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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-002412
[2022] NZHC 1370

UNDER	The Commerce Act 1986
BETWEEN	TE KOMIHANA TAUHOKOHOKO/COMMERCE COMMISSION Plaintiff
AND	MONDIALE FREIGHT SERVICES LIMITED First Defendant

Contd over….

Hearing:	2 June 2022
Appearances:	J C L Dixon QC, F J Cuncannon and P I C Comrie-Thomson for Plaintiff J Farmer QC, S C Keene, T J Pilkington and E M Ferrier for First Defendant A I C Denton for Second, Third and Fourth 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:……

JOHN DOUGLAS SARGENT
Second Defendant

PHILIP ARTHUR BRAMWELL
Third Defendant

BRYAN RONALD HUTSON
Fourth Defendant

Introduction

[1] The plaintiff, Te Komihana Tauhokohoko, the Commerce Commission (the Commission), asks the Court to impose pecuniary penalties of $4.9 million on the first defendant, Mondiale Freight Services Ltd (Mondiale), and $65,000 on each of the second, third and fourth defendants, John Sargent, Philip Bramwell and Brian Hutson, 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 Oceanbridge Shipping Ltd*.[1] There is considerable overlap between the two judgments.

The anti-competitive conduct

[3] Mondiale carries on business as a transport and logistics provider. Mr Sargent was one of four initial directors who established the company in 1989. He was a director at all relevant times. Mr Bramwell was appointed a director in December 1994. He held that office at all material times and he remains a director. Mr Hutson was appointed a director in April 1998 and he held office until July 2018. Each of them either directly or indirectly was a shareholder of or had interests in Mondiale.

[4] The factual background is set out in a lengthy agreed statement of facts dated 17 December 2021. It was filed at the same time as the Commission's statement of claim and the notice of admissions.

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

(a) exporters;

(b) importers;

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[1] *Te Komihana Tauhokohoko/Commerce Commission v Oceanbridge Shipping Ltd* [2022] NZHC 1371.

(c) shipping and air lines; and

(d) freight forwarders.

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

[6] 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.

[7] Freight forwarders can supply either or both:

(a) retail freight forwarding services; and

(b) wholesale freight forwarding services.

[8] 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 and 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

customers that they would not otherwise be able to offer. There are resulting efficiencies and costs savings.

[9] 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. There are only three freight forwarders who supply both wholesale freight forwarding services and retail freight forwarding services to and from New Zealand on a substantial basis — Mondiale, Oceanbridge Shipping Ltd and one other.

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

[11] In the course of supplying its wholesale freight forwarding services, Mondiale reached arrangements with nine counterparties with whom it was otherwise in competition for the supply of retail freight forwarding services. Mondiale 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. It also wished to protect itself from any conflict of interest in a situation where it was acting as the agent of the counterparty. The arrangements were entered into in this context.

[12] 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, Mondiale agreed not to compete with the counterparties in the supply of retail freight forwarding services to customers to whom the counterparties were supplying retail freight forwarding services, as long as the counterparties used Mondiale's

wholesale freight forwarding services to an extent that was considered acceptable by Mondiale; and

(b) under the two-way arrangements there was also an expectation that the counterparties would not compete with Mondiale by supplying retail freight forwarding services to customers to whom Mondiale was supplying retail freight forwarding services.

Tenders were usually excluded from the contravening arrangements.

[13] All but one of the contravening arrangements were entered into before December 2011. Most of them were entered into following prompting by the counterparties.

[14] Mondiale gave effect to the contravening arrangements, including by:

(a) refraining from approaching customers to whom the counterparties were supplying retail freight forwarding services;

(b) declining to provide quotes to such customers;

(c) withdrawing quotes provided by it to such customers;

(d) not competing for such customers, either generally or in relation to what are known as "trade lanes" or particular types of freight; and

(e) designating each of the counterparties as "Hands Off" on an internal list it maintained.

[15] On occasion, Mondiale:

(a) provided assurances to counterparties that it would not approach, provide quotes to and/or otherwise compete for, the counterparty's customers;

(b) advised the counterparties that it had refrained from approaching, providing quotes to, and/or otherwise competing for customers to whom the counterparties were supplying retail freight forwarding services;

(c) communicated with the counterparties regarding whether either it or the counterparty was supplying retail freight forwarding services to specific customers, to determine whether those customers could be competed for;

(d) discussed with the counterparties how to address situations where one party had been asked to provide a quote for retail freight forwarding service to, and/or had approached, provided quotes to, and/or otherwise competed for, a customer to whom the other party was supplying retail freight forwarding services, including by discussing:

(i) how to withdraw quotes; and

(ii) "cover pricing" to ensure that a price offered would not be competitive;

and

(e) quoted cover prices on five occasions to customers to whom counterparties were supplying retail freight forwarding services.

[16] Mondiale was involved in giving effect to the contravening arrangements with seven of the counterparties from (for present purposes)[2] December 2011 through to October 2018. It gave effect to a contravening arrangement with one counterparty from (again for present purposes) December 2011 to August 2016 and with another counterparty from December 2011 to August 2018.

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2 See below at [24]–[26].

[17] Each of them, Mr Sargent, Mr Bramwell, and Mr Hutson personally participated in some of the contravening conduct:

(a) Mr Sargent was involved in giving effect to the contravening arrangements with seven counterparties — with one between September 2015 and October 2018, with a second in September 2015, with a third in September 2016, with a fourth from February 2016 to October 2018, with a fifth from October 2015 to October 2018, with a sixth from November 2012 to October 2018 and with a seventh from July 2013 to August 2018;

(b) Mr Bramwell was involved with giving effect to the contravening arrangements with one counterparty from December 2011 to October 2018 and with another counterparty from June 2014 to October 2018; and

(c) Mr Hutson was involved with giving effect to the contravening arrangements with four counterparties, with one from September 2015 to July 2018, with a second from August 2014 to July 2018, with a third from November 2017 to July 2018 and with a fourth from May 2016 to July 2018.

[18] Each of the defendants accepts that the contravening arrangements contained provisions which had the purpose, effect or likely effect of:

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

(b) controlling or maintaining the price of retail freight forwarding services supplied to customers.

[19] It is common ground that the defendants were unaware that they were breaching the Act.

[20] Mondiale ceased engaging in the unlawful conduct in October 2018 when it first became aware of the Commission's investigation (two of the arrangements had ceased earlier). It changed its practices to ensure internal decisions about its approaches to customers were made without communicating with retail freight forwarders. Further, it commenced a range of internal compliance and educational initiatives.

Relevant legislative provisions

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

[22] 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.

[23] 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.

[24] 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, a "cartel provision" (as defined in s 30A). It is no longer necessary to refer back to s 27. The 2017 amendments included a nine-month transitional period during which 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]

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

[25] 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.

[26] Here, all but one of the contravening arrangements were entered into before December 2011. The entry into these arrangements falls outside the limitation period. One of the contravening arrangements was however entered into in March 2018. Further, the contravening arrangements were given effect to in the ten year period before the proceedings were filed by the Commission, and during and after the nine-month transitional period (with one exception). Accordingly, liability for giving effect to the contravening arrangements arises under:

(a) s 27 of the Act via s 30 from December 2011 to 15 May 2018; and

(b) s 30(b) of the Act from 15 May 2018 until the contravening arrangements were terminated in October 2018.

[27] 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**
>
> (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

[28] Under s 80, it is for the Court to impose the appropriate pecuniary penalty in respect of any contravention of the provision 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

4 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC).

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 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.

[29] 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]

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

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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).

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].

[31] 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

(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.

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

Maximum available penalties

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

[34] For Mondiale, 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.

[35] In the present case, while the contravening arrangements created the potential for commercial gain, 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 Mondiale's conduct as involving nine separate breaches of the Act. Mondiale agrees that this approach is appropriate. Its consolidated group revenue

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[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].

in the 2019 financial year (being the last financial year in issue) was in the hundreds of millions of dollars (although much of this revenue was passed on to carriers); 10 per cent of the total group revenue, multiplied by nine, would result in a maximum penalty also in the hundreds of millions of dollars.

[36] Turning to Messrs Sargent, Bramwell and Hutson, the maximum penalty that can be imposed on each of them is $500,000. Mr Sargent was involved in giving effect to seven of the contravening arrangements, resulting in a maximum penalty of $3.5 million. Mr Bramwell was involved in giving effect to two of the contravening arrangements, resulting in a maximum penalty of $1 million. Mr Hutson was involved in giving effect to four of the contravening arrangements, resulting in a maximum penalty of $2 million.

The appropriate starting point

[37] 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]

[38] 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;

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

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

(h) the importance of the market;

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

(j) the size and resources of Mondiale.

[39] 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 although they emphasised that the "totality principle" remains relevant.[12]

(i) The nature and seriousness of the contravening conduct

[40] The Commission argued 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.

[41] Here, Mondiale reached separate unlawful arrangements with nine different counterparties. The contravening arrangements removed the direct competition that would otherwise have existed between Mondiale and the counterparties. The steps taken by Mondiale 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 and reinforce certain of the contravening arrangements.

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[12] Relying on *Commerce Commission v PGG Wrightson,* above n 10, at [37]; and *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* HC Auckland CIV-2005-404-2080, 4 October 2006 at [62].

[42] Mondiale accepted that the contravening arrangements were a serious transgression of the relevant provisions in the Act. The Commission, for its part, accepted that the contravening arrangements arose in the context of the efforts made by Mondiale to address what were perceived to be practical concerns associated with the supply of wholesale freight forwarding services. The Commission also acknowledged that Mondiale's conduct was not the worst conduct of its type, that Mondiale was not the "ringleader" and that some customers were made aware of the arrangements. It noted however that the instances of cover pricing, albeit limited, were serious. The defendants accepted this, but pointed out that cover pricing was only used on five occasions.

[43] I am satisfied that there was a serious transgression of the Act's restrictive trade practice provisions. The contravening arrangements were not a lawful way of addressing the perceived concerns about confidentiality and conflict of interest and the arrangements were wider than was necessary to address those concerns. The contraventions were engaged in or endorsed by persons at the highest levels in Mondiale. They occurred over a number of years. The use of cover pricing was serious. It is intended to mislead.

(ii) The deliberateness of the conduct

[44] The defendants deliberately gave effect to the contravening arrangements, albeit that they did not realise they were thereby breaching the Act. Indeed, they held the view that they were acting ethically in order to respect the trust and confidence of the counterparties. Ignorance is however no excuse. I agree with the Commission that ignorance and misguided good intention only demonstrate the absence of an aggravating factor rather than the presence of a mitigating factor. Mondiale 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

[45] Mondiale accepts that it was an active participant in the contravening arrangements and Messrs Sargent, Bramwell and Hutson accept that they were directly involved in giving effect to various of the arrangements.

(iv) The seniority of the officers involved

[46] As noted, Mr Sargent was one of four initial directors who established Mondiale. Mr Bramwell was appointed a director in December 1994 and he remains a director. Mr Hutson was a director from 1 April 1998 until 31 July 2018. All had held various governance and operational roles within the company. Other senior personnel within Mondiale, including a number of managers, were also involved in the contravening arrangements and in giving effect to them.

[47] Messrs Sargent, Bramwell and Hutson accept that their seniority, and the seniority of other personnel involved in the contravening arrangements, is an aggravating factor in this case, although they point out that the involvement of senior personnel reflects the owner/operator nature of Mondiale's business.

(v) The duration of the contravening conduct

[48] All but one of the contravening arrangements were put into place more than 10 years ago. Relevant to the imposition of pecuniary penalties, Mondiale gave effect to all but two of them from December 2011 until October 2018 (one ceased in August 2018 and the other in August 2016). The involvement of the individual defendants was also of long duration. The unlawful conduct only came to an end when the Commission commenced its investigation. Absent intervention, the conduct may have continued for a longer period, given that none of the defendants was aware that the conduct breached the Act.

(vi) The potential for gain/harm

[49] While the commercial gain/harm cannot readily be ascertained, all accept that the unlawful conduct created the potential for gain by Mondiale and for harm to customers. The contravening arrangements largely removed the possibility of direct

competition between Mondiale and the counterparties. I say largely because the contravening arrangements excluded tenders. Nevertheless, customers could have been charged more by counterparties for retail freight forwarding services than they would have been charged if Mondiale had actively competed to supply those services. Further, other wholesale freight forwarders that did not engage in the same conduct may not have been competing with Mondiale on a level playing field.

[50] Mondiale stood to benefit from the contravening arrangements. Messrs Sargent, Bramwell and Hutson were either direct shareholders in Mondiale or held indirect interests in the company. They stood to benefit personally from any commercial gain that might have arisen.

(vi) The importance of the market

[51] 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 exporters.

(vii) Mondiale's market share and degree of market power

[52] Mondiale is one of the largest privately owned freight forwarders in New Zealand. It is common ground that it has a significant market presence and share. It has a relatively high degree of influence in the New Zealand freight forwarding industry.

(viii) The size and resources of Mondiale

[53] These matters are relevant because they help inform the Court's assessment of the effect of the conduct. They are also relevant to specific deterrence.[13]

[54] As noted, Mondiale is a large New Zealand company. It has a significant number of employees. It has offices throughout New Zealand. It has two subsidiaries as well as non-controlling shareholdings in two companies that supply freight

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13 *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 11, at [54]-[55].

forwarding services in other countries or that assist it to supply freight forwarding services to and from New Zealand. Mondiale's consolidated group revenue in the financial years 2011-2018 (including from its subsidiaries and from its non-controlling shareholdings), was in the hundreds of millions of dollars, although I note that a significant portion of its revenue was passed on directly to carriers for the carriage of freight. Its net revenue from the supply of international freight forwarding services was nevertheless still very substantial.

Comparable cases

[55] 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.

[56] In relation to Mondiale, the Commission referred in particular to:

(a) *Commerce Commission v Air New Zealand*.[14] 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. I agree with the submissions for Mondiale that 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 Mondiale's case; and

(b) *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*.[15] The conduct in this case was described as "hard core" cartel conduct.

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

> 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. 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 Mondiale, and by Messrs Sargent, Bramwell and Hutson.

[57] In relation to the second to fourth defendants, inter alia the Commission referred to:

(a) the *Koppers* case.[16] 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*,[17] 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.

[58] 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.

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16 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd,* above n 12.
17 *Commerce Commission v Hodgson* [2014] NZHC 649.

[59] In considering comparable cases, I have also taken into account the penalty hearing in *Te Komihana Tauhokohoko/Commerce Commission v Oceanbridge Shipping Ltd*[18] and the pecuniary penalties there recommended by the parties. I held the penalty hearing for this case immediately after the penalty hearing for the present case. I heard from counsel in both cases as to the similarities and differences between the admitted contraventions. I agree with counsel that the differences 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 Mondiale is consistent with the starting point proposed for the contraventions by Oceanbridge.

[60] While the Commission proposed a rather higher starting point for the individual involved in the Oceanbridge case than it proposed for the individuals involved in this case, this was because the individual in the Oceanbridge case 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.

Proposed starting points

[61] The parties submit that the appropriate starting points for the offending in issue in this case are as follows:

(a) Mondiale — $7.35 million to $7.75 million;

(b) Mr Sargent — $85,000 to $115,000;

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[18] *Te Komihana Tauhokohoko/Commerce Commission v Oceanbridge Shipping Ltd*, above n 1.

(c) Mr Bramwell — $85,000 to $115,000;

(d) Mr Hutson — $85,000 to $115,000.

[62] Taking into account the various aggravating features I have noted above, I agree with the starting point recommended for Mondiale.

[63] I initially had some reservations as to whether or not Messrs Sargent, Bramwell and Hutson should share a common starting point. Although both the Commission and counsel for Messrs Sargent, Bramwell and Hutson had addressed the matter in their respective written submissions, I sent a minute out to counsel asking them to address me further on the issue.

[64] As a result, the Commission and counsel for the second to fourth defendants have filed further submissions. They advised that it was to some degree a matter of happenstance as to which of the individuals was involved in each of the contravening arrangements. Most of the arrangements were prompted by the counterparties and each of the individual defendants would likely have responded in the same way. All were directors and all were involved in the day to day operation of Mondiale. All were able to stop the conduct but none of them did so because they shared the view that what they were doing was lawful. While they had differing levels of involvement, it was the view of counsel that they were equally culpable and that the differences in their respective levels of involvement were not so material as to justify different starting points.

[65] I accept these arguments and agree that it is appropriate to adopt a common starting point for each of the second to fourth defendants.

[66] Ultimately, the Commission adopted a starting point for Mondiale of $7.54 million and for Messrs Sargent, Bramwell and Hutson, starting points of $100,000.

Adjusting the starting points – mitigating factors

[67] I accept that there are mitigating factors — some general and some specific.

[68] First, none of the defendants has 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.

[69] Secondly, Mondiale ceased the unlawful conduct immediately on being contacted by the Commission in October 2018.

[70] Thirdly, all defendants cooperated with the Commission throughout its investigation, voluntarily making themselves and staff available for interviews and responding to voluntary document and information requests in a timely and fulsome manner. One example of Mondiale's cooperation was its response to a notice issued by the Commission under s 98 of the Act. Mondiale electronically searched a pool of approximately 9.7 million searchable documents, spanning a period of over five years. It conducted a manual review of over 18,000 documents, emails and attachments captured by the electronic searches and provided the Commission a data set of 1,432 documents, emails and attachments. The defendants' cooperation extended to entering into a "standstill" agreement with the Commission, to suspend the operation of the limitation period that would have otherwise applied under the Act.

[71] Fourthly, all defendants acknowledged and accepted that they had contravened the Act at the earliest possible opportunity. They agreed to settle the proceedings on terms acceptable to the Commission prior to the proceeding being filed. As noted, the statement of claim, the notice of admissions and the agreed summary of facts were all filed on the same day. There is a significant public benefit in partly settling such proceedings early. Such settlements are in the interests of the parties, the community and the judicial system because they enable early disposal of such matters.[19]

[72] Fifthly, as a result of the Commission's investigation, Mondiale has intensified its focus on ensuring compliance with the Act. It made changes as soon as possible to its practices to reflect best practice. It also took a lead in disseminating Commerce Act compliance educational material to its retail freight forwarder client base in July 2019.

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[19] *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21].

[73] 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 for each of the defendants. Such a discount is consistent with that given in previous cases.

Conclusion

[74] 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. In addition, there will have been stress on Messrs Sargent, Bramwell and Hutson and that what occurred will have had an adverse effect on their respective reputations. Although this will be common in such cases, the Court has been prepared to accept that it is an additional sanction and deterrent.[20]

[75] 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) $4.9 million against Mondiale;

(b) $65,000 against Mr Sargent;

(c) $65,000 against Mr Bramwell; and

(d) $65,000 against Mr Hutson.

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

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

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

Confidentiality orders

[78] 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 Mondiale 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.

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

[80] I accept the submissions made on behalf of Mondiale and I order as follows:

(a) the information shaded in yellow in the marked up copies of the agreed statement of facts, the Commission's penalties submissions and the submissions made on behalf of Mondiale, 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 remain sealed. It is not to be searched or accessed without leave from a High Court Judge.

Wylie J

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