IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-003040
[2019] NZHC 1426

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	GEA MILFOS INTERNATIONAL LIMITED Defendant

Hearing:	20 June 2019
Appearances:	J Dixon QC and L Farmer for Plaintiff K E Cornegé and A Lear for Defendant
Judgment:	20 June 2019

ORAL JUDGMENT OF WYLIE J

Solicitors/counsel:
Meredith Connell/J Dixon QC, Auckland
Tompkins Wake, Hamilton

Introduction

[1] The defendant, GEA Milfos International Ltd (Milfos), has admitted contravening s 27 of the Commerce Act 1986. The Court is asked to impose a pecuniary penalty under that Act. The Commerce Commission (the Commission) and Milfos are agreed that, subject to the Court's review, a penalty of $825,000 is appropriate. The Commission and Milfos have also agreed that Milfos should make a payment of $100,000 to the Commission in connection with the Commission's investigation and enforcement costs. I am advised by Mr Dixon QC, appearing for the Commission, that that sum has been paid.

The agreed facts

[2] Milfos at all material times was a designer, manufacturer and installer of milking sheds for use on dairy farms throughout New Zealand. It brought in products and supplies from others to supplement the products which it manufactured itself and in order to sell complete packages to farmers. Amongst the products it brought in were milk sensors, which are installed in dairy sheds to help farmers ascertain the health and milk output of their cows. Milfos obtained its milk sensors on a wholesale basis from a trade competitor, Dairy Automation Limited (Dairy Automation). Dairy Automation also sold a herd management software system for use by farmers. As I understand it, the herd software management system was often used in conjunction with the milk sensors.

[3] In mid-2010, Milfos and Dairy Automation began discussing the possibility that Milfos might become the exclusive retailer of Dairy Automation's milk sensors in New Zealand. As part of these discussions, the parties entered into a memorandum of understanding in June 2010.

[4] While the negotiations were in train, Milfos ordered sensors and herd management software systems from Dairy Automation and on-sold these items under its own brand names. Milfos and Dairy Automation agreed the prices at which Milfos would offer both milk sensors and herd management software systems to farmers. Milfos incorporated these prices into an excel spreadsheet, together with the prices (and margins) for other components in its dairy sheds, and Milfos used the spreadsheet (known as the "quote calculator") to provide quotes to potential customers. Milfos

also provided the quote calculator to Dairy Automation, and it in turn provided it to its sales representatives.

[5] Milfos staff met with staff from Dairy Automation in May 2012. They agreed to tie their sites together at field days, thus presenting a united front to the marketplace. Minutes of the meeting record that the two companies were not to quote against one another. There was to be a clear line of communication between Milfos and Dairy Automation sales teams. The quote calculator was revised. Agreed retail prices were set for various items. The prices were lower than those which had previously been used by Milfos, but higher than those which had previously been used by Dairy Automation. It was agreed that from 2012 field days onwards, Milfos and Dairy Automation would both use the quote calculator for pricing milk testing services and herd management services.

[6] Following the May 2012 meeting, Milfos and Dairy Automation consulted with each other from time to time to revise the quote calculator. Although Milfos wished to continue discussions with Dairy Automation about becoming a distributor of its products, by 24 October 2012, Milfos had not negotiated an exclusive retail supplier agreement and Milfos and Dairy Automation were continuing to supply milk testing services and herd management software services in competition with each other. Both nevertheless continued to use the quote calculator, albeit that they were competing with each other in these markets. Both had arrived at an arrangement or understanding that they would each use the quote calculator to generate the prices that they would offer to retail customers for milk testing services and herd management software services, and they entered into an agreement to this effect. From mid-October 2012 until at least September 2014, both gave effect to this agreement.

[7] In or around September 2014, Milfos decided to stop selling milk sensors and herd management software systems supplied by Dairy Automation. No exclusive supplier agreement had been finalised. However, Dairy Automation continued to use the quote calculator until June 2015.

[8] Milfos accepts, that by entering into and giving effect to the quote calculator agreement, it breached s 27 of the Commerce Act and that it did so via s 30 of that Act. It accepts that the quote calculator agreement had the purpose or effect or likely effect

of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining, of the prices for, or any discount in relation to, the supply of milk sensors and/or herd management software systems that both it and Dairy Automation supplied in competition with each other. This conduct had the purpose, or the effect or likely effect, of substantially lessening competition in the relevant markets.

The consequences of Milfos' actions

[9] The conduct admitted to is in breach of s 27, via s 30, of the Commerce Act. Both provisions are in Part 2 of the Act.

[10] Section 80 of the Act confers on the Court jurisdiction to impose pecuniary penalties for such breaches. Relevantly, the section provides as follows:

> **80 Pecuniary penalties relating to restrictive trade practices**
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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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> …
>
> 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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> …
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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,—
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> …
>
> (b) in any other case, the greater of the following:
>
> (i) $10 million:
>
> (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 readily be ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.

…

Sentencing procedure

[11] Under s 80 the Court imposes the penalty. However, as confirmed by the full Court in *Commerce Commission v New Zealand Milk Corporation Ltd*,[1] there is no objection to the parties making submissions and presenting a joint view as to the appropriate penalty, nor to such view being reached as a result of negotiations that represent what could be described as a settlement. The Court has accepted that such settlements are in the interests of the parties and the community, and that they aid an early disposal of the proceedings, and encourage a realistic view of culpability and penalty. As Rodney Hansen J observed in *Commerce Commission v Alston Holdings SA*:[2]

> [18] … in discussing the general approach to fixing penalty, I acknowledge the submission that the task of the Court in cases where penalty has been agreed between the parties is not to embark on its own enquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range – … 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.

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1 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC).

2 *Commerce Commission v Alston Holdings SA* [2009] NZCCLR 22 (HC) at [18]; See also *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414 at [23]; *Commerce Commission v Kuehne & Nagel International A.G.* [2014] NZHC 705 at [21]; *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097, [2013] TCLR 628 at [34]; *Commerce Commission v Carter Holt Harvey* [2014] NZHC 531 at [30].

[12] While agreed penalty proposals have a significant public benefit, the Court still has to be satisfied that the final penalty proposed satisfies the objectives of the Act in the particular circumstances of the case before it.

The Commission's approach

[13] In the present case, the Commission has explained its reasons for suggesting that the pecuniary penalty it considers is appropriate in this case should be adopted by the Court. First, it referred to the maximum penalty available under s 80 of the Act. It noted the importance of deterrence in cases of this kind. It referred to the various factors relevant to culpability, and then allowed for mitigating factors. It also considered the pecuniary penalties imposed in broadly similar cases.

[14] Milfos, for its part, did not dissent from this approach; rather, it sought to emphasise various factors it considered are relevant.

Relevant factors

[15] In considering whether or not to approve the pecuniary penalty proposed by the parties, I note the following.

[16] First, the paramount concern for the Court when imposing a civil pecuniary penalty is to provide both general and specific deterrence. The deterrence objective is best served if anti-competitive behaviour is profitless. Penalties should not be treated as "a licence fee".[3]

[17] Secondly, I have given consideration to the markets involved. Here the offending involved two markets – namely, the milk testing services market and the herd management software systems services market. Both are national markets but both are relatively small. Nevertheless, they are important markets, because they are part of New Zealand's wider dairy industry market.

[18] Both Milfos and Dairy Automation supplied milk testing services and herd management services in competition with each other. They each had a different focus,

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[3] *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [53].

but they were both supplying the relevant services to farmers who were trying to ensure that their milk was of good quality.

[19] Thirdly, the impugned conduct involved an arrangement or understanding contrary to s 30 of the Act. Section 30 deals with conduct at the serious end of the spectrum of the types of conduct prohibited by the Act. While Milfos and Dairy Automation did not set out to enter into an illegal arrangement or understanding, they nevertheless engaged in conduct that gave them an improper advantage over their customers and competitors. Once the parties arrived at their understanding, they gave effect to it over a period of almost two years.

[20] Both Milfos and Dairy Automation were equal partners in the unlawful understanding. Milfos developed the quote calculator. I accept the submission made by Mrs Cornegé, appearing on behalf of Milfos, that it did so initially for its own purposes. Nevertheless, it subsequently gave the quote calculator to Dairy Automation, in anticipation of becoming an exclusive supplier for Dairy Automation. Once those discussions failed, the parties each used the quote calculator, which included the agreed retail prices, pursuant to the unlawful understanding. Milfos continued to provide updated versions of the quote calculator to Dairy Automations and both parties continued to use it.

[21] Milfos emphasises, and the Commission for its part accepts, that the offending arose from initially legitimate discussions with a view to entering into an exclusive supplier agreement. Nevertheless, by October 2012, both Milfos and Dairy Automation had reached an understanding that engendered an expectation as to future conduct – namely that they would both continue using the quote calculator for pricing jobs, notwithstanding that the distribution discussions were then no longer actively on foot, and notwithstanding that each was offering the relevant services in competition with the other. The fact that the conduct was in anticipation of a legitimate exclusive supply arrangement is not a defence. As Mr Dixon put it for the Commission, Milfos was at least careless in what followed thereafter. Mr Dixon argued that that carelessness became recklessness at the point when the discussions regarding an exclusive supplier agreement were no longer progressing, and when Milfos took no steps to ensure that it and Dairy Automation ceased using the quote calculator. Milfos denied this. It said that it had not entirely given up on the prospect of obtaining an

exclusive supplier agreement – and it said that it simply carelessly allowed matters to drift. It also pointed out that both its staff and Dairy Automation staff were free to, and did, give discounts from prices generated by use of the quote calculator. In my view, Milfos' conduct was certainly careless – even grossly careless. It matters little whether it was also reckless.

[22] Fourthly, the offending was carried out by senior employees in both Milfos and Dairy Automation. The key Milfos employee involved was its Product Manager. He was responsible for creating the quote calculator in the first place, and he provided it to Dairy Automation's General Manager. Milfos' Product Manager revised the quote calculator from time to time. Milfos' Business Development Manager attended the May 2012 meeting when Milfos and Dairy Automation agreed prices for the milk sensors.

[23] Fifthly, the commercial gain and damage caused by use of the quote calculator is difficult to quantify. Milfos has admitted that it amended the gross profit margin forming part of the quote calculator to ensure that the gross profit margin was between [Redacted] per cent at all relevant times, and that it set a gross profit margin of [Redacted] per cent from about August 2013. It also admits that the agreed retail prices were higher than Dairy Automation's retail prices before the offending conduct, and that, in the period 24 October 2012 to September 2014, it quoted approximately 29 out of the 31 jobs it won and which incorporated the milk testing services and herd management systems sensors. It also used the quote calculator to quote a further 137 jobs which did not go ahead. Because they were both using the quote calculator, Milfos and Dairy Automation did not need to have regard to the risk that their major competitor would undercut their quotes. There was plainly a detriment to consumers.

[24] Sixthly, there were a limited number of players in the milk testing services and herd management systems services markets. Milfos and Dairy Automation were the two key players in those markets. Milfos' national market share for the sale of milking systems (which is a slightly different market) for those farmers who wanted them was between 20 and 25 per cent. Its retail sales of milk testing services and herd management systems amounted to between $2 million and $3 million for the period 1 January 2011 to 31 May 2015, and for the period 24 October 2012 to 30 September 2014, [Redacted].

[25] Finally, I note that exemplary damages have not been awarded under s 82A of the Commerce Act. Nor are exemplary damages sought by the Commission.

The starting point

[26] Having regard to all of those various factors, the Commission and Milfos have agreed that the starting point for the imposition of the pecuniary penalty should be $1.1 million.

[27] The Commission and Milfos reached that figure by reference not only to the factors set out above, but also by reference to comparable cases.[4] There are some similarities between the cases referred to by counsel and the present case. In particular, in two of the comparable cases, the offending emerged from initially legitimate negotiations between competitors. Nevertheless, as is almost always the case when considering other cases, the offending is not identical. The other New Zealand cases involved much more serious offending.

[28] On balance, I agree with the parties' submissions that the appropriate starting point in this case is one of $1.1 million.

Mitigating factors

[29] There are mitigating factors specific to Milfos.

[30] First, Milfos has not previously contravened the Act. Nor has it previously been warned by the Commission in respect of conduct likely to breach the Act.

[31] Secondly, when the Commission commenced its investigations, it issued a notice to Milfos requiring it to provide information. Milfos promptly complied with that notice. It cooperated with the Commission's investigation by providing information voluntarily and by making its employees available to voluntarily attend interviews with the Commission. It also offered to settle the proceedings on terms acceptable to the Commission, although not at the first reasonably available opportunity

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[4] *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360; *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361; *Commerce Commission v Carter Holt Harvey*, above n 2; *Australian Competition and Consumer Commission v Cryosite Ltd* [2019] FCA 116 (contravention of the Australian Competition and Consumer Act 2010).

[32] The Commission accepts that a discount is justified given Milfos' acceptance of responsibility, and its admission of liability. I agree that a discount is appropriate.

[33] The Commission submits, and Milfos accepts, that a discount of 20 per cent for the admissions, and a further discount of 5 per cent for voluntarily cooperating with the Commission in the course of its investigations, are appropriate to reflect all mitigating factors.

[34] I agree. A 25 per cent discount is broadly consistent with discounts given in previous pecuniary penalty decisions.[5] This results in a penalty figure of $825,000.

Summary

[35] I make an order declaring that Milfos' conduct in using the quote calculator between 24 October 2012 until at least September 2014 contravened s 27(1) and (2), via s 30, of the Commerce Act 1986.

[36] In light of all the relevant circumstances, and in light of the penalties imposed in similar cases, I accept that the recommended penalty of $825,000 is appropriate.

[37] Accordingly, there will be an order approving the recommended penalty and directing Milfos to pay to the Commission a pecuniary penalty in the sum of $825,000.

[38] As noted, the parties have already reached agreement regarding costs, and those costs have been paid. Accordingly, there is no order requiring Milfos to contribute to the Commission's costs of investigation.

Wylie J

5 *Commerce Commission v Kuehne & Nagel International A.G.*, above n 2; *Commerce Commission v Visy Board (NZ) Ltd*, above n 2; *Commerce Commission v Alstom Holdings SA*, above n 2; *Commerce Commission v Unique Realty* [2016] NZHC 1074; *Commerce Commission v Property Brokers Ltd* [2016] NZHC 2851.