the objective of deterrence in light of the relevant factors; and

(c) adjust the starting point to discount or increase the penalty on the basis of any consideration specific to the defendant.

Assessment

[41] The first step in the three steps outlined above is to identify the maximum penalty. Pursuant to s 80(2B)(b) of the Act the maximum penalty that could be imposed on NGB is the greater of $10 million or an alternative calculation based on the commercial gain from the offending. As outlined above there was no actual commercial gain to NGB from the offending. So the relevant maximum penalty is $10 million.

5490, 22 December 2010 at [38] and *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21].

2 See, for example *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097, (2013) 13 TCLR 628 at [35].

[42] The Commission submitted that a starting point in the range of $680,000–$750,000 was appropriate, reduced to $500,000 for mitigating personal circumstances.

[43] I do not intend to make my own assessment of what the starting point should be in light of the maximum, and what adjustments are appropriate for the personal circumstances of the defendant. That is because the Court's role is to assess whether the overall penalty that is proposed falls within the appropriate range, rather than to embark upon my own assessment of the penalty. In the circumstances I will address what I consider to be the key factors, and then consider whether the proposed penalty is within the appropriate range.

[44] The paramount concern is to impose penalties that provide general and specific deterrence. It must be well understood by market participants that anti-competitive behaviour will ultimately be profitless, and penalties will be imposed to ensure this. A series of considerations may be relevant when undertaking that assessment.[3]

[45] I was advised that this is the first case where the Court has imposed a penalty for entering a restrictive covenant in contravention of s 28 of the Act. I accept the Commission's submission that the issue of restrictive land covenants is a significant one. In the three market studies undertaken by the Commission it has identified land covenants as a factor affecting competition for all three market areas.[4] The lodging of the encumbrance in the present case illustrates the type of concerns it has identified. It was lodged as part of a deliberate strategy to prevent access to land by Bunnings and any other potential rivals to stop them competing with Mitre 10 MEGA Tauranga. For these reasons it is important for the Court to impose a penalty that is significant, and which operates as an effective deterrent against conduct of this kind.

[46] But the Court is not imposing a penalty for a breach of the Act associated with NGB's original acquisition of the Cameron Road site. The contravening conduct is only associated with the entry of the covenant seeking to restrict competitive activities

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3 *Commerce Commission v Ronovation Ltd*, above n 1, at [31].

4 Commerce Commission *Market study into retail fuel sector: Final report* (5 December 2019) at [6.117]–[6.122]; Commerce Commission *Market study into the retail grocery sector: Final report* (8 March 2022); and Commerce Commission *Residential building supplies market study: Final report* (6 December 2022) at [7.44]–[7.69].

by future owners should NGB have sold the property. That is an important point and one which I asked the parties to address further by way of a joint memoranda following the initial hearing.

[47] Depending on the circumstances an original acquisition of a property by a person with the purpose of preventing another purchaser acquiring the site and using it for competitive activities may be a breach of s 27 of the Act (relating to contracts or understandings which substantially lessen competition), or a breach of s 47 (concerning the prohibition on certain acquisitions). A market participant who takes such steps can expect that significant penalties will be imposed for such contravening conduct.

[48] In the present case, however, no such allegation is advanced by the Commission, or admitted by NGB. The penalty here is limited to one imposed in relation to the subsequent conduct of creating an encumbrance on the title intended to restrict competition by subsequent owners of the land. The fact that the contravention here is limited to the subsequent conduct makes the breach less serious.

[49] I also consider it to be of significance that such an encumbrance is unenforceable under s 28(4). So a potential competitor wishing to acquire a site with such an encumbrance, and a potential vendor wishing to sell the site without the encumbrance, would be able to apply to have such a covenant removed. This potentially reduces the significance of the contravention, although I accept the Commission's point that removal would not necessarily be a straightforward exercise, and the cost and uncertainty involved could have anti-competitive effects in themselves.

[50] These factors are relevant both to the seriousness of the breach, and as an aspect of personal mitigating circumstances. NGB did not benefit from its contravention as the covenant only existed while NGB was the owner. It initially established the covenant without appreciating it contravened the Act, and on the advice of one of its directors who was a lawyer. As soon as it was aware of the problem following the commencement of the Commission's investigation it took steps to address any anti-competitive impact, not only by having the covenant removed, but also by approaching

Bunnings to see if they wished to acquire the site. It then offered the property for sale on the open market, and it then sold it without the covenant. I accept that the contravention was the consequence of ignorance, that no anti-competitive effect actually arose from it, and that no benefit was derived from the unlawful covenant.

[51] But it nevertheless remains important for the Court to signal that contraventions of this kind are still to be regarded as serious, albeit normally less serious than initial anti-competitive acquisitions. It is still necessary to send a signal to the market in this respect. Moreover, as will be identified below, it is a striking feature of the present case that the present contravention was made in apparent ignorance that conduct of this kind is unlawful. The conduct was no doubt engaged in to restrict competition from Bunnings, but it was not appreciated that it could be unlawful. The Commission's market studies suggest that such misunderstandings might exist more widely. The illegitimacy of such conduct needs to be better appreciated. The Court should accordingly impose a significant penalty in the circumstances.

[52] The Commission referred to other decisions on penalty to use by way of comparison. Comparison is difficult because each of the cases put forward arise in different circumstances and for breaches of different provisions of the Act. As I say, this is the first case where the Court has been asked to assess the penalties for a restrictive covenant breaching s 28. The cases provided a potential range, however. In particular:

(a) In *Commerce Commission v GEA Milfos International Ltd* the defendant entered negotiations with its competitor for the defendant to take over the market for wholesale supply of "milk sensors".[5] An automated pricing tool for the product was established during these negotiations, and it was still used by them after the negotiations broke down, and an arrangement continued between them to continue to price in accordance with this tool for approximately two years. The Court

[5] *Commerce Commission v GEA Milfos International Ltd* [2019] NZHC 1426.

concluded that a starting point of $1.1 million for this contravention was appropriate.

(b) In *Commerce Commission v Hutt and City Taxis Ltd* an agreement was entered to charge a minimum fare for pick up taxi trips from Wellington airport.[6] This was a clear example of price fixing instigated by the defendant and led by its directors. But it was only short-lived. The Court concluded that a starting point of $500,000–$600,000 was appropriate.

(c) In *Commerce Commission v Ronovation Ltd* the defendant was advising clients acquiring Auckland residential real estate for investment purposes.[7] It operated a member only Facebook page. The rules for membership existed to avoid members of the group competing against each other in relation to properties. There was only limited scope for indirect gain by the defendant although there was a possibility of market effect. The Court accepted a starting point of $550,000–$650,000 was appropriate.

[53] I agree that NGB's conduct was less serious than the case of *Milfos* — it acted in ignorance and that there was no actual anti-competitive effect or illegitimate gain. I also accept that NGB's conduct can be thought of as falling into the same general category as *Hutt and City Taxis* and *Ronovation*. There are also other cases of contravention of the Act that similarly involve conduct assessed in the same general financial range which could be considered to be in the same general category.[8]

[54] It is also appropriate to take into account deductions from the starting point in light of the personal circumstances of the defendant. The breach was of a "one-off" kind. NGB has not previously contravened the Act or received a warning, it has fully cooperated with the Commission, and it took steps to address the infringement once it became aware of the significance of it, including by selling the property.

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6 *Commerce Commission v Hutt and City Taxis Ltd*, above n 1.
7 *Commerce Commission v Ronovation Ltd*, above n 1.
8 *Commerce Commission v Enviro Waste Services Ltd* [2015] NZHC 2936; *Commerce Commission v Specialised Container Services (Christchurch) Ltd* [2021] NZHC 2279.

[55] Bearing in mind all of the above factors I accept that the proposed penalty of $500,000 is within the available range.

Result

[56] For these reasons the Court orders that NGB pay a pecuniary penalty in the amount of $500,000 for its admitted contravention of s 28 of the Act.

[57] In accordance with the parties' agreement costs will lie where they fall.

Cooke J

Solicitors:
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Matthews Law, Auckland for the Defendant