IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-5474

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	EGL INC Defendant

Hearing: 10 December 2010

Counsel: JBM Smith, NF Flanagan and FJ Cuncannon for Plaintiff
BWF Brown QC and JL Bates for Defendant

Judgment: 16 December 2010

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 16 December 2010 at 4.00 p.m., pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors: Meredith Connell, P O Box 2213, Auckland 1140 for Plaintiff
Quigg Partners, P O Box 3035, Wellington for Defendant

Introduction

[1] The defendant (EGL) has admitted two breaches of Part 2 of the Commerce Act 1986 (the Act) in that it entered into and gave effect to a price fixing agreement, contrary to s 27 via s 30 of the Act. I am asked to impose a pecuniary penalty of $1.15m agreed to by the Commerce Commission (the Commission) and EGL and to approve the payment of $50,000 towards the Commission's costs.

Agreed facts

[2] EGL is incorporated in Texas, United States of America. Until August 2007 it was an independent, publicly traded company that provided freight forwarding services. In August 2007 it was acquired by CEVA Group Plc. It now trades in New Zealand as CEVA Logistics (New Zealand) Limited (EGL NZ).

[3] The relevant market is the New Zealand market for freight forwarding services for goods shipped to and from overseas destinations. The business of freight forwarders is to facilitate the efficient transportation of cargoes between New Zealand and overseas destinations. The services provided include advice as to the appropriate routes, arranging for carriage, collection and delivery, and the preparation and processing of documentation.

[4] In 2002 the authorities in the United Kingdom introduced new mandatory reporting requirements at airports for exports from the United Kingdom to non-European Economic Area countries, including New Zealand. It was known as the New Export System (NES). The reporting requirements required exporters to provide data electronically to Her Majesty's Customs and Excise. These reporting requirements involved additional costs for freight forwarders.

[5] EGL and five competing freight forwarders entered into an agreement to charge a fee ostensibly to recover the costs of the increased reporting requirements. The agreement was reached by representatives of the participants who referred to themselves as the "Garden Club" or the "Gardening Club". EGL was represented at meetings by a senior manager with significant industry experience. The participants agreed that customers would be charged a fee to cover the additional reporting requirement. The fee applied to goods exported by air from the United Kingdom to non-EEA countries, including New Zealand.

[6] From October 2002 until October 2007, EGL gave effect to the agreement by charging a fee in accordance with the agreement. Over the same period EGL's New Zealand subsidiary gave further effect to the agreement by charging customers in accordance with the agreement.

[7] The commercial gain to EGL arising from its conduct cannot be readily ascertained with precision but is estimated to be a low six-figure (NZ dollar) sum.

Legislation

[8] Pecuniary penalties for breaches of Part 2 of the Act are provided for by s 80 which relevantly provides:

> **Pecuniary penalties**
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> (1) If the Court is satisfied on the application of the Commission that a person—
>
> (a) has contravened any of the provisions of Part 2;
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> ...
>
> the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate ….
>
> (2) The Court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the Court considers that there is good reason for not making that order.
>
> (2A) In determining an appropriate penalty under this section, the Court must have regard to all relevant matters, in particular,—
>
> (a) any exemplary damages awarded under section 82A; and

> (b) in the case of a body corporate, the nature and extent of any commercial gain.
>
> (2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
>
> (a) in the case of an individual, $500,000; or
>
> (b) in the case of a body corporate, the greater of—
>
> (i) $10,000,000; or
>
> (ii) either—
>
> (A) if it can be readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or
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> (B) if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).
>
> ...
>
> (6) Where conduct by any person constitutes a contravention of 2 or more provisions of Part 2 of this Act, proceedings may be instituted under this Act against that person in relation to the contravention of any 1 or more of the provisions; but no person shall be liable to more than 1 pecuniary penalty under this section in respect of the same conduct.

[9] Section 80(2A) requires the Court, in determining an appropriate penalty, to have regard to all relevant matters and specifically identifies, in the case of a body corporate, the nature and extent of commercial gain. If it can be readily ascertained, the commercial gain arising will also determine the maximum penalty.[1]

[10] It is accepted that the precise amount of the commercial gain is not readily ascertainable. On the basis of the indicated approximate figure of a "low six-figure sum", it would not, in any event, have produced the maximum pecuniary penalty which must be $10m as provided by subs 2B(b)(ii). (The 10 per cent of turnover maximum provided by subs 2B(b)(ii)(B) could not apply as the relevant turnover figure is too low.)

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[1] Section 2B(b)(ii)(A).

[11] Pursuant to s 80(6) of the Act, no person shall be liable to more than one pecuniary penalty in respect of the same conduct. The Commission says, however, that two distinct offences arise from EGL's conduct. Entering into the agreement and giving effect to it are said to be two distinct offences and should be treated as such for the purposes of penalty.[2] On that basis, the maximum penalty would be $20m. However, having regard to the totality of the conduct involved, the Commission does not press for a maximum penalty of $20m. It accepts that it is appropriate to proceed from a single starting point for the purpose of fixing a penalty in relation to the overall conduct of EGL. I agree with that approach.

Starting point

[12] In *Commerce Commission v Alstom Holdings SA*[3] I accepted a submission that criminal sentencing principles provide an appropriate framework for the determination of a pecuniary penalty under s 80. I said:[4]

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

[13] While the contemporary approach to sentencing in the criminal jurisdiction provides a helpful framework, the analogy should not be taken too far. The two jurisdictions serve markedly different ends. The primary purpose of pecuniary penalties for anti-competitive conduct is deterrence.[5] The Select Committee Report

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2 *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617 at [318].

3 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22.

4 At [14].

5 *New Zealand Bus Limited v Commerce Commission* [2008] 3 NZLR 433 at [197]; *Commerce Commission v Koppers Arch Wood (Protection NZ) Limited* (2006) 11 TCLR 581 (*Koppers*) at [18]; *Commerce Commission v Alstom Holdings SA (Alstrom)* at [17] and *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010, Allan J (*Diagnostic Group*) at [15].

which commented on the proposed increase in the maximum pecuniary penalty provided by the Commerce Amendment Bill in 2001 stated:[6]

> The dominant reason for penalties under competition law is the forward looking aim of promoting general deterrence. To promote deterrence, illegal conduct must be profitless, which means that the expected penalty should be linked to the expected illegal gain. The courts should severely penalize today's offender to discourage others from committing similar acts.

And:[7]

> The [Supplementary Order Paper] seeks to increase the maximum pecuniary penalty from $5 million to $10 million, while retaining the other options. As noted previously, the purpose of penalty and [remedial] provisions in competition law is to penalise today's offender with sufficient severity to discourage others from committing similar acts. The proposed changes are consistent with that approach. They will provide a much stronger signal than the current provisions that the deterrence objective will only be served if the anti-competitive behaviour is profitless.

[14] Deterrence is only one of the objectives, and by no means the dominant consideration, of criminal sentencing. The way in which relevant factors are measured and weighed when fixing pecuniary penalties must be informed by the distinctive character and consequences of anti-competitive conduct and the overriding objective of the pecuniary penalty regime.

[15] The factors identified by the Commission as having particular relevance to the offending are:

a) any commercial gain;

b) the seriousness of the conduct;

c) the duration of the conduct;

d) the extent of any losses it may have caused;

e) the seniority of the employees involved; and

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6 Commerce Amendment Bill (No 2) 2001 (1-32) (Select Committee Report) at 30.

7 At 23.

f) the degree of market power held by the cartel participants.

[16] As submitted by Mr Smith on behalf of the Commission, the participants to the agreement in this case engaged in "hard core cartel" behaviour.[8] Although the conduct did not generate significant commercial gain for EGL, it enabled all members of the cartel to impose a surcharge without the need to consider their competitors' likely response. It is true, as Mr Brown QC pointed out, that the illegal conduct was reactionary and the fee was only a very small fraction of total charges to customers on any given shipment. In this sense, it was less egregious than the conduct in cases such as *Koppers* and *Alstom* which involve overarching agreements to maintain market share and control prices. But it will, nevertheless, have affected both price competition and the competitive dynamics in the freight forwarding industry and impacted on the efficiency of cartel members.

[17] Additional aggravating factors relevant to fixing a penalty are the duration of the conduct and the seniority of the employee involved.

[18] Having regard to all aspects of EGL's conduct and the critical importance of deterring like behaviour (as reflected in the increased maximum penalties available since 2001), I accept the Commission's submission that a starting point in the range of $2.3m to $2.8m is justified.

Mitigating factors

[19] It is accepted that EGL admitted liability at the first opportunity. It entered into a cooperation agreement with the Commission prior to the commencement of proceedings under which it agreed to admit liability. It had actively sought that cooperation agreement in the course of a lengthy investigation commenced in September 2007. EGL cooperated from the outset.

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[8] A "hard core cartel" is an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce: Organization for Economic Co-operation and Development Recommendation of the Council concerning Effective Action against Hard Core Cartels 1998 (14 May 1998) C(98)35 at 3.

[20] The Commission acknowledges the high level of cooperation of EGL and that the information it provided has been very helpful. I am informed that this cooperation has been a costly exercise. It has involved, for example, EGL procuring its local and Australian based operative company to cooperate in full with notices issued under s 98 of the Act and other requests for information. It has made current and past staff, based locally and overseas, available to attend interviews with the Commission. It has agreed to continue cooperating.

[21] EGL instructed solicitors in New Zealand to accept service on its behalf. It has submitted to the jurisdiction of the New Zealand Courts. It has agreed to pay a pecuniary penalty, despite the possibility that a penalty imposed by the Court might not be enforceable.[9]

[22] EGL has not offended previously. It is under new ownership and management which took over in August 2007, shortly before EGL became aware of the investigation. Under its previous ownership and management EGL had in place a compliance programme. This was promptly and substantially upgraded by EGL's new owners and management upon them becoming aware of the investigation in overseas jurisdictions and New Zealand.

[23] In *Diagnostic Group* Allan J had regard to the discount available in the criminal sentencing jurisdiction in accordance with *R v Hessell*,[10] while noting that cases under the Commerce Act have their complexities, and might not always be susceptible to a strict application of the *Hessell* tariff.[11]

[24] The Supreme Court's decision in *Hessell v R*[12] has indicated a more flexible and less prescriptive approach when determining discounts for an admission of guilt and cooperation in criminal sentencing. It is an approach which, arguably, is more readily applicable to pecuniary penalties under the Act although, for the reasons earlier discussed, close comparisons with the approach taken in criminal sentencing are unlikely to be helpful. As was mentioned in the course of argument, there seems

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9 This was also a mitigating factor noted in *Alstom* at [29].
10 *R v Hessell* [2010] 2 NZLR 298.
11 At [28].
12 *Hessell v R* [2010] NZSC 135.

little room, for example, to attribute remorse to a corporation. On the other hand, early and full cooperation in an investigation into anti-competitive conduct provides benefits of a scale and nature seldom encountered in the criminal jurisdiction. As recognised in the Commission's Cartel Leniency Policy:[13]

> Commission investigations can derive considerable assistance from the input of individuals and companies. Cooperation can consist of providing evidence and/or information, or admitting to the cartel conduct, or both. The Commission seeks to encourage such cooperation. Cooperation can be particularly valuable for the investigation of cartels, as their secretive nature may present major challenges. It allows the Commission to make more effective use of the resources available to it for the investigation of cartels.

[25] It is in the public interest that substantial allowance is made for a high level of cooperation, both for the purpose of recognising the savings achieved and providing appropriate incentives to firms and individuals who have engaged in anti-competitive conduct.

[26] Having regard to these factors, the Commission proposes a 50 per cent discount which would reduce the appropriate penalty to the range of $1.15m to $1.4m. The proposed penalty is at the low end of the range for two reasons. First, the Commission accepts that calculating a penalty is an art, not a science, and is mindful of EGL's view that a different penalty range might apply. Secondly, the Commission is content to seek a penalty at the low end of the range in this case because admissions were made at such an early stage.

Conclusion

[27] In *Alstom*[14] I discussed the function of the Court when the parties have agreed on the appropriate penalty. I said:[15]

> 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 the3 proposed penalty is within the proper range (see the judgment of the Full

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13 Commerce Commission "Cartel Leniency Policy and Process Guidelines" (November 2004) at 4.01.

14 At [18].

15 Ibid.

> 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.

[28] I am satisfied that the proposed penalty is appropriate. In addition to the factors already discussed, I have regard to the deterrent effect of penalties likely to be imposed in other jurisdictions and adverse publicity which is likely to follow investigations into the cartel conduct in Europe and the United States.[16] I have also had regard to the penalties imposed in cases involving conduct in the same general category.[17] Finally, I do not overlook the careful and responsible approach taken by both parties to achieve an outcome that appropriately reflects the private and public interests involved. As in *Alstom*,[18] my confidence in the integrity of the process has been reinforced by the high calibre of submissions made by counsel with significant levels of experience in this field of law.

Result

[29] I approve the recommended penalty and costs award and order EGL to pay a penalty of $1.15m and costs of $50,000.

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16 That was also a relevant consideration in *Alstom* at [31].

17 E.g. *Koppers*, above n 5; *Alstom*, above n 5; and *Diagnostic Group*, above n 5.

18 See [33].

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MINUTE OF RODNEY HANSEN J

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[1] There has been a typographical error detected in para [26] of the judgment delivered on 16 December 2010 which previously read, "$1.5m to $1.4m". This error has been corrected and now reads, "$1.15m to $1.4". Would you please replace page 9 of your judgment with the attached.