IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-008352
[2013] NZHC 1414

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: 7 June 2013

Appearances: B W F Brown QC, J C L Dixon, K C Francis and L C A Farmer for Plaintiff
A R Galbraith QC and S Ladd for Defendant

Judgment: 13 June 2013

JUDGMENT OF VENNING J

This judgment was delivered by me on 13 June 2013 at 5.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Solicitors: Meredith Connell, Auckland
Bell Gully, Auckland
Copy to: B W F Brown QC, Wellington
A R Galbraith QC, Auckland

Introduction

[1] The defendant, Air New Zealand Limited (Air NZ) has admitted certain breaches of Part 2 of the Commerce Act 1986 (the Act) and has not denied other breaches. The Court is asked to impose a pecuniary penalty under the Act. The Commerce Commission (the Commission) and Air NZ are agreed that, subject to the Court's review, a penalty of $7.5 million is appropriate, together with costs of $259,079.18. Air NZ has also agreed to pay a further contribution of $300,000 towards the Commission's investigation costs.

Background – Air NZ

[2] Air NZ is an international airline with its registered office and global head office in Auckland, New Zealand. It carries on business in New Zealand (and elsewhere) as an airline transporting passengers and freight to and from New Zealand.

[3] In 2006 Air NZ was the 46th largest cargo airline in the world by cargo revenue. It flew between New Zealand and 18 countries and employed approximately 96 staff in its cargo business. It also had independent sales agents in 37 countries to which it did not fly but in relation to which it provided air cargo services on other airlines' aircraft.

The Air Cargo industry

[4] The international air cargo business transports 35% of the value of goods traded internationally. Airlines typically supply air cargo services to freight forwarders at origin. Freight forwarders generally organise the integrated transport of goods on behalf of a range of shippers (exporters and importers). In doing so they purchase air cargo services from airlines. The cost of air cargo services is typically passed on by freight forwarders to shippers.

[5] Between January 2000 and February 2006 Air NZ and other airlines charged freight forwarders a price for air cargo services that consisted of a base rate together

with various surcharges and fees. Relevantly for present purposes the surcharges included fuel and security surcharges for some routes and periods.

[6] For present purposes the relevant markets in New Zealand for air cargo services to New Zealand were from Australia, Japan and Malaysia.

[7] For the purposes of this proceeding only Air NZ admits the facts set out in the second agreed statement of facts and, to the extent set out in the agreed statement of facts, it admits the third to ten causes of action of the seventh amended statement of claim. Air NZ does not plead to the Commission's allegations in relation to the fuel surcharge component of the price of air cargo services from Australia to New Zealand. That is, however, deemed an admission under r 5.48(3) of the High Court Rules for the purposes of this proceeding.

Australia

[8] On or about January 2000 Air NZ and Qantas reached an understanding regarding timing and rates for the imposition of fuel surcharges they would impose on air cargo services from Australia to New Zealand. The fuel surcharge was set at A$0.10 cents/kg on air cargo from Australia to New Zealand. The understanding was reached via communications between Air NZ's regional cargo manager for Australia and Qantas's general manager for freight sales. From on or about February 2000 until on or about September 2000 Air NZ and Qantas implemented and gave effect to the understanding. As a result Air NZ and Qantas fixed, controlled or maintained the fuel surcharge component of the price for air cargo services from Australia to New Zealand. The agreement came to an end in September 2000 following the retirement of the Air NZ manager.

Japan

[9] Following the terrorist attacks in the United States on 11 September 2001, Air NZ and other airlines that were members of the International Cargo Association of Japan, TC3 subcommittee entered an understanding in September and October 2001 to impose a security surcharge on air cargo services from Japan to New Zealand to recover increased costs associated with increased security involving cargo. The

understanding had the purpose, effect, or likely effect, of fixing, controlling and maintaining the security surcharge component of the price charged by the airlines for air cargo services from Japan to New Zealand. Air NZ and each of the other airlines sought and obtained regulatory approval to the imposition of the security surcharges in Japan. No attempt was made to conceal the conduct.

[10] From October 2001 to February 2006, Air NZ gave effect to the Japan Security Understanding.

[11] In September 2002 Air NZ and other airlines that were members of the International Cargo Association of Japan, TC3 Sub-committee entered an understanding to implement a fuel surcharge of ¥12/kg on the price for air cargo services from Japan to New Zealand. The Japan Fuel Surcharge Understanding had the purpose, effect, or likely effect, of fixing, controlling and maintaining the fuel surcharge component of the price charged by the airlines for air cargo services from Japan to New Zealand. Air NZ gave effect to the Understanding from October 2002 until February 2006. Air NZ and each of the other airlines involved in the Understanding sought and obtained regulatory approval to the imposition of the fuel surcharge in Japan. No attempt was made to conceal the conduct.

[12] Air NZ was entitled to apply to the New Zealand Minister of Transport for approval of the Japan Fuel Surcharge Understanding and the Japan Security Surcharge Understanding under s 88 of the Civil Aviation Act 1990 but it did not do so. Air NZ considers that if it had done so such application would have been granted.

Malaysia

[13] Between 2000 and 2006 Air NZ did not provide air cargo services directly between Malaysia and New Zealand and did not employ any cargo staff in Malaysia. Air NZ operated in Malaysia through an independent sales agent, who would typically represent a number of airlines, providing indirect air cargo services on other airlines' aircraft.

[14] Following the terrorist attacks in the United States on 11 September 2001, Air NZ and other airlines operating in Malaysia, entered an understanding in September and October 2001 that they would impose a security surcharge on air cargo services from Malaysia to New Zealand to recover the increased costs of security incurred in handling cargo. Like the Japan Security Surcharge Understanding, the Understanding had the purpose, effect, or likely effect of fixing, controlling and maintaining the security surcharge component of the price charged by the airlines for air cargo services from Malaysia to New Zealand. From October 2001 to February 2006 Air NZ gave effect to the Malaysia Security Surcharge Understanding.

[15] On 5 February 2000 various airlines, not including Air NZ, that were members of the Inter-Airline Cargo Group – Malaysia arrived at an arrangement or understanding to impose a fuel surcharge, the Malaysia Fuel Surcharge Understanding. Air NZ was not initially a party to the Malaysia Fuel Surcharge Understanding. Subsequently, in or about October/November 2002, through the conduct of its independent sales agent in Malaysia Air NZ joined the Malaysia Fuel Surcharge Understanding. That Understanding had the purpose, effect, or likely effect, of fixing, controlling and maintaining the fuel surcharge component of the price charged by the airlines for air cargo services from Malaysia to New Zealand. Through the conduct of its independent sales agent Air NZ gave effect to the Malaysia Fuel Surcharge Understanding from October/November 2002 until February 2006.

[16] The proposed security and fuel surcharges were notified to and a surcharge formula agreed with the Malaysian Ministry of Transport by Malaysian Airlines on behalf of all airlines. While Air NZ was entitled to apply to the New Zealand Minister of Transport for approval of the Malaysia Fuel Surcharge Understanding and the Malaysia Security Surcharge Understanding it did not do so. Air NZ considers that had it applied for approval any such application would have been granted.

[17] The Japan Fuel and Security Surcharge Understandings and the Malaysia Fuel and Security Surcharge Understandings ceased by February 2006 when allegations of price-fixing regarding surcharges in the air cargo industry were

publicised following raids undertaken by competition agencies in the United States and Europe.

Consequences of Air NZ's actions

[18] The conduct admitted to (or not denied) is in breach of s 27 via s 30 of the Act. Section 80 of the Act confers on the Court jurisdiction to impose pecuniary penalties for such breaches. In its current form s 80 provides for a maximum pecuniary penalty of a sum 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 ...

[19] Prior to its amendment in May 2001 the maximum pecuniary penalty provided in s 80 was limited to $5 million in respect of each act or omission.

[20] Until its amendment in May 2001 s 80 directed the Court to have regard to all relevant matters including the following in fixing an appropriate penalty:

> (a) the nature and extent of the act or omission;
>
> (b) the nature and extent of any loss or damage suffered by any person as a result of the act or omission;
>
> (c) the circumstances in which the act or omission took place;
>
> (d) whether or not the person has previously been found by the Court in proceedings under this part of this Act to have engaged in any similar conduct.

[21] Section 80 now requires the Court to determine the appropriate penalty subject to the statutory maximum by:

(a) having regard to all relevant factors;

(b) having particular regard to the nature and extent of any commercial gain.

[22] It is accepted that the reference to all relevant factors in s 80(1)(a) brings into account the factors previously spelled out in the former s 80(1).[1]

Sentencing procedure

[23] Under s 80 the Court imposes the penalty. However, as confirmed by the Full Court in *Commerce Commission v New Zealand Milk Corporation Ltd*[2] there can be no objection to a joint view of the parties on submissions as to penalty nor to such a view being reached as a result of negotiations so that it represented what could be described as a settlement. The Court accepted that such settlements were in the interests of the parties and the community, enabling early disposal of the proceedings and encouraging a realistic view of culpability and penalty.

[24] As Rodney Hansen J more recently observed in *Commerce Commission v Alstom Holdings SA*:[3]

> [18] Finally, in discussing the general approach to fixing a penalty, I acknowledge the submission that the task of the court in cases where a penalty has been agreed between the parties is not to embark on its own inquiry 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 Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285). As noted by the Court in that case and by Hugh 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

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1 *Commerce Commission v Cathay Pacific Airways Ltd* [2013] NZHC 843 at [24]. See also *Telecom Corporation of NZ Ltd & Anor v Commerce Commission* [2012] NZCA 344 at [15].

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

3 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR (HC) at [18].

insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[25] In the present case the Commission has approached setting the appropriate penalty by:

(a) determining the maximum penalty;

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

(c) adjusted the starting point for mitigating factors.

[26] This approach has been endorsed by this Court in previous penalty judgments in the Air Cargo cases.[4]

[27] I might add that ultimately, as is the case on sentence appeals in the criminal context, it is the final figure, the end result, which is relevant and determinative. There may be room for debate as to the appropriate starting point and credit for mitigating factors. The ultimate issue is however, whether the penalty recommended to the Court is within a proper range.

The starting point – general considerations

[28] The parties agree that the commercial gain is not readily ascertainable. Applying the definition of turnover in the Act to Air NZ's operating figures for the financial year to 30 June 2012 (being the most recent reports available), puts its revenue for passenger and cargo services into and out of, and including within New

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[4] *Commerce Commission v 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 Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011; *Commerce Commission v Japan Airlines Co Ltd* HC Auckland CIV-2008-404-8348, 29 June 2012; *Commerce Commission v Emirates* HC Auckland CIV-2008-404-8349, 27 July 2012; *Commerce Commission v Korean Air Lines Ltd* [2012] NZHC 1851; *Commerce Commission v Singapore Airlines Cargo Pty Ltd* [2012] NZHC 3583; *Commerce Commission v Cathay Pacific Airways Ltd* [2013] NZHC 843; *Commerce Commission v Thai Airways International Public Co Ltd* [2013] NZHC 844; *Commerce Commission v Malaysia Airlines System Berhad Ltd* [2013] NZHC 845.

Zealand, at $4.483 billion. On that basis the maximum penalty that could be imposed for each breach would be 10% of that figure, or $448,300,000. The entry into and giving effect to each of the separate Fuel Surcharge and Security Surcharge Understandings was distinct conduct.[5] Consequently Air NZ is liable for a maximum pecuniary penalty of $448,300,000 in respect of the eight admitted breaches involving the Japan and Malaysian markets and for a maximum pecuniary penalty of $5 million in respect of the breaches deemed to be admitted representing the Australian Fuel Surcharge Understanding.

[29] While strictly Air NZ has committed separate breaches in relation to each of the understandings by entering into and also giving effect to those understandings I agree with the approach adopted by Allan J in *Commerce Commission v Korean Airlines Ltd* that:

> Where a defendant has admitted a number of separate breaches of the Act, it will generally be convenient to view the contravening behaviour as a single related course of conduct. Adopting that approach facilitates the determination of an appropriate penalty and enables the Court to maintain consistency between cases. ...

[30] The last general point is that in establishing an appropriate starting point, the Court must bear in mind that general and specific deterrence is an important factor in cases of this nature. In *Telecom Corporation of New Zealand Ltd v Commerce Commission* the Court of Appeal accepted the observations of the High Court that by increasing the available maximum penalties in 2001 Parliament had sought to send a:[6]

> "much stronger signal ... that the deterrence objective will only been served if anti-competitive behaviour is profitless".

Starting point – specific considerations

Nature and seriousness of the conduct

[31] The conduct in this case (price-fixing) is at the serious end of the spectrum of the types of conduct prohibited by the Act. It is deemed anti-competitive per se. The carriage of goods to New Zealand, including from Australia, Japan and Malaysia, is

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[5] Commerce Act 1986, s 80(6).

[6] *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 1, at [53].

important for the supply of goods and services throughout the New Zealand economy. While the surcharges comprised only part of the total charges the Understandings and their implementation would inevitably have affected price competition and so impacted upon the competitive dynamics in the relevant markets for air cargo services. As Allan J observed in *Commerce Commission v Japan Airlines*[7] it is proper to infer that there will have been a degree of "softening" of competition overall, in that Air NZ and the other airlines were able to impose the surcharges without the need to consider the likely commercial response of its competitors.

The role of Air NZ

[32] In Australia, Air NZ's regional cargo manager was a key participant in initiating the Understanding. However, the Commission accepts that Air NZ was not a leader in the agreements reached in Malaysia and Japan. Nor did it coerce any other airline to join the agreements.

The deliberateness of the conduct

[33] In Japan and Malaysia the conduct was not covert and, as noted, approval of the relevant authorities was sought and obtained in those countries. Mr Galbraith made the point that none of the conduct concerns air cargo services from New Zealand. The Stage 1 judgment issued in August 2011 held that markets existed from each of Australia, Japan and Malaysia to New Zealand. That was contrary to Air NZ's prior understanding.

The seniority of the employees involved

[34] Air NZ's Board of Directors and executive committee in New Zealand were not aware of the relevant conduct.

[35] The understandings in Australia and Japan arose from the conduct of regional managers. The conduct in Malaysia was that of an independent sales agent. While a more senior cargo manager of Air NZ in New Zealand was aware of the relevant

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7 *Commerce Commission v Japan Air Lines Co Ltd*, above n 4, at [44].

conduct in Japan he did not contemplate that New Zealand law applied. Similarly there is no evidence to indicate whether Air NZ senior cargo managers were aware of the sales agent's conduct in Malaysia but in any event Air NZ did not contemplate New Zealand law applied.

Duration

[36] The conduct in Japan and Malaysia involved a sustained course of conduct over time. Air NZ gave effect to the Japan and Malaysia Security Surcharge Understandings for four and a half years, and to the Japan and Malaysia Fuel Surcharge Understandings for three and a half years. The conduct in Japan and Malaysia only ceased when search warrants were executed by regulatory bodies in the United States and Europe. The duration of the conduct in Australia was much less. It only extended for seven months. It ceased when the particular regional manager left Air NZ.

Commercial gain to Air NZ

[37] As noted the parties have not attempted to calculate the amount of commercial gain, if any, derived from the conduct. The Commission considers that there was at the very least potential for substantial gain from the conduct by Air NZ and other airlines party to the agreements. Air NZ considers there was no commercial gain because freight forwarders and importers did not necessarily pay higher prices for air cargo services from Malaysia and Japan to New Zealand than they would have given that the price of fuel and security costs increased considerably. Even where an increased fuel surcharge was imposed in some instances the increase would have been offset by a discount from the base rate.

[38] Air NZ did earn the following revenue:

(a) $1,928,430 of fuel surcharge revenue for air cargo services from Australia to New Zealand from February to September 2000;

(b) $1,735,496 of fuel surcharge revenue for air cargo services from Japan to New Zealand between October 2002 and February 2006;

(c) $197,030 of fuel surcharge revenue for air cargo services from Malaysia to New Zealand for the period from October 2002 to February 2006;

(d) $174,444 of security surcharge revenue for air cargo services from Japan to New Zealand from October 2002 to February 2006; and

(e) $151,810 of security surcharge revenue for air cargo services from Malaysia to New Zealand from October 2001 to February 2006.

Size and resources of Air NZ

[39] The Commission submits that a significant penalty is required to achieve specific deterrence of Air NZ in light of its size, financial resources, and its position of influence, being the national carrier, in the New Zealand air cargo services market.

[40] From January 2000 to February 2006 Air NZ carried just under 407,000 tonnes of freight into and out of New Zealand, earning total freight revenue over that six year period of approximately $1,073 million.

[41] In the year to 30 June 2012 Air NZ had total revenue of $4,483 million, including cargo revenue of $298 million, and overall net profit of $71 million.

[42] Air NZ has a substantial "footprint" in the air cargo services market in New Zealand. For the period 2000 – 2006 it earned more than twice the total cargo sales revenue of its closest competitor, Qantas.

[43] The goal of specific deterrence requires a penalty sufficient to take into account the size and resources of the contravening company as well as its position of influence in the relevant industry: *Telecom Corporation of New Zealand Ltd v Commerce Commission*.[8]

[44] Taking all relevant factors into account the Commission suggests a starting point of between $9 million and $9.75 million is appropriate.

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[8] *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 1.

[45] That proposed starting point of between $9 – $9.75 million can be tested by reference to the starting points adopted in other air cargo cases determined by the Court. They range from $1.8 to $2.3 million in the case of Emirates in relation to Fuel and Security Surcharge Understandings in Indonesia over a period of two and a half years to $13 million in the case of Qantas involving a worldwide fuel surcharge over a period of six years.

[46] The particularly relevant variables are the extent of the markets, the duration, the total sales revenue, and the surcharge revenue.

[47] The markets in which Air NZ's conduct occurred are of great importance to New Zealand. The relevant surcharge revenue of $4.2 million far exceeds the revenue obtained by Korean Air, Cathay Pacific and Singapore Airlines. While Mr Galbraith submitted otherwise, I agree with Mr Brown's submission that Air NZ's conduct was more serious than for instance Singapore, Cathay Pacific and Korean Air. I accept that, with perhaps the exception of perhaps Qantas and Cargolux, given its position in the New Zealand market place, the conduct of Air NZ is likely to have had a greater impact on the New Zealand markets and consumers. The proposed starting point in the present case is comparable to the starting point for Cargolux. Cargolux achieved substantially more surcharge revenue than Air NZ because of its worldwide overarching agreements on inbound and outbound air cargo services, but its market presence in New Zealand was smaller.

[48] The starting point for Qantas was considerably higher. However, Air NZ's conduct is properly seen as less culpable than Qantas given that Qantas was involved in worldwide arrangements and its surcharge revenues on the relevant routes significantly exceeded those of Air NZ.

[49] It follows I agree the proposed starting range of $9 – $9.75 million is within range.

Mitigation

[50] I turn to the mitigating features of Air NZ's case. A discount is justified for Air NZ's admissions of liability. While it can have no credit for co-operation for the

future, it being the last airline to resolve issues with the Commission, I agree that the acceptance and acknowledgement of responsibility is a responsible corporate response which the Court should take into account. Further, during the Commission's investigation Air NZ co-operated and fully complied with its obligations under statutory notices issued by the Commission.

[51] I also accept Air NZ went further and provided documents held overseas and facilitated access by the Commission to Air NZ employees based overseas. Next, Air NZ had at all relevant times, and continues to have, compliance programmes in place that were intended to ensure full compliance.

[52] Air NZ has a clean record. It has not previously been found to have contravened the Act. Air NZ has not paid penalties in other jurisdictions in respect of the related conduct and harm. It has defended proceedings brought by the Australian Competition and Consumer Commission (ACCC) in Australia and awaits judgment in respect of those proceedings.

[53] Taken overall I agree that a reduction of approximately 20% from the starting point is appropriate. That produces a penalty in the range of between $7.2 and $7.8 million.

Summary/result

[54] In all the circumstances and in light of the penalties imposed in similar cases, I accept that the recommended penalty of $7.5 million is appropriate.

[55] Accordingly there will be an order approving the recommended penalty and directing Air NZ to pay to the Commission the sum of $7.5 million. Air NZ is further ordered to pay costs to the Commission of $259,079.18. Air NZ is also to make a contribution of $300,000 towards the Commission's investigation costs.

Venning J