IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV 2010-404-5490

	BETWEEN	COMMERCE COMMISSION Plaintiff
	AND	GEOLOGISTICS INTERNATIONAL (BERMUDA) LIMITED Defendant

Hearing: 26 November 2010

Appearances: J B M Smith, N F Flanagan and F J Cuncannon for plaintiff
M Dunning and C Wilson for defendant

Judgment: 26 November 2010

Reasons: 22 December 2010

REASONS FOR JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 10.30 am on Wednesday 22 December 2010.

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[1] The defendant having admitted breaches of part 2 of the Commerce Act 1986 (the Act), the Court is asked to impose a pecuniary penalty of $2.5 million, agreed between the Commission and the defendant, and to approve a proposed payment of $50,000 by the defendant towards the cost of the Commission.

[2] At the conclusion of the hearing on 26 November 2010, I indicated to counsel that I was satisfied that the orders sought were appropriate, and that I would deliver my reasons in writing in due course. These are those reasons.

Agreed facts

[3] The defendant, incorporated in Bermuda, is part of the Agility Group and provides global freight forwarding services under the brand Agility. The Agility Group previously offered global freight forwarding services under the brand Geologistics.

[4] The international airfreight industry involves all facets of the logistical arrangements necessary to facilitate the movement of goods by air from origin to destination. The business of freight forwarders here is to facilitate the efficient transportation of cargoes between New Zealand and overseas destinations. Such services include the provision of advice as to routing, the making of arrangements for carriage, direction and delivery of freight, and the preparation and processing of the necessary documentation.

[5] At all times material to this proceeding there existed in New Zealand separate markets for the provision of freight forwarding services for goods shipped to and from a number of overseas regions, each such region representing a separate geographical market.

[6] Between about September 2001 and the present time the defendant participated in both the in-bound and out-bound freight forwarding markets in competition with a number of other market participants.

[7] 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.

[8] The Commission has alleged that, together with certain other freight forwarders, the defendant 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.

[9] The Commission's case is that the defendant, and two other market participants, entered into the Air AMS agreement at a meeting in London on 19 March 2003, and that other market participants entered into the same agreement in Brussels on 8 April 2003. The employee who represented the defendant at the meeting on 19 March 2003 was a Senior Vice President with significant industry experience.

[10] 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.

[11] The defendant gave effect to the Air AMS agreement by arranging, whether itself or through an agent, for freight to be shipped to New Zealand, and through its agent Agility NZ from New Zealand, pursuant to house way bills which included charges set in accordance with the agreement.

[12] Agility NZ was unaware of the cartel. The Commission accepts it was not a knowing party to the offending.

[13] The commercial gain arising from the defendant's conduct cannot be readily ascertained, but it was substantial by reason of the volume of affected cargo and the

length of time during which the agreement was carried into effect. Mr Dunning does not accept that the agreement was in full force and effect for the whole of the period between 2003 and the present time. Because the Commission commenced its investigations in 2007, cartel behaviour affecting the defendant may have been much reduced from that time on. The defendant accepts however, that it gave effect to the agreement in New Zealand for a period of some years.

[14] The Agility Group approached the Commission on 5 February 2008, offering to co-operate with the Commission. The investigation proceeded, and some information was provided. But on 4 July 2008, the Commission was told that the defendant was unable to provide further information, or to further facilitate the Commission's investigation. It acknowledged its involvement in the Air AMS agreement and has accepted its liability to pay a pecuniary penalty pursuant to Part 2 of the Act.

Legislation

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

> **80 Pecuniary penalties**
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> (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; or
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> ...
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> the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate.
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> (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.
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> (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).

...

(6) Where conduct by any person constitutes a contravention of 2 or more provisions of Part 2 of this Act, proceedings may be instituted under this Act against that person in relation to the contravention of any 1 or more of the provisions; but no person shall be liable to more than 1 pecuniary penalty under this section in respect of the same conduct.

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

[17] The parties are agreed that the relevant commercial gain is not readily ascertainable in this case, and that in consequence, the turnover limb does not apply. It is further agreed that the maximum penalty for each breach is $10 million. It is also agreed that there were two relevant breaches, namely entering into the agreement and giving effect to it. Theoretically, that suggests an available starting point of $20 million, but the Commission accepts that it is appropriate to proceed from a single starting point for the purpose of fixing a penalty in relation to the overall conduct of the defendant.

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[1] Section 80(2B)(b)(ii)(A).

[18] In *Commerce Commission v Alstom Holdings SA*,[2] 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:

> [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.[3] 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*.[4] 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,[5] 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;

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2 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC).

3 *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 (CA) at [197]; *Commerce Commission v Koppers Arch Wood (Protection NZ) Limited* (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, Allan J at [15].

4 *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [13].

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.

Quantum assessment

[21] I accept Mr Smith's submission that this was a case of hard core cartel behaviour. Hard core cartels were identified in a recent OECD report,[6] as "the most egregious violations of competition law". This is because they are covert in character and so are difficult to detect, but yet distort world trade by creating market power, waste and inefficiency in countries whose markets would otherwise be competitive. The report notes that because not all cartels are detected and prosecuted, there is an available argument that in cases where there is a successful prosecution, the total fine imposed upon participating organisations should exceed the gain realised from the cartel. That approach underpins the provisions of s 80 of the Act.

[22] But although the Court is required to pay particular attention to the actual commercial gain resulting from the conduct, the potential gain or harm associated with that conduct is of equal significance.

[23] Here, the likely actual commercial gain is not able to be readily ascertained. But the defendant accepts that its conduct, together with other members of the cartel, enabled participants to impose a surcharge without the need to consider the likely commercial response of competitors. So there was an effect both on price

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5 At [14].

competition and upon competitive dynamics in the industry, with a corresponding reduction in efficiency incentives.

[24] In such cases a significant penalty is required. There is a small but growing body of case law in New Zealand. In *Alstom* even though there was no commercial gain, a penalty of $1.05 million before discounts (together with costs of $50,000) was approved. There was no commercial gain in that case because there were no tenders for the product at the time.

[25] There, the maximum penalty was $5 million, because the conduct occurred prior to the amendment to s 80. The selected starting point was $1.25 to $1.75 million. That was a cartel case, and so the impugned conduct was covert in character. But the impact on the market was negligible and the defendant's role limited. The defendant admitted liability, co-operated in full with the Commission, and implemented a competition law compliance programme. Attention was also paid to the deterrent effect of a further penalty imposed by the European Commission, and the impact of adverse international publicity. The ultimate penalty was fixed at $1.05 million.

[26] In *Koppers Arch* a starting point of $5.7 million was reduced by half to recognise mitigating factors, including the admission of liability, full co-operation with the Commission, and the implementation of a compliance programme. In that case there had been an over-arching agreement to maintain market share and to control prices in the market for wood preservative chemicals. The scope and scale of the impugned conduct was somewhat wider than occurred here. As in this case, it was difficult to identify precisely the extent of any commercial gain, but it was accepted to have been significant.

[27] Mr Smith submits that the key features of this case for penalty assessment purposes are:

a) The fact of hard core cartel conduct;

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[6] Organisation for Economic Co-operation and Development *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003).

b) Unquantified but substantial commercial gain;

c) The duration of the conduct;

d) The importance of the freight forwarding industry and the significant harmful consequential effects on New Zealand consumers resulting from the infringing conduct;

e) The involvement of senior staff in a collusive activity;

f) The degree of market power exercised by the defendant and other cartel participants.

[28] I accept Mr Smith's submission that *Alstom* is the most helpful authority. However, as he further submits, there are clearly identifiable differences between that case and this. *Alstom* was decided under the old penalty regime; maximum penalties have now doubled. Further, the duration of the offending, and therefore the total assumed commercial gain, require a significant uplift from the level of penalty imposed in *Alstom*. Indeed, in *Alstom* there was no identifiable commercial gain at all. There, the identified starting point was a range of between $1.25 and $1.75 million.

[29] I accept that the combination of the increased statutory maximum, the greater duration of the offending, and the presumed significant commercial gain, take this case well beyond the starting point chosen in *Alstom*, and that the proposed starting point of between $3.75 and $4.25 million is appropriate in all the circumstances. That starting point is also broadly in line with the range of $2.3 to $2.8 million chosen in *Commerce Commission v EGL Inc*, heard and determined after the hearing of the present case. There, although the duration of the impugned conduct seems to have been similar to that alleged here, the extent of the commercial gain appears to have been limited. It is relevant also to mention the *Koppers Arch* case, which involved an overarching agreement to maintain market shares, price fixing and exclusionary conduct. There, the Court approved penalties totalling $3.6 million reached by reference to an estimated likely penalty of $5.6 million following trial,

and taking into account Koppers' significant co-operation with the Commission over a period of some years. The judgment does not disclose a notional starting point, but it must have been higher than in the present case, by reason of the ultimate penalties approved.

[30] In my view, *Koppers Arch* is generally in line with the penalties suggested here. The impugned conduct of the defendant in that case was even more egregious than here, in that it involved large scale rigging of the market.

[31] I consider the proposed starting point to be within the properly available range.

Mitigating factors

[32] The defendant acknowledged liability at the earliest opportunity and for a time provided a degree of assistance to the Commission. But co-operation was formally discontinued after some months, and so any discount on that score must necessarily be muted. I agree with Mr Smith that in the circumstances there is no room here for a very substantial co-operation discount of the sort allowed in *Koppers*. Neither is remorse or contrition evident here, although that is perhaps less likely to be encountered in Commerce Act cases than in the ordinary criminal jurisdiction. There is no suggestion that the defendant has instituted a compliance programme either.

[33] In the end, the single factor requiring a significant discount is the early and continuing acceptance of responsibility. Counsel are agreed that it is appropriate to allow a discount of one-third in reliance on the analysis appearing in *R v Hessell*.[7] That decision has since been reviewed in *Hessell v R*[8] where the Supreme Court rejected the somewhat prescriptive approach mandated by the Court of Appeal. The Supreme Court also indicated that the reduction for a guilty plea component should not exceed 25%.[9]

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7 *R v Hessell* [2010] 2 NZLR 298 (CA).
8 *Hessell v R* [2010] NZSC 135.
9 At [75].

[34] However, that indication is not of binding relevance to the assessment of penalties under the Act. In my judgment in *Diagnostic Group,*[10] I pointed out that Commerce Act proceedings of this type have their complexities, and that the analogy was not a direct one. Rodney Hansen J in *EGL Inc*[11] likewise suggested that the analogy with sentencing in the criminal jurisdiction should not be taken too far, because the two jurisdictions serve markedly different ends.

[35] In that same case, he referred to the very significant public benefits to be derived from co-operation by a defendant:

> [24] …early and full cooperation in an investigation into anti-competitive conduct provides benefits of a scale and nature seldom encountered in the criminal jurisdiction. As recognised in the Commission's Cartel Leniency Policy:[12]
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> > Commission investigations can derive considerable assistance from the input of individuals and companies. Cooperation can consist of providing evidence and/or information, or admitting to the cartel conduct, or both. The Commission seeks to encourage such cooperation. Cooperation can be particularly valuable for the investigation of cartels, as their secretive nature may present major challenges. It allows the Commission to make more effective use of the resources available to it for the investigation of cartels.
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> [25] It is in the public interest that substantial allowance is made for a high level of cooperation, both for the purpose of recognising the savings achieved and providing appropriate incentives to firms and individuals who have engaged in anti-competitive conduct.

[36] There, the Court approved a 50% discount, which must of necessity have included a very substantial allowance for the defendant's acceptance of responsibility.

[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.

[38] As I said in the *Diagnostics* case:

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10 At [15].
11 At [13].
12 Commerce Commission "*Cartel Leniency Policy and Process Guidelines"* (November 2004) at 4.01.

> [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*[15] case Rodney Hansen J said at [18]:
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> > … 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.

[39] Having considered all of the relevant factors the Commission proposes a pecuniary penalty of $2.5 million. The defendant accepts that figure to be appropriate, and Mr Dunning advises that the defendant is in a position to pay it. I am satisfied that the sum suggested is within the available range, and adopting the approach to which I have referred above, I am satisfied that the plaintiff is entitled to the orders sought.

Result

[40] The recommended penalty is approved. There will be an order directing the defendant to pay a pecuniary penalty of $2.5 million. The defendant is further ordered to pay to the Commission costs of $50,000.

C J Allan J

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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.

15 *Commerce Commission v Alstom Holdings SA.*