ORDER THAT ANY SEARCH OF THE COURT FILE IS TO BE LIMITED TO THE FORMAL PLEADINGS. THE SUMMARY OF FACTS IS TO BE SEALED AND IS NOT TO BE SEARCHED.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV-2014-404-000006
[2014] NZHC 531

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	CARTER HOLT HARVEY LTD First Defendant
	DEAN DODDS Second Defendant

Hearing: 19 March 2014

Appearances: J C L Dixon and V A Howell for Plaintiff
S J P Ladd and L M L Bird for First Defendant
A E Ferguson and K J Webster for Second Defendant

Judgment: 26 March 2014

JUDGMENT OF VENNING J
(REDACTED COPY FOR PUBLICATION)

This judgment was delivered by me on 26 March 2014 at 11.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Meredith Connell, Auckland
Bell Gully, Auckland
Wilson Harle, Auckland

Introduction

[1] Following an investigation the Commerce Commission (the Commission) commenced proceedings against Carter Holt Harvey Ltd (Carter Holt) and Dean Dodds for breaches of the Commerce Act 1986 (the Act). The Commission alleged Carter Holt had breached ss 27(1) and 27(2) of the Act via s 30 and that Mr Dodds had breached s 80(1)(c) by being a party to the entry of an understanding and also by being a party to giving effect to the understanding in breach of s 27(2) via ss 30 and 80(1)(c) of the Act.

[2] The Commission commenced proceedings in this Court on 20 December 2013. On the same date Carter Holt filed a notice of admission of the first and third causes of action against it and Mr Dodds filed a notice of admission of the second and fourth causes of action against him. The admissions were on the basis of an agreed statement of facts.

[3] The Commission, Carter Holt and Mr Dodds have reached agreement on the quantum of penalty that they consider appropriate. It is now for the Court to fix the quantum of that penalty.[1]

Background

Parties and market

[4] Carter Holt is a New Zealand registered company having its registered office in Auckland. It is comprised of two divisions: "pulp, paper and packaging" and "building supplies". The "building supplies" division is made up of three business units, two of which are relevant for present purposes – Carter Holt Harvey Wood Products New Zealand (Wood Products) and Carters. As its name suggests, Wood Products manufactures and distributes a range of wood products, including MSG8 which is timber used for commercial construction.

[5] Wood Products is the largest supplier of structural timber in New Zealand. It supplies product to a number of building supply merchants, including Carters,

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1 Commerce Act 1986, s 80(1).

Fletcher Distribution Ltd (Placemakers), Bunnings, ITM and Mitre 10. Nationally Wood Products major MSG8 structural timber customers are Placemakers and Carters. In Auckland Wood Products' major customers are Carters and the Placemakers' outlets at Mount Wellington and Cook Street. Wood Products estimated annual sales of structural timber for commercial construction in Auckland amounts to [ ]. The parties estimate the total value of sales of all products by all building supply merchants for commercial construction in Auckland is $113 million annually.

[6] Carters is Carter Holts' building supplies merchant. It has stores throughout New Zealand. In Auckland Carters operates its commercial business via a central sales force. Orders are then fulfilled by one of the 10 Carters' branches.

[7] During the relevant period Mr Dodds was Wood Products' national sales manager, that is the sales manager of the domestic division of the Wood Products' business.

Development of the arrangement

[8] During the relevant period Wood Products set prices for each of its individual merchant customers on a regional basis. Merchant customers could also request a customer specific quote or CSQ for specific jobs from Wood Products.

[9] Commercial customers would often share quotes from competing merchants and request the merchant match or better the prices in the quotes in order to win the business.

[10] In 2012 competition in the Auckland commercial market for structural timber meant that merchant margins had been low for 12 to 18 months. Wood Products was receiving complaints from merchants that their margins were as low as zero percent, i.e. that merchants were selling structural timber at cost.

[11] As a result of the position in the Auckland commercial market the merchants were more frequently asking Wood Products to reduce its prices to them. Wood Products was also receiving complaints from Placemakers and Carters, each

complaining that Wood Products must have been offering preferential prices to the other. Wood Products' sales of structural timber were static.

[12] There was further tension between Placemakers and Wood Products in the period between March and June 2012.

[13] In mid to late May 2012 senior Carter Holt employees and senior Wood Products employees, including Mr Dodds, held an internal meeting to discuss the issues in the Auckland commercial market for structural timber, including:

(a) complaints Wood Products was receiving from merchants about lack of transparency in its pricing,

(b) decreasing merchant margin levels; and

(c) the pricing pressure that Wood Products was facing.

[14] One option discussed was the possibility of implementing a recommended retail price (RRP) for structural timber in the Auckland commercial market. That would allow the merchants to maintain their margin and reduce requests for lower pricing by Wood Products.

[15] Following the Wood Products' internal meeting in May 2012 Mr Dodds spoke to representatives of Mount Wellington, Cook Street and Carters in late May and early June about the idea of an RRP. On 15 June 2012 Mr Dodds and two Wood Products' legal advisers met and discussed further the possibility of issuing an RRP price list for structural timber. Practical and legal difficulties were identified. It was decided not to pursue the idea further.

[16] As a result of the meeting on 15 June Mr Dodds understood that the concept of an RRP price list would not be implemented, but believed he was able to make non binding recommendations to individual customers about prices to encourage them in their own behaviour. The idea of making recommendations about pricing continued to hold appeal for him as a means of addressing merchant pricing

pressure, customer perceptions about favouritism and the pressure on Wood Products.

[17] On 2 August 2012 Mr Dodds met with representatives of Mount Wellington and discussed the concept of recommended pricing. Mount Wellington expressed concern that if it implemented such a pricing structure Carters might not follow suit. Mr Dodds told the representatives of Mount Wellington he would talk to Carters and use his influencing skills and recommend strongly to them to comply with any RRP.

[18] On 23 August 2012 Mr Dodds and another Wood Products' employee met with two representatives of Cook Street and discussed how an RRP proposal could work in relation to MSG8. A proposal for pricing at cost plus eight per cent for MSG8 was raised by the Cook Street representative. Mr Dodds said he would try to ensure Carters also priced at that level. The Cook Street representative agreed to discuss the proposal with the Mount Wellington branch.

[19] Although not expressly raised during the discussions with Cook Street and Mount Wellington in August the reference to RRP was in fact a reference to a minimum resale price. It was implicit that the pricing strategy would only apply when the building supply merchants competing were limited to Carters, Cook Street and/or Mount Wellington.

Implementation of the arrangement

[20] Shortly after the 23 August 2012 meeting Mr Dodds spoke to Carters' employees, including the senior and more junior managers by telephone about the RRP proposal and strongly encouraged them to price MSG8 at cost plus eight per cent. Mr Dodds advised that he had spoken to both Cook Street and Mount Wellington and that he expected that Cook Street and Mount Wellington would price in the same way.

[21] At least one senior manager at Carters was concerned about the legal implications of the proposal and advised that before he would commit to it he would speak to a more senior manager and take internal legal advice. Mr Dodds encouraged him to do so. However a more senior manager at Carters considered

Carters should comply with the request as it emanated from Wood Products. That senior manager instructed his staff to price MSG8 at cost plus eight per cent but told them they were not to lose business as a result.

[22] After the 23 August 2012 meeting the representative of Cook Street spoke to a representative of Mount Wellington and said he would price MSG8 for commercial jobs in Auckland at cost plus eight per cent and that he expected Carters to do the same. On 10 September 2012 an internal email was circulated among five senior members of Fletcher Distribution Ltd directing pricing on MSG8 for commercial jobs in Auckland by Cook Street and Mount Wellington to be at cost plus eight per cent.

[23] On the basis of this conduct, in or about August to September 2012 there arose an understanding between Fletcher Distribution Ltd trading as Placemakers and Carter Holt that Cook Street, Mount Wellington and Carters would each increase their prices for MSG8 to the Auckland commercial market to cost plus eight per cent when the only building supply merchants competing were Cook Street, Mount Wellington and Carters.

[24] In accordance with the understanding Cook Street, Mount Wellington and Carters commenced pricing MSG8 at cost plus eight per cent for jobs where they were the only tenderers from mid September 2012. Carters did not, however, always price MSG8 at cost plus eight per cent. During the relevant period Carters made 359 quotes for commercial jobs that included an MSG8 component. For 33 of these quotes which fell within the terms of the understanding, Carters priced the jobs in accordance with the understanding. Carters was successful on five of those quotes. For a small number of additional quotes Carters did not price the job in accordance with the understanding.

[25] On or about 12 December 2012 a representative of Mount Wellington telephoned Mr Dodds and complained about Carters undercutting Mount Wellington on three commercial jobs in Auckland. Mr Dodds met with two representatives of Mount Wellington to discuss the complaints. The discussion included a proposal for Mount Wellington to provide further additional information with a view to Wood

Products compensating Mount Wellington for any profit lost. Mr Dodds said Wood Products might consider some form of compensation. The matter was not taken further.

[26] On 13 December 2012 Carters issued a quote to a customer that did not comply with Carters internal pricing approval procedures and also was not priced at cost plus eight per cent for the MSG8 component. The responsible sales manager was admonished and told to discuss the pricing aspect of the quote with Mr Dodds. Mr Dodds told the sales manager to withdraw the quote and reissue it with the price for MSG8 at cost plus eight per cent. The job was repriced.

[27] The understanding continued in effect from September 2012 through until March 2013.

Financial benefits/consequences

[28] The Commission accepts that the difference between the cost plus eight per cent (where Carters priced on the agreed basis and won the contract) and the price otherwise quoted was less than $1,000. However it also says that, as a result of the conduct Wood Products is likely to have gained in the order of $10,000 to $20,000 as a result of paying reduced rebates to Cook Street. Carter Holt does not accept that. The parties agree however, that there was potential for Wood Products to gain by paying reduced rebates to Cook Street. There was also potential for Wood Products, and by virtue of that Mr Dodds, to have an improved relationship with Cook Street and Mount Wellington which would also have the benefit they would spend less time addressing persistent customer complaints about pricing.

[29] Mr Dodds did not stand to gain financially as a result of the understanding and did not gain from it.

Sentencing procedure

[30] Under s 80 of the Act the Court imposes the penalty. However, as has been confirmed by the full Court in *Commerce Commission v NZ Milk Corporation Ltd*[2]

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2 *Commerce Commission v NZ Milk Corporation Ltd* [1994] 2 NZLR 730.

and adopted in a number of subsequent cases, there can be no objection to a joint view of the parties on submissions as to penalty nor to such a view being reached as a result of negotiations so that it represents what could be described as a settlement. Such settlements are in the interests of the parties, the community and the judicial system, enabling as they do early disposal of the proceedings and encouraging a realistic view of culpability and penalty. They also avoid the need for a full hearing.

[31] Ultimately it is the final figure the Court is asked to approve.[3] The Court must be satisfied the figure proposed is within a range which satisfies the objectives of the Act and the particular circumstances of the case before it.

[32] In the present case the parties have adopted the approach which has been applied in a number of previous cases to setting the appropriate penalty. The steps are to:

(a) determine the maximum penalty;

(b) establish an appropriate starting point for the offending that achieves the object of deterrence in light of relevant factors; and

(c) adjust the starting point for mitigating/defendants' specific factors.

The maximum penalty

[33] In the present case while the parties cannot agree on the precise commercial gain to Carter Holt it is, on any view, extremely limited. The maximum penalty is thus to be calculated as the greater of $10 million or 10 per cent of Carter Holt's relevant turnover. Carter Holt's turnover from trading within New Zealand in the year ended 31 December 2012 was [ ]. On that basis the maximum penalty available in respect of one breach is [ ]. As there are two breaches the potential maximum is [ ].

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[3] *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011 at [17]–[18].

[34] In the case of Mr Dodds the maximum available penalty is $500,000 per breach.

[35] For the breaches in this case, there is no prospect of a penalty of anything like those figures but they reflect Parliament's intention to mark the seriousness of such offending.

The starting point

Deterrence

[36] A number of considerations are relevant to the starting point applicable to both Carter Holt and Mr Dodds' cases. General and specific deterrence is an important factor in cases of this nature.[4] While Carter Holt is ultimately responsible, it was Mr Dodds' actions which led to the Carter Holt's breach of the Act.

Totality

[37] The totality principle is applicable. In the present case I consider it appropriate to fix a single start point to take account of both entry into and giving effect to the understanding.

Importance and type of market

[38] Mr Dixon submitted that the market in issue, namely the supply of structural timber to commercial customers in Auckland, has a value of between approximately $19 million and $24 million annually. The market is an important one. Carter Holt and Fletcher Distribution Ltd are both important participants in commercial timber markets. Counsel for the Commissioner effectively submits that it is necessary for the participants in that market to improve their understanding of what constitutes unlawful anti-competitive conduct.

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4 *Telecom Corporation of NZ v Commerce Commission* [2012] NZCA 344 at [53].

Nature and seriousness of the conduct

[39] This is a classic case of price fixing. Price fixing is at the serious end of the spectrum of the types of conduct prohibited by the Act. It is deemed anti-competitive per se.

[40] However, the understanding was entered into in the context of a market that was already under pressure and when merchant margins had been low for 12 to 18 months. Also, as Ms Ferguson submitted, it effectively evolved from an in-house and legitimate discussion. It was only when third parties became involved that it became illegal. The Commission accepts that the understanding in this case was entered into in order to provide Wood Products and Mr Dodds with a quieter life in the context of the intense competition. So, while the conduct was of its nature serious, it must be recognised it was not the most egregious of such conduct.

The role of the defendants

[41] Mr Dixon submitted that both Carter Holt and Mr Dodds, together with Fletcher Distribution Ltd officers were integral to developing the RRP concept that led to the understanding and putting it into effect. Mr Dixon also referred to Mr Dodds' conduct during December 2012 in telling the sales manager to withdraw a quote and reprice it at the agreed cost plus eight per cent.

Was the conduct deliberate or not?

[42] Mr Dixon submitted that both Carter Holt and Mr Dodds were willing participants in the understanding and submitted the conduct of both was deliberate. He accepted however that neither coerced the Placemakers' stores to enter the understanding. I also accept there is force in Ms Fergusson's submission that the summary of facts confirms Mr Dodds had no intention to breach the provisions of the Act. For example, as noted, when one of the Carters' managers said he wanted to speak to a senior manager and take internal legal advice, Mr Dodds encouraged him to do so.

Seniority of employees

[43] The Commission concedes that the conduct did not take place at the direction of or even with the knowledge of Carter Holts Board or Executive. The Commission does however submit that those managers more senior to Mr Dodds at Carter Holt who were aware that the RRP for structural timber had been implemented ought to have been well aware that it amounted to price fixing.

Duration

[44] The conduct lasted from September 2012 until March 2013 when it petered out.

Potential commercial gain

[45] The Commission and the defendants disagree as to the amount of commercial gain but it is accepted by the Commission that it was minimal. While that is a relevant factor it is by no means determinative, particularly where deterrence is the issue and the Court is required to consider the harm to markets and consumers: *Commerce Commission v Qantas Airways Ltd*.[5] There is also the issue of potential gain or harm associated with the conduct *Commerce Commission v Geologistics International (Bermuda) Limited*.[6]

[46] Nevertheless the fact that of the 33 quotes issued by Carters where the understanding had been applied, Carters won only five provides further contextual background to the offending and puts it in perspective.

[47] There may have been other incidental benefits but, again in context, they were modest.

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5 *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011, at [49].

6 *Commerce Commission v Geologistics International (Bermuda) Limited* HC Auckland CIV-201-404-5490, 22 December 2010 at [22].

Market share

[48] Carter Holt is the largest manufacturer and wholesaler of structural timber in New Zealand. As noted the Auckland commercial market for structural timber is estimated to have had a value of between $19 and $24 million annually. Carters is the third largest of the competitors but still holds a significant share of the market.

Defendants' resources

[49] Carter Holt Harvey has substantial resources. Mr Dodds does not.

Comparison with other cases

[50] The cases that are of particular assistance to the position of Carter Holt in this case are *Commerce Commission v Visy Board (NZ) Ltd; Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*; and *Commerce Commission v Whirlpool SA*.[7] In those cases the Court took starting points of between $4 to $7 million. Penalties of $3.6 and $4.5 million were imposed. Each case must of course turn on its own facts.

[51] There are no direct comparisons in terms of people at the relatively junior level that Mr Dodds was in where penalties had been imposed in the past. However, I have had regard to the penalty imposed on Mr Carroll in the *Visy* case of $25,000 and the penalties imposed on the corporate defendants in the *Koppers Arch* cases.

Summary

Starting point – Carter Holt

[52] Having regard to the above features and the comparison with other cases the Commission submits an appropriate start range is in the order of $2.8 million to $3.5 million for Carter Holt. Carter Holt submits the appropriate start range is $2.8 to

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[7] *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097; *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC), HC Auckland CIV-2005-404-2080, 4 October 2006, [2009] NZCCLR 1 (HC); and *Commerce Commission v Whirlpool SA*, above n 3.

$3.2 million. In my assessment of this particular case I favour the range suggested by Carter Holt rather than the Commission.

Mitigating factors relevant to Carter Holt

[53] There are a number of mitigating factors. First, there have been no previous contraventions by Carter Holt. Next, as Mr Ladd emphasised, Carter Holt has cooperated from the outset of the investigation, at significant internal cost. It indicated a willingness to assist from the outset of the inquiry and was in a position to file the admissions with the proceedings. The early acknowledgement of responsibility minimised the time and cost of the Commission's inquiry. Carter Holt does run compliance programmes but it does seem that the programme was inadequate or ineffective.

[54] In light of those factors I consider a discount of between 35 to 40 per cent to be appropriate. I accept the suggested figure of $1.85 million recommended by both the Commission and Carter Holt to be appropriate.

Mr Dodds

[55] The Commission accepts that Mr Dodds did not set out to contravene the Act. The RRP concept developed over a period of time. Mr Dodds did not stand to gain personally from the understanding and has suffered significantly in both his personal and financial life as a result of the investigation. His family has been affected.

[56] Mr Dodds cooperated fully with the Commission including undertaking a voluntary interview.

[57] The culpability of Mr Carroll in the *Visy* case and the employees in the *Koppers Arch* case was, in my assessment, significantly more than that of Mr Dodds in the present case. I consider that an appropriate starting point for Mr Dodds is in the region of $10,000 to $15,000.

[58] Taking account of the positive mitigating features, namely Mr Dodds' cooperation, his personal situation, the references and his early admission of liability,

I consider a discount of 50 to 55 per cent is appropriate. I agree that the suggested penalty of $5,000 is within the range available to the Court.

Result/orders

[59] For the breaches of the Act Carter Holt is to pay a penalty of $1.85 million. Mr Dodds is to pay a penalty of $5,000.

[60] The parties are to bear their own costs.

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Venning J