**IN THE HIGH COURT OF NEW ZEALAND**
**NELSON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**WHAKATŪ ROHE**

**CIV-2018-442-26**
**[2020] NZHC 1176**

| | |
|---|---|
| BETWEEN | COMMERCE COMMISSION<br>Plaintiff |
| AND | PRICES PHARMACY 2011 LIMITED<br>First Defendant |
| | RICHARD STUART GRANT HEBBERD<br>Second Defendant |

On papers

Judgment: 29 May 2020

---

**JUDGMENT OF DOBSON J**

---

[1] The plaintiff (the Commission) commenced these proceedings in 2018 alleging anti-competitive conduct by the defendants in breach of s 27, via s 30, of the Commerce Act 1986 (the Act).

[2] By December 2019, the defendants had admitted the relevant breaches. The parties negotiated an agreed statement of facts, and the defendants had agreed to a level of pecuniary penalties that were acceptable to the Commission.

[3] Settlement of such proceedings requires the approval of the Court and that was sought jointly by the parties. A scheduled hearing on the application for approval of the agreed settlement was frustrated by the restrictions imposed in dealing with the COVID-19 pandemic. The parties requested the Court to deal with the approval application on the papers.

[4] After considering the written submissions, agreed statement of facts and other relevant materials provided, I came to the view that I was not able to approve the settlement on the quantum of penalties agreed between the parties. I came to that conclusion, acknowledging that it is not for the Court to determine for itself what the appropriate penalties should be, but rather to consider whether approval should be given to the agreed sum as falling within the appropriate range. I also acknowledged that the Court should approach the prospect of declining its approval cautiously.

[5] I issued an interim judgment setting out my conclusions on 8 April 2020. It was distributed only to counsel and the parties. The interim judgment acknowledged that I had tested all the circumstances relevant to what should be accepted as appropriate levels of penalty without the benefit of interchanges with counsel that would have occurred at a hearing. Because of that, I offered the parties a period of 10 working days each in which to invite me to reconsider my conclusions in light of any misapprehensions suggested in my interim judgment, or other matters that the parties considered to be relevant to determining appropriate penalties.

[6] My interim judgment observed that the timing of the parties' agreement on the level of penalties had been concluded prior to the economic consequences of the COVID-19 pandemic becoming apparent. I took the view that, whatever the nature of Mr Hebberd's retirement nest egg, it was likely to have been substantially reduced by the dramatic loss in value of all types of investments that has been caused by the pandemic.[1] That new development since the agreement had been reached between the parties on penalties was among the reasons I cited for declining approval of the agreed settlement.

[7] The Commission's initial response to my invitation for further submissions was to seek clarification of the extent of Mr Hebberd's financial resources, and whether the reduction in value I projected had in fact occurred.

[8] Mr Hebberd obliged with an affidavit as to his financial position on 29 April 2020. That affidavit confirmed that the value of Mr Hebberd's investment assets have

---

1 Interim judgment at [53].

indeed reduced materially, but he acknowledged that he has "a buffer" and he certainly did not wish to plead poverty to the Court.

[9] Subsequent to that, the Commission filed supplementary submissions on 12 May 2020 and the defendants filed supplementary submissions on 27 May 2020. I am grateful to the parties for their responses to my interim judgment. To conclude my consideration of the request for approval, I am attaching my interim judgment to this one, and it is to be read in light of the following reasoning which reflects the matters put to me since it was issued to the parties.

**Respective roles of Messrs Hebberd and Wright**

[10] In [7], [13] and [37] of the interim judgment, I commented on the level of involvement respectively of Messrs Hebberd and Wright in initiating arrangements for a price-fixing arrangement, and carrying it into effect. Essentially because of his dominant position within Prices Pharmacy's business, my interim judgment implicitly attributes a similarly senior role to Mr Hebberd relative to Mr Wright, in the conduct in breach of the Act.

[11] The Commission's supplementary submissions seek to correct that impression, attributing a larger role to Mr Wright in the mechanics of setting up and implementing the understanding between Nelson pharmacies.

[12] The Commission's submission on the point is that notwithstanding some measure of overstatement in the level of Mr Hebberd's involvement relative to that of Mr Wright, in assessing Mr Hebberd's level of culpability the Commission still contends that Mr Hebberd was substantially involved. He was at the key meetings, copied in on email correspondence and perhaps most importantly twice pressured a competing pharmacy to join the understanding.

[13] Supplementary submissions on behalf of the defendants suggest that Mr Wright's involvement should be put in a different context, in that he was involved in communications between the owners of community pharmacies in the Nelson region in part because he was standing for a vacant position as a South Island representative on the board of the Pharmacy Guild. Arguably, it mischaracterises his

involvement in dealings with those operating other pharmacies in the Nelson area to attribute it all to a role in co-ordinating an arrangement contrary to the Act, when he had a different relevant context in pursuing his election to the Pharmacy Guild board.

[14] As to Mr Hebberd's involvement, submissions on behalf of the defendants refer to his having no recollection of the second approach to the pharmacist who had declined to join the arrangement. Despite no clear recollection, Mr Hebberd disputed that he would have been "heated" or "forceful" in his dialogue with that non-participant, and the agreed statement of facts did not attribute that to him.

[15] I accept that the size of Mr Hebberd's business gave him a senior position among the Nelson community pharmacies and that the combined conduct of both of them reflected a leading role, and a relatively significant contribution to bringing the arrangement into existence.

**The defendants' motivation**

[16] The Commission invites me to reconsider my observation that the motive for the participating pharmacies was not primarily to force customers to pay a higher price for the products sold.[2] This aspect of my analysis of the circumstances in which the breaches of the Act occurred was reflected in my earlier comment at [29] of the interim judgment that the conduct in issue was the antithesis of a cartel seeking to exploit an arrangement to extract super profits.

[17] In its supplementary submissions, the Commission accepts that the pharmacies were motivated by a desire to alter their terms of trade with the Nelson and Marlborough District Health Board (DHB), but submit that they were pursuing that aim to increase their profitability by extracting further payments from the DHB, which was the primary funder of prescriptions. The Commission's proposition is that the DHB was the main customer of the pharmacies in the monetary sense.

[18] My analysis of the context in which the breaches of the Act occurred took into account (at [17] to [20] of the interim judgment) analyses of the viability of community

---

2 Interim judgment at [45].

pharmacies recorded in four reports prepared between January 2015 and November 2016. The Commission has now submitted that it is an overstatement to suggest that the then current model of funding by DHBs for provision of prescription medicines endangered the survival of community pharmacies.

[19] The supplementary submissions for the defendants supported the analysis in my interim judgment suggesting that the motivation for the pharmacies in seeking to pressure the DHB is an important distinguishing factor when comparing the levels of penalty approved in other cases. It is submitted for the defendants that it is inappropriate for the Commission to downplay concerns at the viability of supplying prescription medicines by suggesting that other aspects of the businesses (that is, the margins on "over the counter" products) should subsidise the service of providing prescription medicines. I was urged to take into account that the impact of the margin charge was lessened by the pharmacies not applying the margin charge to many of the most vulnerable customers in the community.

[20] The analyses reflected in my reasoning did not take into account the wider range of products sold by pharmacies, including some prescription medicines on which a higher mark-up was available, and the wide range of non-prescription medicines that community pharmacies sell, and on which they are able to maintain materially higher margins. The Commission does not suggest that pharmacies do treat the terms on which they sell prescription medicines at low margins as loss leaders, or that they should do so. The Commission does contend that it is the sale of prescription medicines which draws substantial volumes of customers into their retail premises, where they then take the opportunity of buying additional items attracting a higher mark-up for the pharmacy. Accordingly, the Commission suggested that there was no evidentiary basis for treating the defendants' conduct as less culpable because in some way it was resorted to in a fight for their survival. Rather, the Commission characterised the conduct in breach of the Act as an illegitimate part of the pharmacies' pursuit of greater returns.

[21] I accept that the analysis of context in my interim judgment may have placed more emphasis on the defendants perceiving the terms of trade stipulated by the DHB as a threat to their viability than is warranted. However, concerns of that type were

material to the defendants. I am not dissuaded from my view that the primary motive for the conduct in breach of the Act was distinguishable from the arrangements and understandings between competitors in a market that usually attracts attention for breach of s 30 of the Act. Certainly, the effect of the arrangement was to fix the prices that the participating pharmacies would charge for filling prescriptions. The immediate consequence was to substantially lessen competition in the Nelson community pharmacy market, to the detriment of the customers purchasing the prescription medicines.

[22] However, it is common ground that the aim sought to be achieved by the pharmacists was to pressure the DHB, as an important contributor to the cost of those supplies, to deal on more generous terms with the pharmacies.

[23] I remain of the view that applying pressure on the DHB was the main reason for the arrangement because the pharmacists blamed the DHB for the need to make the extra charge. When explaining it to their customers they did not demand the extra charge from those they perceived would have difficulty paying it, and they ceased the arrangement once the DHB had indicated its preparedness to alter the terms on which it would contribute to payment for the prescription medicines.

**Mr Hebberd's financial capacity**

[24] To the extent that I had regard to a presumed substantial reduction in Mr Hebberd's financial capacity to contribute substantially to the company's penalty and to pay his own, the Commission invites reconsideration.[3] The Commission submits that Mr Hebberd's affidavit as to his financial position indicates that he will not face hardship in paying the penalty that was agreed and that the standard accepted by the Court previously is that the purpose of such penalties is for them to "sting", so that, for example, penalties have been imposed where they could only be met "with difficulty".[4]

---

3 See interim judgment at [58]–[60].

4 Compare *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 at [34].

[25] For Mr Hebberd, it is submitted that his affidavit describing the adverse impact of the pandemic does justify the concerns I expressed at the impact being unduly harsh on him, where he is having to arrange for the bulk of the resources for the company to pay its penalty as well.

[26] I accept that the extent of the adverse economic consequences of the COVID-19 pandemic described in Mr Hebberd's recent affidavit are not as great as I contemplated would be most likely, and I further acknowledge that the level of penalty he agreed to appears not to put a life-changing extent of financial pressure on his retirement.

**Revisiting the conclusions in my interim judgment**

[27] I am not persuaded to change the analysis in my interim judgment in light of the further submissions received about the respective roles of Messrs Hebberd and Wright, nor am I persuaded that the Commission's analysis of the commercial motivation for the conduct in breach of the Act ought properly to require the conduct to be ranked more seriously than I have done. I remain of the view that the unusual motivation for the arrangement is an important distinguishing feature from other cases where the Court has approved such settlements. The other considerations I took into account in my interim judgment when assessing an appropriate range for the company's penalty remain valid.

[28] However, I am required to revisit the reasoning on the extent to which the penalties agreed to by Mr Hebberd will impose an exceptional level of financial pressure on him. Although the increased difficulty I perceived in his paying the pecuniary penalty ordered personally against him was not the only consideration in declining to approve it, the financial position as now disclosed is sufficient for me to accept that the penalty agreed personally ought to be approved. Rather than being at the bottom of the range I proposed, I am satisfied that a penalty can appropriately be placed at the top of the range of $20,000 to $50,000. I accordingly now approve the penalty at the top of that level, namely $50,000 as had been agreed between the parties.

[29] My further analysis in light of the parties' supplementary submissions does not alter my analysis on the grounds for declining approval for the penalty imposed on

Prices Pharmacy. I adhere to the level of $344,000 as explained in my interim judgment, as the amount for which I am prepared to grant approval of the pecuniary penalty imposed against Prices Pharmacy.

**Dobson J**

Solicitors:
Meredith Connell, Auckland for plaintiff
Darroch Forrest, Wellington for defendants

**THIS INTERIM JUDGMENT IS DISTRIBUTED TO COUNSEL AND THE PARTIES ONLY**

**IN THE HIGH COURT OF NEW ZEALAND**
**NELSON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**WHAKATŪ ROHE**

**CIV-2018-442-26**

| | |
|---|---|
| BETWEEN | COMMERCE COMMISSION<br>Plaintiff |
| AND | PRICES PHARMACY 2011 LIMITED<br>First Defendant |
| | RICHARD STUART GRANT HEBBERD<br>Second Defendant |

On papers

Judgment: 8 April 2020

---

**INTERIM JUDGMENT OF DOBSON J**

---

[1] This judgment deals with a joint application by the parties for the Court's approval of agreed terms of pecuniary penalties to be imposed on the first defendant (Prices Pharmacy) and the second defendant (Mr Hebberd) for admitted breaches of s 27, via s 30, of the Commerce Act 1986 (the Act).

[2] The courts have encouraged that proceedings brought by the Commerce Commission (the Commission) for pecuniary penalties imposed under s 80 for breaches of the Act should be the subject of negotiation between the parties.[1] Where the parties reach an agreed settlement as to the penalties to be imposed, the courts will

---

1 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 at 733.

generally approve the agreed sum, taking into account the public interest in promoting a resolution that avoids costly and time-consuming litigation.[2]

[3] Both parties provided relatively detailed written submissions setting out their reasons for agreeing to the proposed extent of pecuniary penalties. At the time when their submissions were filed, a hearing was scheduled for 25 March 2020. As that date approached, government initiatives to reduce non-essential movements because of the COVID-19 pandemic resulted in a proposal for the hearing to be conducted by way of telephone conference. When the logistics for convening a hearing by that mode became more difficult, counsel filed a joint memorandum inviting the Court to deal with the penalty issues on the papers. Both parties emphasised the importance of achieving finality with the matter.

[4] For the reasons set out below, and in the circumstances as I presently apprehend them to be, my view is that the agreed penalties should be viewed as outside a proper range, and excessive. I am accordingly minded to decline approval of the penalties as agreed to by the parties of $400,000 for Prices Pharmacy and $50,000 for Mr Hebberd. Instead, I recommend the lower penalties of $344,000 for Prices Pharmacy and $20,000 for Mr Hebberd.

[5] I have been unable to identify any proceeding under s 80 of the Act in which the Court has not approved a proposed settlement that has been agreed to between the Commission and parties admitting breaches of the Act.[3] One explanation for that may be that the Court generally appreciates that the parties know more of the detail of the matters that have been taken into account in reaching a settlement than is provided to the Court, and the Court therefore accords a measure of deference to the parties as

---

2 *Commerce Commission v New Zealand Milk Corporation Ltd*, above n 1, at 733. See also, for example, *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18]; *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21]; and *Commerce Commission v First Gas Ltd* [2019] NZHC 231 at [3].

3 There are examples of the Court expressing reservations that agreed penalties are on the light side, but not to an extent precluding the Court giving its approval. See for example, *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581; the earlier Full Court decision in *Commerce Commission v New Zealand Milk Corporation Ltd*, above n 1, at 737; *Commerce Commission v Ellingham* (2005) 2 NZCCLR 753 (HC) at [13]. See also *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360 at [55]–[56] and *Commerce Commission v First Gas Ltd*, above n 2, at [49] where in both cases the Court approved the agreed penalty, but expressed concern that the agreed starting point was too high.

better appreciating the full nuances.[4] However, it is ultimately the Court's responsibility to be satisfied that a proposed settlement is appropriate and that the extent of proposed fines is within an appropriate range.[5] The Court is equally concerned that:

- the Commission is not proposing to let off lightly those contravening the Act, or that the Commission has rated the conduct more seriously than it should; and

- defendants accepting breaches of the Act have conceded to the Commission's position for whatever reasons thereby accepting too great a liability and risking the creation of a precedent that is out of kilter.

[6] Notwithstanding the parties' wish for finality, I allow the parties a period of up to 10 working days in which to file further submissions, which either support the conclusions I have reached or provide further grounds supporting the levels of penalty previously agreed. I acknowledge that in the absence of exchanges that would have occurred in the course of oral submissions, my analysis of the issues includes the drawing of numerous inferences. Counsel may include in their further submissions any factual matters that might require such inferences to be revisited.

**The conduct complained of**

[7] In early 2016, Prices Pharmacy was the second largest community pharmacy in the South Island and was considered a leader in the pharmacy sector. Mr Hebberd was the majority shareholder. A 15 per cent shareholder, Mr Wright, appears to have played a somewhat subsidiary role in governance and management of the business.[6]

---

4 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, above n 3, at [35].

5 *Commerce Commission v Lodge Real Estate Ltd* [2016] NZHC 3115 at [5]. See also *Commerce Commission v Barfoot & Thompson Ltd* [2016] NZHC 3111 at [10]; and *Commerce Commission v PGG Wrightson Ltd* [2016] NZHC 2921 at [27].

6 The Commission also brought these proceedings against Mr Wright but they have not been pursued against him.

[8] At the time, there were concerns among pharmacy businesses at the squeeze on margins for prescription medicines caused by the terms on which district health boards (DHB) paid for supply by pharmacies of medications to customers.

[9] In April 2016, a meeting of the proprietors of pharmacies in the Nelson region was convened. Attendees agreed that their respective pharmacies would institute a new charge in addition to any co-payment for eligible supplies, to start in May 2016. The arrangements agreed at that meeting and thereafter implemented are treated by the Commission as an understanding to limit competition (the understanding), contrary to s 27 of the Act.

[10] The terms of the understanding included that where a co-payment was payable by the customer requesting a prescription, the pharmacies would impose a margin charge for eligible supplies (the margin charge), in addition to that co-payment. Further, that each of the pharmacies would charge the margin charge unless the customer was in financial hardship or objected to paying it. The understanding allowed pharmacies a discretion as to whether the margin charge would be imposed when a co-payment was not payable for a prescription, and recognised that the participating pharmacies would not insist on charging the margin charge for customers who objected to it.

[11] Prices Pharmacy instituted the margin charge from about 12 May 2016, with other Nelson pharmacies imposing it from various dates thereafter. In the case of Prices Pharmacy, the margin charge was capped at five prescriptions and did not apply to:

- repeat prescriptions;
- patients under 13 years;
- those in community homes or aged residential care;
- some exempt patients;

- mental health support services patients;
- selected monthly and weekly patients;
- high dependent patients; or
- methadone patients.

[12] Prices Pharmacy recovered the charge from customers for a period of some six weeks, until the Nelson Marlborough DHB indicated that it was prepared to reconsider the terms on which community pharmacies would be paid for supplying prescription medications. The total amount of the margin charge collected by all the pharmacies who participated was approximately $60,000, of which Prices Pharmacy collected $11,451.

[13] Mr Hebberd, and to a somewhat lesser extent Mr Wright, took leading roles in bringing the understanding into being and in its application. On two occasions, Mr Hebberd pressured the proprietor of another Nelson pharmacy, who had declined to participate, to join in the understanding .

[14] Between 2011 and 2014, the Commission had investigated proposals discussed between pharmacists for imposition of an extra charge on prescription items. The outcome of the Commission's investigation was that certain Christchurch pharmacists were warned that an understanding to impose such a charge would breach the Act. Mr Hebberd was aware of that conduct and of the outcome of the Commission's earlier investigation. In addition, the Commission had warned all DHBs, the pharmacists' industry group (the Pharmacy Guild) and community pharmacies that provisions in a 2012 community pharmacy services agreement (CPSA), which purported to prevent any discounting of co-payments, breached s 27 of the Act. Messrs Hebberd and Wright were also aware of that warning.

[15] In or about 2015, the Pharmacy Guild recommended that pharmacies not collaborate in imposing surcharges. Both Messrs Hebberd and Wright were involved with the Pharmacy Guild and were aware of that advice. Notwithstanding the agreed

summary of facts including acknowledgements of this extent of their knowledge, the Commission for its part accepts that Prices Pharmacy and Mr Hebberd did not intend to breach the Act by their part in the understanding.

**The industry context at the time**

[16] At the time of the understanding, Prices Pharmacy and Mr Hebberd were concerned that they were obtaining less funding under arrangements with the DHB than costs of supply of about half of the medications they stocked. The viability of the current model of community pharmacies had been, and was being, substantially analysed by experts at the time.

[17] The material supplied with counsel's submissions included copies of four reports touching on the viability of community pharmacies. The first of those was completed in January 2015 by Deloitte and was a report on margins for pharmaceutical drugs. That report recognised the critical costs for community pharmacies as being the costs of procurement and stockholding of prescription medications, and acknowledged that both wholesalers and pharmacies were being squeezed by reduced margins.

[18] In August 2015, the Community Pharmacy Services Governance Group commissioned a report from Sapere research group. Sapere produced a "strategic think piece on pharmaceutical margins", which included comparisons with models in other jurisdictions for supply of prescription medication. It acknowledged that changes that had been made to the CPSA in 2012 appeared to have exacerbated the pressures for those involved, including community pharmacies.

[19] Then in April 2016, Ernst & Young (EY) reported on the impact of practices instituted by, or affecting, community pharmacies between July and December 2015. The EY report opined that modest surcharges of between 20 and 70 cents per item that had been imposed by community pharmacies in the second half of 2015 were unlikely to have had a material impact on the purchasers of the medications. The EY report included a statistic that 6.5 per cent of the New Zealand adult population do not pick up all the medicines prescribed for them because of the cost of doing so and that the non-collection of all prescription medicines can result in increased consultations with

health professionals. In canvassing options, the EY report opined that maintaining the then status quo was untenable. During this period, the Pharmacy Guild calculated that the shortfall in funding was costing pharmacies $9 million per year.

[20] In November 2016 (that is, after the period of breaches admitted by Prices Pharmacy and Mr Hebberd), Grant Thornton produced a further report for the parties then engaged in mediation on the terms for payment for the supply of prescription medicines by community pharmacies. The focus of that report was on the true costs of the pharmaceutical supply chain. It concluded that the economic returns to pharmacists were poor, which reduced the likelihood of investment in significant improvements to the relative efficiency of delivery of medications.

[21] This context cannot provide any excuse for conduct in breach of the Act, but it is relevant in assessing the motives for the understanding.

**The scale of the activity and its impact**

[22] Given that all the participating pharmacies collected approximately $60,000 in the period in which the margin charge was imposed, that presumably impacted by $1 on each of 60,000 prescriptions for consumers in the Nelson region. Prices Pharmacy accounted for some $11,451 of those additional costs. The summary of facts acknowledges that Prices Pharmacy did explain to customers that the reason for the charge was to draw attention to the under-funding of prescription medicines and to put pressure on the DHB to provide adequate funding to ensure the viability of community pharmacies. It is also accepted that the charge was voluntary, but that a large majority of patients paid it. The maximum cost to any one family, if they had high medical needs, would have been an extra $20 during the period of the arrangement.

[23] There is no evidence of the extent, if any, to which the imposition of the margin charge dissuaded customers from procuring medicines that had been prescribed for them. Common sense suggests that over a six week period, the number of such occurrences would have likely been small.

**Approach to the quantification of penalties**

[24] The Court's task when asked to approve penalties that have been agreed between the parties is not to assess whether the agreement reached between the parties accords with the Court's own quantification of the penalties that should apply to the circumstances of the acknowledged breaches.[7] Instead, the Court is to determine whether the agreed penalties are in the appropriate range.[8] As Rodney Hansen J put it in *Commerce Commission v Alstom Holdings SA*:[9]

> [18] Finally, in discussing the general approach to fixing a penalty, I acknowledge the submission that 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 (see the judgment of the Full Federal Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285). As noted by the Court in that case and by Hugh 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.

[25] The courts have cautioned against the imposition of penalties at a level that might be seen by those in breach, and others observing the enforcement of the Act, as some form of licence fee.[10] At the time of these breaches, the maximum penalty for a company was $10 million,[11] and for an individual $500,000. There have been more recent amendments to the Act in 2017 and 2019 that could justify treating such conduct

---

7 *Commerce Commission v Alstom Holdings SA*, above n 2, at [18].

8 *Commerce Commission v Lodge Real Estate Ltd*, above n 5, at [5]. See also *Commerce Commission v Barfoot & Thompson Ltd*, above n 5, at [10]; *Commerce Commission v PGG Wrightson Ltd*, above n 5, at [27]; and *Commerce Commission v Ronovation Ltd* [2019] NZHC 2303 at [25].

9 *Commerce Commission v Alstom Holdings SA*, above n 2.

10 *Telecom Corporation New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [27]. See also *Commerce Commission v BP Oil New Zealand Ltd* [1992] 1 NZLR 377 (HC) at 383; and *Commerce Commission v Toyota New Zealand Ltd* HC Wellington CP95/95, 9 September 1997 at 2.

11 Under s 80 of the Act, alternative maxima are either three times the value of any commercial gain resulting from the contravention, or 10 per cent of the turnover of the company found to be in breach and all its inter-connected bodies corporate. Neither of those alternatives applied in the present case.

more seriously.[12] Deterrence is an important and constant consideration.[13] The importance of deterrence lessens the relevance of any relativity between the financial gain obtained by those acting in breach of the Act, and the appropriate penalty for their misconduct.[14]

[26] In addition, the Court quite sensibly encourages those in breach of the Act to acknowledge that misconduct and reach agreement with the Commission on the appropriate penalties.[15] That places a premium on the predictability of outcomes that will be approved by the Court as appropriate. That in turn constrains the circumstances in which the Court will reject an agreed settlement as being outside a proper range, so the Court approaches the prospect of such a finding cautiously.

[27] In its submissions, the Commission touched upon 10 factors that it drew from earlier cases as being relevant to an assessment of the appropriate level of penalty.[16]

*Nature and seriousness of contravening conduct*

[28] The first is the nature and seriousness of the contravening conduct. The Commission submitted that an increase of $1 per prescription, which would otherwise cost a maximum of $5, amounted to a 20 per cent increase. The Commission acknowledged that although the charge is characterised as voluntary, the vast majority of patients paid it. Mr Hebberd's conduct was aggravated by the two attempts he made to persuade a non-participating pharmacy to join the understanding.

[29] Despite this last aspect, which is an aggravating feature, overall I do not rank the contravening conduct as any higher than, say, 15 to 25 per cent on a continuum from the least to the most serious conduct in contravention of the relevant provisions in the Act. The conduct was undertaken primarily, or at least in part, to pressure the DHB into acknowledging that the then existing payment arrangements were

---

12 Commerce (Cartels and Other Matters) Amendment Act 2017, Commerce (Criminalisation of Cartels) Amendment act 2019.

13 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, above n 3, at [30]. See also *Commerce Commission v Alstom Holdings SA*, above n 2, at [15]–[17].

14 *Commerce Commission v Cathay Pacific Airways Ltd* [2013] NZHC 843 at [39] and [48].

15 *Commerce Commission v Alstom Holdings SA*, above n 2, at [18].

16 *Telecom Corporation New Zealand Ltd v Commerce Commission*, above n 10, at [13]; *Commerce Commission v Alstom Holdings SA*, above n 2, at [19]–[21]; and *Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [20].

inadequate to ensure the viability of community pharmacies. It was the antithesis of a cartel seeking to exploit an arrangement to extract super profits. Prices Pharmacy did not insist on payment of the margin charge and the practice was voluntarily stopped after some six weeks, when the DHB indicated a shift in its position and well before the Commission had raised any concerns about the understanding.

*Importance and type of market affected by contravening conduct*

[30] The second consideration is the importance and type of the market affected by the contravening conduct. The Commission characterised the market for prescription medicines as a sensitive one due to the vulnerability of some patients with imperative needs for medication, particularly those from lower socio-economic backgrounds and those with high levels of need for medication. Although the margin charge was modest in absolute terms, as a proportion of the cost of prescription medication required to be met by the consumer it could arguably be seen as significant.

[31] It was agreed in the summary of facts that the maximum cost of the practice to a family unit may have been $20. Prices Pharmacy applied the margin charge for a period of approximately six weeks. I agree that those adversely affected by the contravening conduct were potentially vulnerable because of their high need for the products being purchased. The level of vulnerability was moderated by their ability to decline to pay the $1 margin charge on any prescription. It seems most likely that the contravening conduct could only have impacted on a small part of the population in the Nelson area in the course of the six weeks it was in place.

*Whether the conduct was deliberate*

[32] Mr Hebberd acknowledged awareness of warnings provided by the Commission in the period since 2014 to the effect that agreements between pharmacies on charging, such as were involved here, would breach the Act. Mr Hebberd's dialogue with the pharmacist who declined to be a party to the understanding included a comment that the margin charge was not going to be implemented by all of the pharmacies at the same time because that would enable them to "get around the Commerce Commission rules".

[33] The Commission characterised it as a case of deliberate conduct undertaken with an awareness of the provisions in the Act but not one where the Act was knowingly and deliberately breached.

*The duration of the conduct*

[34] The Commission accepted that the period during which the margin charge was imposed was a short one, but nevertheless contended that it was applied to a large number of transactions for potentially vulnerable customers. The Commission acknowledged as relevant on this consideration that the practice had been brought to an end voluntarily. However, from the Commission's perspective that was not because of an appreciation that the behaviour was contrary to the Act but rather because ending the practice suited the wider purposes of the participants, given the progress that had been made in their dealings with the DHB.

*The degree to which the conduct was initiated by senior management*

[35] In contrast to some cases, this conduct was undertaken by the directing minds of the business involved. In comparative terms, that makes the conduct more serious than where anti-competitive arrangements are made by relatively junior or mid-level employees, without the concurrence of those ultimately responsible for the business.

*Commercial gain and loss or damage caused*

[36] Gross receipts over all participants in the six week period were approximately $60,000, of which Prices Pharmacy collected $11,451. In competition law terms, these amounts are modest. Given that Prices Pharmacy did not insist on payment of the margin charge, but treated it as "voluntary", there is at least the prospect that the customers for whom an additional $1 per prescription caused the most acute financial pressure would have declined to pay.

*The role of the defendants in the impugned conduct*

[37] Mr Hebberd, together with Mr Wright, was an initiator of the discussions leading to the understanding. Mr Hebberd also applied pressure to a non-participant who owned a competing pharmacy in the Nelson area to join the understanding. His

involvement, and the relative size of Prices Pharmacy in the community pharmacy market in the Nelson area, meant that his was a relatively prominent role in the formation and conduct of the understanding.

*The market share or degree of market power enjoyed by the defendants*

[38] Ten out of 16 pharmacies in the Nelson region took part in the understanding and were later joined by three others, so that only three pharmacies in the region did not impose the margin charge. Within those participating, Prices Pharmacy was a leading player given its size. The Commission characterises Prices Pharmacy's participation as "crucial".

*Nature, size and resources of the defendants*

[39] At the time, Prices Pharmacy was the second largest pharmacy in the South Island, employing approximately 70 staff and pharmacists. The gross revenue of all of its business at the time was approximately $9 million, which included the turnover of three pharmacies and two gift stores. Whilst in terms of regional retailing businesses that may be substantial, in competition law terms it could not be characterised as a significant corporate entity.

[40] I was provided with the financial statements for the business for the years ending 31 March 2016 to 2019. Although the net surplus in the financial year in which the offending conduct occurred was more than twice that of the previous year, the improved profitability cannot be attributed to the conduct, given its modest scale.

*Possible comparators*

[41] In seeking guidance on the range for the appropriate starting points in this case, I am mindful of the observation of the Court of Appeal in *Telecom Corporation of New Zealand Ltd v Commerce Commission*:[17]

> … while pecuniary penalties imposed in one case may provide a guide, that guide will seldom be able to be used mechanically. Changes in circumstance will affect the appropriate penalty in a case, such as differing circumstances of the conduct, size, market power and responsibility for the contraventions.

---

[17] *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 10, at [62].

> These factors, among others (including mitigating factors), complicate any attempt to compare penalties imposed in one case with those imposed in another.

[42] The requirement for a penalty to be set at a meaningful level that inarguably takes it beyond a cost to the business in the nature of a licence fee requires account to be taken of the scale of the business in question. Multi-million dollar penalties were imposed on international airlines that colluded on terms for charging for the carriage of air cargo.[18] These may be compared with penalties imposed on a colluding group of large-scale real estate businesses that engaged in anti-competitive arrangements on the charges they incurred when listing properties on TradeMe, where a number of firms were penalised more than $2 million.[19] The differences in the circumstances of the breaches and the identity of the businesses contravening the Act in those cases are so great as to make them irrelevant in present circumstances, beyond making the point that the extent of the penalties has to be significant relative to the scale of the business undertaking the contravening conduct.

[43] Submissions for the Commission invited comparison with a recent penalty decision in *Commerce Commission v Ronovation Ltd*.[20] Ronovation's business was providing advice to clients wishing to buy investment properties in Auckland. In a mode of electronic communication open only to members using Ronovation's services, rules were set intending to avoid competition between members when purchasing investment properties. The rules would give priority to the first member to notify the group of their interest in a property for sale, and compliance by other members with the rules limited competition in setting the price. This buyer-side cartel was ranked by Katz J as involving moderately serious conduct in that the agreement would lower prices for properties on the market to which the arrangement applied.[21]

---

18 *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414 at [45].

19 *Commerce Commission v Barfoot Thompson Ltd*, above n 5; *Commerce Commission v Success Realty* [2016] NZHC 1494; *Commerce Commission v Lodge Real Estate Ltd*, above n 5; *Commerce Commission v Manawatu (1994) Ltd* [2016] NZHC 2851; *Commerce Commission v Unique Realty Ltd* [2016] NZHC 1064; *Commerce Commission v Bayley Corporation Ltd* [2016] NZHC 1493; *Commerce Commission v Lodge Real Estate Ltd (Online Realty Ltd)* [2017] NZHC 1875; *Commerce Commission v Property Brokers Ltd* [2017] NZHC 681.

20 *Commerce Commission v Ronovation Ltd*, above n 8.

21 At [40].

[44] The conduct had occurred for some seven years, with a potential effect on 471 properties in the Auckland real estate market. The members of Ronovation by no means dominated the investment property market, so they could not exclude all competition for properties where a member nominated relevant interest. The harm caused was ranked at the low end of the spectrum. Katz J adopted a starting point between $550,000 and $650,000 and imposed a penalty of $400,000.[22]

**Analysis on relative seriousness of the conduct**

[45] There are two unusual features about the circumstances in which the admitted breaches of the Act occurred in this case. First, the motive for the participating pharmacies was not primarily to force customers to pay a higher price for the products sold. Rather, the pharmacies identified the $1 margin charge as an initiative intended to draw attention to the terms of trade on which they had to deal with the DHB. Secondly, and consistent with their anomalous motive for the understanding, the participants ceased the practice voluntarily once the DHB indicated its preparedness to consider changes to its terms of dealing with the pharmacies.

[46] In one sense, the customers of the pharmacies who did not object to paying the margin charge were as much collateral damage in a strategy that focused on the DHB, as they were victims of the collusive power the pharmacies were exercising in the Nelson regional community pharmacy market. Customers were told when confronted with the margin charge that it was to draw attention to the under-funding and to put pressure on the DHB. Categories of customer perceived as being the most vulnerable were not asked to pay the margin charge.

[47] More conventional indicia of the relative seriousness include the senior level of the individual participants in their organisation, and Mr Hebberd's attempts to pressure another pharmacy to join the understanding. Consistently with the unusual motive, there was relatively small financial gain achieved.

---

22 *Commerce Commission v Ronovation Ltd*, above n 8, at [73].

**An appropriate starting point**

[48] Reflecting on all factors that are relevant to setting a starting point, I cannot accept the Commission's range of $500,000 to $650,000 as being appropriate. I consider the seriousness of these breaches, including a need for stern deterrent signals, is adequately conveyed in a range between $400,000 and $480,000. I would adopt, within that range, a starting point of $430,000, which is somewhat below the bottom of the range proposed on behalf of the defendants.

[49] The personal consequences for Mr Hebberd and his co-shareholder director, Mr Wright, have clearly been seriously traumatic. They sold their interests in Prices Pharmacy in March 2017. For Mr Hebberd, this was part of a planned retirement but both he and Mr Wright have had to make significant personal commitments to ensure that the company would have the resources to pay the substantial penalty contemplated by the Commission. I note that the Commission's investigation appears to have contributed to adverse health consequences for Mr Wright and that he has not returned to work in any community pharmacy business.

[50] Messrs Hebberd and Wright have to provide the resources for the company to meet a significant penalty without the business affording them any on-going opportunity to generate income to recoup it. The Commission is perfectly entitled to proceed separately against each legal entity. However, maintaining a complete distinction is somewhat artificial in the present circumstances. Accordingly, I assess the starting point for Mr Hebberd having some regard to the additional obligation that he is in effect assuming to fund the penalty payable by the company.

[51] There is no suggestion that there had been previous contraventions by the company or by Mr Hebberd, so this was the first contravention standing as a blemish on his professional reputation. The contravening conduct is now almost four years ago. Mr Hebberd has sold the business and there is no prospect of any repetition.

[52] In some cases, a finding of contravention of the Act may not be seen by those operating large corporates as a serious on-going black mark (irrespective of the fact that it should be so seen). However, for professionals operating businesses like Mr Hebberd's, the opprobrium caused by having to admit breaches of the Act do

operate as a deterrent, and would certainly add a measure of reinforcement to the pain of financial penalties. I see the deterrent impact of tarnishing his professional reputation, plus the doubling up impact of the financial cost where Mr Hebberd was also having to fund the company to meet its penalty, as factors going to reduce the appropriate level of penalty separately imposed on him. Rather than the proposed range for a starting point for Mr Hebberd between $62,500 and $70,000, I consider a range between $20,000 and $50,000 to be an appropriate one.

[53] Since the written submissions were filed and I was requested by counsel to deal with the application for Court approval on the papers, the full impact of the COVID-19 pandemic has crystallised in a far more serious way than would reasonably have been anticipated some weeks earlier. I have no detail as to the nature or extent of Mr Hebberd's retirement nest egg. The financial reality is that no forms of savings or investment have been spared a savage drop in value. However optimistic one might be about a later restoration of value, I consider it safe to infer that Mr Hebberd's financial resources are materially reduced from the extent that would have existed when he indicated his preparedness to meet the level of penalties for which approval is now sought. As a result I consider the separate penalty for Mr Hebberd should be at the bottom of the appropriate range, and I would nominate $20,000.

[54] Given that material intervening circumstance, and given also my concern that the Commission's characterisation of the breaches attributes a higher level of seriousness to them than is warranted, I have come clearly to the view that the agreed terms of settlement ought not to be approved by the Court.

**Mitigating factors and discount**

[55] Applying mitigating circumstances to quantify the extent of discount from the starting point in the sequence conventionally adopted in criminal sentencing analyses raises concerns over double-counting. In ranking the seriousness of the breaches, I have had regard to the modest extent of financial gain, the anomalous motive for entry into the understanding, the limited period during which it applied and the voluntary circumstances in which it was brought to an end. That leaves for recognition as mitigating factors the circumstances in which the defendants accepted responsibility

for the breaches of the Act. The courts have often acknowledged admission of liability and acceptance of responsibility for breaches of the Act as mitigating factors.[23] The Commission is somewhat qualified in the credit it is prepared to give on that account, given an expectation that greater information could have been volunteered and an acknowledgement of breach of the Act provided at an earlier point in time.

[56] By analogy with the consideration of the extent of discount for guilty pleas, I consider the defendants' response to the Commission's proceedings justifies a 20 per cent discount. This is consistent with a number of other cases where a 20 per cent discount was allowed to the defendant on the basis that an admission occurred, but it was not at the earliest possible stage and the co-operation with the Commission was not extensive.[24] A greater discount may have been available had these two factors been present.[25]

[57] A 20 per cent discount would reduce the appropriate penalty for Prices Pharmacy to $344,000 and I consider that is sufficient to serve the purposes of the Act and is appropriate to the circumstances of the breach.

[58] I consider Mr Hebberd's position on a somewhat different basis. It is his personal resources that will have been savaged by the financial consequences of the COVID-19 pandemic and he has had to fund at least a substantial portion of the penalty payable by his former company. I note the decisions in *Commerce Commission v Rural Livestock Ltd* and *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, where this Court acknowledged that the financial circumstances of a defendant engaging in anti-competitive behaviour is a factor that can be taken into

---

23 *Commerce Commission v Ellingham*, above n 3, at [14]; *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, above n 3, at [43]–[47]; and *Commerce Commission v GEA Milfos International Ltd* [2019] NZHC 1426 at [31]–[34].

24 *Commerce Commission v Singapore Airlines Cargo Pty Ltd* [2012] NZHC 3583 at [58] and [63]; *Commerce Commission v Air New Zealand Ltd*, above n 18 at [50]–[53]; *Commerce Commission v Thai Airways International Public Company Ltd* [2013] NZHC 844 at [54]–[58]; *Commerce Commission v Cathay Pacific Airways Ltd*, above n 14 at [56]–[62]; and *Commerce Commission v GEA Milfos.* above n 23, at [31]–[34].

25 *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [25]; *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011 at [52]-[53]; and *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, above n 3, at [43]–[47].

account when setting the appropriate penalty. In *Rural Livestock Ltd*, Asher J observed that:[26]

> [57] Mr Dixon for the Commission submits that the Court may take into account Rural's financial means in setting a penalty at a level below that which would otherwise be appropriate for the conduct and the other defendant specific factors. The tension is between applying a level of penalty that promotes deterrence, against the need to ensure the result of the penalty does not inhibit the ongoing commercial viability of the defendant. Both Mr Dixon and Mr McIntosh for Rural accepted that while there could be cases where penalties would be imposed that would inhibit the ongoing commercial viability of a defendant, where the conduct is not so egregious such a result can be undesirable.
>
> …
>
> [59] The Commission accepts that Rural's conduct in this case has not been so egregious as to justify a response that would put it out of business. Rural was to some extent just following along and reacting to new circumstances. It was not a leader. A significant penalty is required as a deterrence to others, and the penalty will be significant to Rural in the circumstances, but a reduction is warranted to ensure that the sentence is not so onerous as to put Rural out of business. I am satisfied, like the Commission, that a penalty of $475,000 is within, and at the maximum, of Rural's financial means. In those unusual circumstances I will impose such a reduced penalty.

[59] In *Koppers Arch Wood*, Venning J similarly observed that:[27]

> [34] The second point of note is that although Koppers accepts that, with difficulty, Koppers NZ and Koppers Arch Investments will be able to meet the approved penalties, the financial circumstances of a defendant engaging in anti-competitive behaviour, including their resources, are a factor to be taken into account in setting penalty levels. Despite that, it is noteworthy that there is authority for the proposition that the quantum of penalties imposed for anti-competitive behaviour may, in egregious circumstances, be such that payment may put that defendant out of business (*ACCC v Leahy Petroleum (No.3)* (2005] ATPR 42,642, 42,653 para 66).

[60] In reflecting Mr Hebberd's personal liability for breaches, I consider that a penalty of $20,000 is sufficient, and that is the extent to which I would approve penalties.

---

26 *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361.
27 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, above n 3.

**Further submissions**

[61] In the circumstances I indicated at the outset of this judgment, I consider it appropriate to afford counsel an opportunity to respond to the reasoning in which I have rejected their agreed settlement. I accordingly direct that the Commission is to have a period of 10 working days in which to file further submissions in support of the proposed settlement. If such submissions are filed and served on behalf of the Commission, counsel for the defendants will have a period of up to 10 working days from service on them in which to file submissions in reply.

**Costs**

[62] The parties are agreed that there is no issue as to costs.

**Dobson J**

Solicitors:
Meredith Connell, Auckland for plaintiff
Darroch Forrest, Wellington for defendants