IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV-2010-404-5479

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986.
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	DEUTSCHE BAHN AG AND OTHERS Defendants

Hearing: 6 May 2011

Counsel: J B M Smith and F J Cuncannon for Plaintiff
D T Street for First to Fifth Defendants and Seventh Defendant
E S Scorgie for Ninth Defendant

Judgment: 13 June 2011

JUDGMENT OF ALLAN J.

This judgment was delivered by
The Hon. Justice Allan
on
13 June 2011 at 4:30pm
pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

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Introduction

[1] The plaintiff alleges unlawful cartel behaviour against each of the defendants in this proceeding. The fourth, seventh and ninth defendants admit legal liability for breaches of Part 2 of the Commerce Act 1986 (the Act). The Court is asked to impose pecuniary penalties against each of those defendants and to direct the payment of an agreed figure for costs in each instance. Should the Court grant the plaintiff's application and impose the penalties sought, counsel for the Commerce Commission (the Commission) indicates that the plaintiff will discontinue proceeding against all remaining defendants except the eighth defendant.

[2] Against the fourth defendant, Schenker AG (Schenker), the Commission seeks a pecuniary penalty of $1.1 million and an order for costs of $25,000. Against the seventh defendant, BAX Global Inc (BAX), the Commission seeks a pecuniary penalty of $1.4 million and an order for costs of $25,000. Against the ninth defendant, Panalpina World Transport (Holdings) Ltd (Panalpina), the Commission seeks a pecuniary penalty of $2.7 million together with an order for costs of $75,000.

Agreed facts

The International Freight Forwarding Industry

[3] This proceeding is concerned with participants in the international air freight forwarding industry which involves all facets of the logistical arrangements for the movement of goods by air from origin to destination. The agreed factual summary provides a helpful analysis of the industry:

> 2.1 The international freight forwarding industry involves all facets of the logistical arrangements for the movement of goods, by air, from origin to destination.
>
> 2.2 Importers and exporters are the source of demand for freight forwarding services. The demand for freight forwarding services ranges from the demand to send a single item from one location to another location on a single occasion through to the demand for the forwarding of both perishable and non-perishable products on a regular basis to and from one or multiple locations on a global basis. Consequently, the quality and cost of freight forwarding services impacts throughout the New Zealand economy.

2.3 The freight forwarding industry facilitates the efficient transportation of cargo to and from New Zealand. In 2009, the freight forwarding industry processed 0.18 million tonnes[1] of cargo into and out of New Zealand generating revenue of approximately NZ$600 million.[2]

2.4 Freight forwarders compete with each other to provide the following services to exporters (consignors) and importers (consignees):

(a) Advising on the most appropriate routes, given the nature of the goods to be shipped.

(b) Arranging for the carriage of freight with international airlines. In this regard, a freight forwarder can either act as an intermediary between the customer and the carrier or the freight forwarder can book space with a carrier and then on-sell the space to a customer.

(c) Organising the collection of goods from the consignor at origin and delivery of them to the carrier, and collection of goods from the carrier at destination and delivery of them to the consignee.

(d) Preparing and processing the documentation required for international shipments, such as the commercial invoice, shipper's export declaration, air waybills and other documents required by the carrier or country of export, import, or transhipment.

(e) Carrying out incidental services such as: custom clearance at the origin and destination points; warehousing; security and insurance; packaging of cargo; and monitoring the progress of the cargo from origin to destination.

2.5. Freight forwarding rates are typically expressed as a price per kilogramme in the currency at the point of origin. The price can either be structured as:

(a) a flat rate per kilogramme;

(b) a flat rate per kilogram plus various surcharges and/or origin and estimation charges and/or third party costs; or

(c) a pass through of third party costs plus a margin and/or origin and destination charges.

The Defendants

[4] Deutsche Bahn AG (First Defendant), DB Sechste Vermogensverwaltungsgesellschaft Mbh (Second Defendant), DB Mobility Logistics

[1] Statistics New Zealand and Cargo Account Settlement System (CASS).
[2] Cargo Account Settlement System (CASS).

AG (Third Defendant), Schenker AG (Fourth Defendant), Schenker (Asia Pacific) Pte Limited (Fifth Defendant), and BAX Global Inc (Seventh Defendant), together "DB Schenker", are part of the Deutsche Bahn Group and provide global freight forwarding services under the brand DB Schenker. DB Schenker is a leading globally integrated logistics service provider. Its logistics activities employ over 91,000 staff spread across about 2,000 locations in some 130 countries. In its 2009 business year, DB Schenker's turnover exceeded €15 billion.

[5] Until January 2006, BAX was part of the BAX Group and provided global freight forwarding services under that brand. In January 2006, DB Schenker acquired most of BAX Group's freight forwarding operations by purchasing all the shares in BAX. Following the acquisition, BAX's global operations were integrated into DB Schenker's global operations.

[6] On 31 July 2007, BAX NZ and Schenker (NZ) Ltd were amalgamated under Part XIII of the Companies Act 1993, to become Schenker (NZ) Ltd. That company, together with Schenker Holdings (NZ) Ltd, is ultimately owned by the first defendant which is, in turn, ultimately owned by the Federal Republic of Germany.

[7] Panalpina has no direct connection with the other defendants. It is incorporated in Switzerland and is also one of the world's leading providers of forwarding and logistics services. It is the sole shareholder of Panalpina World Transport Pty Ltd, a company incorporated in Australia but carrying on business in New Zealand as an overseas company under the Companies Act 1993.

The markets

[8] For the purposes of this proceeding the fourth, seventh and ninth defendants agree with the plaintiff that at all material times there existed in New Zealand separate markets for the provision of freight forwarding services shipped to and from a number of overseas regions, each such region representing a separate geographical market.

[9] During all or part of the period October 2002 to 31 July 2007, DB Schenker participated in both inbound and outbound freight forwarding markets. During all or part of the period March 2003 to October 2007, Panalpina likewise participated in both markets.

UK NES Agreement

[10] In 2002, the United Kingdom Government introduced new security measures at airports for exports from the United Kingdom. The new requirements increased freight forwarders' costs. Together with a number of other freight forwarders, BAX entered into an arrangement or understanding relating to the imposition of a charge, ostensibly to cover the costs incurred by freight forwarders by reason of the increased security measures. The employee who represented BAX in the course of participation in these arrangements was a senior operations manager who acted without the knowledge of his superiors. In brief terms, the participating freight forwarders agreed to a scale of fees under which each would charge customers for the purposes of recouping the additional costs arising from the new security arrangements.

[11] Between November 2002 and 31 July 2007, BAX gave effect to the UK NES Agreement through its agent, BAX NZ, although the latter company had no knowledge of the operation of the cartel. Neither Schenker nor Panalpina was a participant in the UK NES Agreement.

Chinese CAF Agreement 2005

[12] In July 2005, the People's Bank of China announced that the local currency would cease to be pegged to the US dollar and would become subject to a managed floating exchange rate released daily by the Chinese Government. BAX, Schenker and Panalpina, together with other freight forwarders, entered into an arrangement or understanding relating to the imposition of a currency adjustment fee (the Chinese CAF), ostensibly to offset the revaluation of the Chinese currency.

[13] The agreement was reached at a meeting in Shanghai on 27 July 2005 attended by representatives of BAX and Panalpina. The employee representing BAX was a senior manager with responsibility for Chinese operations. DB Schenker (prior to its acquisition of BAX) did not attend the meeting but it was advised of the agreement, and two days later agreed by email to participate in the arrangement. Participation was confirmed by a senior manager of Schenker who had responsibility for operations in China.

[14] BAX, Schenker and Panalpina all gave effect to the Chinese CAF agreement by shipping freight to New Zealand on terms that included a charge set in accordance with the Chinese CAF agreement, and by actually charging customers in accordance with the agreement. BAX and Schenker participated in the arrangements between about August 2005 and July 2007. Panalpina's participation was for a shorter period, from July 2005 to June 2006. In each case, the New Zealand subsidiaries of the defendants were unaware of the operation of the Chinese CAF agreement.

The Air AMS Agreement

[15] In 2004, the United States of America Customs and Border Patrol (USCBP) introduced what is known as the Air Automated Manifest System (the Air AMS), aimed at ensuring that, prior to the arrival of air freight in North America, a manifest setting out the description of the cargo was filed with the USCBP.

[16] The Commission has alleged that, together with certain other freight forwarders, Panalpina entered into a cartel arrangement relating to the imposition of a fee (the Air AMS fee), ostensibly to cover the costs incurred by freight forwarders as a result of the need to comply with the requirements of the AMS, as introduced by the USCBP.

[17] The Commission's case is that Panalpina, and two other market participants, entered into the Air AMS agreement at a meeting in London on 19 March 2003, and that additional market participants entered into the same agreement in Brussels on 8 April 2003. The employee who represented Panalpina at the meeting on 19 March

2003 was the head of Corporate Development for the company and FFE Airfreight Chairman. He had significant industry experience.

[18] The Air AMS agreement, which applied to shipments both to and from New Zealand, provided for the making of a charge (the Air AMS fee) by parties to the agreement, for the additional costs of complying with the Air AMS. It provided also that the parties would not use the Air AMS fee as an element of price competition between them.

[19] From August 2004 to October 2007, Panalpina gave effect to the Air AMS Agreement by arranging for freight to be shipped to and from New Zealand on terms that included charges set in accordance with the agreement. Again, Panalpina's New Zealand subsidiary was unaware of the cartel arrangements

Legislation

[20] Section 27 of the Act relevantly provides:

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
>
> (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (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.
>
> …

[21] Section 30 of the Act provides:

> **30 Certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition**
>
> (1) Without limiting the generality of section 27, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are —

(a) supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or

(b) resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.

(2) The reference in subsection (1)(a) of this section to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

[22] Schenker, BAX and Panalpina all admit that they have contravened s 27 via s 30 by:

(a) entering into an understanding that had the purpose and effect of fixing, controlling or maintaining components of the price for international air cargo services including air cargo services to and from New Zealand; and

(b) giving effect to such understandings.

[23] Under s 30 of the Act, the admitted conduct is per se illegal, because price fixing agreements restrict competition and are detrimental to economic welfare, without any beneficial effects. By co-ordinating behaviour, competitors can achieve monopolistic outcomes in a market that would otherwise be subject to market forces.

[24] It is often said that, where cartel behaviour is identified, punishments must be condign, in order both to ensure that the participant is stripped of any profits derived from the illegal behaviour, and to serve as an appropriate deterrent in a class of case where, because illegal behaviour is often covert, detection will sometimes be avoided.

[25] Those considerations are reflected to some extent in s 80 of the Act, which confers on the Court jurisdiction to impose pecuniary penalties for breaches of Part 2. Section 80, as now constituted, provides:

> **80 Pecuniary penalties**
>
> (1) If the Court is satisfied on the application of the Commission that a person—
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> (a) Has contravened any of the provisions of Part 2 of this Act; or
>
> (b) Has attempted to contravene such a provision; or
>
> (c) Has aided, abetted, counselled, or procured any other person to contravene such a provision; or
>
> (d) Has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; or
>
> (e) Has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or
>
> (f) Has conspired with any other person to contravene such a provision,—
>
> 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,—
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> (a) any exemplary damages awarded under section 82A; and
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> (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

(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).

(3) *Repealed.*

(4) *Repealed.*

(5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. However, no proceedings under this section may be commenced 10 years or more after the matter giving rise to the contravention.

(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 one or more of the provisions; but no person shall be liable to more than one pecuniary penalty under this section in respect of the same conduct.

[26] Prior to its amendment in May 2001, the section required the Court to determine an appropriate penalty, subject to the statutory maximum, by having regard to all relevant matters, including:

(a) the nature and extent of the act or omission;

(b) the nature and extent of any loss or damage suffered by any person as a result of the act or omission;

(c) the circumstances in which the act or omission took place; and

(d) whether or not the person had previously been found by the court in proceedings under Part 6 of the Act, to have engaged in any similar conduct.

[27] Since May 2001, s 80 has required the Court to determine an appropriate penalty subject to the statutory maximum by:

(a) having regard to all relevant factors;

(b) having particular regard to the nature and extent of any commercial gain.

[28] It is well established that the reference to "all relevant factors" will bring to account all those factors previously set out in s 80.[3]

Sentencing principles

[29] In *Alstom*,[4] Rodney Hansen J discussed the significant public interest in bringing about the prompt resolution of penalty proceedings, and the role of the Court in ensuring the efficacy of negotiated resolutions. His Honour stated that:

> [18] Finally, in discussing the general approach to fixing penalty, I acknowledge the submission that the task of the Court in cases where penalty has been agreed between the parties is not to embark on its own enquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range – see the judgment of the Full Federal Court in *NW Frozen Foods v ACCC* (1996) 71 FCR 285. As noted by the Court in that case and by Williams J in *Commerce Commission v Koppers*, there is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[30] In *Commerce Commission v Geologistics International (Bermuda) Ltd*,[5] I noted also His Honour's analysis of the place of ordinary criminal sentencing principles in the context of cases under the Act. There I said:[6]

> [18] In *Commerce Commission v Alstom Holdings SA*,[7] Rodney Hansen J confirmed that criminal sentencing principles provide an appropriate framework for the assessment of a proposed penalty under the Commerce Act. His Honour said:

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[3] *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [19].
[4] Ibid, at [18].
[5] *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010.
[6] Ibid, at [18]-[20].
[7] *Alstom*,, above n 3.

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

[19] I agree with that approach.[8] But while the analogy with sentencing in the ordinary criminal jurisdiction provides broad assistance, a degree of caution is advisable, as Rodney Hansen J pointed out in *Commerce Commission v EGL Inc*.[9] The two jurisdictions serve markedly different ends. The primary purpose of pecuniary penalties for anti-competitive conduct is deterrence, but a range of other factors will be relevant as well. The identification of those factors and the weighting to be accorded them when fixing pecuniary penalties must, as Rodney Hansen J observed,[10] be informed by the distinctive character and consequences of anti-competitive conduct.

[20] Among the factors which will be relevant are:

a. The duration of the contravening conduct;

b. The seniority of the employees or officers involved in the contravention;

c. The extent of any benefit derived from the contravening conduct;

d. The degree of market power held by the defendant;

e. The role of the defendant in the impugned conduct;

f. The size and resources of the defendant;

g. The degree of co-operation by the defendant with the Commission;

h. The fact that liability is admitted;

i. The extent to which a defendant has developed and implemented a compliance programme.

[8] *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 (CA) at [197]; *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC) at [18]; and *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [15].
[9] *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [13].
[10] *Alstom*, above n 3 at [14].

[31] In *Geologistics* I said:[11]

> [37] Ultimately, it is the final figure which the Court is asked to approve. The identification of appropriate starting points and discounts for mitigating factors are simply tools aimed at producing a result which is in accordance with the ends of justice and which properly reflects the aims and objectives of the Act.

[32] It follows that, provided I am satisfied that the ultimate penalty falls within the appropriate available range, the Court ought to accept the penalty proposed by the parties.

[33] In *Commerce Commission v New Zealand Diagnostic Group Ltd*,[12] I noted that:

> [45] The general approach of the Court is to accept and impose a penalty which has been agreed between the parties, so long as it is within the Court determined permissible range: *Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd;*[13] *NW Frozen Foods v Australian Competition & Consumer Commission*.[14] That approach is also adopted in this country. In the *Gas Insulated Switchgear* case Rodney Hansen J said at [18]:
>
> > … 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.

Quantum assessment

Schenker and BAX

[34] BAX entered into the UK NES Agreement on 1 October 2002 and gave effect to it from November 2002 to 31 July 2007. The Agreement involved an agreement to impose a surcharge on all air freight from the United Kingdom to non-European Union countries (including New Zealand).

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[11] *Geologistics*, above n 5, at [37].
[12] *New Zealand Diagnostic Group Ltd*, above n 8, at [45].
[13] *Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd* (2004) ATPR 48,848 at 48,855.
[14] *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285.

[35] Mr Smith accepts that the agreement covered a component of the price rather than the whole price. But the conduct is nevertheless at the serious end of the spectrum. It involved a price fixing arrangement of the type that the law regards as anti-competitive per se. The conduct took place over a long period and involved ongoing communications between participants. A senior employee of BAX was active on its behalf in agreeing to and implementing the price-fixing agreement. I accept the plaintiff's submission that the conduct occurred in a significant market of fundamental importance to New Zealand. BAX gave effect to the UK NES Agreement both before and after it was acquired by the Deutsche Bahn Group in January 2006 but that group (including Shenker) was unaware of the arrangement. The parties agree that the commercial gain cannot be readily ascertained. The Commission maintains that the gain would have been substantial by reason of the volume of affected cargo and the length of time over which the conduct occurred.

[36] Mr Street submits that the identification of commercial gain can be a somewhat nebulous task and indicates to the Court that both Schenker and BAX have their own views as to the actual gain likely to have been derived from the unlawful conduct. They consider that gain to have been limited. But it is agreed that, because the gain cannot be readily ascertained and the turnover limb is not applicable, the alternative maximum penalties prescribed by s 80 will apply.

[37] BAX entered into the Chinese CAF Agreement on 27 July 2005, and Schenker on 29 July 2005. Each gave effect to that agreement between August 2005 and July 2006. The conduct of the defendants was again at the serious end of the spectrum in that it involved an agreement to impose a surcharge. But it involved only freight sent from China to New Zealand and occurred over a much more limited time than did the UK NES Agreement. Again, it is agreed that the relevant commercial gain by either Schenkar or BAX is incapable of assessment.

[38] The Commission's position is that:

(a) A starting point of between $2.6-$3.4 million is appropriate for BAX both entering into and giving effect to the UK NES Agreement.

(b) A starting point of between $1.15-$2 million is appropriate for BAX both entering into and giving effect to the Chinese CAF Agreement.

(c) A starting point of between $1.15-$2 million is appropriate for Schenker both entering into and giving effect to the Chinese CAF Agreement.

That produces a combined starting point range for both defendants of between $4.9-$7.4 million, a figure reached in the context of a theoretical maximum starting point of $60 million (there being six separate breaches in all). It is common ground that entering into and giving effect to a contract arrangement or understanding are separate breaches of the Act.

[39] The Commission acknowledges, however, that it is necessary to take into account the totality principle. Relevant to that is the consideration that there is an inter-relationship between entry into these agreements and giving effect to them, and also that separate agreements may be taken to simply form part and parcel of a single approach adopted within the industry over the relevant period to rapid escalations of surcharges and costs. In other words, the agreements were part of a wider culture within the freight forwarding and air cargo industries. The Commission accepts that a reduced range of $4-$6.5 million is appropriate to recognise the totality of the conduct of BAX and Schenker taken together.

[40] I turn to a brief consideration of some of the recent New Zealand authorities. In *Alstom*,[15] which involved a world-wide price-fixing understanding for a key component in electrical substations, a starting range of $1.25-$1.75 million was adopted, even though there was no pecuniary gain associated with the conduct.

[41] It is important however to note that the relevant behaviour there consisted of an agreement as to the manner in which customer inquiries ought to be managed. In the result, there were no such inquiries and therefore no pecuniary gain. It is noteworthy also that the maximum penalty there was $5 million, because the conduct occurred before s 80 of the Act was amended.

[15] *Alstom*, above n 3.

[42] In *Commerce Commission v Koppers Arch Wood (Protection NZ) Ltd*,[16] a starting point of $5.7 million was adopted in respect of both a covert overarching agreement, and specific price fixing understandings involving the control of prices for wood preservative chemicals over a period of about four years. The relevant market was thought to have been worth between about $14 and $25 million per annum. The challenged conduct straddled the change to the penalty regime on 26 May 2001, but most of the period occurred prior to the penalty increase. No commercial gain was identified although the Court acknowledged that the price fixing agreements must have had some effect on prices charged to customers.

[43] In *Geologistics*[17] a starting point range of between $3.75 and $4.25 million was adopted for entering into and giving effect to a price fixing agreement associated with the collusive imposition of a fee charged by freight forwarders on all freight forwarding services for cargo shipped to and from New Zealand via the United States. The conduct occurred over a number of years, commencing in about 2003. Of some significance for present purposes is that in *Geologistics*, as here, the price fixing arrangement related only to a component of the total price. The actual commercial gain could not be quantified, but it was acknowledged to have been substantial. This case is of particular interest since it was concerned with similar conduct in the same industry.

[44] A further case which also involved a participant in the UK NES Agreement was *Commerce Commission v EGL Inc*.[18] There, the Court imposed a penalty of $1.15 million after allowing a discount of 50 per cent from a starting range of $2.3-$2.8 million. The commercial gain in that case was estimated to be in the low six figure range.

[45] I return to the present case. The Commission acknowledges the application of the parity principle. Starting points for conduct of equal culpability ought to be at least broadly similar. Accordingly, the Commission recommends a higher starting point from that which was imposed on EGL for BAX's entry into and giving effect to the UK NES Agreement because EGL would have derived a lower commercial gain

[16] *Koppers Arch Wood Protection (NZ) Ltd*, above n 8.
[17] *Geologistics*, above n 5.
[18] *EGL*, above n 9.

from the agreement. The Commission also recommends a lower starting point in relation to the Chinese CAF Agreement compared to both the UK NES Agreement and the Air AMS Agreement because it was implemented over a much shorter period.

[46] The Air AMS Agreement should, in the Commission's submission, require a higher starting point than either the UK NES Agreement or the Chinese CAF Agreement because it related to both inbound and outbound cargo, whereas the other agreements related only to inbound cargo. Further, it involved more senior personnel and a greater level of coordination between the participants. I return to the topic of the Air AMS Agreement when discussing the individual position of Panalpina below.

[47] In considering the position of Schenker and BAX, I note the detailed submissions advanced on their behalf by Mr Street, who takes no issue with either the Commission's starting point or the eventual proposed penalty. The Commission accepts that a discount is justified for:

(a) early admissions of liability by BAX and Schenker with respect to the Chinese CAF Agreement and BAX's willingness not to oppose the Commission's allegations with respect to the UK NES Agreement (there is a subtle difference in the stance adopted with respect to the latter agreement but it is essentially a pleading point and in my view makes no difference to the ultimate outcome);

(b) BAX and Schenker's undertaking to pay a penalty if ordered to do so by the Court.

[48] BAX and Schenker have fully cooperated with the Commission throughout the investigation while aware that immunity was not available and that they would face substantial penalties. Further, DB Schenker has introduced a comprehensive global compliance programme in response to investigations into its conduct, both in New Zealand and elsewhere.

[49] It is worth mentioning briefly the detail of the Group's compliance activities. Mr Street advises the Court that in the context of the global investigation into the impugned conduct, DB Schenker has spent more than $USD55 million worldwide in analysing the conduct of the Group and providing detailed material to various regulatory authorities, including the Commission. Settlement discussions with the Commission commenced in June 2010, representatives of DB Schenker travelling to New Zealand from Germany and Singapore to attend. Since 2008, DB Schenker has instituted new guidelines for business conduct vis-a-vis competitors, has held about 100 refresher training courses in 39 countries, and has created a custom-built web-based training solution which is mandatory for all white collar employees globally. It has established a dedicated anti-trust compliance unit covering all the DB Schenker group of companies.

[50] I am satisfied that DB Schenker (which must now encompass BAX as well) has adopted a responsible approach to this offending and to other unlawful conduct elsewhere. Having said that, the degree of assistance provided to the Commission has not approached that to be found in, for example, *Commerce Commission v Qantas Airways Ltd*[19] where highly valuable ongoing assistance was being provided by Qantas to the Commission.[20] Neither BAX nor Schenker has previously been found to have contravened the Act; neither has previously been warned by the Commission in respect of conduct likely to breach the Act. The Commission submits that the appropriate discount for mitigating factors is 40 per cent.

[51] In summary, the Commission submits that an appropriate penalty may be assessed by adopting a final starting point range of $4.9-$7.4 million, reducing that range to $4.0-$6.5 million to recognise the totality of BAX's and Schenker's conduct, and then applying a discount of 40 per cent in order to recognise mitigating factors in each case. That produces an agreed penalty of $2.5 million which is at the lower end of the available range. The Commission proposes, and the respective defendants agree, that the penalty ought to be paid as to $1.4 million by BAX and as to $1.1 million by Schenker.

[19] *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011.
[20] Ibid, at [52]-[53].

Panalpina

[52] Much of the foregoing discussion applies equally to Panalpina's position. It is unnecessary to repeat it. The parties agree that commercial gain is not readily ascertainable and, as in the case of the other defendants, the turnover limb in s 80(a)(b)(ii) is not engaged in this case. Consequently, the parties have agreed the maximum penalty is $10 million for each breach.

[53] At least in theory, the maximum available starting point in this case is $40 million by reason of Panalpina's entry into and giving effect to both the Air AMS Agreement and the Chinese CAF Agreement. But, as is well established by the authorities, the proper course is to proceed from a single starting point.[21] I have discussed the Chinese CAF Agreement earlier. The Air AMS Agreement was carried into effect over a period of a little more than two years ending in October 2007. It involved an agreement to impose a surcharge on all air freight sent to and from the United States including to and from New Zealand, and also all freight transiting the United States; so it fixed a component of the price rather than the whole of the price. But, like the other agreements, it was part of a sustained course of conduct involving covert meetings and communications and the active participation of a senior Panalpina employee. Likewise, the conduct occurred in a market of fundamental importance to New Zealand.

[54] The Commission suggests a starting point of between $3.3-$4 million in respect of the Air AMS Agreement. The Chinese CAF Agreement attracts a lower starting point on the Commission's argument; that is because it applied only to freight sent from China to New Zealand and was implemented for a period of only about 11 months. Here, the Commission submits that a starting point of between $1.15-$2 million is appropriate for both entry into and giving effect to the agreement. That produces a starting point range for both agreements and understandings of between $4.45-$6 million. The Commission accepts, however, that totality principles require a reduction of that range to between $3.75-$5.3 million.

[21] *EGL Inc*, above n 9, at [11].

[55] It is, of course, necessary to ensure that parity principles are observed as between Panalpina on the one hand, and BAX and Schenker on the other. The Commission submits that conduct in relation to the Chinese CAF Agreement is the same for each of the three defendants. But it recommends a higher starting point in relation to the Air AMS Agreement than is recommended for the other two agreements because the former related to both inbound and outbound cargo whereas the others related only to inbound cargo. Moreover, the Air AMS Agreement involved more senior personnel and a greater level of co-ordination between the participants. Consequently, the likelihood is that there was a greater degree of harm by reason of the Air AMS Agreement.

[56] Mr Scorgie, for Panalpina, submits that Panalpina's overall culpability is mitigated by that company's willingness not to oppose the Commission's allegations and its undertaking to pay a penalty if ordered to do so by the Court. Moreover, it has introduced a comprehensive global compliance programme in response to investigations into its conduct. There have been no previous contraventions of the Act; neither has the Commission warned Panalpina on any occasion of conduct likely to breach the Act.

[57] It is agreed that a discount of 33 per cent is appropriate in order to recognise these mitigating factors. This discount is somewhat lower than that suggested for the remaining defendants because the degree of co-operation by Panalpina was somewhat lower than was proffered by them. Having said that, it is important to record that there is no suggestion of a want of co-operation on the part of Panalpina. It has co-operated fully with the Commission since it first received a s 98 notice in about October 2007. It has provided staff for interview and has provided extensive documentation from its local subsidiary to the Commission. There were early settlement discussions and overall settlement was envisaged at the time this proceeding was commenced.

[58] The Commission proposes an agreed penalty of $2.7 million, calculated by:

(a) adopting a starting point of $4.45-$6 million for the four breaches of the Act;

(b) reducing that range to $3.75-$5.3 million to recognise the totality of Panalpina's conduct;

(c) applying a discount of 33 per cent to recognise mitigating factors. The Commission says that this figure is towards the lower end of the available range but accepts that in all the circumstances it represents an appropriate outcome.

Conclusion

[59] I am persuaded that in each case the agreed starting point is within the properly available range in all the circumstances of the case and that the respective discounts for mitigating factors are appropriate. I am satisfied in particular that the agreed penalties are consistent with those imposed in recent cases, including those to which I have not found it necessary to refer. Accordingly, I have reached the view that the agreed penalties are justified and that it is proper to approve them.

Result

[60] The recommended penalties are approved. There will be orders that:

(a) BAX pay a pecuniary penalty of $1.4 million together with $50,000 for costs.

(b) Schenker pay a pecuniary penalty of $1.1 million together with $25,000 for costs.

(c) Panalpina pay a pecuniary penalty of $2.7 million together with $75,000 for costs.

Other matters

[61] Upon payment of the pecuniary penalties and costs, the Commission has indicated that it will discontinue this proceeding against all defendants save for the eighth defendant. The case continues, however, against that defendant. If it

proceeds to trial the Court will no doubt determine certain factual matters and in so doing may make findings that differ to some degree from those appearing in the agreed statements of facts upon which the Court has relied in this case. It is appropriate to record here that any factual admissions made by defendants other than the eighth defendant are limited in their application to the present application for approval only. It follows that any factual findings in this judgment which may touch upon the behaviour of the eighth defendant are reached only in the context of the allegations against BAX, Schenker and Panalpina and are not to be construed as findings in respect of the liability of the eighth defendant.

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C J ALLAN J.