IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-2165

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	ALSTOM HOLDINGS SA First Defendant
AND	SIEMENS AG Second Defendant
AND	SCHNEIDER ELECTRIC SA Third Defendant

Hearing: 19 December 2008

Counsel: MR Dean QC and NF Flanagan for Plaintiff
GA Hughes for Second Defendant
SC Keene and CJ Graf for Third Defendant

Judgment: 22 December 2008

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 22 December 2008 at 3.30 p.m., pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors: Meredith Connell, P O Box 2213, Auckland 1010 for Crown for Plaintiff
Kensington Swan, Private Bag 92101, Auckland for First Defendant
Chapman Tripp, P O Box 2206, Auckland 1140 for Second Defendant
Russell McVeagh, P O Box 8, Auckland for Third Defendant

Introduction

[1] The Commerce Commission has brought this proceeding alleging that the defendants participated in a price-fixing cartel, in breach of s 27 (via s 30) of the Commerce Act 1986 (the Act). The third defendant (Schneider) has admitted liability for a breach of the Act in circumstances set out in an agreed statement of facts. I am asked to approve a penalty of $1.05m, agreed to by the Commission and Schneider and to order payment of that sum and costs of $50,000.

Agreed facts

[2] The proceeding concerns the supply of Gas Insulated Switchgear (GIS) to the New Zealand market from 26 May 1998 to, in the case of Schneider, 13 December 2000. GIS is a system of circuit-breakers used to control the flow of electricity in substations. Through subsidiaries, Schneider manufactured and supplied GIS to electricity generators, transmission and distribution companies and power retailers.

[3] All manufacturers of GIS equipment are multi-national corporations based overseas. Supplies to the New Zealand market are arranged by local subsidiaries. During the period to which this proceeding relates, there were four manufacturers and suppliers of GIS in the New Zealand market, three of whom are defendants.

[4] In a decision dated 24 January 2007, the European Commission found that Schneider was one of a number of manufacturers, including the first and second defendants, who, through subsidiaries, were parties to an agreement to share pricing information, not compete with each other on price, maintain existing market shares, rig the prices for supply of GIS, and generally avoid competing with each other for the supply of GIS (the Cartel). The Cartel was recorded in a document dated 15 April 1988, known as the GQ-Agreement. The GQ-Agreement was the basis of the Cartel's international activities and operations until its termination in March 2004. The Cartel operated in all countries worldwide (except North America) and included New Zealand within the category of Oceania. Schneider's involvement in

the Cartel ceased no later than 13 December 2000 when its GIS business was transferred to a joint venture and Schneider was excluded from the Cartel by other participants.

[5] The GQ-Agreement required each Cartel member to notify all GIS customer enquiries to the Cartel secretary. A detailed procedure was set out and used for allocating available GIS projects among Cartel members. Price arrangements were agreed to maintain the price level of GIS enquiries that were unsuitable for allocation. Where only one Cartel member was notified of a customer enquiry, that member was supposed to respond in accordance with a price list in the GQ-Agreement.

[6] The Cartel met regularly to discuss and allocate projects, fix prices and deal with the day-to-day running of the Cartel. There were annual or bi-annual meetings of senior staff of Cartel members to agree on its continuance. There was a Cartel secretary responsible for administering and overseeing the Cartel, including bids worldwide by Cartel members. Cartel members who departed from the agreement were punished by being denied future work.

[7] Customers in New Zealand purchased GIS from local suppliers through a tender system. Upon receipt of a customer's tender invitation, Schneider's New Zealand subsidiary (Schneider NZ) would seek pricing from Schneider's European based subsidiaries, who would complete the technical specifications of the tender and send them back with the price to the New Zealand subsidiary. The tender would then be submitted to the customer, as would tenders from other GIS suppliers. The "successful" tenderer would then enter into a supply contract.

[8] A similar approach was taken in response to GIS budget enquiries from New Zealand customers. Schneider NZ would seek price directions from European subsidiaries, which would then be relayed to the GIS customer in New Zealand. Under the GQ-Agreement, these prices would be discussed and determined in Cartel meetings or in accordance with the price list attached to the GQ-Agreement. Schneider NZ had no knowledge that the prices it was supplied with had been determined in this manner.

[9] Although Schneider was involved in the Cartel from its inception in 1988 until it was excluded from it by other participants, for the purpose of this proceeding, by virtue of the applicable limitation period under the Act, Schneider's participation dates from 26 May 1998. During that period it was involved, through its subsidiaries, in three budget enquiries and one tender for GIS equipment in the New Zealand market.

[10] In January and February 1999, Mercury Energy (now Vector) requested budget prices from Schneider NZ for the supply of 110 kV and 220 kV GIS for its Liverpool Street substation. In both cases, Schneider determined budget prices in accordance with the GQ-Agreement and passed the prices back to Mercury via Schneider NZ. In neither case did the budget price result in an order.

[11] In August 2000, Trans Power requested budget prices from Schneider NZ for the supply of a 245 kV GIS. Budget prices were determined in accordance with the GQ-Agreement and passed to Trans Power but did not result in an order.

[12] In May 1999, Vector issued a request to Schneider NZ for a tender for the supply of a single 110 kV GIS extension bay. Vector did not seek a tender from any other supplier, so the process was not a competitive one. In those circumstances, the GQ-Agreement provided for the tender to be allocated to the incumbent supplier. Schneider NZ tendered on the basis of the price determined by Schneider's European subsidiary. The tender was accepted by Vector and the equipment supplied and installed in December 2000.

Liability

[13] On the basis of the agreed statement of facts, Schneider accepts that its former subsidiaries breached the Act as alleged in the Commission's statement of claim dated 20 April 2007. Specifically, it admits that its former subsidiaries contravened the Act by giving effect and conspiring to give effect to an agreement, arrangement or understanding that had the purpose, effect or likely effect of fixing, controlling or maintaining prices for the supply of GIS in New Zealand, in breach of s 27(2) via s 30 of the Act.

General approach to penalty

[14] The parties invite me to consider the proposed penalty, broadly by reference to orthodox sentencing principles. That requires assessing the seriousness of the offending, identifying relevant aggravating and mitigating factors to determine an appropriate starting point and, finally, having regard to any factors specific to the defendant that may warrant an uplift in, or reduction from, the starting point. I accept that approach is appropriate. It is consistent with the statute and is endorsed by practice in New Zealand and other jurisdictions.

[15] Ms Dean QC also asks me to note the importance of deterrence, both specific and general, in setting penalties for cartel conduct. She points out that because such conduct is so destructive and difficult to detect, penalties must be sufficiently high that the conduct is widely understood not to be worth the risk. As Williams J said in *Commerce Commission v Koppers Wood Protection (NZ) Limited* (2006) 11 TCLR 581 at [30]:

> The first point of note in this general discussion is to reiterate the point made in every case in this area, both in New Zealand and overseas, that deterrence is a significant factor, perhaps the most significant factor, to be considered in the imposition of penalties for anti-competitive behaviour. That deterrence is not just deterrence for the particular defendant but for all others in the commercial community who might contemplate being engaged in such behaviour. And deterrence is of especial importance given that anti-competitive behaviour is almost always covert, discovery can be fortuitous and proof can be time-consuming, arduous and expensive.

[16] Ms Dean referred me to a growing body of international evidence that deterrent penalties are effective and that those contemplating anti-competitive conduct take into account the level of competition enforcement and likely penalty in structuring their activities and may seek to limit contact with, or entirely avoid, jurisdictions where penalties are severe. I was told that appears to be the reason why the Cartel did not operate in North America.

[17] Deterrence is also relevant to the effectiveness of the Commission's leniency programme. That scheme allows a participant in a cartel to receive immunity from claims by the Commission if it is the first to bring the arrangement to the Commission's notice, and cooperates with the Commission's investigation and any

proceedings. This is the first case the Commission has brought after receiving an application under its leniency programme. The Commission believes that appropriate deterrent penalties are necessary to its effectiveness. The cost of complying with a leniency agreement can be considerable in terms of staff time and legal costs. In the absence of appropriate deterrent penalties, the Commission foresees a risk that potential leniency applicants will refrain from reporting cartels to the Commission because the risk of detection and its consequences are not outweighed by the costs of complying with leniency obligations.

[18] Finally, in discussing the general approach to fixing penalty, I acknowledge the submission that the task of the Court in cases where penalty has been agreed between the parties is not to embark on its own enquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range – see the judgment of the Full Federal Court in *NW Frozen Foods v ACCC* (1996) 71 FCR 285. As noted by the Court in that case and by Williams J in *Commerce Commission v Koppers*, 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.

Factors relevant to penalty

[19] At the time the offending occurred, s 80(2) of the Act provided:

> In determining an appropriate penalty under this section, the Court shall have regard to all relevant matters, including:
>
> (a) The nature and extent of the act or omission;
>
> (b) The nature and extent of any loss or damage suffered by any person as a result of the act or omission;
>
> (c) The circumstances in which the act or omission took place;

> (d) Whether or not the person has previously been found by the Court in proceedings under this Part of the Act to have engaged in any similar conduct.

That section has been repealed. Section 80(2A) now requires the Court to consider "all relevant factors". As Ms Dean submits, however, the factors set out s 80(2) will continue to be relevant – see also *Gault on Commercial Law* at CA80.06(2).

[20] In considering the circumstances of the offending, the following additional matters are likely to be of particular relevance:

- The duration of the contravening conduct.
- The seniority of employees involved.
- The extent of any benefit derived from the contravening conduct.
- The degree of market power held by Cartel participants.

[21] Among the factors bearing on the offender, which will be relevant to sentence, are:

- Any previous misconduct of a similar nature by the offender.
- The role of the offender in the Cartel.
- The size of the offender.
- The offender's cooperation with the authorities.
- The admission of liability.
- Any compliance programmes put in place by the offender.

Penalty in this case

[22] The maximum fine for the offending is $5m. It increased to $10m in 2001 but, as Schneider's conduct preceded the increase, the penalty falls to be determined by reference to the maximum penalty prescribed before 2001.

[23] The proposed penalty was reached by reference to a starting point at the mid-point of a range between $1.25m and $1.75m, reduced by one-third to take account

of mitigating factors. I am satisfied the figure is appropriate, having regard to the relevant considerations which I discuss below.

Seriousness of the conduct

[24] The nature and scale of the operation was, as Ms Dean submits, at the most serious end of the spectrum. It was both a price-fixing and market-sharing arrangement involving all participants in the market. It operated worldwide except for Canada and the United States of America where criminal penalties are imposed for such conduct. Its purpose was to eliminate competition between manufacturers and suppliers of GIS products.

[25] The Cartel was highly organised, elaborately structured and so successful in its implementation that it avoided detection for almost fifteen years. As Ms Dean says, it was so sophisticated that even enquiries about potential future products were met with a coordinated response.

Impact on the market

[26] The Cartel affected the electricity generation and distribution markets, which are vital to the New Zealand economy. I am told the goods in question are of high value. The Cartel had the potential to impact significantly and adversely on the economy. It did not do so because the period it was relevantly operative was limited and only one GIS contract was supplied by Schneider during the period. It appears that in that case the price was fixed by a Schneider subsidiary but in a manner consistent with the GQ-Agreement.

Schneider's role

[27] The Schneider personnel involved in the Cartel held relatively senior positions. However, they were not involved in the leadership of the Cartel and, as previously mentioned, the staff of Schneider's New Zealand subsidiary were not aware of the Cartel's operations.

[28] Schneider had a significant share of the GIS market worldwide during the period but it was considerably less than the other defendants. Ms Keene points out that Schneider's relatively minor involvement is reflected in the significantly lower penalty imposed on it by the European Commission – 8.1m euros out of total penalties of 750m euros.

Mitigating factors

[29] Schneider is entitled to a generous discount for its admission of liability and its full cooperation with the Commission. It has cooperated fully since the Commission first approached its subsidiary in February 2007. Among other things, it procured its wholly-owned subsidiary to cooperate in full with s 98 notices issued by the Commission. This has required engaging IT experts at considerable cost to search historic electronic data. It has instructed solicitors to accept service on its behalf, saving the Commission the delay and cost of serving proceeding in France. It has submitted to the jurisdiction of the New Zealand Courts and agreed to pay a pecuniary penalty, notwithstanding the fact that a penalty imposed by the Court might not otherwise be enforceable against Schneider.

[30] Schneider is entitled to appropriate credit for implementing a competition law compliance programme on a global basis since the European Commission imposed penalties in January 2007. It is accepted that a corporate culture conducive to compliance with competition law is relevant to an assessment of penalty: *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076 at 52-153; *NW Frozen Foods v ACCC*.

[31] I accept that it is appropriate also to make some allowance for the deterrent effect of the penalty imposed by the European Commission and of the adverse publicity which is likely to follow the imposition of a penalty. Ms Keene informs me that part of Schneider's rationale for settling the proceeding and accepting responsibility for a penalty that may not at law be enforceable, is to maintain the reputation and public standing of its local wholly-owned subsidiary.

Penalties in other cases

[32] Finally, I note that the suggested penalty is consistent with penalties applied in other cases of anti-competitive arrangements by cartels referred to me by counsel. They include the decisions of Williams J in the *Koppers Archwood Protection* litigation (as to which, refer also HC AK CIV 2005-404-2080 8 February 2008 re FERNZ defendants), *ACCC v ABB Power Transmission* (2004) ATPR 42-011; *Schneider Electric (Australia) Pty Limited v ACCC* (2003) 127 FCR 170; *ACCC v Visy Industries Holdings Pty Limited (No 3)* (2007) 244 ALR 673.

Conclusion

[33] Having regard to the considerations I have discussed, I am satisfied that both the starting point and the discount adopted for the purpose of arriving at the suggested penalty are appropriate. I accept that the parties have applied themselves conscientiously to the task of balancing the relevant considerations to arrive at a just conclusion and one which appropriately reflects both the private and public interests involved. They have been assisted by counsel of high calibre and great experience in the area (including, for Schneider, Mr AR Galbraith QC). Their careful and comprehensive submissions have reinforced my confidence in the integrity of the process that has led to the recommendation.

Result

[34] I approve the recommended penalty and costs award and order Schneider to pay a penalty of $1.05m and costs of $50,000.