PARAGRAPHS [27] AND [55] HAVE BEEN AMENDED TO DELETE CONFIDENTIAL MATERIAL.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-005479

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	DEUTSCHE BAHN AG & ORS Defendants

Hearing: 12 August 2011

Appearances: J B M Smith and F J Cuncannon for Plaintiff
I J Thain and D C E Smith for Kuehne + Nagel International AG

Judgment: 12 October 2011

JUDGMENT OF VENNING J

This judgment was delivered by me on 12 October 2011 at 5.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

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Introduction

[1] The Commerce Commission (the Commission) alleges that Kuehne + Nagel International AG (Kuehne + Nagel), together with a number of other freight forwarders, entered into and gave effect to seven cartel agreements in breach of the Commerce Act 1986 (the Act). Kuehne + Nagel is based in Switzerland. It filed a protest to jurisdiction. The Commission applies to set the protest aside.

The investigation and Kuehne + Nagel's position

[2] In late 2007 the Commission commenced an investigation into the freight forwarding industry as a result of a confidential application for leniency. Following its investigation the Commission brought these proceedings against a number of freight forwarders, including Kuehne + Nagel. The Commission has settled the proceedings with all parties other than Kuehne + Nagel.

[3] Kuehne + Nagel is incorporated in Switzerland. It is the sole shareholder of Kuehne + Nagel Limited (Kuehne + Nagel NZ). Prior to 12 May 2009 Kuehne + Nagel NZ was ultimately owned by Kuehne + Nagel via Kuehne + Nagel Asia Pacific Holding AG. On 12 May 2009 Kuehne + Nagel Asia Pacific Holding AG merged into Kuehne + Nagel.

The agreements in issue

[4] The Commission alleges that Kuehne + Nagel entered into and gave effect to the following seven cartel agreements in breach of s 27(1) and (2) of the Act.

The WRS 2001 agreement –

An agreement to pass on security surcharges imposed on freight forwarders by airlines.

United Kingdom NES agreement, Italian SAF agreement, (United States) Air AMS agreement, (Canadian) ACI agreement and Swiss SFA agreement –

Agreements to impose a surcharge to recover costs related to additional security measures required by the relevant national authorities.

Chinese CAF agreement –

An agreement to insulate freight forwarders from the impact of the revaluation of the Chinese currency by the People's Bank of China.

[5] The Commission alleges that, from the perspective of a New Zealand freight forwarding customer, the WRS 2001 agreement, Air AMS agreement and ACI agreement were both inbound and outbound agreements as they applied to freight shipped to and from New Zealand:

- the WRS 2001 agreement applied to all freight sent to and from New Zealand;

- the Air AMS agreement applied to all freight sent to or from New Zealand via the United States; and

- the ACI agreement applied to all freight sent to or from New Zealand via Canada.

[6] The Commission also alleges that, from the perspective of a New Zealand freight forwarding customer, the United Kingdom NES agreement, Italian SAF agreement, Chinese CAF agreement and Swiss SFA agreement were all inbound agreements as they applied to freight shipped to New Zealand:

- the United Kingdom NES agreement applied to all freight sent to New Zealand from the United Kingdom;

- the Italian SAF agreement applied to all freight sent to New Zealand from Italy;

- the Chinese CAF agreement applied to all freight sent to New Zealand from China;

- the Swiss SFA agreement applied to all freight sent to New Zealand from Switzerland.

The applicable rules

[7] As the proceedings were served out of New Zealand without leave and Kuehne + Nagel protested jurisdiction under r 5.49 of the High Court Rules, r 6.29(1) applies:

> … the court must dismiss the proceeding unless the party effecting service establishes—
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> (a) that there is—
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> (i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and
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> (ii) the court should assume jurisdiction by reason of the matters set out in rule 6.28(5)(b) to (d); or
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> (b) that, had the party applied for leave under rule 6.28,—
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> (i) leave would have been granted; and
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> (ii) it is in the interests of justice that the failure to apply for leave should be excused.

The r 6.29(1)(a) test

[8] Rule 6.29(1)(a) prescribes a two-stage inquiry. The first stage requires the Commission to establish it has a good arguable case that the claim falls wholly within one or more of the paragraphs of r 6.27 (relating to the circumstances in which service may be effected overseas without leave). This part of the inquiry is a gateway or threshold which must be established. It is a largely factual question to be assessed on the basis of the pleadings and the affidavit or other evidence before the

Court.[1] As to what is required for a "good arguable case" the Court of Appeal said in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*:[2]

> It is clear, however, that the good arguable case test does not require the plaintiff to establish a prima facie case. [See the discussion in *Seaconsar Far East Ltd v Bank Markazi* [1994] 1 AC 438 (HL) at 453.] 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.

[9] In the present case the Commission relies upon r 6.27(2)(j) which provides for service when the claim arises under an enactment and either:

- any act or omission to which the claim relates was done or occurred in New Zealand: r 6.27(2)(j)(i); or

- any loss or damage to which the claim relates was sustained in New Zealand: r 6.27(2)(j)(ii).

[10] If the Commission is able to satisfy the threshold test then the Court must consider the second stage of the inquiry, namely whether it should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) – (d):[3]

> (b) whether there is a serious issue to be tried on the merits;
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> (c) whether New Zealand is the appropriate forum for the trial; and
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> (d) any other relevant circumstances supporting an assumption of jurisdiction.

[11] In *Wing Hung* the Court of Appeal also confirmed that r 6.29 requires separate consideration of each cause of action.[4] At the threshold stage of the inquiry, the question whether a particular cause of action falls within r 6.27 will depend on which (if any) of the circumstances set out in that rule applies. There may be commonalities but it is not permissible to reason that if one cause of action passes muster the others arising from the same or similar facts must meet the criteria too.

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1 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [32]-[33].
2 At [41].
3 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* at [35].
4 At [71].

That said it will often be appropriate to assess the appropriate forum issue and other relevant factors on a global basis where there are multiple causes of action.[5]

Does the Commission have a good arguable case that its s 27(1) claims fall within r 6.27?

[12] The Commission claims under both s 27(1) and (2) of the Act in relation to each agreement:

> (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.
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> (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.

[13] The subsections are directed at different actions concerning agreements that have the purpose or effect or likely effect of substantially lessening competition in a market. To satisfy the threshold test in relation to the claims under s 27(1) in this case, the Commission must show it has a good arguable case that an act to which the claim relates was done in New Zealand[6] or that any loss or damage to which the claim relates was sustained in New Zealand.[7]

[14] There is an immediate difficulty for the Commission with its claims under s 27(1). All of the agreements in issue were entered into outside New Zealand. For example, the first cause of action alleges that Kuehne + Nagel contravened s 27(1), via s 30, of the Act, in that they entered into the WRS 2001 agreement at a telephone conference on 1 October 2001. It alleges that at the telephone conference Kuehne + Nagel agreed with other freight forwarders that all war risk and other surcharges would be passed on to customers (including those in the freight forwarding markets) as they were imposed on freight forwarders by airlines. The telephone conference was convened overseas. It was attended by Mr Werner Blaser on behalf of Kuehne + Nagel. Mr Blaser is based in Switzerland. Similarly, all other meetings at which the

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5 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* at [71]-[72].
6 High Court Rules, r 6.27(2)(j)(i).
7 High Court Rules, r 6.27(2)(j)(ii).

alleged agreements were entered were held overseas. Overseas representatives of Kuehne + Nagel attended. As the agreements were entered into overseas, s 4(1) of the Act applies.

[15] Section 4(1) of the Act provides:

> This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

[16] In *Poynter v Commerce Commission* Elias CJ confirmed:[8]

> Section 4 is concerned with how the Act is to apply to conduct outside New Zealand. To the extent that the Act is not explicitly extended to conduct outside New Zealand by s 4, it does not apply.

[17] In the same case the Supreme Court affirmed the following general principles applied in a competition setting to claims against defendants resident overseas:[9]

(a) Persons who reside overseas and are not present in New Zealand will not lightly be subjected to the jurisdiction of the New Zealand courts: *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd (No 2)*;[10]

(b) The New Zealand legislature will be slow to assert jurisdiction over conduct occurring wholly outside New Zealand, even if that conduct has consequences within New Zealand. This is reflected in the presumption that statutes do not have extraterritorial effect except to the extent permitted by law: *Governor of Pitcairn and Associated Islands v Sutton*.[11]

[18] Quite apart from whether either leg of r 6.27(2)(j) applies, the combined effect of s 27(1) and s 4(1) raises the fundamental issue whether it can be said that Kuehne + Nagel carries on business in New Zealand. If not, the Commission cannot pursue its claim under s 27(1) against Kuehne + Nagel because the relevant conduct,

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8 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [16].

9 At [30] and [31].

10 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd (No 2)* [1989] 2 NZLR 50 (CA) at 54.

11 *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 438.

the entry into the agreements, took place outside New Zealand and the Act would not extend to such conduct unless Kuehne + Nagel carries on business in New Zealand.

[19] A similar issue arose for consideration in the case of *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd.*[12] Bomac and the other plaintiffs were the major purchasers in the vitamin market New Zealand. The defendants were the relevant suppliers, particularly in animal nutrition and health. The defendants comprised New Zealand subsidiaries (the domestic defendants) and their parent and related companies (the international defendants). Bomac claimed that, when it invited the domestic defendants to submit tenders for the supply of vitamins, the domestic defendants would seek prices from the international defendants, and that the prices were effectively pre-set between the international defendants in accordance with a global arrangement. Harrison J first considered whether it could be said the international defendants were carrying on business in New Zealand through their local subsidiaries, noting that there were two avenues to support such a finding: agency or by piercing the corporate veil.[13] He considered the question of agency first, noting the issue was an essentially factual one.[14] He stated the principle:[15]

> Within the traditional corporate structure, there is not normally a legal relationship of principal and agent between parent and subsidiary. It is not created by the former's control of the latter (*Attorney-General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528 (CA) per McKay J at 539 (10-30) and 540 (15-35)). The control vested in the parent as a consequence of its beneficial shareholding is not determinative. Likewise the existence of consolidated group accounts is irrelevant.

[20] Harrison J concluded that the critical point was that the international and domestic defendants transacted their business inter se as contracting principals, a relationship which effectively excluded a relationship of principal and agent.[16] The New Zealand subsidiaries, on their own behalf, entered into the various supply contracts.

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12 *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 (HC).
13 At [65].
14 At [68].
15 At [69].
16 At [70].

[21] As to the possibility of piercing the corporate veil, Harrison J accepted that it might be said generally that overseas registered companies carry on business in a particular country through local subsidiaries and that:[17]

> It is of the essence of a multinational structure that all members function within a group. In economic terms they are collectively seen as one unit. But this brief overview does not assist a legal analysis. As noted, New Zealand Courts, applying settled principles of English common law, have started from the point of recognition of each company within a group as a separate legal entity. The corporate veil will only be lifted in extraordinary circumstances.

[22] As there was nothing to suggest that any of the corporate structures were a sham or that their components were illegal, Harrison J declined to lift the corporate veil.[18]

[23] However, the Judge then went on to conclude that, while it could not be said the international defendants were carrying on business in New Zealand through the subsidiaries, that did not exclude the existence of a parallel agency relationship where the international defendants used the New Zealand subsidiaries as instruments to give effect to arrangements settled overseas but which were designed to affect the local market.[19]

[24] In coming to that conclusion, Harrison J considered the application of s 90(2) of the Act. That is a matter I return to when considering the causes of action under s 27(2). It does not, however, assist with the issue under consideration at present, namely whether Kuehne + Nagel carried on business in New Zealand through Kuehne + Nagel NZ, either by agency or by lifting the corporate veil. I turn to the evidence on that issue.

The evidence as to the carrying on of business in New Zealand in this case

[25] Mr Smith referred to the evidence of Mr Grant Chamberlain, the Commission's Chief Adviser, that Kuehne + Nagel NZ was subject to instructions from other members of the group with respect to both fees and contractual terms

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17 At [72].
18 At [73].
19 At [75].

with airlines, and that the Kuehne + Nagel group as a whole took a global approach to its freight business, including setting fees for a number of the requirements. Kuehne + Nagel NZ is now, of course, a wholly owned subsidiary of Kuehne + Nagel. At material times it was a subsidiary of Kuehne + Nagel Asia Pacific Holding AG which was in turn a wholly owned subsidiary of Kuehne + Nagel.

[26] Mr Smith emphasised the following matters:

- Mr Troy Hageman, the managing director of Kuehne + Nagel NZ, had admitted to the Commission in an interview that Kuehne + Nagel NZ had no discretion whether or not to pass on the various surcharges.

- Kuehne + Nagel NZ accepted that local management had delegated authority but only to a certain level. Decisions beyond that level were elevated to regional management based in Hong Kong and decisions beyond their competency levels were elevated to head office in Switzerland. (Dr Bernd Pill's response as group general counsel for Kuehne + Nagel Management AG to this point is that the head office referred to is in fact Kuehne + Nagel Management AG not Kuehne + Nagel).

Mr Smith submitted that Kuehne + Nagel was directing the actions of the group.

[27] However, there is further, relevant, evidence of Mr Hageman on the issue of whether Kuehne + Nagel can be said to have carried on business in New Zealand through Kuehne + Nagel NZ. Mr Hageman confirms:

- Kuehne + Nagel NZ operates from Auckland, Wellington and Christchurch. It is a separate and distinct legal entity. Importantly, it enters into all contracts and arrangements with customers and suppliers (including other freight forwarding companies) in its own right. Kuehne + Nagel NZ has no authority to act on behalf of any other Kuehne + Nagel group company.

- Kuehne + Nagel NZ operates its own business. It owns and operates its own bank accounts and prepares its own financial statements which are audited

each year. It owns significant assets including land, buildings, plant and equipment in its own name.

- Mr Hageman has a senior management team that report to him directly. He has general authority in terms of overseeing matters relating to the day to day running of Kuehne + Nagel NZ's business.

- Kuehne + Nagel NZ reports to the regional manager for the Asia Pacific region primarily on financial matters on a monthly basis. Mr Hageman discusses strategic issues with regional management. He says he has never had any direct dealings with Kuehne + Nagel.

[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.*[20] 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.

[29] Kuehne + Nagel does not carry on business in New Zealand. Section 4 applies. There is no basis for a claim against it under s 27(1) in relation to agreements entered into overseas.

[30] The act in issue under the s 27(1) claims is the entry into the agreements. In terms of r 6.27(2)(j), the act was not done and did not occur in New Zealand. The Commission therefore fails to satisfy the onus on it under r 6.29 that there is a good arguable case for its claims under s 27(1) of the Act. Even if, contrary to the observations of Harrison J in *Bomac,*[21] it could be argued that loss or damage was sustained in New Zealand as a result of the entry into the agreement, it cannot be said that there is a serious issue to be tried in relation to the claims under s 27(1),

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

21 *Bomac Laboratories Limited & Ors v F Hoffman-La Roche Limited & Ors* above n 10, at [95].

based as they are on agreements entered into outside New Zealand by Kuehne + Nagel, an entity which does not carry on business in New Zealand.

[31] For the same reasons the Commission could not satisfy the alternative r 6.29(1)(b) criteria. To recap, r 6.29(1)(b) applies where, had the Commission applied for leave under r 6.28, leave would have been granted and it is in the interests of justice that failure to apply for leave should be excused. Rule 6.28(5)(a) requires the claim to have a real and substantial connection with New Zealand, which it does not. The agreements were entered into outside New Zealand. Nor, for the reasons given above, can it be said there is a serious issue to be tried on the merits in relation to the s 27(1) claims, as again the claim is premised upon establishing that Kuehne + Nagel carried on business in New Zealand, which it does not.

[32] Like Harrison J in *Bomac* I consider it would be entirely artificial to find that Kuehne + Nagel carried on business in New Zealand through Kuehne + Nagel NZ. That is, however, different to the issue of whether it can be said Kuehne + Nagel used Kuehne + Nagel NZ as its instrument to give effect to price fixing agreements settled overseas, a matter to which I now turn.

Does the Commission have a good arguable case that r 6.27 applies to its s 27(2) claims?

[33] That leads to consideration of the more difficult issue of the causes of action under s 27(2) of the Act. Section 27(2) provides:

> 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.

[34] The claims under s 27(2) allege that Kuehne + Nagel gave effect to the provisions of the various agreements that had the purpose or effect or likely effect of controlling or maintaining prices or of substantially lessening competition in a market.

[35] For example, the Commission pleads that Kuehne + Nagel gave effect to the WRS 2001 agreement:

(a) By arranging, whether itself or through an agent, for freight to be shipped to New Zealand and, through its agent Kuehne + Nagel NZ, from New Zealand pursuant to and accompanied by house air waybills that included charges set in accordance with that agreement; and

(b) By charging customers in the freight forwarding markets in accordance with that agreement.

[36] In *Bomac,* Harrison J accepted that, while the international defendants could not be said to be carrying on business in New Zealand through their New Zealand subsidiaries, there was a parallel agency relationship pursuant to which the international defendants used their New Zealand subsidiaries as instruments to give effect to agreements settled overseas but designed to affect, inter alia, the New Zealand market. The argument rests upon application of s 90(2)(b) of the Act:

> (2) Any conduct engaged in on behalf of a body corporate—
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> ...
>
> (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—
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> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

[37] If s 90(2)(b) of the Act applies, the relevant conduct of persons in New Zealand, being conduct directed or consented to or agreed to by agents of Kuehne + Nagel, would be attributable to Kuehne + Nagel because of the s 90 relationship. As any such attributed conduct took place in New Zealand no extraterritoriality would have been involved.[22] Kuehne _+ Nagel's liability would not therefore depend on it carrying on business in New Zealand.

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22 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [51].

[38] The question is whether s 90(2)(b) of the Act applies. Mr Thain referred to the comments of the Supreme Court in *Poynter v Commerce Commission* as to the application of s 90:[23]

> 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.

[39] In *Poynter*, it was accepted s 90 did not apply. The attribution sought was of the conduct of a subordinate to a superior who was not the employer or principal, for which s 90 makes no provision.[24]

[40] In terms of s 90(2)(b), in the present case the issue is whether it can be said the cartel agreements were given effect to on behalf of Kuehne + Nagel by Kuehne + Nagel NZ at the direction or with the consent or agreement of an agent of Kuehne + Nagel. If so then such conduct is deemed to have been engaged in also by Kuehne + Nagel. That is a different question to that of whether Kuehne + Nagel carried on business in New Zealand through its agent Kuehne + Nagel NZ.

[41] The Commission argues generally that communication between Kuehne + Nagel officers and other freight forwarders showed that Kuehne + Nagel had arranged for the various surcharges to be imposed on freight being shipped to and from New Zealand. It also refers to interviews with Kuehne + Nagel NZ's employees and Kuehne + Nagel NZ's written responses to s 98 notices which, it says, revealed that Kuehne + Nagel NZ was required to pass on or charge surcharges imposed or advised by other members of the Kuehne + Nagel group of companies. Those specific directions were provided either via direct communications between members of the Kuehne + Nagel group or via Kuehne + Nagel's database on its group intranet. The Commission says Kuehne + Nagel implemented the cartel agreements in New Zealand by directing Kuehne + Nagel NZ to pass on certain surcharges so that Kuehne + Nagel NZ was Kuehne + Nagel's agent or instrument in New Zealand for the purposes of s 90(2).

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23 At [70].
24 See [9] and [47]-[51].

The holding company issue

[42] Kuehne + Nagel's principal response to this argument and the claims under s 27(2) is that it is a mere holding company and it does not operate or manage freight forwarding so that there can be no serious issue to be tried on the merits that it gave effect to the price fixing agreements. Put another way, Kuehne + Nagel submit that Kuehne + Nagel NZ could not have been acting "on behalf of" Kuehne + Nagel when it gave effect to the agreements (if indeed it did so) because Kuehne + Nagel was a mere holding company.

[43] Kuehne + Nagel relies on the evidence of Dr Pill. Dr Pill says that Kuehne + Nagel is a holding company only. It does not carry on the business of freight forwarding. It owns and invests in companies that operate freight forwarding businesses or that provide management and other services to those businesses. Dr Pill deposes that the Kuehne + Nagel group comprises over 200 companies. Many, but not all, operate freight forwarding businesses. All companies in the group are ultimately owned by Kuehne + Nagel. Kuehne + Nagel is incorporated in Switzerland and is listed on the Swiss stock exchange. It has no employees. Importantly, because it is a holding company, Kuehne + Nagel has the advantage of tax privileges in Switzerland which are dependent on its non-trading status. The relevant legislation requires that such a company, not only formally but also in practice, cannot be involved in business activities outside of merely owning and investing in other companies.

[44] Dr Pill says the management and co-ordination of freight forwarding activities of the operating companies is managed by Kuehne + Nagel Management AG, although that company does not itself carry on the business of providing freight forwarding services. He also identified the various individuals involved in the agreements the Commission relies on to support its case against Kuehne + Nagel and identifies which member of the Kuehne + Nagel group they are employed by.

[45] Mr Smith submitted that, despite Dr Pill's evidence, there was evidence to support the Commission's submission that Kuehne + Nagel was not just a holding company. Mr Smith referred to the following factors:

- Kuehne + Nagel holds out that it is the head office of the Kuehne + Nagel group on its website. The website lists the office locations of Kuehne + Nagel's global logistics network across a number of regions and records the world headquarters as Kuehne + Nagel and its address. That, however, does not really address the issue of whether Kuehne + Nagel is merely a holding company or not. A holding, non-trading, company could still describe itself as the world headquarters of the group.

- Next, Mr Smith noted that Dr Pill's evidence that Kuehne + Nagel has no employees and no business activities was contrary to its prior advice to the Commission when, in response to a request for information, Kuehne + Nagel (rather than Kuehne + Nagel NZ) replied through its solicitors and attached a schedule advising the Commission that Mr Klaus Herms was employed by Kuehne + Nagel. Dr Pill has deposed that was a mistake and Mr Herms was employed by Kuehne + Nagel Management AG. Mr Smith suggested that, notwithstanding Dr Pill's evidence, if the admission was an error, it was a highly convenient one. I agree it is surprising that a schedule containing a list of seven key employees would contain such an error, particularly when, as the covering letter confirmed, the letter could not be sent until approval was obtained from the Swiss Federal Department of Economic Affairs.

- Next, Kuehne + Nagel brought proceedings in relation to breach of its intellectual property rights before the World Intellectual Property Organization. Mr Smith referred to the following material from those proceedings where Kuehne + Nagel stated:

> The Complainant's group today is one of the world's leading freight forwarding and logistics consolidated companies. Complainant's group operates across a global network of 750 offices staffed by over 40,000 logistics employees.

The fact Kuehne + Nagel owns a domain name and defends its rights in relation to that name for the benefit of the operating companies within the group is not necessarily inconsistent with Kuehne + Nagel's argument that it is a holding company and does not trade. It does however show that Kuehne + Nagel is prepared and able to take action on behalf of the group as a whole.

[46] The principal feature that supports the Commission's challenge to Kuehne + Nagel's submission that it is no more than a holding company is the fact that in the United States Kuehne + Nagel was charged with, and accepted liability for, its involvement in the Air AMS, the United Kingdom NES and the Chinese CAF agreements.

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

[48] Mr Thain submitted that the Commission could not rely on the United States Department of Justice media release or the pleadings in that case to show Kuehne + Nagel acted as a freight forwarder. He submitted that the formal admissions could only be binding for the purpose of the particular case in which they are made: *Australian Competition and Consumer Commission v ABB Transmission and*

Distribution Ltd (No. 2).[25] Mr Thain noted there was no evidence of the relevant underlying United States law of attribution or of any other circumstances surrounding the plea agreement. He submitted the Court should not engage in speculation.[26] Mr Thain submitted that there could be numerous reasons for plea agreements and that in any event, the admissions did not extend to cover the allegations in New Zealand. He sought to distinguish the present case from *Bray v F Hoffman-La Roche Ltd*[27] where European parent companies of Australian subsidiaries had admitted certain regulatory offences on a worldwide basis, which was not the position here. In summary he submitted the plea arrangement in the United States did not affect Kuehne + Nagel's status as a holding company for the purposes of these proceedings.

[49] In *Bray,* European parents admitted certain regulatory offences in the United States, Canada and Europe. The factual basis for the United States and Canadian pleas included admissions that the European parents had committed the anti-competitive offences with which they were charged in the United States and Canada respectively, "and elsewhere". Merkel J was satisfied that the "elsewhere" included Australia.[28] He regarded it as probable that the European parents, acting through officers of the regional parent and national subsidiary, were actively involved in implementing the cartel agreement in Australia. In *Bray* evidence was also filed to support the submission that one of the European parents was only a holding company. The Judge, however, was not satisfied that the European party had no involvement.[29] The fact that the European parent had pleaded guilty to the charges in Canada and Europe warranted the inference that it was also involved in making and implementing the cartel agreement, albeit by agents that included a European subsidiary and its servants and agents.

[50] I accept that formal admissions (as to engaging in anti-competitive behaviour) can only be binding for the purpose of the particular case in which they

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

26 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [41].

27 *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243, (2002) 190 ALR 1.

28 At [149].

29 At [150].

are made and that, unlike in *Bray,* the admissions in this case do not in any event extend to behaviour "elsewhere".

[51] However, against that, the charges that Kuehne + Nagel pleaded to record that Kuehne + Nagel was engaged in the business of providing freight forwarding services in the United States and elsewhere. Even without the principal concession that it engaged in anti-competitive behaviour, the significance for present purposes is the acceptance that Kuehne + Nagel was in business and provided freight forwarding services. The guilty pleas must have been premised on the basis that Kuehne + Nagel was engaged in the business of providing freight forwarding services. That is inconsistent with Kuehne + Nagel's position in these proceedings that it is a holding company only and does not trade. That factor, taken with the advice (albeit now retracted) that it employed Mr Herms supports a finding that Kuehne + Nagel is not merely a holding company and could have authorised the conduct carried out in New Zealand by Kuehne + Nagel NZ. At the least it is a genuinely disputed fact which cannot be resolved on this application.

[52] I then move to consider whether the surrounding facts provide a sufficiently plausible foundation the claim falls within r 6.27(2).

[53] The key to the finding in *Bomac* that the claim satisfied the test of a good arguable case lay in the Court's acceptance that the issue of whether or not a foreign corporation could give effect to an agreement through the instrumentality of a local subsidiary, whether by the doctrines of pure agency, s 90(2) of the Act or attribution, was a serious or substantial question to be tried and there was a compelling factual basis for it.[30]

[54] The issue in the present case is whether there is a sufficiently compelling factual basis for the argument in this case as there was in *Bomac*. The Supreme Court did not directly address this issue in *Poynter*, where the focus was on the preliminary question of whether Mr Poynter carried on business in New Zealand.

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30 At [89].

[55] Mr Thain submitted that charges to New Zealand customers were set independently by Kuehne + Nagel NZ because it and other members of the Kuehne + Nagel group were independent companies.

[56] However, 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.

[57] As Merkel J accepted in *Bray*, the cartel agreement can be implemented by the overseas parent company and overseas operational companies and the local subsidiary by officers of each of those companies acting as agent for the company next up in the chain of companies (other than the overseas parent company which is at the top of the chain).[31] That is the position that the Commission argues for in this case. Section 90(2) supports such an analysis, providing the factual basis is made out.

[58] There are a number of factors that support the conclusion that Kuehne + Nagel NZ was implementing the agreements at the direction of the Asia Pacific regional office which in turn was subject to direction from Kuehne + Nagel head office in Switzerland.

- As Mr Smith referred to, Kuehne + Nagel NZ customer notices explained the implementation of the fees by reference to the Kuehne + Nagel group's justification for the fees rather than it being a local activity or initiative.

- In relation to the AMS fees there is an email from Kuehne + Nagel (Asia Pacific) Management Ltd to Mr Stephen Fredricson of Kuehne + Nagel NZ (and sent to other members within the regional group) to the effect:

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[31] At [151].

Dear all

I'm really sorry, but I have just realized an error in the e-mail I have sent you in the amendment to the A–AMS fee. The amount to charge is:

* US$ 15.00 *

instead of US$ 12.50! ...

- There is similar communication in relation to the ACI shipments in an email from Mr Thomas Lehmann of Kuehne + Nagel (Asia Pacific) Management Ltd on 10 June 2007:

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

- When Mr Hageman of Kuehne + Nagel NZ was asked about the American manifest system fee in relation to imports into the United States the following exchange took place:

Commission:	Do you know if that fee was actually implemented by Kuehne & Nagel?
Hageman:	I couldn't tell you.
Commission:	If you were advised of the increase ...
Hageman:	If we were advised of it we would pass knowledge of it as it was.
Commission:	Do you recall any staff discussion in respect of that?
Hageman:	No I don't.
Commission:	Ok, and do you have any discretion on whether you charge that?
Hageman:	Not to my knowledge, no.
Commission:	Do you have any role whether it's implemented at all or is it just merely passed on?
Hageman:	Merely passed on.

Mr Hageman gave similar responses in relation to the other price fixing agreements.

[59] Further, there is the response by Kuehne + Nagel NZ to the Commission's inquiry as to the relationship between Kuehne + Nagel NZ and any holding companies up to and including the ultimate parent company:

> Kuehne + Nagel New Zealand's relationship with the Group is similar to many multinationals. Local management has delegated authority to make decisions to a certain level, decisions beyond this level are elevated to regional management based in Hong Kong and decisions beyond their competency level are elevated to head office in Switzerland. Instructions and directives relating to the New Zealand business come either from head office via regional management in Hong Kong, or directly from regional management in Hong Kong.

[60] Next, local staff were expected to adhere to the fee agreements implemented. The tone of the matter is made by Mr Leahmann's correspondence from Kuehne + Nagel (Asia Pacific) Management Ltd to various members of the Asia Pacific Group:

> Please be advised that in view of various uncertainties in regards to the fee structure to be charged for A-AMS in the market place, it has been decided **NOT** to go forward and bill the suggested fee of EUR 25.00 per HAWB and EUR 15.00 per IATA Direct AWB ...
>
> We will keep you posted once a market-accepted fee structure has been agreed upon which can then be levied for the AAMS filing.
>
> Please ensure that all staff in your area of responsibility are informed and will adhere accordingly.

[61] At a broader level, there is the evidence of Mr Blaser reporting on behalf of the Kuehne + Nagel group as to its compliance with charging its customers. That required Kuehne + Nagel NZ to also be compliant.

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

[63] Also significant is the nature of the freight forwarding industry. As Mr Chamberlain says, at least three quarters of freight is paid for at destination. In most cases a number of members within the Kuehne + Nagel group were required to be involved to implement the agreements. The language of internal communications suggests that the agreements were made and implemented through the group as a whole. The email of Mr Jochen Thewes to others within the industry on 8 March 2005 regarding the Chinese CAF agreement strongly suggests that he considered Kuehne + Nagel operated as a group:

> We as KN are already now facing exactly the situation, which we all wanted to avoid, which is that we are out in the market trying to push this through and our customers are telling us that the competition has not given them any notice. ... Your fast action is requested, as KN, DHL and Schenker cannot push this through alone.

[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 Kuhne + 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.

The WRS 2001 agreement

[65] In relation to the WRS 2001 agreement Mr Thain submitted there is insufficient evidence any agreement was actually entered into let alone given effect to. He submitted that the only evidence of the alleged agreement was to be found in the minutes of a FreightForward Europe (FFE) conference call on 1 October 2001 which merely recorded proposals as to short and medium term measures. Mr Werner Blaser, who attended on behalf of Kuehne + Nagel Management AG, was, the minutes noted, apparently cut off unnoticed during the call.

[66] Mr Thain further submitted that there was no evidence the war risk surcharge was implemented in New Zealand by being charged on freight to New Zealand. While there was a Kuehne + Nagel NZ customer notice outlining that a standardised fee structure for shipments from the United States was to be implemented he noted the fee structure was different to either of the proposals suggested during the conference call. He submitted there was no evidence that Kuehne + Nagel NZ was directed to implement the charge by the Kuehne + Nagel group (including Kuehne + Nagel). Nor, as Mr Thain noted, were any of the allegations in relation to the WRS 2001 agreement admitted by Kuehne + Nagel in the United States.

[67] Mr Thain is correct to the extent that the minutes of the meeting of 1 October record agreement as to a short-term (immediate to seven days) measure to pass on to shippers the security fees as levied by the airlines. The minutes also record a mid-term (seven to 14 days) measure to come up with a proposal that envisaged a security fee being charged per air waybill, which would also cover the additional costs incurred once established. However, the inference is that there would be a longer term agreement to charge the WRS 2001 fee and the reference to an airline security surcharge in a Kuehne + Nagel NZ customer notice dated 16 October 2001 is, I infer, a reference to the surcharge discussed and agreed to in principle at the meeting of 1 October 2001. The fact it is a different price to that discussed at the meeting of 1 October is not significant. It was contemplated that there would be adjustments to the initial short-term cost. The surcharge charged is clearly the war risk surcharge and is the same surcharge discussed at the meeting on 1 October 2001. The customer notice states:

> The surcharge is required to cover additional costs in the wake of terrorist attacks.

[68] Apart from that notice there is also further evidence that the surcharge was applied to customers in New Zealand. For instance, there is a customer invoice dated 20 December 2001 for freight from New Zealand to Germany using the agency of Kuehne + Nagel (AG & Co) in Nuremberg. The invoice includes: "War risk surcharge NZ $46.60" Finally I note Mr Chamberlain's evidence that when Mr Fredricson (Kuehne + Nagel NZ's national air freight manager at the time) was

interviewed on 7 May 2009 he confirmed a war risk surcharge was applied to customers by Kuehne + Nagel NZ.

[69] I find that there is sufficient evidence before the Court to support a good arguable case for the causes of action under s 27(2) on the basis that Kuehne + Nagel gave effect to the WRS 2001 agreement, which had the purpose or effect or likely effect of controlling or maintaining prices or of substantially lessening competition in the New Zealand market through Kuehne + Nagel NZ giving effect to the agreement at the direction or with the consent or agreement of agents of Kuehne + Nagel. There is a good arguable case that the Commission has a claim under s 27(2) for acts or omissions by Kuehne + Nagel done or occurring in New Zealand (through its agent(s)) or that as a result of Kuehne + Nagel's actions or omissions (through its agent(s)) loss or damage was sustained in New Zealand and there is a serious issue to be tried on the merits of the claim.

The Chinese CAF agreement

[70] Next, Mr Thain referred to the Chinese CAF agreement. He submitted there was no evidence that the agreement was given effect to in New Zealand. There was no evidence of any communication in relation to the Chinese CAF agreement either to inform of the existence of it or require it to be on charged to customers.

[71] Mr Blair Hassall, the general manager (finance) of Kuehne + Nagel NZ, gave evidence to confirm Kuehne + Nagel NZ's response of 30 November 2007 to the s 98 notice that:

> ... K+N (NZ) has no record at all of a Chinese CAF surcharge being imposed on, or charged in respect of, air freight from China *at any time*.

[72] Mr Thain submitted there was no evidence to the contrary.

[73] Mr Smith referred to and relied upon Mr Chamberlain's evidence, and particularly an email from Mr Holger Beyer of Kuehne + Nagel Ltd (China) confirming implementation of the CAF and an email of Mr Jochen Thewes of

Kuehne + Nagel Ltd (China) encouraging competitors to speed up the implementation of the CAF, noting that Kuehne + Nagel had done so.

[74] However, neither Mr Beyer nor Mr Thewes' correspondence, which show the intention to implement the CAF worldwide, shows that it was actually implemented in New Zealand. The only direct evidence on that issue is what Mr Hageman said during interview. Mr Hageman said that if a Chinese CAF had been charged to Kuehne + Nagel it would have been passed on. However, Mr Hageman's evidence was prefaced by saying he was not aware of the Chinese CAF. Mr Hageman's evidence does not support the Commission's case.

[75] There is an insufficient factual basis to suggest there is a serious issue to be tried on the merits that the Chinese CAF was given effect to in New Zealand. In relation to this point, it is relevant that the Commission has had an opportunity to make inquiries and obtain documents and information under s 98 of the Act. As the Court of Appeal said in *Harris v Commerce Commission*:[32]

> How much material will be required to persuade the court will depend in part on the stage that the case has reached. Here the Commission has required parties to produce documents and to attend interviews. So while the Commission need not show that it will ultimately succeed in establishing liability, the court's assessment of its claims must recognise that the Commission has had the opportunity to conduct a thorough investigation.

The Italian SAF agreement

[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:

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

> 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.

The Canadian ACI agreement

[81] Mr Thain again submitted that there was insufficient evidence of a price fixing agreement in relation to the Canadian ACI agreement.

[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.

The United Kingdom NES, Air AMS and Swiss SFA agreements

[86] Mr Thain did not address specific submissions in relation to the implementation of the United Kingdom NES agreement, the Air AMS agreement or the Swiss SFA agreement in New Zealand.

[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.

[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.

[92] The last agreement is the Swiss SFA agreement. Kuehne + Nagel was a member of the Swiss Freight Forwarding and Logistics Association (Spedlogswiss). Mr Chamberlain's evidence is that the Commission has been advised by another attendee that Mr Fredi Baumgartner of Kuehne + Nagel attended the Spedlogswiss air freight committee meeting that discussed the imposition of a security fee some time on or before 18 April 2007.

[93] On 23 April 2007 notice of that decision was provided to members of Spedlogswiss stating:

> Due to the increased costs imposed to us by the landsidehandling agents (due to new stricter security provisions of the EU which also have repercussions for Switzerland), the swiss forwarding industry, represented by SPEDLOGSWISS ... is introducing as per May 1, 2007 a Security Fee Agent (SFA) on all airfreight exports from Switzerland according to the following model. ...

[94] The Commission's evidence the surcharge was imposed in New Zealand is based on Mr Hageman's evidence that if the Swiss SFA was charged by the origin office then Kuehne + Nagel NZ would have passed it on to the customers. There is, however, no direct evidence of it or reference to its application in New Zealand. There is an insufficient factual basis for a serious question on this matter.

The r 6.28(5) considerations

[95] It follows that I accept the Commission has established there is a serious question to be tried on its claims under s 27(2) in relation to the WRS 2001, United Kingdom NES, Air AMS, Italian SAF and Canadian ACI agreements.

[96] New Zealand is the appropriate forum. As the relief sought by the Commission under the Act can only be imposed by the High Court of New Zealand, there can be no other appropriate forum: *Apple Computer Inc v Apple Corps SA*.[33]

[97] The only other relevant circumstances are the costs of the proceedings in New Zealand. Kuehne + Nagel will incur expenses of bringing witnesses to New Zealand for trial. However, that is a matter that can be addressed by way of costs if Kuehne + Nagel is ultimately successful.

[98] There are no other circumstances that count against the assumption of jurisdiction in relation to the claims noted above. The claims have a real and substantial connection with New Zealand given the impact of the implementation of the agreements on the freight forwarding industry in New Zealand.

[99] Given the findings under r 6.29(1)(a) there is no need to consider the alternative route under r 6.29(1)(b).

Summary/orders

[100] In summary, the position reached is as follows:

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[33] *Apple Computer Inc v Apple Corps SA* (1990) 3 PRNZ 78 (HC) at 80.

(a) the Commission's claims under s 27(1) against Kuehne + Nagel cannot succeed;

(b) the Commission's claims against Kuehne + Nagel under s 27(2) in relation to the implementation of overseas agreements in New Zealand are, in principle, arguable;

(c) in relation to the claims there is, however, insufficient evidence to support the claims that the agreements in relation to the Chinese CAF or the Swiss SFA agreement were implemented in New Zealand. Put another way, there is no serious issue to be tried on the merits of those specific agreements.

[101] Consistent with the Court of Appeal's direction in *Wing Hung* the protest to jurisdiction is dismissed but on terms requiring the Commission to file an amended statement of claim excluding the causes of action which cannot be supported.

Directions

[102] The amended statement of claim is to be filed and served by Friday 4 November 2011 and the file is to be reviewed. Further directions made in the Commercial List at 9.30 a.m. on 11 November 2011.

Costs

[103] Both parties have had a measure of success. It may be appropriate for costs to lie where they fall. If, however, counsel are unable to agree on costs I will receive memoranda.

Venning J