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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV 2011-404-6362

BETWEEN	COMMERCE COMISSION Plaintiff
AND	WHIRLPOOL SA Defendant

Hearing: 25 November 2011

Appearances: J C L Dixon and B Hamlin for plaintiff
S C Keene and T J Pilkington for defendant

Judgment: 19 December 2011

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 11.30 am on Monday 19 December 2011

Solicitors:
Meredith Connell, Auckland *john.dixon@meredithconnell.co.nz*
Ben.hamlin@meredithconnell.co.nz
Russell McVeagh, Auckland *sarah.keene@russellmcveagh.com*

Introduction

[1] The plaintiff alleges breaches by the defendant of Part 2 of the Commerce Act 1986 (the Act). The defendant has filed a statement of defence, in which it does not plead to certain allegations in the Commission's statement of claim. By virtue of r 5.48(3) of the High Court Rules, those allegations are deemed to be admitted.

[2] The Court is now asked to impose a pecuniary penalty of $3 million, agreed between the Commission and the defendant, and to approve a proposed payment of $50,000 by the defendant towards the costs of the Commission.

Agreed facts

[3] This case is concerned with the markets for domestic and light commercial hermetic compressors under one horsepower (DLCs) in New Zealand. The impugned conduct is that of employees of Empresa Brasileira de Compressores SA (Embraco SA). Following a merger which led to the formation of the defendant, those employees became the defendant's employees in May 2006.

[4] During the period under consideration, Embraco was a company incorporated in Brazil, but carrying on business in New Zealand as a supplier of DLCs. On any view it is a large international organisation, having approximately 10,000 staff worldwide, operating in more than 80 countries and ranking as one of the largest compressor manufacturers in the world in terms of revenue. During the period under consideration it sent communications into, and met with customers in, New Zealand.

[5] At all relevant times there were markets in New Zealand for the supply of DLCs. The two largest suppliers in the New Zealand market were Panasonic and Embraco. The annual value of sales within the markets was of the order of $15 million. Embraco's market share was about one-fifth of that figure. Panasonic is Embraco's largest competitor in New Zealand. It enjoys a market share of the order of 60%.

[6] From at least 2004 onwards, in response to growing global demand for natural resources, there were significant increases in the price of steel and copper used in compressor manufacturing. Steel and copper are significant inputs into the manufacture of compressors.

[7] In 2005 and 2006, Embraco and Panasonic exchanged information on prices, production capacities and other market intelligence. In the course of those communications there arose an understanding and expectation between Embraco and Panasonic that each would increase prices for certain DLCs in New Zealand during the relevant period (the parties have termed these arrangements the 2005 Understanding and the 2006 Understanding). Each Understanding had the purpose, or effect, or likely effect of controlling or maintaining prices in respect of the distribution, sale and supply of DLCs in New Zealand during the relevant period, and are deemed by s 30 of the Act to have substantially lessened competition in contravention of s 27.

[8] Two senior employees of the defendant met with Panasonic employees in Asia in March 2005. It is common ground that the Embraco employees had significant industry knowledge and experience.

[9] During the meeting, information and market intelligence was exchanged in anticipation of supply contract negotiations, including discussions with one or more customers in New Zealand. At the meeting in Asia, there arose a general understanding that Embraco and Panasonic would each seek to increase prices for certain DLCs supplied into New Zealand.

[10] There were further meetings between senior executives of Embraco and Panasonic in Asia, in May, September and November 2006. Again, a general understanding was reached that both Embraco and Panasonic would seek to increase prices for certain DLCs supplied to New Zealand customers.

[11] Subsequent to entry into the Understandings, the defendant exchanged information on sales and production capacities with Panasonic in relation to New Zealand customers and negotiated with and supplied those customers. During the

period Embraco also substantially increased prices to New Zealand customers for sales of DLCs in New Zealand. It is however common ground that during the relevant period Embraco's input costs increased significantly, at a greater rate than its prices to New Zealand customers.

Legislation

[12] 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 of this Act; or
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> (b) Has attempted to contravene such a provision; or
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> (c) Has aided, abetted, counselled, or procured any other person to contravene such a provision; or
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> (d) Has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; or
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> (e) Has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or
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> (f) Has conspired with any other person to contravene such a provision,—
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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 one or more of the provisions; but no person shall be liable to more than one pecuniary penalty under this section in respect of the same conduct.

[13] The defendant accepts that it is in breach of Part 2 of the Act and therefore liable to a pecuniary penalty, pursuant to s 80, in that it:

(a) contravened s 27(1) via s 30, by entering into the 2005 Understanding, which had the purpose or effect or likely effect of controlling or maintaining prices for the supply of DLCs in New Zealand;

(b) contravened s 27(1) via s 30, by entering into the 2006 Understanding which had the purpose or effect or likely effect of controlling or maintaining prices for the supply of DLCs in New Zealand; and

(c) contravened s 27(2) via s 30, in that it gave effect to the 2005 and 2006 Understandings.

[14] Section 80(2)A requires the Court, in determining an appropriate penalty, to have regard to all relevant matters including the case of a Body Corporate, the nature

and extent of any commercial gain. If that can be readily ascertained, the identified gain will also determine the maximum penalty.[1]

Sentencing Principles

[15] In *Commerce Commission v Alstom Holdings SA*,[2] Rodney Hansen J discussed the significant public interest in bringing about the prompt resolution of penalty proceedings, and the role of the Court in ensuring the efficacy of negotiated resolutions. His Honour stated that:

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

[16] In *Commerce Commission v Geologistics International (Bermuda) Ltd*,[3] I noted also His Honour's analysis of the place of ordinary criminal sentencing principles in the context of cases under the Act. There I said:[4]

> [18] In *Commerce Commission v Alstom Holdings SA*,[5] Rodney Hansen J confirmed that criminal sentencing principles provide an appropriate framework for the assessment of a proposed penalty under the Commerce Act. His Honour said:
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> > [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

[1] Commerce Act 1986 s 80(2B)(b)(ii)(A).
[2] *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].
[3] *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010.
[4] *Geologistics* fn 3, at [18]-[20].
[5] *Alstom* at [19].

> appropriate. It is consistent with the statute and is endorsed by practice in New Zealand and other jurisdictions.

[19] I agree with that approach.[6] 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*.[7] 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,[8] be informed by the distinctive character and consequences of anti-competitive conduct.

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

a. The duration of the contravening conduct;

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

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

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

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

f. The size and resources of the defendant;

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

h. The fact that liability is admitted;

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

[17] In *Geologistics*, I said:[9]

> [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.

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[6] *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 (CA) at [197]; *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC) at [18]; and *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [15].
[7] *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [13].
[8] *Alstom* fn 2, at [19].
[9] *Geologistics*, above fn 3, at [37].

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

[19] In *Commerce Commission v New Zealand Diagnostic Group Ltd*,[10] I noted that:

> [45] The general approach of the Court is to accept and impose a penalty which has been agreed between the parties, so long as it is within the Court determined permissible range: *Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd;*[11] *NW Frozen Foods v Australian Competition & Consumer Commission*.[12] That approach is also adopted in this country. In the *Gas Insulated Switchgear* 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.

Penalty assessment

[20] The first step is to identify the maximum applicable penalty. For the purposes of s 80, the Commission's position is that the commercial gain, if any, arising from the 2005 and 2006 Understandings cannot be readily ascertained. On the other hand, Embraco claims that it received no commercial gain at all by reason of either Understanding.

[21] The parties accordingly agree, although for somewhat different reasons, that, given Embraco's limited turnover in New Zealand, the maximum penalty for each of the three identified breaches is $10 million. So the total maximum penalty is $30 million.

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[10] *New Zealand Diagnostic Group Ltd*, above fn 6, at [45].
[11] *Australian Competition and Consumer Commission v ABB Power Transmission Pty Ltd* (2004) ATPR 48,848 at 48,855.
[12] *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285.

[22] The factors ordinarily taken into account in determining the appropriate starting point were helpfully reviewed in *Alstom*.[13] The first factor is the nature and extent of the conduct. Here, the Asian meetings and the resultant Understandings were intended to enable Embraco and Panasonic to pass on rising input costs, without the risk that they might lose sales to a competitor which had lower steel or copper costs, or was prepared to accept a lower margin.

[23] So the purpose and likely effect of the agreement was to control or maintain prices. I accept, as does counsel for the defendant, that this type of conduct is serious and warrants substantial penalties under the Act, in order to deter both the defendant and others minded to act in like fashion.

[24] Price fixing understandings are per se illegal, because they restrict competition and are detrimental to economic welfare without any beneficial effects.[14] Moreover, the collusion inherent in cartels is difficult to detect, and so when offending is identified it is necessary to impose penalties which carry a significant element of deterrence.

[25] Here, the Understandings were entered into by organisations that were substantial, which between then held more than four-fifths of the relevant market, and which was carried into effect over a period of nearly two years. But it is common ground that the offending was not the most serious of its type, and that in particular for present purposes, there was no intention to eliminate all competition from the market; nor could the defendant be described as the ringleader of the impugned conduct. The arrangements were neither sophisticated nor rigorously enforced or implemented. In that respect, this case is to be distinguished from *Alstom* where the cartel involved secretariats, sharing of tender information, and compensation regimes. It may also be contrasted with the structured nature of the agreements in the Air Cargo and Freight Forwarding proceedings which have recently been the subject of determinations by this Court. Those cases also involved

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[13] *Alstom* fn 2 at [20].
[14] *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV 2008-404-8366, 11 May 2011 at [21].

highly structured agreements and significant collaboration between international entities.[15]

[26] The extent of a defendant's commercial gain from the prohibited conduct is always a factor requiring attention. Here, it is common ground that it is not possible to assess the extent of any gain. The Commission argues that the Court may nevertheless consider the potential gain from collusion.[16]

[27] Mr Dixon argues that collusive agreements of this type almost inevitably have the potential for substantial commercial gain, if only because collusive arrangements reduce the pressure on and between market participants, and more generally.

[28] Ms Keene, on the other hand, urges the Court not to speculate in the absence of a proper evidential foundation. I propose to proceed on the basis that no actual commercial gain is established, and that the potential, if any, for a commercial gain in a wider sense must have been limited.

[29] An associated factor is the overall size of the market in which the cartel participants operated. I accept Ms Keene's submission that the market here was significantly smaller, for example, than those which the Court was required to consider in the Air Cargo and Freight Forwarding cases. In assessing market impact, it is legitimate also to take into account the importance of the market to the New Zealand economy.[17] Here, DLCs are undoubtedly important in a general sense. But the market does not feature centrally in the commercial life of New Zealand in the same way as the market for freight services.

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[15] *Qantas Airways Ltd*, fn 14; *Cargolux Airlines International SA* HC Auckland CIV-2008-404-8355, 5 April 2011; *Commerce Commission v British Airways plc* HC Auckland CIV-2008-404-8347, 5 April 2011; *Commerce Commission v Deutsche Bahn AG* HC Auckland CIV-2010-404-5479, 13 June 2011; *Geologistics* fn 3; *EGL Inc* fn 7.
[16] *Geologistics* fn 3 at [22].
[17] *Deutsche Bahn* fn 15 at [35] and [53].

[30] I accept Ms Keene's submission that market size and market impact are comparable with the market considered in *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*.[18]

[31] Against that background, counsel for the Commission submits that a starting point of $4-6 million is consistent with previous decisions of the Court, the case being comparable in counsel's submissions to *Deutsche Bahn, Koppers* and *Geologistics*. In *Deutsche Bahn* there were, as here, two separate agreements but no ascertainable commercial gain. The starting point penalty range there was $4-6.5 million. In *Koppers* the implied starting point was $5.7 million, but the conduct was of longer duration and involved a greater number of breaches of the Act (albeit that the penalties were imposed partially under the pre-2001 penalty regime). In *Geologistics* the starting point penalty range was $3.75-4.25 million, in a case which arose from a cartel arrangement but involved the admission of a single agreement only.

[32] Mr Dixon accepts that the appropriate penalty range must be less than the starting points identified in *Cargolux* and *Qantas* where the market was substantially larger, and the contact continued for longer. By contrast, he argues, the cases of *Alstom*, *ELG* and *British Airways* can be distinguished because they involved a single agreement, relatively little New Zealand revenue, and minimal or no ascertainable commercial gain.

[33] The Commission submits that a starting point between $3-4 million would be appropriate in respect of the entry into, and the implementation of each of the 2005 and 2006 Understandings. That results in a total starting point of between $6-8 million.

[34] However, the Commission acknowledges that it is necessary to recognise the similarities between the 2005 and 2006 Understandings. Although these were separate agreements, the 2006 Understanding was in effect a repetition or continuation of the 2005 Understanding. The Commission says a range of $4-6 million is appropriate to recognise the totality of Embraco's conduct.

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[18] *Koppers* fn 6.

[35] Ms Keene advocates a starting point of $3.5-5 million. She identifies as comparable cases this Court's decisions in *Koppers* and *Osmos* (a defendant in the *Koppers* litigation), *Panalpina* (the ninth defendant in *Deutsche Bahn*) and *Geologistics.*

[36] Ms Keene notes that the starting point proposed by Embraco is higher than in *British Airways* and *EGL* where the conduct could not be said to have affected to any significant degree the level of revenue generated by the defendants, but is significantly lower than the starting point selected in *Qantas* and *Cargolux* where there was a major potential for impact on the relevant market. Her analysis of comparable cases is similar to that of Mr Dixon.

[37] Each of the cited cases can be distinguished to some degree from this one, but it is unnecessary to identify the precise similarities and differences between this case and the growing body of comparable authority because here, the defendant's proposed starting point is remarkably similar to that of the Commission. I noted in *Qantas* that an overlap between competing starting points may provide a window of agreement between the parties, which will facilitate ultimate agreement. That is what has occurred here. Indeed, the overlap here is reasonably significant, and assists the Court in determining whether or not the proposed pecuniary penalties are appropriate.

[38] I turn to factors that are specific to the defendant, rather than to its behaviour. There is no doubt that it is a very substantial market participant with the ability to pay a considerable penalty, but as Mr Dixon accepts, its business in this country is not extensive, and there is no need to consider an uplift simply by reason of size, as was done in *Telecom v Commerce Commission*.[19]

[39] The defendant has not hitherto been found to have breached the Act in New Zealand, but Ms Keene does not seek a discount on that score. Mr Dixon refers the Court to certain foreign anti-trust proceedings in which Embraco appears to have paid significant sums in settlement. Again however, it is not suggested that the defendant's record elsewhere needs to be taken into account for present purposes.

[19] *Telecom v Commerce Commission* [2011] NZCCLR 19 (HC) at [57].

[40] Although the defendant has not provided any substantial co-operation or assistance, it has nevertheless offered to settle proceedings on terms acceptable to the Commission, and it did so at an early stage, thereby avoiding time consuming and costly litigation. Moreover, it has submitted to the jurisdiction of the Court, has facilitated service here, and has agreed to pay the penalty imposed. This last consideration is of some practical significance, given the possible difficulty inherent in endeavouring to enforce pecuniary penalties outside Australasia. The Court is advised also the Embraco has introduced a comprehensive compliance programme in response to the Commission's investigations into its conduct.

[41] Counsel join in suggesting a one-third discount from the appropriate starting point in order to reflect mitigating factors, principally, the defendant's acceptance of responsibility, submission to the Court's jurisdiction, and the introduction of a compliance programme.

[42] A discount of one-third applied to the Commission's starting point range of $4-6 million produces a figure of between $2.6-4 million. $3 million is towards the lower end of that range.

[43] For the defendant, Ms Keene accepts that the proposed pecuniary penalty of $3 million sits within the appropriate range for the relevant conduct. Although the $3 million figure occurs towards the higher end of the range advocated by the defendant, it nevertheless sufficiently recognises the available mitigating factors and produces an outcome which the defendant considers is reasonable in all the circumstances.

Conclusion

[44] I am persuaded that the proposed pecuniary penalty is within the properly available range. I am likewise satisfied that the proposed one-third discount for mitigating factors is appropriate. A pecuniary penalty of $3 million represents a starting point of $4.5 million (when the discount is added back), a figure which is within the separate ranges suggested by counsel for the respective parties.

[45] I am further satisfied, in particular, that the agreed penalty is consistent with those imposed in recent cases, including those to which I have not found it necessary to refer. Accordingly, I have reached the view that the agreed pecuniary penalty is justified, and that it is appropriate to approve it.

Result

[46] The recommended penalty is approved. Accordingly, there will be orders that:

(a) Whirlpool SA pay a pecuniary penalty of $3 million to the Commission;

(b) Whirlpool SA pay to the Commission the sum of $50,000, as and for its costs.

Other matters

[47] At the request of counsel for the defendant, I record the defendant's position in respect of the deemed admissions which have enabled the Court to impose an agreed pecuniary penalty in this case. The deemed admissions are limited in their application to the present application for approval only. The defendant does not thereby accept that any admission (express or deemed) will bind it in other proceedings, whether in New Zealand or elsewhere.

[48] Currently there is in force an order that the court file not be searched without the leave of a Judge. Any person or organisation wishing to search the file must apply to the Court under rr 3.9 or 3.13.[20]

[49] As I understand it, the defendant's concern was the fact of the settlement and the reasons for it, which were highly confidential until such time as the Court's judgment was released. Those concerns do not extend beyond the public dissemination of this judgment. Accordingly, the order restricting search of the court

[20] See the Court's minute of 14 October 2011.

file is discharged. If the defendant seeks some form of continued restriction on search, then a fresh application should be made.

[50] Ms Keene seeks an order directing that distribution of this judgment to any person other than the parties, be deferred for 72 hours following delivery. That is to enable the terms of the judgment to be notified to the management of the defendant in Brazil before it reaches the public domain. That was a course I adopted in *Commerce Commission v New Zealand Diagnostic Group Ltd*.[21] There will be an order accordingly.

C J Allan J

[21] *New Zealand Diagnostic Group Ltd*, fn 6.