SUPPRESSION ORDER IN PLACE AS SET OUT IN [55] –[58] OF THIS JUDGMENT

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2023-409-331
[2024] NZHC 1596

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	CANTERBURY INDUSTRIAL SCRUBBING LIMITED First Defendant
AND	DANIEL JAMIESON Second Defendant

Hearing: 10 June 2024

Appearances: J B Hamlin and J P W Leslie for Plaintiff
B R McKinnon for First Defendant
G M Richards for Second Defendant

Judgment: 18 June 2024

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 18 June 2024 at 10.45 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] The first defendant, Canterbury Industrial Scrubbing Ltd, provides industrial cleaning services to remove residues, marks and stains from floors of commercial buildings. The second defendant, Daniel Jamieson, is the current director of the first defendant, having commenced working for that company in 2006 as an employee when it was owned and operated by his father, Paul Jamieson.

[2] On 30 June 2023, the plaintiff, the Commerce Commission (the Commission), filed proceedings against both defendants alleging that they engaged in cartel conduct in relation to industrial cleaning services in contravention to the Commerce Act 1986 (the Act).

[3] The parties have reached a settlement of the proceedings against the defendants. The defendants admit that they contravened s 27 via s 30 of the Act (until 14 May 2018), and s 30 of the Act (from 15 May 2018 onward), and the facts giving rise to those contraventions have been agreed. The parties have also reached a settled view as to the appropriate penalty to be imposed by the Court under s 80 of the Act.

[4] This judgment considers whether the penalty proposed meets the objectives of the Act in all the circumstances and, if so, imposes it. It also makes declarations in respect of the admitted contraventions of the Act.

Agreed background

[5] The first defendant, along with Canterbury Industrial Sweeping Ltd (Canterbury Industrial Sweeping) and, subsequently, CanSweep Ltd (CanSweep), were respectively one of the largest suppliers of industrial scrubbing services and one of the largest suppliers of industrial sweeping services to commercial and industrial premises in the Canterbury region. The second defendant became a director of the first defendant on 29 March 2012 and has been the sole director of the company since 2018.

[6] Canterbury Industrial Sweeping was incorporated in 2003 by Mr Owen Kinnane. He is the sole director and shareholder of the company. From

2012 onward Mr Kinnane was assisted in running the business by his daughter, Sarah Kinnane.

[7] At sometime prior to 2003, the second defendant's father, Paul Jamieson, and Mr Kinnane agreed not to compete with each other in respect of industrial floor cleaning services. They recorded this agreement in an unsigned written agreement whereby the first defendant undertook only industrial scrubbing work and subcontracted industrial sweeping services for existing customers to Canterbury Industrial Sweeping. It also referred new customers seeking industrial sweeping services to Canterbury Industrial Sweeping. Canterbury Industrial Sweeping likewise agreed to undertake only industrial sweeping work and referred all customers wanting industrial scrubbing services to the first defendant.

[8] In mid 2007, Canterbury Industrial Sweeping purchased an industrial scrubbing machine and started providing scrubbing services at competitive prices. When Paul Jamieson and the second defendant became aware of this fact, they organised a meeting with Owen Kinnane. It was agreed at the meeting that:

(a) the first defendant would purchase the industrial scrubbing machine from Canterbury Industrial Sweeping and that that company would revert to only providing sweeping services;

(b) the first defendant would not provide sweeping services and would continue to only provide scrubbing services; and

(c) the parties would resume their arrangement of subcontracting existing customers and referring new customers to each other (the 2007 Agreement).

[9] The 2007 Agreement endured from August 2007 until late 2019.

[10] In March 2019, Mr Kinanne's daughter, Sarah Kinnane, incorporated CanSweep. In August 2019 she took over the running of Canterbury Industrial

Sweeping. From around this time, industrial sweeping services that had been performed by Canterbury Industrial Sweeping were carried out by CanSweep.

[11] In late 2019, the second defendant became concerned after receiving customer feedback about how Ms Kinnane was running Canterbury Industrial Sweeping and formed the view that the services it provided were declining in quality which affected the first defendant's reputation. In December 2019, the first defendant acquired five industrial sweepers.

[12] In early 2020, the second defendant met with Mr Kinnane to advise him of the first defendant's intention to start offering sweeping services and to cease subcontracting those services to CanSweep. There then followed communications with Ms Kinnane and her partner, Mr Richard McGill, in which the second defendant proposed a meeting to find a "way forward" that would involve some continuation of the 2007 Agreement.

[13] There was also clearly a concern that CanSweep had been making disparaging comments to customers about the first defendant, with the second defendant emailing Ms Kinnane on 15 January 2020, saying:

> … I have feedback that you are not painting me or my company in a good way and this is not the discussions I had with [Mr Kinanne] on a way forward of mutual respect for each other's client bases. … If I continue to hear these untruthful statements you will find that I will take action against these and I will be forced to aggressively target your customer base like you are planning to do to mine. This approach I believe is not good for either of our companies.

[14] The following day a text message was sent by the second defendant to Ms Kinnane, again expressing concern about what she was saying to customers about the first defendant and threatening to "actively" target her customer base.

[15] Ms Kinnane then sent a message to the second defendant saying that she and her partner would be in touch to arrange a meeting. The second defendant responded to the meeting invitation saying "it would be good to have a sit down and get a mutual respect for each other and clear the air and hopefully find a way forward that does not involve the companies fighting over customers and driving down rates which is not good for either business".

[16] Ms Kinnane and her partner met with the second defendant on 17 January 2020 and discussed a way forward. The parties shook hands at the end of the meeting and the second defendant considered that there had been agreement to his proposal. He then summarised what he described as the "outcomes we agreed on" in an email sent later that day. The points listed included agreement not to give negative feedback to customers about the other's business, to put forward a list of approximately 10 to 15 key clients that would be "off limits" in terms of the other approaching them and to generally communicate regarding services that might be being offered to the other's clients or potential clients. The Commission and the defendants consider that, viewed objectively, the circumstances demonstrate that a further agreement had been reached which contravened s 30 of the Act (the 2020 Agreement).

[17] Ms Kinnane and Mr McGill did not respond to the second defendant's email of 17 January 2020, summarising what had been agreed to at the 17 January 2020 meeting. On 24 January 2020, Mr McGill emailed the second defendant denying there was an agreement and referring the second defendant to guidance on cartel conduct published by the Commission. The second defendant responded saying "[r]egardless of what you are saying now, you did actually agree at the meeting to my proposal."

[18] Following the exchange of emails on 24 January 2020, the first defendant began competing with CanSweep, offering services at up to a 20 per cent discount to a group of CanSweep customers. That rate was said to be fixed for two years. The first defendant also reduced the prices charged to some of the first defendant's existing customers by up to 30 per cent for work that it previously contracted to CanSweep to reflect that it had reduced costs through not subcontracting the work. In some cases, the first defendant also offered additional services to customers at no additional charge.

Admitted contraventions of the Act

[19] The parties have filed a notice of admission from the defendants dated 15 April 2024. In it, the first defendant has admitted the first, second, third and fourth

causes of action in the Commission's statement of claim, accepting that it contravened the Act by:[1]

(a) entering into the 2007 Agreement in August 2007 in contravention of s 27, via s 30 of the Act;

(b) giving effect to the 2007 Agreement between August 2007 and 30 June 2013 in contravention of s 27, via s 30 of the Act;

(c) giving effect to the 2007 Agreement between 1 July 2013 and 14 May 2018 in contravention of s 27, via s 30 of the Act;

(d) giving effect to the 2007 Agreement between 15 May 2018 and 13 January 2020 in contravention of s 30 of the Act; and

(e) entering into or arriving at the 2020 Agreement between 13 January 2020 and 24 January 2020 in contravention of s 30 of the Act.

[20] The second defendant admits the fifth and sixth causes of action in the Commission's statement of claim, accepting that he contravened the Act by:

(a) giving effect to the 2007 Agreement between 1 July 2009 and 14 May 2018 in contravention of s 27 via s 30 of the Act;

(b) giving effect to the 2007 Agreement between 15 May 2018 and 13 January 2020 in contravention of s 30 of the Act; and

(c) entering into or arriving at the 2020 Agreement between 13 January 2020 and 24 January 2020 in contravention of s 30 of the Act.

---

[1] While some of the dates set out differ slightly from those referred to in the statement of claim, the defendants have confirmed they accept the plaintiff's submissions and that the consequent declarations sought can be made or the terms proposed by the Commission.

[21] It is noted, however, that in relation to the 2007 Agreement, the defendants:

(a) admit that the 2007 Agreement was an arrangement or understanding that contained provisions that had the *likely* effect of controlling or maintaining the price for industrial cleaning services that the first defendant and Canterbury Industrial Sweeping supplied in competition with each other; but

(b) do not admit that the 2007 Agreement was an arrangement or understanding that contained provisions that had the *purpose or effect* of controlling or maintaining the price for industrial cleaning services that the first defendant and Canterbury Industrial Sweeping supplied in competition with each other.

[22] I also note that the Commission's pleading distinguishes between conduct occurring before, and conduct occurring after, 14 May 2018, with the former alleged to involve price fixing, and the latter alleged to involve both price fixing and market allocation. This reflects a change to the legal framework in the Act, in that the Commerce (Cartels and Other Matters) Amendment Act 2017 amended s 30 and directly prohibited provisions that had the purpose, effect, or likely effect of market allocation. Prior to that time, market allocation was prohibited where it fell within the existing prohibition on provisions that had the purpose, effect, or likely effect of fixing, controlling or maintaining prices.

[23] Although the first and second defendants have admitted several breaches of the Act, they and the Commission are agreed, relying on *Commerce Commission v Korean Airlines Ltd*, that the appropriate approach in this case is to view the contraventions as comprising a single related cause of conduct and to determine a penalty that reflects the overall culpability of each defendant.[2]

---

[2] *Commerce Commission v Korean Air Lines Co Ltd* [2012] NZHC 1851 at [42].

The legal principles relating to penalty

[24] Section 80 of the Act governs the Court's jurisdiction to impose pecuniary penalties for the admitted breaches. Relevantly, the section 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
>
> …
>
> 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.
>
> …
>
> (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.
>
> …
>
> (5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. However, no proceedings under this section may be commenced 10 years or more after the matter giving rise to the contravention.

…

[25] In the present case, it is acknowledged that s 80(5) precludes consideration of any conduct prior to 30 June 2013 in the imposition of a penalty.[3]

[26] While in the present case, the appropriate level of penalty is agreed, the Commission nevertheless considers it important, for the purpose of the Act, for the Court to articulate the starting point and discounts that would apply were it not for issues relating to the defendants' ability to pay in the particular circumstances which affect the penalty sought in this case.

[27] The Court's approach to imposing a civil pecuniary penalty under the Act has some parallels with the approach to criminal sentencing in that the Court will set a starting point based on the gravity of the contravention which is then adjusted to reflect the circumstances of the contravener.[4]

[28] However, unlike in criminal sentencing, the primary objective of imposing a penalty for breaches of the Act is deterrence whereas, in the criminal jurisdiction, deterrence is only one of the objectives of sentencing and not necessarily the dominant consideration.[5]

[29] As can be seen from s 80(2B) of the Act, substantial penalties are able to be imposed on parties who contravene the Act, noting the maximum penalty for a corporate defendant is the greater of $10,000,000 or three times the commercial gain obtained from the breach or 10 per cent of the turnover of the corporate defendant. As the Court has noted, penalties must not be a "licence fee" and "the deterrence objective will only be served if anti-competitive behaviour is profitless".[6]

---

3 Being the date 10 years prior to the issue of proceedings.

4 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC); *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [14]; *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [14]; and *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011 at [18].

5 *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [13].

6 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [15] and [53].

[30] Beyond that, there are a number of factors the Court will consider when determining the appropriate starting point under s 80. These are:[7]

(a) the importance and type of market;

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

(c) whether the conduct was deliberate or not;

(d) the role of the defendant in the impugned conduct;

(e) the seniority of the employees or officers involved in the contravention;

(f) the duration of the contravening conduct;

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

(h) the extent of any loss or damage suffered by any person as a result of the contravening conduct; and

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

[31] In adjusting the starting point, the Court will then consider:[8]

(a) the nature, size and resources of the defendant;

(b) the degree of co-operation by the defendant with the Commission;

(c) the fact that liability is admitted; and

(d) the extent to which a defendant has developed and implemented a compliance programme.

---

7 *Commerce Commission v Ronovation Ltd* [2019] NZHC 2303 at [31].
8 *Commerce Commission v Ronovation Ltd,* above n 6, at [63]-[70].

[32] I accept, therefore, as the parties have submitted, that the orthodox approach to setting a penalty under s 80 is to:

(a) determine the maximum penalty under s 80(2B);

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

(c) adjust the starting point to discount or increase the penalty on the basis of any considerations specific to the defendant, including their size and resources.

[33] I also accept that the role of the Court in dealing with agreed penalties is primarily to be satisfied that the proposed penalty is appropriate in all the circumstances. As was said in *Commerce Commission v New Zealand Milk Corporation Ltd*, the agreed penalty procedure is in the interests of both the parties and the community, enabling early disposal of potentially complex and lengthy proceedings and encouraging a realistic view of culpability and penalty.[9] Specifically, as Katz J said in *Ronovation*:

> [25] The role of the Court in such circumstances is to consider whether the proposed penalty is in the appropriate range, rather than to embark on its own enquiry independently. This recognises the "significant public benefit when corporations 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.
>
> [footnotes omitted]

The starting point

[34] I begin by considering the factors that are relevant to setting a starting point under s 80.

---

9 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730.

The nature and extent of any commercial gain

[35] It is common ground that the parties have not been able to determine the extent of the gain over the relevant period. However, the Commission notes that the fact that the first defendant immediately discounted its prices once CanSweep refused to continue with any form of agreement, suggests that the gain could have been significant. The fact that those prices were not ultimately maintained may simply have been a factor of the higher rate of inflation in recent times. Indeed, the Commission submits that the extent of change in pricing has a more obvious and immediate effect on price than in many comparable penalty cases. That said, I acknowledge that neither the first defendant's current financial circumstances, nor those of the second defendant, suggest any significant or sustained commercial benefit was received.

The duration of the contravening conduct

[36] The Commission considers that the duration of the conduct is one of the most significant aggravating features. The 2007 Agreement ran for 12 years before it broke down. The Commission acknowledges the 2020 Agreement was not implemented, but nevertheless, submits this was long running and stable conduct in contravention of the Act.

[37] I note the limitation period in s 80(5) precludes me from considering conduct prior to late June 2013. Nevertheless, I accept that even the admitted period of conduct is of significant duration and is a clear aggravating factor.

The nature and circumstances of the contravening conduct

[38] The Commission points out, and I accept, the conduct involved multiple arrangements contrary to s 30 of the Act. It was an integral part of the business practice of the first defendant over an extended period of time. While the Commission accepts the 2007 Agreement did not have an anti-competitive purpose, that was the likely effect of that arrangement. It is also notable that the 2007 Agreement arose from the decision of Canterbury Industrial Sweeping to purchase an industrial scrubbing machine. Thus, the 2007 Agreement was to stop an actual competitor from competing with the defendants.

[39] While the 2020 Agreement was a very short duration, it, too, was a serious breach of the Act, as one party was attempting to exit an unlawful agreement, but was briefly induced to continue to participate in part because of threats made by the second defendant. Furthermore, it was explicitly focused on avoiding competition on price, given that both parties would be providing scrubbing and sweeping services under the 2020 Agreement.

The role as defendants in the conduct

[40] The Commission submits, and I accept, that the first and second defendants were the instigators and primary drivers of the conduct. The 2007 Agreement was instigated by the then director, Paul Jamieson, on behalf of the first defendant. At the time the agreement was entered into, the second defendant was simply an employee. However, by 2013 at the latest, he was a director of the first defendant and the 2007 Agreement was perpetuated by him. The 2020 Agreement was instigated by the second defendant on behalf of the first defendant. He actively sought to restore the relationship between the first defendant and CanSweep, including by entering into the 2020 Agreement.

Deliberateness of the conduct

[41] While the Commission accepts that both defendants did not know that what they were doing was illegal, the conduct was always deliberate and intended to benefit the first defendant's commercial position. Furthermore, when Mr McGill confronted the second defendant with the proposition that the 2020 Agreement was illegal, he did not immediately seek to resile from it. I accept that while the impugned conduct was intentional, it was not done in knowing contravention of the law.

The seniority of those involved

[42] The conduct was, at all relevant times, undertaken by the most senior personnel of the first defendant, being the second defendant, as director of the company.

Nature of the market and market share of the first defendant

[43] The parties have not come to any agreement on the breadth and scope of the market definition or market share, or the actual or potential competitors in the relevant market. However, the first defendant and Canterbury Industrial Sweeping were two of the largest providers of scrubbing and sweeping services to commercial and industrial premises based in the Canterbury market. The services (and so the market) are submitted to be of moderate importance as being essential for hygiene and health and safety in many businesses, so it is a service that businesses cannot easily avoid.

Cases relevant to starting point

[44] Taking into account those factors, the Commission submits that the following cases may assist in setting the starting point:

(a) *Commerce Commission v Prices Pharmacy*: Prices Pharmacy operated several pharmacies in the Nelson region.[10] The directors of Prices Pharmacy organised a meeting with initially 10 and later 13 of the 16 Pharmacies in the Nelson region agreeing to add a $1 surcharge to prescriptions. The conduct ceased after six weeks and Prices Pharmacy gained $11,000 from the conduct. A starting point of $430,000 was adopted.

(b) *Commerce Commission v Specialised Container Services (Christchurch)*: Specialised Container Services was a company involved in container shipping.[11] It intended to introduce a new fee and one of its directors made a phone call to its main rival and unsuccessfully attempted to reach agreement to charge the same fee. A starting point of $500,000 to $650,000 was adopted.

(c) *Commerce Commission v Ronovation*: Ronovation was a small closely held company that provided online advice to individuals seeking to

---

10 *Commerce Commission v Prices Pharmacy* [2020] NZHC 1176.
11 *Commerce Commission v Specialised Container Services Ltd (Christchurch)* [2021] NZHC 2279.

invest in residential property in Auckland.[12] It imposed rules whereby members agreed not to compete with each other during property auctions. This arrangement lasted seven years and the nature of the conduct was considered moderately serious, although there was limited scope for gain by Ronovation as it, itself, was not a market participant. The market share of Ronovation members was deemed likely to be "relatively small". A starting point of $550,000 to $650,000 was adopted.

(d) *Commerce Commission v Enviro Waste Services*: Enviro Waste, through its local branch manager tried unsuccessfully to attempt to reach an agreement with its main rival not to compete.[13] This was done without the knowledge of senior management. Enviro Waste was a minor player in the relevant market and, because the attempt failed, there was no commercial gain. A starting point of $550,000 to $650,000 was adopted.

(e) *Commerce Commission v GEA Milfos*: Senior managers at GEA Milfos, which distributed milk sensors, provided its rival with information which resulted in an understanding as to the prices to be charged.[14] The conduct began when what was intended to become an otherwise legitimate joint venture drifted into an anti-competitive arrangement. It continued for two years and the gain was difficult to quantify. A starting point of $1,100,000 was adopted.

(f) *Commerce Commission v Rural Livestock*: Rural Livestock was one of a number of firms involved in the series of agreement as to the fees that would be charged for services relating to compliance with the National Animal Identification and Tracing Act 2012.[15] The conduct occurred over three years, but the gain to Rural Livestock was assessed as "unlikely … [to have] $100,000, and the figure could have been

---

12 *Commerce Commission v Ronovation*, above n 6.
13 *Commerce Commission v Enviro Waste Services Ltd* [2015] NZHC 2936.
14 *Commerce Commission v GEA Milfos International Ltd* [2019] NZHC 1426.
15 *Commerce Commission v Rural Livestock* [2015] NZHC 3361.

considerably less".[16] A starting point of $1,600,000 to $2,000,000 was adopted.

[45] In setting the starting point for the penalty to be imposed on the second defendant, the Commission refers to the following three cases:

(a) *Commerce Commission v Specialised Container Services (Christchurch)* – a starting point of $25,000 to $30,000 was adopted for the director who made the single phone call attempting to reach an agreement on the level of a new fee with a rival.[17]

(b) *Commerce Commission v Prices Pharmacy*: a starting point of $50,000 was adopted for one of the directors who took a leading role in bringing the understanding into being and its application.[18] He also applied pressure to another participant to join on two occasions. Furthermore, he was aware of previous warnings given by the Commission as to the potential anti-competitive conduct by pharmacies involved.

(c) In *Commerce Commission v Property Brokers Ltd*, a starting point of $70,000 was adopted.[19] The individual was the sole director whose family trust held all shares in the company. The conduct involved a price fixing agreement with 10 other estate agencies, lasting just under a year that substantially reduced the number of residential properties listed on TradeMe, and he stood to benefit personally from the agreement.

Discussion

[46] The Commission submits, and the first defendant accepts, that an appropriate starting point for the first defendant's contraventions is between $750,000 and $1,250,000, being around 7.5–12.5 per cent of the maximum penalty. I accept,

---

16 At [41].
17 *Commerce Commission v Specialised Container Services (Christchurch)*, above n 10.
18 *Commerce Commission v Prices Pharmacy*, above n 9, at [28].
19 *Commerce Commission v Property Brokers Ltd* [2017] NZHC 681 at [21].

particularly given the duration of the conduct and the logical inference that it adversely affected the prices customers had to pay (noting the discounts that were offered as soon as the agreement terminated), this was serious conduct and a starting point in that range would be warranted.

[47] In terms of the second defendant, I accept he did not instigate the 2007 agreement. Rather, he inherited it when he took over running the business from his father. However, he gave effect to it and actively promoted the 2020 Agreement and there was an element of pressure or coercion placed on the competitor by him to reach an agreement. I accept a starting point of between $50,000 and $70,000 would be appropriate.

[48] In terms of adjustments to the starting point, I accept there have been no previous contraventions of the Act, although, as the Commission points out, little weight should be placed on this given the first defendant has been involved in anti-competitive behaviour since its inception. I see this as the absence of an aggravating factor, rather than a mitigating factor.

[49] I accept the defendants have co-operated fully with the Commission and, through the second defendant, they have provided information and attended interviews voluntarily. Both acknowledged breaches of the Act at the earliest possible stage of the proceedings. In addition, the defendants have brought other potential contraventions to the attention of the Commission, although the Commission has not been able to use this information to bring any other prosecution. Having regard to the discounts offered in similar circumstances, I agree that the defendants' co-operation and admissions warrant a total discount of around 35 per cent, noting that discounts of 25–35 per cent have been granted in other cases.[20] In cases where higher discounts have been given, there has been some additional factor present, such as providing witnesses to help with prosecutions against third parties.[21]

---

20 *Commerce Commission v Property Brokers*, above n [18], and *Commerce Commission v Barfoot & Thompson Ltd* [2016] NZHC 3111.

21 *Commerce Commission v Lodge Real Estate* [2016] NZHC 3115 at [23]–[24].

[50] However, even with these discounts, the penalty which would be imposed on each defendant is very different from the recommended penalty presented by the parties. The difference between them is a reflection of the financial means of the defendants and of the tension recognised by the Commission between setting a penalty that promotes deterrence and the need to ensure that the penalty does not inhibit the financial viability of a defendant.[22]

Suppression orders sought in relation to evidence of financial circumstances

[51] The financial circumstances of the defendants are detailed both in the agreed summary of facts and in a confidential affidavit filed by the second defendant. Suppression orders are sought in respect of this information given that some of it is commercially sensitive and, in relation to the second defendant, contains material about his personal and family circumstances that is private in nature.

[52] In deciding whether to make a suppression order in civil proceedings, I must be satisfied that there is a specific adverse consequence which is sufficient to justify an exception to the starting point of open justice and I note the standard is a high one.[23] However, it does not require exceptional or extraordinary circumstances. I am required to strike a balance between the interests of the party and considerations of open justice.[24]

[53] Suppression orders are commonly made for reasons of commercial sensitivity.[25]

[54] Here, I consider the general information that is included in this judgment is sufficient to explain why a higher penalty is not being imposed on the first defendant in this case. In particular, in respect of the first defendant, I am satisfied that:

(a) it will need time to obtain the funds to pay a penalty;

---

22 *Commerce Commission v Rural Livestock*, above n 14 at [57]; *Commerce Commission v Hutt and City Taxis Ltd* [2021] NZHC 2543 at [30].

23 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

24 *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911 at [31].

25 See for example, *Terminals (NZ) Ltd v Comptroller of Customs* [2012] NZHC 447; and *Financial Markets Authority v Hotchin* HC Auckland CIV-2010-404-8082, 1 December 2011.

(b) it has provided its financial accounts for the past four years which show that, while solvent, it does not have the ability to meet a significant financial penalty in the order that would otherwise be appropriate;

(c) its annual profit will not support a significant penalty, including its projected profit position in the current year and beyond;

(d) it does not have significant liquid assets and its balance sheet will not support further borrowing;

(e) any improvements in the company's profitability will be gradual; and

(f) imposing a higher penalty would risk the financial viability of the first defendant.

[55] I do not consider it is necessary to detail the figures that support these conclusions and I suppress all the information identified as confidential in the agreed statement of facts by yellow highlighting, and have not included that in this judgment.

[56] Similarly, in relation to the confidential affidavit of Daniel Jamieson, the following parts are suppressed:

(a) The third sentence in paragraph five beginning "I am living …".

(b) Paragraph six, from the start of the second sentence beginning "As is …".

(c) Paragraph eight, from the second sentence beginning "The assets of …".

[57] In addition, I make an order, under r 5 of the Senior Courts (Access to Court Documents) Rules 2017 that the Court file and any document in it may not be searched, inspected or copied by anyone without permission of the Judge and with the parties to be given an opportunity to be heard on any such application.

[58] The sole purpose of this order is to ensure that the above suppression orders are complied with.

The jointly recommended penalty

[59] In the present case, the Commission confirms that this is not a circumstance where the conduct is sufficiently egregious that deterrence requires the Court to set the first defendant's penalty at a level that would potentially put it out of business. Similarly, the second defendant's conduct is not so egregious that deterrence requires the Court to impose a penalty that would drive the second defendant into bankruptcy or would be unduly harsh in the circumstances. This is particularly so given the defendants have accepted responsibility for their actions and are committed to achieving compliance in the future. The proposed penalty is $51,000, payable by the first defendant.

[60] Furthermore, the Commission accepts that the first defendant is not in a position to make the payment of $51,000 immediately and seeks that the Court approve payment of the penalty in the following instalments: $6,000 to be paid within 30 days from the date of this judgment; $15,000 by 12 months from the judgment; $15,000 by 24 months from the judgment; and $15,000 by 36 months from the judgment.

[61] The submissions from the defendants on penalty reflect the agreed position promoted by the Commission in its submissions. In particular, they emphasise that the proposed penalty is justified having regard to:

(a) the absence of quantifiable commercial gain;

(b) the level of co-operation;

(c) the fact there have been no previous infringements; and

(d) their respective financial positions.

Discussion

[62] I accept that the first defendant does not have the ability to meet a significant financial penalty which would otherwise be appropriate from income. Furthermore, it does not have the borrowing capacity to meet a significant penalty.

[63] The second defendant is also of limited means and has provided such cash resources as he has to the company to help it pay the penalty imposed on it. He is not in a position to borrow to pay a penalty, nor does he have assets which could be realised or borrowed against to meet a penalty.

[64] Having considered the evidence, I accept that the first defendant can afford to pay a penalty of $51,000 but not more than that, and that it would not be appropriate to impose a penalty on the second defendant given he has put his available resources into the company so that it can pay a penalty. The Commission also points out, and I accept that the making of declaratory orders confirming the contraventions will have a deterrent effect in and of itself. These factors constitute a good reason not to impose a penalty on him for the purposes of complying with s 80(2).

[65] Taking all these matters into account, I am satisfied that:

(a) imposing a pecuniary penalty of $51,000 on the first defendant meets the deterrent purpose of the Act while reflecting the first defendant's particular circumstances; and

(b) there is no need to make a pecuniary penalty order against the second defendant, notwithstanding s 80(2) of the Act, because there is good reason not to.

Result

[66] I declare that:[26]

---

[26] Again, while the declarations do not mirror all aspects of the statement of claim, the defendants confirm that it is appropriate to make declarations in these terms.

(a) the first defendant's conduct in entering into or arriving at the 2007 Agreement in August 2007 was a contravention of s 27 via s 30 of the Act;

(b) the defendants gave effect to the 2007 Agreement:

(i) between 1 July 2013 and 14 May 2018 in contravention of s 27 via s 30 of the Act; and

(ii) between 15 May 2018 and 13 January 2020 in contravention of s 30 of the Act;

(c) the defendants' conduct in entering into or arriving at the 2020 Agreement between 13 January 2020 and 24 January 2020 was a contravention of s 30 of the Act.

[67] I impose a pecuniary penalty of $51,000 on the first defendant for that offending.

[68] I record that, by agreement between the Commission and the defendants, the first defendant will pay the penalty in the following instalments:

(a) $6,000 to be paid within 30 days from the date of this judgment;

(b) $15,000 by 12 months from the judgment;

(c) $15,000 by 24 months from the judgment; and

(d) $15,000 by 36 months from the judgment.

[69] No interest is to be payable on any part of the penalty and there is no order as to costs.

[70] Suppression orders are made as set out at [55] – [58] above.

Solicitors:
Crown Solicitor, Wellington
Buddle Findlay, Christchurch
Fitzherbert Rowe, Palmerston North