ORDER PROHIBITING PUBLICATION OF INFORMATION RELATING TO SALARIES OF THE THIRD, FOURTH, FIFTH, SIXTH AND SEVENTH DEFENDANTS.
ORDER THAT COURT FILE NOT BE SEARCHED, COPIED OR INSPECTED WITHOUT LEAVE OF A JUDGE.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV 2015-404-1750
[2016] NZHC 2921

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	PGG WRIGHTSON LTD First Defendant
	ELDERS RURAL HOLDINGS LTD Second Defendant
	NIGEL JOHN THORPE Third Defendant
	DONALD HUGH JAMES BAINES Fourth Defendant
	DOUGLAS MICHAEL EDWIN CARTRIDGE Fifth Defendant
	ANDREW CLARK Sixth Defendant
	STUART IAN CHAPMAN Seventh Defendant

Hearing:	2 December 2016
Counsel:	J C L Dixon and L C A Farmer for Plaintiff No appearance by or on behalf of First and Second Defendants R Raymond QC for Third to Sixth Defendants G Hall for Seventh Defendant
Judgment:	5 December 2016

JUDGMENT OF HEATH J

This judgment was delivered by me on 5 December 2016 at 11.00am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] The combined effect of ss 27 and 30 of the Commerce Act 1986 (the Act) is to render of no effect any "contract, arrangement or understanding" that has the purpose, or the likely effect, of substantially lessening competition in a market. Section 80(1) of the Act provides that those who engage (or attempt to engage) in conduct that is in contravention of those provisions are liable to pay pecuniary penalties. In the case of an individual, the maximum penalty is $500,000.[1]

[2] This proceeding concerns an arrangement entered into in the period between 5 April 2011 and 16 April 2012. It involved a number of stock and station agents, including PGG Wrightson Ltd (Wrightsons) and Elders Rural Holdings Ltd (Elders). The arrangement was called the "Tagging Fee Agreement" (the Agreement). During the relevant time, Wrightsons and Elders were in competition, both as stock and station agents and saleyard owners. The Commerce Commission (the Commission) alleged that the conduct of both companies and the individuals in each who promoted and implemented the arrangement amounted to illegitimate price-fixing, contrary to s 27.

[3] Elders has not admitted liability. The proceeding continues, so far as it is concerned. Wrightsons has admitted its breach. Its contravening conduct involved three distinct arrangements. In addition to the Agreement, Wrightsons has admitted involvement in two other arrangements which breached s 27. They were called the "Yard Fee Agreement" and the "RFID Administration Fee Agreement".[2]

[4] Having admitted its conduct, Wrightsons entered into an agreement with the Commission to pay a pecuniary penalty of $2,700,000. As a penalty must be ordered by this Court, any such agreement requires the Court's approval. This Court sanctioned the agreement, and, on 22 December 2015, imposed a penalty in that sum.[3]

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1 Commerce Act 1986, s 80(2B).

2 RFID means Radio Frequency Identification Device. This is the device that was used for tagging the animals. See para [8] below.

3 *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360. Another livestock company has also acknowledged responsibility in respect of the three agreements. See also, *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361.

[5] Messrs Nigel Thorpe, Donald Baines, Douglas Cartridge and Andrew Clark were, at material times, employed by Wrightsons. Mr Stuart Chapman was employed by Elders. The Commission alleges that each was complicit in the breaches of s 27 of the Act caused by implementation of the Agreement. All five have accepted involvement in the anti-competition alleged. Each has agreed the amount of a pecuniary penalty order[4] to respond to those breaches. The Commission applies to the Court to sanction that agreement and to impose penalties in those sums.

Background

(a) The National Animal Identification and Tracing Act 2012

[6] A bill was introduced into Parliament in 2010 to create a system whereby certain livestock could be traced. Eventually, that was enacted as the National Animal Identification and Tracing Act 2012 (the Animal Tracing Act). It came into force on 1 July 2012.

[7] The Agreement was directed at the sale of cattle through the saleyards operated by Wrightsons and Elders. It concerned the need for saleyard owners and stock and station agents to meet compliance costs arising out of the owners intended legislation. Wrightsons and Elders had interests in the new legislation both as saleyard owners and stock and station agents. As stock and station agents, they procured cattle from farmers to sell at auction. As saleyard owners, they provided the facilities from which the auction was conducted.

[8] The purpose of the Animal Tracing Act was to monitor movement of (for present purposes) cattle throughout New Zealand. Primarily for bio-security reasons, the statute provided for the rapid and accurate tracing of animals from birth to death, or live export. An obligation to tag each animal with a Radio Frequency Identification Device and to report movements of animals between particular locations was imposed on natural persons who had day-to-day charge of the animal. The Animal Tracing Act makes movement of untagged animals an offence, punishable by fines up to $10,000 for an individual and $20,000 for a body

[4] Set out at para [27] below.

corporate. Both Wrightsons and Elders harboured concerns about their liability for ensuring untagged cattle supplied to them were tagged on sale to a third party.

(b) The consultation process

[9] An organisation called NAIT Ltd was created to administer the Animal Tracing Act. It was also involved in preparatory work intended to ensure that once enacted, the Animal Tracing Act could be implemented smoothly. To achieve that goal, NAIT sought involvement of a representative from the stock and station agent companies to assist with the transition. This was done through a stakeholder reference group. Initially, NAIT contacted the New Zealand Stock and Station Agents Association (the Association) but because of its lack of resources Wrightsons' seconded Mr Cartridge, and later Mr Clark, as an industry representative.

[10] Consultation with the stock and station agents began in October 2010 and extended through to April 2012. A series of meetings were held. Discussions among the representatives of those companies led to finalisation of the Agreement, and its later implementation. To understand the roles played by each of the individuals in the formation and implementation of the Agreement, it is necessary to explain the way in which discussions progressed. A short summary follows.

[11] NAIT made it clear that neither saleyard owners nor stock and station agents would be paid for, or be subsidised, in respect of obligations they were required to fulfil under the proposed Animal Tracing Act. The companies, including Wrightsons and Elders, were encouraged to work collaboratively in implementing the new statutory scheme.

[12] The first meeting was held on 22 October 2010. It was attended by representatives of both Wrightsons and Elders, though none of the individuals with whom I am concerned were present. The meeting was characterised as a "NAIT Information Day". One of the items for discussion was the proposed saleyard tag-reading system. The question whether the saleyard companies should pay for replacement tags was under consideration.

[13] A further meeting was held on 5 April 2011, designed to consider further the possibility of imposing a tagging fee. The date of this meeting represents the starting date for the alleged anti-competitive conduct. The meeting was convened by the Association. Messrs Cartridge and Baines attended, as did livestock managers employed by Elders who reported to Mr Chapman. The minutes of the meeting record that "there was general agreement that saleyard facilities nationally will charge, to the respective selling company, $20 plus GST for every … tag that is applied to an animal". At that meeting, those present considered (what they considered to be) an analogous fixed fee to be set by regulations of $13 for sending untagged cattle to a meet processor, given the absence of any such fee for untagged cattle consigned to a saleyard.

[14] The initial intention was to set a standard fee to enable the saleyards to recover their costs of compliance in relation to their new statutory obligations, as well as providing a disincentive to farmers who sent cattle for sale without being tagged. Those present at the meeting were aware of significant health and safety problems that could arise out of the sale of untagged cattle, as well as the practical reality that to reject cattle and return them to the farmer was unlikely to enhance customer relations. Whatever solution was found, the task of separating untagged from tagged cattle in the saleyard would be time consuming, and would reduce the ability of saleyard companies to process cattle as efficiently as they would like.

[15] Wrightsons and Elders were involved at two different stages of the process. As agent of the farmer, each procured stock on his or her behalf to take to market. A commission is charged for that. As saleyard company, a fee was charged to the stock and station agents, some of which were different companies. The idea was for the saleyard companies to charge the stock and station agents who would then pass on the cost to the farmer. So far as companies such as Wrightsons and Elders were concerned, their stock and station businesses were doing no more than to act as a conduit for the payment of money from the farmer to the saleyards.

[16] Further meetings followed. On 8 April 2011, Mr Cartridge circulated a summary of the outcome of the 5 April 2011 meeting to members of the Association. On 16 April 2012, members of the Association "agreed that a minimum charge of

$25 would be charged for all tagging completed at the saleyards, with the except of four-day-old calves, which a minimum fee of $10 per head was agreed". Messrs Thorpe, Baines, Cartridge, Clark and Chapman were all present at that meeting. Mr Clark fulfilled the role of a "note-taker". The date of 16 April 2012 is fixed by the Commission as the date on which the Agreement was finalised.

[17] In various ways, Mr Thorpe, Mr Baines, Mr Cartridge, Mr Clark and Mr Chapman all participated in the decision-making process or authorised implementation of the Agreement. The final agreement among the members of the Association was that a minimum tagging fee of $25 per head for cattle and $10 per head for calves would be imposed. While there is no evidence of the precise methodology used to calculate those fees, it can be safely inferred that those involved in the process would have ensured, in calculating the level of fee payable, that their respective employers did not suffer any loss. Indeed, the fee was likely to contain a premium, in order to provide a disincentive for farmers to send untagged stock for sale.

(c) Legal advice

[18] Legal advice was sought on two occasions about the potential impact of the anti-competition provisions of the Act on the Agreement. Initially, Mr Clark received advice from an in-house counsel with Wrightsons that the arrangement could amount to price fixing. On 9 February 2012, that counsel recommended that Wrightsons set its own prices based on reasonable cost. Mr Cartridge took the view that as the saleyards were charging the livestock companies that, in turn, would recover the cost no element of anti-competitive behaviour arose.

[19] On 11 May 2012, Mr Baines sent an email to Messrs Thorpe, Cartridge and Clark, as well as Wrightson's South Island Livestock Manager, in which he indicated a desire to obtain "expert advice on the Commerce Act" because "I am a bit uncomfortable as to whether [the Association] can just make a blanket cost increase recommendation". As a result, Mr Clark sought further advice from the in-house counsel.

[20] By 24 May 2012, the Association intended to circulate a letter to members about the recommended fee. Wrightson's in-house counsel advised that this letter should be accompanied with a suggestion that members seek independent advice on the Commerce Act implications of the Agreement. Unfortunately, the letter failed to incorporate that suggestion.

[21] All of that advice was obtained on behalf of Wrightsons. Elders sought no advice on the topic.

(d) Implementation of the Agreement

[22] From 1 July 2012, both Wrightsons and Elders implemented the Agreement by charging the recommended fees of $25 per beast for cattle and $10 per calf. That was done at most of the saleyards in which they had ownership interests. The fee was passed on to farmers, for whom each was acting as an agent.

The roles of the participants

(a) General observations

[23] I summarise the roles of each of the individuals against whom pecuniary penalties are sought:

(a) Mr Thorpe held the position of "General Manager Livestock" from 1 July 2012. He reported directly to Wrightson's Chief Executive Officer.

(b) Mr Baines was Wrightson's North Island Livestock Manager, and reported directly to Mr Thorpe. Mr Baines was a member of Wrightson's NAIT Project Team. That team was established to manage Wrightson's implementation of the Animal Tracing Act.

(c) Mr Cartridge was Wrightson's North Island Property Manager, and also its NAIT Implementation Manager.

(d) Mr Clark was Wrightson's Livestock Project Manager and was also a member of the NAIT Project Team. He reported initially to Mr Baines.

(e) Mr Stuart Chapman was the Managing Director of Elders. At that time, that company owned and operated a diversified agricultural business providing a range of products and services to the rural sector. Mr Chapman had oversight of and ultimate responsibility for Elders' business. He was involved in the implementation of the Agreement.

[24] By the time the Tagging Fee Agreement was being implemented, I am satisfied that Mr Thorpe, Mr Baines, Mr Cartridge, Mr Clark and Mr Chapman each had sufficient knowledge of its terms to be liable for pecuniary penalties based on breach of the anti-competition provisions of s 27 of the Act. Having said that, I accept that while they intended to carry out the Agreement, they had no intention to engage in price-fixing. Their culpability must be assessed on that basis.

(b) Proposed penalties

[25] Messrs Thorpe, Baines, Cartridge, Clark and Chapman have each admitted responsibility for breaches of s 27 of the Act. Each of them and the Commission have agreed to recommend to the Court that penalties should be imposed. The suggested penalties are:

(a) $25,000, for each of Mr Thorpe and Mr Chapman

(b) $20,000, for each of Mr Baines and Mr Cartridge

(c) $15,000, for Mr Clark.

[26] The Commission now seeks Court approval for those penalties to be imposed. Should approval be granted, costs of the proceeding will lie where they fall. I record that the five individuals have agreed that each of them will contribute $5,000 towards the investigation costs incurred by the Commission prior to commencement of this proceeding.

The Court's approach to fixing penalties

[27] Although it is open to parties to litigation of this type to agree on an appropriate pecuniary penalty to be imposed, it remains necessary for the Court to give its sanction to it. The authorities make it clear that the Court should acknowledge the public benefits of prompt resolution of penalty proceedings through agreement. The approach that has been consistently applied is for this Court to consider whether the amounts agreed are within an appropriate range, rather than to determine whether the penalty is the same as that which would have been imposed by the Judge who hears the penalty proceeding.[5] If so satisfied, the Agreement will be sanctioned.

[28] I adopt the approach taken by Venning J in *Commerce Commission v Kuehne + Nagel International AG*,[6] in which His Honour emphasised the need for the Court to approach its evaluation of an appropriate penalty in a manner akin to the way in which a criminal sentencing would be undertaken. That means it is necessary to determine a starting point by reference to the maximum penalties involved, and then to consider relevant aggravating and mitigating factors. That exercise must be undertaken in respect of each of the individuals. Their respective level of culpability and mitigating circumstances differ.

[29] As previously indicated,[7] the maximum penalty that can be imposed in respect of individuals is $500,000. In imposing pecuniary penalties, the Court is endeavouring to provide both general deterrence to others in a market who might consider acting in the same or similar way, and specific deterrence to those who have infringed and are subject to a penalty.

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5 Generally, see *Commerce Commission v Alstom Holdings SA* HC Auckland CIV-2007-404-2165, 22 December 2008 (Rodney Hansen J) at para [18], applying a judgment of the Full Court of the Federal Court of Australia in *NW Frozen Foods v ACCC* (1996) 71 FCR 285; *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 (Allan J) at para [45]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-4590, 22 December 2010 (Allan J) at para [38]; *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011 (Allan J) at para [15], *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at para [21] (Venning J), *Commerce Commission v Envirowaste Services Ltd* [2015] NZHC 2936 at para [27] (Heath J) and *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360 at paras [30]–[32] (Asher J).

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

7 See para [1] above.

[30] It is necessary for such penalties to be pitched at a level which is commercially realistic; namely, one which outweighs the likely profit margin to be obtained from any breach of provisions relating to anti-competitive conduct. After maximum penalties were increased in 2001, the Court of Appeal observed that Parliament had intended "to send a much stronger signal than the current provisions that the deterrence objective will only be served if anti-competitive behaviour is profitless".[8]

[31] In determining individual penalties, the aggravating factors relating to the conduct (as opposed to the person against whom the order is sought) will generally fall into three main categories:

(a) The first involves an assessment of the particular person's culpability. Those who initiate anti-competitive behaviour will ordinarily be treated more harshly than those lower in the managerial hierarchy who carry out express instructions to implement an arrangement.

(b) The second is duration. The period over which the contravening conduct occurs is a relevant factor to be taken into account.

(c) The third involves causation. The question here is whether the anti-competitive behaviour caused loss to any person or produced significant gain for the enterprise which undertook the contravening conduct.

[32] The proposed penalties,[9] recognise differing levels of culpability in respect of those individuals against whom the Commission has brought proceedings. Mr Thorpe and Mr Chapman held senior positions, and were in a position to give directions that would have affected the way in which employees lower in the management hierarchy would have been obliged to carry out their tasks. Messrs Baines and Cartridge were at a level lower than Mr Thorpe, though each played a significant role in relation to the formation of the Agreement. Mr Clark, although

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8 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at para [53], quoting Commerce Amendment Bill 2001 (296-2) (select committee report) at 23.

9 See para [28] below.

being present at some meetings and acting as note-taker on 16 April 2012,[10] did not have the decision-making ability of others in the management chain. Further, he was someone who took steps to obtain legal advice in relation to the Commerce Act implications.[11]

[33] It is significant that the saleyard companies were encouraged by NAIT to collaborate in the fixing of fees to recover compliance costs that they would not have incurred but for the Animal Tracing Act. However, in the absence of any evidence to indicate that either Wrightsons or Elders received any significant benefit from the arrangement, I am not prepared to find those involved acted out of malevolent motive. They were endeavouring to respond in an efficient and economic way to the fiscal problem created by the Animal Tracing Act.

[34] None of the individuals gained any benefit from the implementation of the agreement. Given the involuntary assumption of the tagging responsibilities imposed by the Animal Tracing Act and the assistance that the employees from both Wrightsons and Elders gave in the preparatory process, their actions could properly be described as "good intentions gone wrong".

Assessment of penalties

[35] Mr Dixon, for the Commission, set out its view of the roles undertaken by each of the individuals against whom penalties are sought. He submits:

(a) **Mr Thorpe** was the senior member of Wrightson's NAIT Project Team. He attended internal Wrightson meetings discussing the Agreement and the Association meetings where the tagging fee was discussed and agreed. Mr Thorpe engaged in correspondence discussing and endorsing the Agreement. He had the ultimate responsibility for ensuring that Wrightson's tagging fees were set in accordance with the Agreement.

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10 See para [16] above.
11 See paras [18] and [19] above.

(b) **Mr Cartridge** attended most of the key meetings at which the Agreement was discussed and agreed. He prepared and circulated reports for and minutes of those meetings which recorded the Agreement. Mr Cartridge was involved in confirming the Agreement both internally and to Elders. He was also involved in the implementation of the Agreement, even after receiving legal advice that the Agreement may amount to price-fixing.

(c) **Mr Baines** also attended most of the key meetings at which the Agreement was discussed and agreed. He sought to include a reference to the Agreement in the minutes of the 8 April 2011 meeting and, at a later meeting, suggested that the fee should be set "so that there is no variety". Although Mr Baines suggested obtaining legal advice on the implications of the Agreement, he did not take any steps to prevent Wrightson from implementing the Agreement after legal advice was received. As Wrightson's North Island Livestock Manager, he continued to have responsibility for implementation of the Agreement in the North Island.

(d) **Mr Clark** was the most junior of the Wrightson individuals and only joined Wrightson in November 2011, after the Agreement had been raised but before it was finally agreed. Mr Clark attended a number of the meetings discussing the Agreement and put it into effect by recording it and including it in correspondence with others. Mr Clark also sought and received legal advice regarding the Agreement. While Mr Calrk initially sought to implement that advice by amending the draft Association letter, he had continued involvement in the implementation of the Agreement.

(e) **Mr Chapman**, as Managing Director of Elders, had ultimate responsibility for Elders compliance with the Animal Tracing Act, and its imposition of fees in connection with that. Although he did not attend the earlier meetings where the Agreement was discussed and entered into, he was kept abreast of what was happening by his staff,

who did attend those meetings. Importantly, he did attend the 16 April 2012 Association meeting. Mr Chapman was also copied to correspondence and documents referring to the Agreement. As the senior manager responsible for Elders' livestock business, Mr Chapman was aware of the Agreement, did not seek to prevent Elders from entering into it, and failed to seek legal advice.

[36] Mr Dixon identified the period during which each of the individuals was engaged with the implementation and execution of the tagging fee agreement. Evidence was available as to the average annual salary each received in the period between October 2010 and 31 July 2015.[12] Emphasis was placed on the level of responsibility that each had within the management hierarchy of both Wrightsons and Elders.

[37] After setting out the Commission's position in respect of the roles of each individuals and to the anti-competitive conduct and the ability of each to meet financial penalties, Mr Dixon contended that starting points within the following ranges were appropriate:

(a) Mr Thorpe: $33,000 to $48,000

(b) Mr Cartridge: $27,000 to $38,000

(c) Mr Baines: $25,000 to $30,000

(d) Mr Clark: $20,000 to $25,000

(e) Mr Chapman: $30,000 to $40,000.

Each of those starting points was fixed by reference to relevant authorities.[13]

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12 An confidentiality order has been made in respect of the salaries.

13 Without being exhaustive, *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097, *Commerce Commission v Hodgson* [2014] NZHC 649, *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581, *Commerce Commission v Carter Holt Harvey and Dodds* [2014] NZHC 531 and *Commerce Commission v Enviro Waste Services Ltd* [2015] NZHC 2936.

[38] Mr Dixon identified a number of mitigating factors relating to the individuals concerned. He accepted that each has co-operated with the Commission's investigations. They agreed to pay pecuniary penalty once other allegations relating to the "Yard Fee Agreement" and the "RFID Administration Fee Agreement" had been withdrawn. Mr Dixon also acknowledged that none of the individuals concerned have previously been the subject of action by the Commission. The individuals have the financial ability to meet the proposed penalties.

[39] Mr Dixon put forward the following penalty recommendations, on behalf of the Commission:

(a) Mr Thorpe: $25,000

(b) Mr Baines: $20,000

(c) Mr Cartridge: $20,000

(d) Mr Clark: $15,000

(e) Mr Chapman: $25,000.

[40] Mr Raymond QC, for Messrs Thorpe, Baines, Cartridge and Clark acknowledged that the range identified by the Commission was appropriate in respect of each of the individuals for whom he acts. While placing greater emphasis on the attempts made by the Wrightsons' employees to obtain legal advice in relation to the Commerce Act implications of the Agreement (in order to place his clients at the lower end of the relevant range), Mr Raymond accepted that the recommended penalties fell within the range available. He supported imposition of them, on that basis.

[41] Mr Hall, for Mr Chapman, told me that Mr Chapman accepted responsibility for his actions, as Managing Director. Mr Hall emphasised that Mr Chapman "did not deliberately set out about breaching the Commerce Act". He confirmed that Mr Chapman accepted the level of the recommended penalty.

[42] Having considered the submissions advanced on behalf of the Commission, the Wrightsons' employees and Mr Chapman, I am satisfied that the level of culpability identified by Mr Dixon correctly represents each of their respective responsibilities in relation to the conduct involved. As a result, I accept that the range of starting points for which Mr Dixon contended are appropriate.[14]

[43] While there may be some room for disagreement in respect of the credit that should be given for the mitigating factors in respect of each of the persons against whom orders are sought, I am satisfied that the approach taken by the Commission is defensible. In those circumstances, I am prepared to endorse the proposed penalties.

Result

[44] For those reasons, I impose pecuniary penalties against the five individuals as follows:

(a) Mr Thorp: $25,000

(b) Mr Baines: $20,000

(c) Mr Cartridge: $20,000

(d) Mr Clark: $15,000

(e) Mr Chapman: $25,000.

[45] Costs shall lie where they fall.

[46] I confirm confidentiality orders provisionally made in respect of the salaries of each of the individuals that are set out in the unredacted version of the agreed summary of facts. To support that direction, I also make an order that the Court file in relation to this proceeding not be searched, copied or inspected without the leave of a Judge.

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[14] See para [37] above.

[47] The proceeding remains extant, as against Elders. That aspect of the proceeding will be called for mention in the Commercial List at 9.15am on 9 December 2016.

[48] I thank counsel for their assistance.

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P R Heath J

Delivered at 11am on 5 December 2016

Solicitors:
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Counsel:
R Raymond QC, Christchurch