IN THE COURT OF APPEAL OF NEW ZEALAND

CA821/2011
[2012] NZCA 221

	BETWEEN	KUEHNE + NAGEL INTERNATIONAL AG Appellant
	AND	COMMERCE COMMISSION Respondent

Hearing: 3 April 2012

Court: Arnold, Stevens and Wild JJ

Counsel: I J Thain and C D Stacey for Appellant
J B M Smith and F J Cuncannon for Respondent

Judgment: 31 May 2012 at 11.45 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band B basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Stevens J)

Table of Contents

A protest to jurisdiction

[1] The appellant, Kuehne + Nagel International AG (Kuehne + Nagel), is a company incorporated in Switzerland. It is the ultimate holding company for a group of companies (including a New Zealand company, Kuehne + Nagel Ltd, which we will refer to as Kuehne + Nagel NZ) that provide freight forwarding services worldwide. These services involve the logistical arrangements for the international movement of goods from origin to destination. The appellant provides such services in over 100 countries by way of subsidiaries in the group.

[2] The Commerce Commission (the Commission), who is the respondent, filed a proceeding in 2010 against the appellant and various other companies alleging that Kuehne + Nagel and others had entered into and given effect to agreements involving price fixing in the freight forwarding industry. The Commission claimed breaches of s 27(1) and (2) of the Commerce Act 1986 (the Act). The appellant protested the jurisdiction of the New Zealand High Court to hear the proceeding. Venning J found that the High Court had jurisdiction to hear the causes of action alleging breach of s 27(2) in relation to five of the alleged price fixing agreements.[1] Hence the protest to jurisdiction was dismissed and the Commission was directed to file an amended statement of claim.

---

[1] *Commerce Commission v Deutsche Bahn AG* HC Auckland CIV-2010-404-5479, 12 October 2011.

[3] The appellant appeals against the dismissal of its protest to jurisdiction on these five causes of action. Leave to appeal was granted to determine whether the Commission has established:[2]

(a) a good arguable case that the acts of Kuehne + Nagel NZ, a New Zealand subsidiary, could be attributed to the appellant pursuant to s 90(2) of the Act; and

(b) that there is a serious issue to be tried in respect of each cause of action relating to the five alleged price fixing agreements.

Factual background

Corporate structure of the group

[4] The appellant is incorporated in Switzerland, has its registered office there, and is the parent company of the KN Group, which provides freight forwarding services worldwide. The KN Group is structured as a corporate network, utilising subsidiary companies in the countries in which it operates. In a country where there is no subsidiary, the KN Group operates through a local company on an agency basis. These subsidiary and/or local companies work together to move freight internationally between them and the business activities are coordinated or directed across the KN Group. This co-ordination is done through a variety of means, including group-wide procedures and communications, and reporting structures based on operational requirements. Kuehne + Nagel NZ is incorporated under the Companies Act 1993 and carries on the appellant's freight forwarding business in New Zealand.

[5] Critical to this appeal is the appellant's contention that it is a mere holding company of the shares in subsidiary companies within the KN Group. The appellant says it does not itself operate or manage any part of the KN Group's freight forwarding business. Rather, the corporate entity that is engaged in operational

---

[2] *Commerce Commission v Kuehne + Nagel International AG* HC Auckland CIV-2010-404-5479, 23 November 2011.

aspects is Kuehne + Nagel Management AG, which is also incorporated in Switzerland. In terms of corporate structure, factors counting against liability under s 90(2) (according to the appellant) include the following:

(a) the appellant has no employees, only a board of directors;

(b) the appellant is entitled to receive and does receive tax advantages under Swiss law due to the fact that it is a holding company with no business outside that of owning and investing in other companies;

(c) the appellant does not enter into any arrangements in relation to operational matters to do with freight forwarding, such as pricing; and

(d) the appellant is thus merely a holding company and is not in fact engaged in the business of freight forwarding.

Counsel therefore submitted that if liability were to be imposed, it should not be on the appellant, but rather on a different company – KN Management AG – which sits in operational terms at the top of the management structure for the KN Group, including Kuehne + Nagel NZ.

Alleged price fixing agreements

[6] The Commission's amended statement of claim, which was before Venning J in the High Court, alleged that Kuehne + Nagel and a number of other defendants entered into and gave effect to five different price fixing agreements in the freight forwarding market. These agreements are said to give rise to various causes of action involving breaches of s 27(2) of the Act. The five agreements are as follows:

(a) *War Risk Surcharge (WRS) 2001 Agreement*: an agreement to pass on to customers all war risk and other surcharges imposed on freight forwarders by airlines. Airlines had ostensibly imposed these surcharges to cover increased costs of insurance and compliance with security measures after the 2001 terrorist attacks in the United States.

It is alleged that the WRS 2001 agreement was entered into at a meeting of the Freight Forwarders Europe (FFE) on 1 October 2001.

(b) *United Kingdom New Export Systems (UK NES) Agreement (2002)*: an agreement by freight forwarders to charge customers a fee to cover costs incurred by freight forwarders as a result of complying with increased security measures in the United Kingdom under a new export system (UK NES). This agreement provided for a range of surcharges and is alleged to have been discussed and agreed at what was known as the "Gardening Club" meeting in the United Kingdom on 1 October 2002.

(c) *United States Air AMS Agreement (2003)*: this involved an agreement to impose a fee to cover costs incurred by freight forwarders in compliance with air customs requirements of the Air Automated Manifest System (Air AMS) in the United States. It did not specify the level of the applicable surcharge. It is alleged that the agreement was discussed and entered into at meetings of the FFE Air Freight Committee in London on 19 March 2003 and Brussels on 8 April 2003.

(d) *Italian Security Administration Fee (Italian SAF) Agreement (2003)*: an agreement to impose a security administration fee to cover costs incurred by freight forwarders as a result of complying with air customs requirements of the Italian Civil Aviation Authority. The agreement specified the level of the surcharge. It is alleged that the Italian SAF agreement was discussed and entered into at a meeting of the Italian Association of Air Freight Forwarders in Italy in March 2003.

(e) *Canadian Advanced Customs Information (Canadian ACI) Agreement (2005)*: an agreement to impose a fee to cover costs incurred by compliance with the obligation to file certain information known as Advanced Customs Information (ACI) with Canadian authorities for

air freight into Canada. The agreement did not specify the level of the applicable surcharge. It is alleged that the agreement was discussed and entered into during a telephone call of the FFE Air Freight Committee on 21 November 2005.

[7] Three of the agreements applied to freight sent both to and from New Zealand: the WRS 2001 agreement (which applied to freight sent worldwide); the Air AMS agreement (which applied to freight sent via the United States); and the Canadian ACI agreement (which applied to freight sent via Canada). Two of the agreements only applied to freight sent to New Zealand: the Italian SAF agreement applied to freight sent from Italy, while the UK NES agreement applied to freight sent from the United Kingdom.

[8] Importantly, the fee for freight arranged by one country (often at origin) is typically collected by another, often at destination. This means that, in order for any of the alleged price fixing agreements to have been implemented, the participation and co-ordination of at least two KN Group entities was necessary. In New Zealand, the Commission alleges that Kuehne + Nagel NZ imposed surcharges (at the direction of other members of the KN Group) on outbound freight, and charged surcharges to New Zealand customers when they had been applied by another KN Group entity on inbound freight. It is a core allegation of the Commission's case that such conduct was on behalf of the appellant.

[9] From the amended statement of claim, the Commission has discontinued the proceedings against one of the defendants. Settlement has been reached with all remaining defendants apart from the appellant. Following the dismissal of the protest to jurisdiction in the High Court, the Commission filed a second amended statement of claim alleging five causes of action based on breaches of s 27(2) of the Act. Subject to the outcome of this appeal, it is on this statement of claim that the case will proceed to trial.

Applicable law

[10] Section 27(2) of the Act provides:

(2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

[11] As the proceeding was served on the appellant overseas without leave, r 6.29(1) of the High Court Rules applies in determining whether the High Court can assume jurisdiction. This rule provides:

> **6.29 Court's discretion whether to assume jurisdiction**
>
> (1) If service of process has been effected out of New Zealand without leave, and the court's jurisdiction is protested under rule 5.49, the court must dismiss the proceeding unless the party effecting service establishes—
>
> (a) that there is—
>
> (i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and
>
> (ii) the court should assume jurisdiction by reason of the matters set out in rule 6.28(5)(b) to (d); or
>
> (b) that, had the party applied for leave under rule 6.28,—
>
> (i) leave would have been granted; and
>
> (ii) it is in the interests of justice that the failure to apply for leave should be excused.
>
> …

[12] The first stage of the inquiry under r 6.29(1)(a) therefore requires there to be a good arguable case that the claim falls wholly within at least one of the paragraphs of r 6.27, which relates to circumstances when an originating document may be served out of New Zealand without leave. The Commission relies upon r 6.27(2)(j). This provides for service when a claim arises under an enactment, and an act or omission, or any loss or damage, to which the claim relates was done, occurred or sustained in New Zealand.

[13] In determining whether there is a "good arguable case" that the claim falls within r 6.27, the correct approach was described by this Court in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*:[3]

---

[3] *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [41] (footnotes omitted).

> It is clear … that the good arguable case test does not require the plaintiff to establish a prima facie case. This recognises that disputed questions of fact cannot be readily resolved on affidavit evidence. On the other hand, there must be a sufficiently plausible foundation established that the claim falls within one or more of the headings in r 6.27(2). The Court should not engage in speculation.

[14] This Court also stated in *Stone v Newman*:[4]

> What is a good arguable case is a straightforward test which comes down to a matter of judgment, in all the circumstances, having regard to the principle of restraint concerning a foreign citizen resident overseas.

[15] The second stage of the inquiry under r 6.29(1)(a) requires an analysis of whether the court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d). These include whether there is a serious issue to be tried on the merits.[5] In *Wing Hung*, this Court cited with approval[6] Lord Goff's description of the serious issue to be tried test in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*:[7]

> [Whether] at the end of the day, there remains a substantial question of fact or law or both, arising on the facts disclosed by the affidavits, which the plaintiff bona fide desires to try …

[16] This Court in *Wing Hung* also held that each cause of action is to be considered separately when undertaking the analysis required by r 6.29.[8] This is particularly so at the second stage, as both the factual and legal bases for each cause of action require separate assessment.

High Court judgment

[17] The Judge upheld the appellant's protest to jurisdiction in respect of all causes of action under s 27(1) of the Act. There has been no challenge to this finding. The Judge then considered whether the Commission had a good arguable case in respect of its s 27(2) claims. These claims asserted that the appellant gave effect to provisions of agreements that had the purpose or effect, or likely effect, of

---

4 *Stone v Newman* (2002) 16 PRNZ 77 (CA) at [26].
5 High Court Rules, r 6.28(5)(b).
6 At [42].
7 *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL) at 452.
8 At [71].

controlling or maintaining prices, or of substantially lessening competition, in a market. The question was whether the conduct of Kuehne + Nagel NZ could be attributed to the appellant on the basis that the agreements were given effect to on behalf of the appellant by Keuhne + Nagel NZ. If so, then no issue of extraterritoriality arose. This question was different to whether the appellant carried on business in New Zealand through its agent Kuehne + Nagel NZ.[9]

[18] The question of liability fell to be considered under s 90(2) of the Act, which provides:

> **90 Conduct by servants or agents**
>
> …
>
> (2) Any conduct engaged in on behalf of a body corporate—
>
> (a) By a director, servant, or agent of the body corporate, acting within the scope of his actual or apparent authority; or
>
> (b) By any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

[19] In determining potential liability pursuant to s 90(2)(b), Venning J addressed the appellant's key argument that it was a mere holding company and that it does not operate or manage any freight forwarding business. Thus, according to the appellant, Kuehne + Nagel NZ could not have been acting "on behalf of" the appellant when (as is alleged) it gave effect to any price fixing agreements. The Commission pointed to various factors demonstrating that the appellant was not a mere holding company. These included the fact that, in the United States, the appellant was charged with, and accepted liability for, its involvement in the Air AMS, UK NES and Chinese CAF agreements. Venning J described the proceeding in the United States thus:

> [47] The information lodged in the United States District Court, District of Columbia, records that at the relevant times Kuehne + Nagel was engaged

[9] *Commerce Commission v Deutsche Bahn AG*, above n 1, at [40].

> in the business of providing freight forwarding services in the United States and elsewhere. The authorised press release confirming a guilty plea by Kuehne + Nagel noted that Kuehne + Nagel agreed to pay fines of $9,865,044 and recorded the conspiracies as:
>
> - A conspiracy that took place from July 2004 to October 2007, to impose an Air Automated Manifest System (Air AMS) fee on shipments from Germany to the United States, in which Kuehne + Nagel and others participated;
>
> - A conspiracy that took place from March 2004 to October 2007, to impose an Air AMS fee on shipments from Switzerland to the United States, in which Kuehne + Nagel and others participated;
>
> - A conspiracy that took place from October 2002 to October 2007, to impose a New Export System (NES) fee on international air shipments from the United Kingdom to the United States, in which Kuehne + Nagel and others participated; and
>
> - A conspiracy that took place from July 2005 to June 2006, to impose a Currency Adjustment Factor (CAF) on international air shipments from China to the United States, in which Kuehne + Nagel and others participated.

[20] The Judge accepted that the formal admissions could only be binding for the purpose of the particular case in which they were made.[10] But the significance of the plea agreement lay in the fact that the appellant accepted that it was in business and provided freight forwarding services.[11] This was inconsistent with its submission that it was a holding company only. This factor, alongside (albeit subsequently retracted) advice from the appellant to the Commission that it had an employee, supported the conclusion that the conduct carried out in New Zealand by Kuehne + Nagel NZ could be attributed to the appellant.[12]

[21] The Judge then considered whether the facts and surrounding context supported the conclusion that Kuehne + Nagel NZ implemented the price fixing agreements on behalf of the appellant at the direction of, or with the consent or agreement of, an agent of the appellant such as the Asia Pacific regional office or Kuehne + Nagel Management AC in Switzerland.[13] Venning J found a good

---

10 Applying *Australian Competition & Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* [2002] FCA 559, (2002) ATPR 41-872 at 44,953.

11 At [51].

12 At [51].

13 At [56].

arguable case that the actions of Kuehne + Nagel NZ could be attributed to the appellant. Therefore the requirements of r 6.29(1)(a)(i) were met. The Judge held:

> [64] In principle then, subject to consideration of each of the agreements, I accept that the Commission can establish a good arguable case that the giving effect to the cartel agreements by Kuehne + Nagel NZ, acts done in New Zealand, may be attributed to Kuehne + Nagel on the basis that they were done at the direction or with the consent or agreement of agents of Kuehne + Nagel, namely Kuehne + Nagel (Asia Pacific) Management Ltd or Kuehne + Nagel Management AG, given within the scope of the actual or apparent authority of the agent. Kuehne + Nagel is at the top of the chain. There is nothing heretical about such a chain of agency. It is therefore necessary to consider each of the causes of action as they relate to the particular agreements.

[22] The Judge then carefully considered each of the seven alleged price fixing agreements to determine whether there was a serious issue to be tried on the Commission's claims under s 27(2) of the Act. The Judge concluded that, on the evidence, there was a serious issue to be tried in respect of five out of the seven agreements: the WRS 2001, UK NES, Air AMS, Italian SAF and Canadian ACI agreements.[14] This satisfied the requirements of r 6.29(1)(a)(ii). Hence the High Court had jurisdiction to hear claims pursuant to s 27(2) in relation to these agreements only and the protest to jurisdiction in respect of those claims was dismissed.

First issue – a good arguable case for s 90(2) liability?

Appellant's submissions

[23] Mr Thain accepted that there was no dispute as to the law to be applied when considering the good arguable case question under r 6.29. Neither was there any real debate on the serious issue test to be applied under r 6.28(5)(b). Counsel urged caution in the application of the tests because of the potential "extraterritorial" effect of liability through imposition of liability under s 90(2).[15]

---

[14] At [95].

[15] Citing the observations of Tipping J in *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [41] and [78].

[24] Counsel for the appellant emphasised that s 90(2)(b) requires the Commission to establish that Kuehne + Nagel NZ was acting "on behalf of" the appellant in the normal business sense. Counsel submitted that the appellant does not carry on business in New Zealand through Kuehne + Nagel NZ and the Commission's argument fails to appreciate the appellant's unique position as a mere holding company. Counsel emphasised the various features of the corporate structure outlined at [5] above as pointing against imposition of liability.

[25] Counsel focused upon the Judge's reliance upon the plea agreement the appellant entered into with the United States Department of Justice (DOJ). He explained that, at the time of the High Court hearing, the Judge only had the information filed by the DOJ and a DOJ press release. The full plea agreement has now become available and should be considered. Counsel submitted that little weight, if any, can be given to the content of the plea agreement. This is because there are many reasons why a party may choose to plead guilty, including avoiding costs, negative publicity and commercial pragmatism. Counsel suggested that there may have been an incentive for the appellant as a holding company to plead guilty in the United States to the charges rather than leave the relevant KN Group operating companies exposed to criminal proceedings. Although the plea agreement includes the statement that the appellant provided freight forwarding services through its subsidiaries, such a statement would have been required to support the substantive pleas agreed.

[26] A further reason why the plea agreement should be given little weight is that its meaning may depend on the law of a foreign jurisdiction, including any general rules of attribution in the United States. Counsel argued the Court ought not to speculate on whether, in the relevant circumstances, conduct of subsidiaries can be attributed to the appellant (even as a holding company). At most, the plea bargain would only support the possibility that the appellant is not in fact a mere holding company. It does not provide any evidence that the surcharges were in fact charged on behalf of the appellant. The content of the plea bargain can, at most, establish no more than a possible case and not a good arguable case of liability under s 90(2).

[27] However, counsel accepted that, if we were to consider that the plea agreement could be interpreted as saying that the appellant was more than a mere holding company, that would be decisive of the s 90(2) liability issue at this stage.

Submissions for the Commission

[28] The Commission's submissions focussed upon the factual material that demonstrates that the requirements of s 90(2) have been fulfilled. Mr Smith argued that the conduct of Kuehne + Nagel NZ in giving effect to the price fixing agreements was on behalf of the appellant. He first identified the "conduct" in New Zealand that gave effect to the price fixing agreements, pointing to evidence that Kuehne + Nagel NZ imposed and collected surcharges on freight that offshore KN Group entities had directed be imposed. Moreover, freight was sent to New Zealand with prices affected by surcharges and fees that were subject to the price fixing agreements.

[29] Mr Smith submitted that the phrase "on behalf of" in s 90(2) did not require a relationship of agent and principal but derives its meaning from the relevant context. In the current case, the conduct in New Zealand was on behalf of the appellant because it was to further the interests of the appellant and for the benefit of the KN Group as a whole. The various subsidiaries, including Kuehne + Nagel NZ, co-ordinated and enforced the implementation of the price fixing agreements. Counsel submitted there was conduct "at the direction" of an agent of the appellant. The subsidiary KN Group companies who gave effect to the price fixing agreements were required to do so by other members of the KN Group (the relevant subsidiaries) as a result of the co-ordinated operational requirements implemented across the KN Group.

[30] Counsel submitted that the way that the KN Group was structured and operated meant that subsidiaries (as well as the appellant) in fact acted as agents of the KN Group. The appellant was the ultimate beneficiary of this arrangement. That is so regardless of whether a broad or narrow view (which requires a relationship of common law agency) of s 90(2) is applied. The Commission also submitted that the conduct was within the scope of the actual or apparent authority of the agent,

because the worldwide co-ordination of freight services (including charging for those services) was the very behaviour that the network was set up to carry out.

Liability under s 90(2)

[31] In our view, as we will later explain, this appeal does not depend upon an interpretation of the provisions of s 90(2) of the Act. However, the parties have raised important points concerning the interpretation of the section, which we will address now. The key focus of s 90(2) of the Act falls on the phrase "conduct engaged in on behalf of a body corporate". That is the mechanism by which liability of a person may arise from conduct of another if the proven facts (or inferences from them) support the existence of such conduct.

[32] The starting point for analysis is the decision of this Court in *Giltrap City Ltd v Commerce Commission*.[16] The scope of s 90(2) was relevant to the issue of whether the conduct of a general manager and chief executive officer might be attributed to the appellant, Giltrap City Ltd. The Court held that by virtue of s 90(2) the conduct of the general manager was to be attributed to the appellant, which was thereby found to be a principal contravener. McGrath J stated:

> [77] The purpose of s 90 is accordingly to better secure compliance with the Act's purpose of promoting a competitive market by confining the scope for a company to obtain the benefit of restrictive practices prohibited by the Act, simply because they were undertaken by low-level employees, without the direct knowledge of the board or senior management.
>
> …
>
> [79] The key phrase in s 90(2) is "the scope of [the] actual or apparent authority". It is unlikely that Parliament intended by those words to adopt the common law meaning of "actual or apparent authority". In the context of a statute with the general purposes identified in *Tru Tone* and stated in s 1A there is no reason for departing from the natural and ordinary meaning of the language used.
>
> [80] Approaching the phrase on this basis, conduct is within the scope of the actual or apparent authority of an employee, if it is an aspect of what the employee was employed to do, considered subjectively in terms of actual employment arrangements or objectively in terms of the reasonable perceptions of observers. That meaning provides a robust but principled

[16] *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA).

> approach for treating anticompetitive conduct by its employees and agents as that of a company, which is consonant with the purposes of the Act. …

[33] This view, that s 90(2) was intended to extend potential liability under the Act for the actions of other persons, for which they would not necessarily have been liable at common law, is consistent with earlier Australian authority relied upon by counsel for the Commission. For example in *Walplan Pty Ltd v Wallace*,[17] a full bench of the Federal Court described s 84(2) of the Trade Practices Act 1974 (Cth), being the Australian equivalent of s 90, as extending the liability of corporations for the actions of others and rendering corporations liable for the conduct of others that they would not necessarily have been responsible for at common law.[18] In *Walplan* it was held that s 84(2) was not limited to situations where the relevant actor had the corporation's express or implied authority; rather, the phrase "on behalf of" was broader in character and conveyed a meaning similar to the phrase "in the course of the body corporate's affairs or activities".[19]

[34] The leading judgment in *Walplan* was given by a highly respected trade practices judge, Lockhart J (with whom Sweeney and Neaves JJ agreed). The appellant had been convicted of four offences of bait advertising contrary to s 56 of the Trade Practices Act.[20] A critical issue was whether the conduct of the salesmen who were employees of Walplan Pty Ltd could be attributed to the company under s 84(2) of the Trade Practices Act.[21] The Federal Court held that it could. The discussion on the scope of s 84(2) is instructive:[22]

> Section 84(2) is obviously a provision of wide application. It is, in my opinion, an extension of the principles enunciated in *Tesco*. Where proceedings are brought against a corporation for contravention of a provision of the Act the corporation's liability may be determined either by applying the principles of *Tesco* or by s 84(2). …
>
> I cannot accept the submission of counsel for the appellant that s 84(2) only applies where a person had the corporation's actual (be it express or implied) authority to engage in the conduct in question. If the subsection had so

---

17 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27.

18 At 37.

19 At 36–37.

20 In New Zealand bait advertising is proscribed as an unfair practice in s 19 of the Fair Trading Act 1986.

21 Under the Fair Trading Act in New Zealand there is an identical provision to s 90(2) of the Act in s 45(2).

22 At 36–37.

> limited an operation it would, I think, fail to achieve any useful purpose. It would be largely a restatement of the general law. It is a statutory provision designed to facilitate proof of the responsibility of a corporation for the acts of its directors, servants, agents and others. It is designed to attribute to a corporation conduct of others for which the corporation would not necessarily be otherwise responsible.
>
> The phrase "on behalf of" is not one with a strict legal meaning and it is used in a wide range of relationships. The words are not used in any definitive sense capable of general application to all circumstances which may arise and to which the subsection has application. This must depend upon the circumstances of the particular case, but some statements as to the meaning and operation of the subsection may be made. In the context of s 84(2) the phrase suggests some involvement by the person concerned with the activities of the company. The words convey a meaning similar to the phrase "in the course of the body corporate's affairs or activities". The words "on behalf of" also encompass acts done by a corporation's servants in the course of their employment, but those words are not confined to the notion of the master/servant relationship. Section 84(2) refers to conduct by directors and agents of a body corporate as well as its servants. Also, the second limb of the subsection extends the corporation's responsibility to the conduct of other persons who act at the behest of a director, agent or servant of the corporation. Hence the phrase "on behalf of" casts a much wider net than conduct by servants in the course of their employment, although it includes it.
>
> The second limb of the subsection reinforces my view that the words "on behalf of" govern both limbs of the subsection. It may be possible to read the second limb as if it was not qualified by the words "on behalf of" and relate back only to the opening words of the subsection "any conduct engaged in"; but the more ordinary and natural meaning of the subsection when read as a whole is that the conduct by the various persons to whom it refers must be engaged in "on behalf of" the corporation to attract the benefit of the deemed responsibility of the corporation. …

[35] Part of the above passage was cited with approval by Lindgren J in *NMFM Property Pty Ltd v Citibank Ltd*.[23] The Judge in that case went on to hold:

> [1244] It seems to me that an act is done "on behalf of" a corporation for the purpose of s 84(2) if either one of two conditions is satisfied: that the actor engaged in the conduct intending to do so "as representative of" or "for" the corporation, or that the actor engaged in the conduct in the course of the corporation's business, affairs or activities. This view accords with what Kiefel J said in *Lisciandro v Official Trustee in Bankruptcy* [1995] ATPR ¶41–436 at 40,903–40,904.

[36] In *Giltrap City Ltd v Commerce Commission* the joint judgment of Gault P and Tipping J referred with apparent approval to the passage in [1244] of the *NMFM*

---

[23] *NMFM Property Pty Ltd v Citibank Ltd* [2000] FCA 1558, (2000) 107 FCR 270 at [1242].

Property Pty Ltd case.[24] The same judgment also discussed whether liability under s 90(2) was to be characterised as arising vicariously rather than by attribution, concluding that the mode of statutory expression suggested the former as opposed to the latter.[25] We do not need to resolve that question here.

[37] In the light of the above authorities, we set out our views on s 90(2), noting first that s 90 is contained within Part 6 of the Act, which deals (inter alia) with enforcement and remedies.[26] It has a section heading referring generally to "conduct by servants and agents". Section 90(2) is a deeming provision which enables conduct engaged in on behalf of a body corporate to be treated as engaged in also by the body corporate. The use of the word "also" in the last line of s 90(2) demonstrates that the liability of one party may potentially become the liability of another. Like McGrath J in *Giltrap*, we see s 90(2) as an enlarging provision which eliminates the necessity to rely upon the various often divergent tests of the common law to establish the liability of a body corporate for the conduct of its servants or agents.

[38] We also mention the relevance of any benefit flowing from the party whose conduct is being considered back to the body corporate on whose behalf the conduct is said to have been engaged in. For some purposes of company law it may be sufficient to show that the conduct of the person was "on behalf of" the company if it is for the company's benefit. We do not consider it is necessary to demonstrate the existence of a benefit in order to attract liability under s 90(2). There is no need to add a gloss on the plain words used in s 90(2). That the party to whom liability is sought to be imposed has benefited in some way will plainly be a relevant factor. However it will be but one of a range of relevant factors that need to be considered.

[39] Whether conduct was engaged in on behalf of a body corporate will depend upon all the circumstances of the case and involves an intensely factual evaluation. For example, the conduct of a party who is, as a matter of fact, involved in the conduct of the business, affairs or activities of the body corporate may well be sheeted back to the company under s 90(2).

---

[24] At [45].
[25] At [52]–[54].
[26] In the Fair Trading Act s 45 is contained in Part 5 dealing also with enforcement and remedies.

[40] Such an approach does not necessarily involve an analysis in terms of agency concepts. Section 90(2) of the Act is a deeming provision which will be relevant to questions of enforcement and remedies under the Act. Its purpose is to enable liability to be sheeted home, in the circumstances described in the subsection, for conduct of the employees or agents of the body corporate that are in breach of the Act. This interpretation arises from the ordinary principles of construction, including the wording of the subsection and its statutory context.

[41] Counsel for the appellant submitted that the correct approach to be taken to s 90(2) was as set out in the judgment of Tipping J in the Supreme Court in *Poynter v Commerce Commission* as follows:[27]

> Section 90, and the New Zealand Act generally, must be interpreted and applied in accordance with ordinary legal principles. There is no basis for concluding that the position was intended to be otherwise so as to allow the courts, for extraterritoriality purposes, if not generally, to treat concepts such as agency in some broad, unspecific and non legal way in order to accommodate the Commission's view of what the outcome should be.

[42] These observations must be read in context. In *Poynter* it was accepted by the Supreme Court that s 90 did not apply on the facts. What the Commission was seeking to do was to attribute to an off-shore party, Mr Poynter, the conduct of persons in New Zealand. But such persons who had allegedly acted on the direction of Mr Poynter had not done so on his behalf but rather on behalf of the company of which they and Mr Poynter were employees.[28] As Tipping J noted, the only subsection of s 90 which could possibly apply was subs (4). That subsection did not apply on the facts of the case, meaning that s 90 was inapplicable. Tipping J observed:[29]

> We do not consider that the Act can properly be construed as providing that, in addition to the agency circumstances dealt with in s 90, there are other unspecified "agency" situations, not dealt with in that section, whereunder the conduct of persons in New Zealand can be attributed to persons outside New Zealand. No such extension of the connotations of "agency" is evident from the language of the Act, either expressly or by necessary implication.

---

27 *Poynter v Commerce Commission*, above n 15, at [70].
28 At [9], [50]–[52] and [70].
29 At [53].

[43] Moreover, we doubt that Tipping J intended to apply a different approach to the one that he and Gault P had endorsed in the *Giltrap City* case. Another feature of *Poynter* is none of the Australian authorities dealing specifically with the scope s 90(2) of the Act seem to have been cited to, or considered by, the Court. That is hardly surprising because the wording of s 90(2) was not directly in issue. In any event, we are not persuaded that the dictum of Tipping J in *Poynter* assists the appellants on the facts of this case. While Tipping J does not expressly confirm that s 90 was intended to enlarge upon the circumstances (other than agency situations) in which a corporation will be liable for the actions of others, he did not on the facts of that case need to do so.

Potential liability under s 90(2) – our evaluation

[44] We agree with Mr Smith's submission that resolution of this first issue turns largely on the facts. In our view the outcome does not depend on the interpretation of the provisions of s 90(2) which we have set out earlier. If common law agency principles are applied, the employees of the various subsidiaries of the appellant who implemented the price fixing agreements plainly had express or applied authority to do so on behalf of the KN Group. This is apparent not only from the DOJ plea agreement but also from other information before the Court. The KN Group operated in the various countries in which it transacted business either through its subsidiaries or through local agents. If it is simply a question of whether Kuehne + Nagel NZ acted on behalf of the appellant because its conduct was in the course of the appellant's affairs or activities then arguably that test was also satisfied. On the evidence presently available it could be said that the conduct of Kuehne + Nagel NZ was in interests of the appellant and for the benefit of the KN Group as a whole. It was carried out as part of the worldwide operation of the network of companies functioning within the KN Group with the New Zealand subsidiary acting at the direction of the appellant.

[45] We are satisfied that Venning J was right to conclude that the Commission can establish a good arguable case on the facts that the giving effect to the price fixing agreements by Kuehne + Nagel NZ, being conduct in New Zealand, may be

attributed to the appellant.[30] The Judge was correct to reject the appellant's argument that it was a complete answer to say that Kuehne + Nagel NZ and other members of the KN Group were independent companies. We agree with the Judge when he said:[31]

> … to come within the wording of s 90(2) Kuehne + Nagel does not itself need to actively conduct a freight forwarding business (in New Zealand or elsewhere). What is required is Kuehne + Nagel NZ giving effect to the proscribed agreements on behalf of Kuehne + Nagel at the direction or with the consent or agreement of an agent of Kuehne + Nagel, for example Kuehne + Nagel Management AG or Kuehne + Nagel (Asia Pacific) Management Ltd, given within the scope of the actual or apparent authority of the agent.

[46] We are of course cognisant of the principle that a subsidiary does not carry on business as an agent for its parent merely as a result of the legal and commercial capacity of the parent to control the subsidiary and the fact that the parent is involved in a price fixing arrangement.[32] Here, as in *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd*,[33] the evidence goes further and provides the necessary factual foundation for potential liability through s 90(2).

[47] We do not need to repeat the detailed evidential material produced by the Commission to support this conclusion. It is clearly set out in the High Court judgment.[34] The Judge's factual summary set out below amply supports his conclusion:

> [62] The picture painted is that of agreements entered into by the group internationally being implemented in New Zealand through direction, primarily from the Asia Pacific regional office. However direction also came from other overseas offices. Where the regional authority was exceeded then direction was obtained from the head office in Switzerland. Dr Pill says that the reference to head office is a reference to the management company rather than Kuehne + Nagel. That must be a matter for trial. However, even if it is a reference to Kuehne + Nagel Management AG, that does not necessarily mean that Kuehne + Nagel did not itself

---

30 *Commerce Commission v Deutsche Bahn AG*, above n 1, at [64].

31 At [56].

32 As discussed in *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 (HC) at [74] and *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243, (2002) 118 FCR 1 at [80].

33 At [75]–[89]. In *Bray*, a different analysis was adopted. There the Court held that the directions sent by facsimile and such like by overseas parent and regional companies intended to ensure that an Australian subsidiary adhered to a price-fixing arrangement formed overseas could be regarded as having occurred in Australia even though they originated from outside Australia: see [142]–[147].

34 At [58]–[63].

> approve the implementation of the cartel agreements throughout its network, including in New Zealand by Kuehne + Nagel NZ.

[48] We would only add that in our view the evidence presently available clearly establishes a good arguable case that Kuehne + Nagel NZ engaged in conduct in New Zealand on behalf of the appellant in the sense that it was the representative of the appellant (that is the means by which the appellant secured representation in the relevant freight forwarding market in New Zealand and elsewhere) and conducted the appellant's business, affairs and activities in this country at the direction of the appellant and for its benefit.

[49] Mr Thain placed significant emphasis on what he said were the limitations of the United States DOJ plea agreement. Unlike Venning J we have had the benefit of being able to consider the precise terms of that document. It is highly instructive in an evidentiary sense. First the context. The plea agreement was entered into on 24 September 2010. It was preceded by a formal resolution of the board of directors of the appellant signed by the chairman and dated 9 September 2010. The resolution acknowledged that the appellant had been the subject of an investigation by the DOJ in which it alleged that the company had violated United States law by engaging in pricing practices in violation of the United States Sherman Act. The Board deemed it advisable, and in the best interests of the company, to settle the claims. Accordingly the execution, delivery and performance of the plea agreement were approved. The executive vice chairman of the company was authorised to execute the plea agreement for and on behalf of the appellant.

[50] The plea agreement itself involved a waiver of rights by the appellant and an agreement to plead guilty to a five count information in the United States District Court. The relevant market affected by the appellant's conduct was the international air freight forwarding services market. By way of example, count one charged the appellant with:

> … participating in a conspiracy among freight forwarders to suppress and eliminate competition by agreeing to impose an Air Automated Manifest System charge ("AAMS fee") on customers that purchased pre-paid international air freight forwarding services from [the appellant] related to the shipment of cargo by air into the United States from Germany, beginning in or about July 2004 and continuing until or about October 2007.

[51] The other four counts involved participation in a conspiracy to impose the AAMS fee in relation to shipments of cargo by air into the United States from Switzerland (count two); a conspiracy to suppress and eliminate competition by agreeing to impose a new export system fee (NES fee) in relation to shipments of air cargo from the United Kingdom to the United States (count three); a conspiracy in respect of the shipment of air cargo from China to the United States (count four); and a conspiracy in relation to shipments of cargo from Hong Kong to the United States (count five). Importantly the plea agreement provided that the appellant "will make a factual admission of guilt to the Court" in accordance with the relevant US statute on the basis set out in the plea agreement.

[52] There are other important features of the plea agreement. It provided that the information to be placed before the Court in the plea agreement would "provide sufficient information concerning [the appellant], the crime charged in this case, and [the appellant's] role in the crimes to enable the meaningful exercise of sentencing authority by the Court". The plea agreement also contained a commitment by the appellant to cooperate on the basis that the DOJ would inform the Court of the fact, manner and extent of such cooperation and the appellant's "commitment to prospective cooperation with the United States' investigation and prosecutions, all material facts relating to [the appellant's] involvement in the charged offences and all other relevant conduct".

[53] The appellant accepted on behalf of itself and its subsidiaries that they would cooperate fully and truthfully with respect to the factual basis for the offences charged. It is convenient, by way of example, to refer to some of the evidence relied upon by the DOJ in respect of count one. The plea agreement provided as follows:

> (i) The "relevant period" is that period from in or about July 2004 until in or about October 2007. During the relevant period, the defendant was a corporation organized and existing under the laws of Switzerland, with its headquarters in Schindellegi, Switzerland. During the relevant period, the defendant, through its subsidiaries, provided international air freight forwarding services in the United States and elsewhere and employed 5000 or more individuals.
>
> (ii) During the relevant period, the defendant, through its subsidiary, Kühne + Nagel (AG & Co.) KG, and its employees, including high-level personnel, participated in a conspiracy among major freight forwarders, the primary purpose of which was to initiate and impose

> a charge for AAMS service on customers that purchased prepaid international air freight forwarding services from the defendant related to the shipment of cargo by air to the United States from Germany. In furtherance of the conspiracy, the defendant, through its subsidiary and its employees, engaged in discussions and attended meetings with representatives of other freight forwarders. During those discussions and meetings, the freight forwarders, including the defendant, agreed to impose an AAMS fee on prepaid shipments of cargo by air to the United States from Germany and agreed on the approximate level of that charge.

[54] The appellant also gave undertakings on behalf of itself and its subsidiaries that they:

> … will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving … the sale of international air forwarding services …

[55] The plea agreement confirmed that the appellant was entering into the agreement voluntarily and on the basis of the representations contained in the plea agreement. There was also a provision providing for what would occur in the event of violation by the appellant of the plea agreement. That provision would apply if the appellant or any of its subsidiaries "failed to provide full and truthful cooperation, as described in Paragraph 13 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement".

[56] Mr Thain submitted that, despite the wording of the plea agreement, the reality was that the appellant was merely a holding company and was not itself engaged in the international air freight forwarding services markets. He submitted that the entering into a plea agreement was based solely upon the United States attribution rules and the statements in the plea agreement should not be taken at face value. But Mr Thain did not provide any material to suggest that any rules for imposing liability on others under the law of the United States were materially different from those in New Zealand. Moreover, the submission cuts directly across the plain wording and tenor of various parts of the plea agreement. We consider it is significant that the undertaking as to ongoing, full and truthful cooperation by the appellant included an obligation of the current directors, officers and employees of the appellant (with five specified exceptions) to make themselves available for interviews and the provision of grand jury testimony.

[57] We find it surprising, to say the least, that the appellant should be seeking to undermine the clear factual admissions and disavow the solemn undertakings set forth in the plea agreement. Moreover, this is done without the benefit of any affidavit evidence from a director of the appellant explaining why the various provisions of the plea agreement are not correct. Even if there were any basis for so contending, we are satisfied that that would be a matter for trial. It does not change the fact that there is a good arguable case for liability under s 90(2) at this stage.

[58] Given the views we have formed about the plea agreement, it follows (from counsel's acknowledgement referred to at [27] above) that the appellant cannot succeed on the first issue. Furthermore the appellant has failed by a wide margin in demonstrating that the Judge below was wrong either in his conclusion or on the factual matters relied upon to support that conclusion.

[59] Two further factual matters, out of a number presented by Mr Smith, support this conclusion in particular. The first is that the appellant was the complainant in a World Intellectual Property Organization proceeding before an administrative panel in which it was represented by one Harry Waldhelm in the protection of a disputed domain name <kuehne-nagel.com>. The appellant stated in the proceeding that it was "the proprietor of the German word/device trademark DE 399 44 911 KN KÜHNE & NAGEL registered in classes 35, 36, 39 on September 2, 1999". The appellant also stated: "In the Internet the Complainant for many years now trades under the Internet domain name <kuehne-nagel.com>". This evidence supports the proposition that the appellant is more than a mere holding company.

[60] The second factual matter relates to a formal letter from the appellant's New Zealand solicitors to the Commerce Commission in which it gave the name of Klaus Herms as the chief executive officer of the appellant. It is true that the general counsel of the KN Group, Dr Pill, has said in an affidavit that Klaus Herms is not employed by the appellant but rather by Kuehne + Nagel Management AG. Dr Pill said he was correcting "an error in information previously provided to the Commission". The difficulty with accepting such a statement, and why it is a matter for trial, is that the letter from the solicitors providing the information indicated that the provision of the information in the schedule was:

> … delayed because of the need for Kuehne + Nagel International AG to ensure that it complied with Swiss law. Specifically … before providing the information to your client, Kuehne + Nagel International AG was obliged to apply for and obtain prior authorisation of the Swiss Federal Department of Economic Affairs.

Thus the evidence detailing the existence of an employee cannot be lightly dismissed in determining whether the appellant was a mere passive holding entity or not.

[61] For all of the above reasons the appellant cannot succeed on the first question. We are satisfied that there exists a good arguable case that the acts of Kuehne + Nagel NZ could be attributed to the appellant pursuant to s 90(2) of the Act.

Second issue – serious issue to be tried

[62] The second issue requires us to examine the Judge's factual findings in respect of each of the five causes of action in respect of which the protest to jurisdiction was dismissed. We should say immediately that Venning J gave conscientious and meticulous consideration to all facets of the Commission's amended statement of claim. With respect to the causes of action against the appellant based on s 27(1) of the Act (entering into the alleged price fixing agreements) the Judge concluded that there was no basis for a claim under s 27(1) in relation to agreements entered into overseas. The Judge's reasoning is succinctly encapsulated in the following:

> [28] Despite the matters Mr Smith has referred to, the evidence overall does not support the Commission's argument that Kuehne + Nagel was carrying on business in New Zealand through its agent, Kuehne + Nagel NZ. Nor is there any basis to lift the corporate veil. It cannot be said that to recognise the separate corporate entities would, in this case, create a substantial injustice which the Court simply could not countenance: *Chen v Butterfield.*[35] Taken overall the evidence falls well short of establishing a good arguable case that Kuehne + Nagel carried on business in New Zealand through its agent Kuehne + Nagel NZ.

---

[35] *Chen v Butterfield* (1996) 7 NZCLC 261,086 (HC) at 261,092.

[63] In terms of the s 27(2) causes of action the Judge ruled that there was an insufficient factual basis to suggest there is a serious issue to be tried on the merits relating to the Chinese CAF agreement or the Swiss SFA agreement.[36]

[64] Mr Thain suggested that the five causes of action under s 27(2) of the Act, in relation to which the Judge dismissed the protest to jurisdiction, received a less than critical evaluation. Counsel submitted that the Judge took the wrong approach by lowering the evidential bar below the serious issue test and merely assumed that the Commission's factual analysis was correct. We disagree. What is clear is that the second issue on appeal turns largely on an analysis of the facts. In this context two points are noted.

[65] First, we agree with Mr Smith's submission that this case is unusual for international price fixing in that the Commission's investigation has produced a significant number of documents. Many of these relate to the discussions surrounding the entering into of the various price fixing agreements, all of which occurred in overseas locations. While it is very rare for a competition authority to be able to produce a "smoking gun" document surrounding the formation of the collusive agreement, here the position is different. The Commission produced in evidence a number of minutes of the relevant freight forwarder associations showing when the alleged price fixing agreements were discussed and entered into. Mr Smith helpfully took us through much of the relevant factual information in responding to the arguments raised by the appellants.

[66] The second point concerns the nature of price fixing behaviour. Conduct involving various types of price fixing and other collusive behaviour will rarely, if ever, be spelled out in formal written documentation. Quite the reverse. Commercial parties involved in breaching the competition laws of various jurisdictions will normally do all they can to avoid detection.[37] This inevitably makes investigation difficult and obtaining evidence problematic. It is for this reason that competition authorities in many jurisdictions have developed leniency

---

[36] *Commerce Commission v Deutsche Bahn AG*, above n 1, at [75] and [94] respectively.

[37] Non-authorised, sinister cartel arrangements "tend to be concluded in secret and are rarely recorded": Matt Sumpter *New Zealand Competition Law and Policy* (CHH, Auckland, 2010) at [607].

policies to encourage parties to disclose and provide advantages to first-mover disclosing law breakers.[38] In the absence of documentation, evidence from participants (often derived from employees of leniency applicants) may be the only available means of proving price fixing allegations. It is for this reason that where only limited documentation or facts are available, inferences may need to be drawn.[39] That said, we should not be seen to be detracting from the need to satisfy the tests of good arguable case and serious issue to be tried in the High Court Rules.

[67] It is also important to note that at the preliminary stage of protest to jurisdiction the Court is not engaged in a mini trial. That is not the purpose of this procedural step. First, as was said by this Court in *Harris v Commerce Commission*, how much material is required to persuade the Court will depend in part upon the stage the case has reached.[40] Second, the relevant tests are to be measured against the need for a plausible and not speculative case. Hence the Court will not normally determine credibility issues, even where there is a contest on affidavits.[41]

[68] We turn now to consider the five causes of action.

WRS 2001 agreement

[69] The Commission's case is that the WRS 2001 agreement was entered into at an FFE Air Freight Committee telephone conference held on 1 October 2001. The KN Group was represented by Mr Werner Blaser, an employee of Kuehne + Nagel Management AG. Membership of the FFE by participants is on a group basis. The Commission submitted that it was inherent in the agreement that it was being entered into by the KN Group as a whole.

[70] With respect to giving effect to the WRS 2001 agreement in New Zealand, the Commission alleges that the war risk surcharge was applied to customers in New Zealand by Kuehne + Nagel NZ. This was confirmed by a New Zealand employee

---

38 It was through such leniency arrangements that the alleged price fixing agreements at hand were brought to the Commission's attention.

39 See, for example, *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446, where Fisher J drew inferences of price fixing from circumstantial evidence only.

40 *Harris v Commerce Commission* [2009] NZCA 84, (2009) 9 NZBLC 102,601 at [62].

41 *Harris* at 61.

during an interview with the Commission. A customer notice dated 16 October 2001 also refers to the surcharge. Moreover, there is evidence of a customer invoice dated 20 December 2001 for freight from New Zealand to Germany using the agency of a KN Group company. The invoice includes a "war risk surcharge" of NZD 46.60.

[71] All of these factors were noted by Venning J. Mr Thain's attack centred around the fact that the Judge drew an inference that there would be "a longer term agreement to charge the WRS 2001 fee".[42] Mr Thain referred to the FFE Air Freight Committee minutes dated 1 October 2001 and submitted that the inference was not available. The submission turned on passages of the minutes set out below:

> The airfreight committee proposes to the CEOs:
>
> …
>
> 2. A uniform approach should be seek to have all airlines adopt the same policy as otherwise the security fee becomes a decision factor regarding the competitiveness of airlines and forces both the shipper and the forwarder not to choose carriers according to best practice but to lowest overall cost for a transport …
>
> As short term (immediate to 7 days) measure the group proposes to the CEOs to
>
> 1. Accept payment as advised by the carriers effective October 05/08 respectively to avoid our (the shippers) cargo being refused
>
> 2. Pass on to the shippers the security fees as levied by the airlines i.e. if charged on per MAWB Fee (BA USD 25/MAWE) or per kilogram actual (LH EUR -.15/K actual) without adding any profit as otherwise we could in legal terms being confronted with claims that we have acted as insurer since we were taking "commission" for it (actual case with K&N) - …
>
> As mid term (7-14 days) measure the group proposes to the CEOs to:
>
> 1. force the carriers back to the negotiation table as individual companies
>
> 2. come up with a proposal that envisages a Security Fee per AWB which does also cover our additional cost incurred (once exactly established and the insurance premium known).
>
> - Decision required:
>
> - Do the CEOs support the correct establishment of the security fee and can a task force be put together

[42] At [67].

> involving the process / security / risk management responsible of the members

[72] Mr Thain submitted that there was no evidence of agreement for a long term measure beyond the mid term of 7/14 days referred to in the minutes. We disagree. We consider that the inference drawn by the Judge was available. In particular we note that the minute provides for an action point, within 7/14 days, to come up with a proposal. When one considers that there is evidence that the WRS surcharge was applied in New Zealand and elsewhere, as evidenced by the customer notice of 16 October 2001, the requirement for a serious issue to be tried is satisfied. The appellant cannot succeed in relation to the WRS 2001 agreement. We are satisfied that the Judge's factual findings were correct.

UK NES agreement

[73] The Judge's findings on the UK NES agreement were as follows:

> [87] The United Kingdom NES agreement is found in a series of coded messages ostensibly between members of a gardening club. Representatives of the Kuehne + Nagel group were included in the communications. Significantly, there is evidence of implementation of the NES surcharge in New Zealand.
>
> [88] In its s 98 response of 9 May 2008 Kuehne + Nagel NZ advised that Kuehne + Nagel applied an export customs clearance fee for exports from the United Kingdom to New Zealand and that invoices indicated this fee was being charged as early as December 2002. Further, in the same response it was advised that the fee would have been included in "handling charges" except where a customer had requested charges to be separated out.

[74] We note that in the High Court Mr Thain did not address specific submissions in relation to the implementation of the UK NES agreement. But before us he stated that the conduct in New Zealand did not match what had been agreed by the participants at the "Gardening Club" meeting dated 1 October 2002 when the price fixing agreement is said to have been entered into. Mr Thain submitted that the Court at this stage must ensure that the party said to have given effect to the price fixing agreement did so by substantially performing the agreement. He said that there was no evidence of what any other freight forwarder was charging in New Zealand. Further, there was email traffic to demonstrate that whatever agreement existed had broken down.

[75] We do not accept these submissions. We consider that it is important to set the allegations in their proper context. The relevant fixing agreement is said to have been entered into through the participation of the KN Group represented by one Chris Edwards of Kuehne + Nagel Ltd (UK) at the Gardening Club meeting of 1 October 2002. Subsequently Mr Edwards was the recipient of the following email:

> Fellow Gardeners,
>
> I am hearing dastardly rumours as to the price of marrows being sold by the one gardener who did not appear at the last horticultural review … Gardener Cat-Weasel from the greenhouses of Geo … It appears they are giving away their marrows to everyone and anyone … Not as agreed … I had assumed the said greenhouse was to be made aware of the market prices … Was this done ? Does Gardener Cat-Weasel not have or influence in his greenhouse, or do we need to get another gardener in line above him …
>
> It is now autumn and we do not want all the leaves blowing out of control !
>
> Any comments ?

[76] That email correspondence prompted the following reply from a third party:

> I had spoken to the Cat Weasel of said nursery and he had agreed the process however maybe he is not the correct nurseryman? I will give him a call. I hear similar concerns about the price of produce from the garden of Velcro, which appears to be operating as a charitable co-operative for the benevolence of vegetable eaters rather than growers …
>
> I understand that the Gardens of BAX have had a late summer and are growing nicely now and I have also spoken to the Expediters Growers association who seemingly are charging premium prices now for their quality merchandise.
>
> Will share more soonest. …

[77] We consider, like Venning J, that there is sufficient evidence of implementation of the agreement in New Zealand to show that there is a serious issue to be tried on the merits. Invoices and email traffic demonstrates that the KN Group (including Kuehne + Nagel NZ) were charging the UK NES fee across group companies. Further there is evidence of emails from participants showing the policing of the agreement. Any evidence that the agreement may later have broken down, or that one or more of the participants might be "cheating on the agreement", is a matter for trial.

[78] The appellant has not succeeded in demonstrating that the Judge was wrong. There is a serious issue to be tried regarding breach of s 27(2) in relation to the UK NES agreement.

US Air AMS agreement

[79] The Judge's findings in respect of this price fixing agreement are as follows:

> [89] The Air AMS fee was apparently agreed at a meeting on 19 March 2003. The minutes of the meeting were approved at a subsequent meeting of the FFE air freight committee on 21 October 2003 where the Kuehne + Nagel group was represented by a Mr Roland Bischoff.
>
> [90] Subsequently Kuehne + Nagel Management AG and Kuehne + Nagel Inc (United States) described the Air AMS fee in a worldwide circular dated 21 July 2004 which provided guidelines for the application of the fee. The circular stated:
>
> > Kuehne + Nagel will address these regulations on a worldwide basis as follows: ...
> >
> > - Fees associated with the new requirements:
> >
> > o Corporate guideline is EUR 25.00 per HAWB and EUR 15.00 per IATA DIRECT AWB; respectively the approx. equivalent in local currency. …
>
> [91] There is also evidence that the Air AMS fee was implemented in New Zealand. Kuehne + Nagel NZ advised in its s 98 response of 30 November 2007 that it charged customers an Air AMS fee of NZ$25 (as a conversion from a foreign currency amount) per shipment commencing in 2004 and that the fee had been set in response to an email received from Kuehne + Nagel Hong Kong. In Kuehne + Nagel NZ's October 2004 customer newsletter it informed customers that as of 13 October 2004, Kuehne + Nagel NZ would implement an Air AMS fee of NZ$25 per shipment. Finally there is a sample invoice of 20 December 2007 for air freight from Auckland to Los Angeles including an Air AMS fee described as an e-manifest fee of NZ$25.

[80] In his oral submissions, Mr Thain did not address any argument on this agreement as a result of pressure of time. However, in his written submissions he noted that the Commission had failed to produce any evidence that any competitors charged the same surcharge as Kuehne + Nagel NZ.

[81] We are satisfied that this submission lacks substance. There is evidence that Mr Blaser of Kuehne + Nagel Management AG attended a policing meeting of the

FFE Air Freight Committee meeting on 19 August 2004. The minutes record the fact that, in relation to charging to customers the US Air AMS fee, "the Group is holding firm on charging to the customers". In terms of the question of non-compliance the minutes recorded:

> Cases of non compliance
>
> - It was reported that from customer side information was given that Expeditors and Danzas are not charging their customers at all
>
> - The group has agreed to inform the members of the [Air Freight Committee] in case they hear from the market that their company should apparently not charge to give them an opportunity to react
>
> - The whole fee structure will need to be addressed again during the Montreal Meeting when more information from the carrier as well as the customer side is known

[82] What the appellant's submission overlooks is that the alleged terms of the Air AMS agreement included that customers would be charged for the additional costs incurred by freight forwarders in complying with the air automated manifest system. Moreover, the parties would not use the Air AMS fee as an element of price competition between them. It does not necessarily follow that this type of agreement required the participants to charge precisely the same fee as their competitors. To the extent that there are variations, these are plainly matters for trial. We are satisfied that there is a serious issue to be tried in respect of the Air AMS agreement.

Italian SAF agreement

[83] The Judge's findings on this agreement are as follows:

> [76] Mr Thain submitted that there was no real evidence that Kuehne + Nagel charged a surcharge based on the Italian SAF agreement which was said to have been made in March 2003.
>
> [77] There is, however, evidence of an agreement made in March 2003 that Kuehne + Nagel was a party to by virtue of its membership of and communications with the Italian Association for Air Freight Forwarders (ANAMA).
>
> [78] On 17 March 2003 ANAMA sent a circular to all members regarding a costs increase for air freight agents recording:

> A.N.A.M.A., as requested by its members, has carried out a preliminary technical evaluation of the increase of costs which will be, inevitably, caused by the new procedures and the task force, which was specifically set up to deal with this matter, has arrived at the conclusion that 25 Euro is the minimum amount of the cost increase, for each individual shipment.
>
> We are highlighting this preliminary valuation to all members, so that they could take it into account, within their accounting management, and achieve an optimisation of costs involved for the implementation of the new safety procedures.

[79] There is also evidence that the charge was imposed in New Zealand. By an email of 29 July 2004 Kuehne + Nagel SpA (Italy) advised Mr Fredricson (Kuehne + Nagel NZ's national air freight manager) of ANAMA's position regarding the security administration fee (SAF) and check fee details.

[80] Further, the email of 17 March 2003 was forwarded to Mr Fredricson in response to a query in relation to an X-ray charge charged by the Italian government. While Mr Fredricson's request was directed at the X-ray charge, the response was directed at the overall agreement to charge the SAF. Further, the Kuehne + Nagel NZ newsletter to customers confirmed the charge was to be implemented in New Zealand:

> **26. Security fee for air freight ex Italy**
>
> Due to compulsory security checks on all air freight ex Italy, all shipments effective immediately will incur a fee of:
>
> EUR1.80 per parcel plus a fixed fee of EUR25.00 with a maximum of EUR50.00 per shipment.

Finally I note that Mr Fredricson stated in his interview that whatever fee was quoted by the Italian office would have been quoted to customers.

[84] The appellant challenged the existence of a serious issue to be tried on the basis that there needed to be a clear consensus between participants to the agreement and the Act did not proscribe conduct amounting to "conscious parallelism". Although Mr Thain did not develop his argument in any depth, "conscious parallelism" describes behaviour between competitors which is seemingly co-ordinated, but in fact reflects mutual awareness of each others' activities and their interdependence in making decisions about pricing and output.[43]

[85] Counsel's submission may be shortly dealt with. We are not satisfied that the Judge was wrong to conclude that there was a serious issue to be tried with regard to

---

[43] See Caron Beaton-Wells and Brent Fisse *Australian Cartel Regulation: Law, policy and practice in an international context* (Cambridge University Press, New York, 2011) at 40–41.

the Italian SAF agreement. There is ample evidence at this stage available to establish entry into the agreement in March 2003 at the board meeting of ANAMA in Italy. The allegation is that the agreement involved, inter alia, customers being charged the Italian SAF for the additional costs incurred by freight forwarders in complying with additional security measures imposed by the Italian Civil Aviation Authority. The content of the Italian SAF fee would be EUR 25 per shipment. To the extent that it is to be argued that similarities in conduct between competitors in the imposition of this fee (or any variant thereof) may amount to conscious parallelism are matters for trial. Whether the participants are giving effect to a price fixing agreement or merely following the lead of another competitor will turn on all of the relevant circumstances including the nature and scope of the agreement, the timing of implementation, and the specific events that occurred around the same time by participants of the particular fee. We emphasise that, at the protest to jurisdiction stage, the court cannot embark upon a mini trial of such issues.

[86] The appellant fails in respect of the Italian SAF fee. We are satisfied, like the Judge, that there is a serious issue as to the merits to be tried.

Canadian ACI agreement

[87] The Judge's findings are as follows:

> [82] The ACI agreement is evidenced by the minutes of a Freight Forward International (FFI) air freight committee conference call of 21 November 2005. Mr Lehmann attended for the Kuehne + Nagel group. The minutes record the following agreement:
>
> > **8. ACI in Canada …**
> >
> > FFI has been successful in influencing ACI to follow the same process for data submission as the US AMS process i.e. the carrier must submit and the forwarder may submit which leaves us the choice. ...
> >
> > Furthermore it was discussed how FFI members should deal with the payment. The AFC members decided that they want to have the same procedure in place as with the US AMS and that they want to transmit it electronically.
> >
> > **Actions:**
> >
> > • Dermot Lepper to draft letter to carriers

- FFI Secretariat to circulate draft to AFC for approval
- FFI Secretariat to carriers and to post it on FFI website

[83] The Canadian ACI agreement was given effect to in New Zealand. Kuehne + Nagel NZ confirmed in its s 98 response dated 30 November 2007 that the ACI fee was first applied in July 2006. The ACI fee was NZ$25 a shipment. It was imposed in response to a notification received from Hong Kong.

[84] In a circular to customers of June 2006 Kuehne + Nagel NZ explained the ACI fee:

> Airfreight into Canada – ACI fee
>
> Air freight into Canada – ACI fee (NZ$25.00 per shipment effective 1st July 2006)
>
> Similar to the US AMS filing fee in place since August 2004, Canada has now
>
> implemented a similar requirement effective 12th May 2006. Effective 1st July, Kuehne + Nagel New Zealand will be implementing a NZ$25.00 per shipment fee to cover the cost of sending and processing this data and implementing the additional requirements as required below. ...

[85] The ACI fee also provides evidence of the implementation of these types of fees and surcharges generally throughout the Kuehne + Nagel group. Mr Blaser of Kuehne + Nagel Management AG sent an email to all regional managers including Kuehne + Nagel (Asia Pacific) Management Ltd, in the following terms:

> Subject: IMPORTANT – ACI (Advanced Cargo Information) for all shipments to Canada and transhipments through Canada – URGENT
>
> Starting June 12th, 2006 the new ACI rules do apply and therefore you need to inform your FA staff in your respective area of responsibility accordingly. See detailed information in enclosed zip file. The same is available on the KNet ... and will be updated there as usual. ...

Following receipt of that email, Mr Lehmann of Kuehne + Nagel (Asia Pacific) Management Ltd forwarded it on to Mr Fredricson of Kuehne + Nagel NZ with a clear direction to apply the charge:

> Fyi. Please ensure that you comply with these new rules and regulations. In the event of questions, please contact either Hkg RA – A or HkgRA – C.

[88] The appellant's challenge to this agreement focuses upon the wording of the minutes of the FFE (or FFI) Air Freight Committee conference call on 21 November 2005. The minutes provided as follows:

> 8. ACI in Canada …
>
> FFI has been successful in influencing ACI to follow the same process for data submission as the US AMS process i.e. the carrier must submit and the forwarder may submit which leaves us the choice. …
>
> Furthermore it was discussed how FFI members should deal with the payment. The AFC members decided that they want to have the same procedure in place as with the US AMS and that they want to transmit it electronically.
>
> Actions:
>
> - Dermot Lepper to draft letter to carriers.
> - FFI Secretariat to circulate draft to AFC for approval.
> - FFI Secretariat to carriers and to post it on FFI website.

[89] Mr Thain argued that there was no evidence of an agreement and that all the minutes were referring to was the process for data submission referred to in the first part of the minutes under section 8. But Mr Smith responded by referring to the second paragraph of the minute quoted above, in that the reference to procedure is used in the singular, which the Commissioner contends referred to the arrangements including the agreement as to surcharges. The Commission also points to subsequent implementation as giving rise to the nature of the agreement reached.

[90] We are satisfied that these are matters for trial. It may well be appropriate to draw inferences from the steps taken by the FFE Air Freight Committee as implemented by the various participants to prove that the ACI Canada fee involved giving effect to the Canadian ACI agreement, particularly if the US Air AMS fee is found to have been the subject of a price fixing agreement (as is alleged).

[91] The appellant's challenge to this agreement must fail. We are satisfied that there is a serious issue to be tried arising from all of the evidence which we have reviewed.

Result and costs

[92] It follows from the above that the questions for which leave was given to appeal must both be answered in the affirmative. The judgment of Venning J is upheld in all respects. Our review of the facts on each of the alleged agreements demonstrates that there is a sufficient factual basis available at this stage to show both a good arguable case with respect to liability under s 90(2) of the Act and secondly a serious issue to be tried in respect of the remaining five causes of action.

[93] The respondent is entitled to costs for a standard appeal on a band B basis and usual disbursements. We certify for second counsel.

Solicitors:
DLA Phillips Fox, Auckland for Appellant
Meredith Connell, Auckland for Respondent