IN THE COURT OF APPEAL OF NEW ZEALAND

CA149/06
CA227/06
[2007] NZCA 502

BETWEEN	NEW ZEALAND BUS LIMITED First Appellant
AND	INFRATIL LIMITED Second Appellant
AND	COMMERCE COMMISSION Respondent

CA151/06

AND BETWEEN	BLAIRGOWRIE INVESTMENTS LIMITED & ORS Appellants
AND	COMMERCE COMMISSION Respondent

Hearing:	19 September - 21 September 2007
Court:	Hammond, Arnold and Wilson JJ
Counsel:	L A O'Gorman and J White for Appellants in CA149/06 and CA227/06 J W Tizard for Appellants in CA151/06 D J Goddard QC and L Theron for Respondent in all appeals
Interim Judgment:	14 November 2007
Judgment:	6 June 2008 at 10 am

JUDGMENT OF THE COURT

A We confirm the dismissal of the appeal by New Zealand Bus Limited against liability in respect of s 47 of the Commerce Act 1986.

B **We allow the appeal by the Blairgowrie Investments Limited & Ors as to the liability of the Waddell interests as accessories under s 83 of the Act.**

C **We dismiss the cross-appeal by the Commerce Commission against Infratil Limited, as to its liability as an accessory under s 83 of the Act.**

D **We dismiss the cross-appeals by the Commerce Commission and New Zealand Bus Limited as to the amount of the penalty ($500,000) ordered by the High Court.**

E **We dismiss the costs appeal by New Zealand Bus Limited.**

F **In this Court, there will be no order for costs.**

REASONS

HAMMOND J

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Introduction

[1] The Commerce Commission brought proceedings in the High Court to restrain New Zealand Bus Limited (NZ Bus) from completing the acquisition of the 74 per cent of Mana Coach Services Limited (Mana) that it did not already own. The Commission was of the view that the acquisition would, contrary to s 47 of the Commerce Act 1986 (the Act), substantially lessen competition in the Wellington regional market for rights to operate scheduled public bus services subsidised by the Greater Wellington Regional Council (GWRC), and school bus services subsidised by GWRC or the Ministry of Education (the Ministry).

[2] In a judgment delivered on 29 June 2006 (the liability judgment), now reported as *Commerce Commission v New Zealand Bus Limited* (2006) 8 NZBLC 101 774; (2006) 11 TCLR 679, Miller J agreed with the Commission that s 47 of the Act had been infringed. The Judge further held that certain members of the Waddell family, who are associated with Mana, were accessory parties to that contravention. However, an accessory liability claim by the Commission against Infratil Limited (Infratil), the parent company of NZ Bus, failed.

[3] By a second judgment delivered on 29 September 2006 (the penalties judgment), the Judge assessed a pecuniary penalty of $500,000 against NZ Bus: HC WN CIV-2006-485-585. He also awarded "usual" costs to the Commission, and its actual fees paid to expert witnesses. This resulted in an award of total costs and disbursements of $619,629.87.

[4] The various parties in this case have all appealed, and cross-appealed, in such a way that effectively all the liability and penalty findings and part of the costs holdings are in issue on this appeal.

[5] For reasons which I need not go into here, the appellants needed a decision from this Court by mid-November 2007 as to whether, on the merits, this Court was minded to uphold the Commission's view as to a contravention of s 47 of the Act.

[6] To assist the parties, on 14 November 2007 this Court issued an interim judgment in which it held that (at [2] – [3]):

> [2] The appeal by NZ Bus Limited and Infratil Limited insofar as it is an appeal against liability is dismissed. Reasons will follow in due course.
>
> [3] All other issues in the appeal by NZ Bus Limited and Infratil Limited, and the associated appeal (CA151/06) by Blairgowrie Investments Limited & Ors, remain reserved for consideration by the Court.

[7] Apparently, subsequent to that judgment, Mana has assigned the agreement to a third party, who has completed the transaction. In that sense there has been a commercial resolution of the ownership issues. Nevertheless, the question of whether there was a breach of the Act is still a live issue, because it has implications for the liability of the so-called accessory parties, and the penalty which was assessed by the High Court. The case is therefore by no means moot.

[8] The proceedings in the High Court attracted a considerable volume of evidence and submissions and two relatively lengthy judgments.

[9] Because there are to be separate judgments in this appeal I will first set out the background and the issues which have arisen in an orthodox narrative fashion. This will relieve my colleagues from having to repeat much of that material themselves. I will then give my reasons in support of our determination on the merits of the Commission's case against NZ Bus; my views as to the liability of the accessory parties; and finally, I will deal with the questions of penalties and costs.

The narrative

The Wellington bus companies

[10] NZ Bus is New Zealand's largest bus company. It has public transport networks in Wellington and Auckland and operations elsewhere. Until November 2005 it was owned by Stagecoach plc, an international bus company based in Scotland. Since then, NZ Bus has been a wholly owned subsidiary of Infratil, which is a listed investment company in New Zealand.

[11] NZ Bus trades through subsidiaries as Stagecoach, Cityline Hutt Valley, and Runciman Motors. It has about 374 buses in Wellington and is by far the largest bus company in the Wellington region. It services Wellington City, and a Hutt Valley corridor running from the city to Upper Hutt, Eastbourne, and Wainuiomata.

[12] Mana is the second largest bus company in the Wellington region. It has 115 buses and operates in North Wellington, Porirua City, and Kapiti. The North

Wellington service operates through a subsidiary, Newlands Coach Service (1998) Limited.

Competition begins

[13] Historically there was no competition between NZ Bus and Mana. Mana serviced North Wellington and a western corridor running from Ngaraunga to Waikanae. NZ Bus operated in the south, and to the east of the greater Wellington area.

[14] That changed. As the Judge noted (at [67]) of the liability judgment:

> Competition was not feasible until 1989, when the Transit New Zealand Act required that all publicly funded passenger transport be tendered. Until then the Wellington City Council owned and operated the public bus network in the city. Following deregulation and the introduction of competition, the Council sold its bus service to Stagecoach plc in 1991.

[15] By the time of the High Court proceedings, NZ Bus held 69 per cent by value of contracts under which the GWRC and the Ministry subsidise scheduled public and school bus services. Mana held 28 per cent. With rare exceptions, NZ Bus and Mana did not compete for GWRC contracts. They did compete for certain Ministry routes.

The Mana interests

[16] Mana has a convoluted corporate history. The Narain family owned Newlands Coach Services until 1998, when they and the Waddells merged their two businesses in Mana. Each family held 50 per cent of shares in Mana, with the Waddells' shareholding being held through Blairgowrie. At the risk of over-simplification, Mana was thereafter owned 50 per cent by what I can term, broadly, Narain family interests, and 50 per cent by Waddell family interests.

[17] It is convenient to interpolate here that Blairgowrie Investments Limited (Blairgowrie), Copland Neyland Associates Limited, Rhoderick John Treadwell, Kerry Leigh Waddell, Karyn Justine Cosgrove, and Ian Waddell are the present

owners in law, and the vendors, of the 26 per cent of shares in Mana. In one way or another they are all associated with the Waddell family.

[18] Eventually, the Waddells sought to buy out the Narains. They looked to Stagecoach (a subsidiary of NZ Bus, not Stagecoach plc) to serve as an equity partner to help finance this bid.

[19] In March 2000, Mana and NZ Bus entered into an agreement whereby NZ Bus or its nominee (together called "Stagecoach" in the Heads of Agreement) would purchase 26 per cent of Mana's shares. In return for its equity participation, Stagecoach secured some important rights: as a result of securing 26 per cent of shares, it gained a power of veto over any major transaction requiring the support of holders of 75 per cent or more of Mana's shares; it obtained pre-emptive rights over the remainder of the Waddell interests' shares in Mana; it acquired the right to appoint one of Mana's four directors and receive financial information; it secured an agreed dividend policy; and it secured certain restraints of trade.

[20] These restraints of trade can be summarised as follows. The first restraint of trade operated only if the Waddells' bid was accepted by the Narain family. The functional effect of it was to prevent either party, if they wanted to sell more than 20 per cent of their shares in Mana, from entering into competition with another party for three years. A second restraint of trade clause, which took effect regardless of whether or not the Waddells' bid was accepted, provided that the Waddells agreed not to compete with Stagecoach for three years if Blairgowrie (which held the majority interest in Mana) sold more than 20 per cent of its shares.

[21] This agreement was substantially negotiated before the Waddells made their bid. It was not however signed until after the transaction had been completed.

[22] The upshot was that upon completion of the transaction in 2000, NZ Bus held 26 per cent of Mana. Blairgowrie, which was controlled by John Waddell and his wife, held 60.65 per cent, and the other second defendants in the High Court proceedings held the balance.

The Waddells' wish to sell

[23] In 2005, by reason of matters of ill health and other personal circumstances, the Waddell family became keen to dispose of their shares. The selling shareholders of Mana approached NZ Bus about the possibility of NZ Bus purchasing their 74 per cent shareholding. This was because of the pre-emptive rights held by Stagecoach to which we have referred.

[24] By a letter of 9 November 2005, the Waddell interests agreed to sell the remaining 74 per cent of shares in Mana to NZ Bus, subject to Commission clearance. In consideration, the Waddell interests were to be paid a non-refundable deposit of $3 million.

[25] Also in 2005, Stagecoach plc was negotiating to sell its shares in NZ Bus to two Australian private equity investors. On 25 November 2005, Stagecoach plc entered into an agreement to sell NZ Bus to Infratil, making NZ Bus a wholly owned subsidiary of Infratil.

[26] On 23 December 2005, the Waddell interests executed an agreement to sell their shareholding in Mana to NZ Bus, which as a result would own 100 per cent of Mana. This agreement was conditional on the purchaser obtaining a clearance or authorisation from the Commission.

The Commission becomes concerned, and brings proceedings

[27] NZ Bus applied for Commission clearance on 9 January 2006. On 9 March 2006 the Commission wrote to NZ Bus expressing concern about high barriers to entry and the likelihood that not allowing the acquisition would result in greater competition.

[28] There was a meeting between the representatives of NZ Bus and Commission staff on 14 March 2006. Although there was some contest in the evidence as to what precisely transpired at that meeting, as a consequence NZ Bus undoubtedly reviewed its position. On 15 March the condition requiring Commission clearance or

authorisation was waived by agreement between NZ Bus and the Waddell interests. NZ Bus thereupon withdrew its application for a clearance.

[29] It followed that, on the waiver, the agreement between NZ Bus and Mana became unconditional and NZ Bus acquired an equitable interest in the shares in Mana.

[30] As a result of an investigation, the Commission concluded that the acquisition would be likely to have the effect of substantially lessening competition in the relevant market. It determined to bring proceedings.

The legislation

[31] The relevant statutory provisions on which the Commission relied are straightforward in this case. It is convenient to set them out in short form now.

[32] The starting point is s 47 of the Act which provides that a person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market. A market is defined under s 3(1A) of the Act as "a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them". Relevantly, for the purposes of this case, a share includes a beneficial interest in any such share (s 2). A person includes two or more persons that are interconnected or associated (s 47(2)). Further, a person is associated with another if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other (s 47(3)).

[33] As to the authorisation and clearance provisions (see generally Part V of the Act), s 66 provides for clearance of a business acquisition by notice to the Commission. The Commission will grant a clearance if it is satisfied that the acquisition does not, or is not likely to have, the effect of substantially lessening competition in a market (s 66(3)(a)).

[34] Section 83 of the Act provides that the Court can award pecuniary penalties if it is satisfied on the application of the Commission that a person has aided, abetted, counselled or procured any other person to contravene s 47 (s 83(1)(c)) or has been in any way, directly or indirectly, knowingly concerned in, or party to the contravention by any other person of that section (s 83(1)(e)).

[35] Section 90 is an attribution of knowledge provision in relation to conduct by servants and agents, both to a corporate defendant and to a person other than a body corporate.

The respective positions of the parties

[36] In broad terms, the Commission maintained that it was at least implicit in the March 2000 Heads of Agreement that Mana and NZ Bus would not compete with one another while NZ Bus held its shares in Mana. Despite the fact that the litigation prevented the transaction from settling, the Commission contended that NZ Bus breached s 47 because it acquired an equitable interest in the shares when the agreement became unconditional on the waiver.

[37] The Commission further maintained that if the transaction did not go ahead, the likely result would be the sale of 74 per cent of shares, and perhaps NZ Bus' existing 26 per cent shareholding, to another bus company which would then use Mana as a springboard to establish itself in the greater Wellington area and actually compete with NZ Bus.

[38] As to the position of the Waddell interests and their liability as accessories under s 83 of the Act, the Commission's position was that by agreeing to waive the condition requiring clearance or authorisation, the Waddell interests aided and abetted, or conspired with, NZ Bus to contravene s 47. In the alternative, the Commission submitted that the Waddells were directly or indirectly concerned in, or a party to, the breach of s 47 by NZ Bus.

[39] The same kind of allegation was made against Infratil, but with the further allegation that Infratil had counselled or procured NZ Bus to contravene s 47. The

Commission maintained that it is sufficient for liability under s 83 to show that the accessory knew the essential facts constituting the contravention without proof of an intention to assist the principal.

[40] As to remedies, the Commission sought declarations, an injunction against all defendants, an order cancelling the agreement, and pecuniary penalties.

[41] NZ Bus denied any tacit understanding in the March 2000 Heads of Agreement that Mana and NZ Bus would not compete with one another while NZ Bus held its share in Mana. It maintained that the transaction raised no competition issues. It said that GWRC and the Ministry were monopsonists with substantial countervailing market power. The term "monopsonist" is not used in everyday language. It is an awkward technical term for the position of a single buyer or consumer in a particular "market" with considerable influence over suppliers. In particular, potential market entrants had identified the power of GWRC and the Ministry to address contract lead times and maximum contract sizes as significant constraints.

[42] In any event, NZ Bus argued that there would be no lessening of competition because in practical terms NZ Bus and Mana operated in separate geographic markets. Mana was in no better position to operate in NZ Bus' territory (and vice versa) than any other firm would be, including an overseas operator entering on a *de novo* basis. Barriers to entry and expansion were low and potential entry imposed a very real constraint on prices.

[43] In the alternative, NZ Bus and Mana made a rather technical argument that they were associated parties for the purposes of s 47, so that any increase in NZ Bus' shareholding in Mana should be treated as an internal transfer that would not substantially lessen competition. The suggestion that Infratil was an accessory was resisted on the footing that it lacked the necessary knowledge of the essential facts which was required to establish the breach of s 47.

[44] The Waddell interests maintained that the transaction would not result in any lessening of competition. They argued that competition from new entrants would

remain a significant constraint for both NZ Bus and Mana whether or not the transaction went ahead. NZ Bus' 26 per cent shareholding in Mana would restrain significant expansion by Mana into NZ Bus' area of operation. This was because that shareholding carried the powers under the March 2000 Heads of Agreement to veto any major transaction and to appoint a director. The Waddell interests also denied that they were accessories to any breach of s 47 by NZ Bus.

The High Court decisions

Introduction

[45] There was a respectable degree of agreement on various matters in the High Court proceedings, and clear findings by the Judge on other areas of concern in a competition law case.

[46] The central issue was whether the acquisition by NZ Bus of the remaining 74 per cent of shares in Mana that it did not already own contravened s 47 of the Act.

[47] At [121] of the liability judgment, Miller J referred to the established authorities which indicate that the question whether a substantial lessening of competition is likely to arise is to be determined by comparing the likely state of competition should the acquisition proceed with the likely state of competition if it does not. No counsel took issue with that approach.

[48] The Judge considered that the relevant product dimension of the market was for the rights to provide subsidised bus services (at [124]), and that the relevant geographic dimension was the Wellington region as a single market (at [127]).

[49] The High Court also had before it evidence as to the history of the transactions canvassed above, the market participants, market share data and the correlation between rivalry and price, the profitability of NZ Bus and Mana, and the position of potential entrants to the market.

[50] As to the latter factor, the Judge was satisfied that there was a genuine interest in market entry among potential entrants. Importantly there was a strong preference for entry by acquisition rather than *de novo* entry (at [143] - [144]).

[51] The Judge noted that barriers to entry and market definition, at least in a case such as this, were primarily economic and factual questions, rather than legal ones (at [154]). In his analysis of conditions of entry, the Judge applied the LET test contained in the Commission's Mergers and Acquisitions Guidelines (2004): that is, whether entry is Likely, sufficient in Extent and Timely (at [151]).

[52] It was common ground amongst the economists who gave evidence that the Court should utilise a three-year time line in analysing conditions of entry when applying the LET test (at [155]). In relation to conditions of entry in the regional market in this case, the Judge traversed evidence pertaining to lead times for requests for tender, maximum size and duration of GWRC contracts, economies of scale, commercial registrations, patronage information, local knowledge, acquisition of staff and buses, depot location and establishment, tendering costs and incumbent retaliation (at [162] - [182]).

The result in the High Court, as to liability

[53] The actual outcome of the liability issues was as follows:

- The High Court made a declaration "that the acquisition of the Waddell interests' shareholding on 15 March 2006 is likely to substantially lessen competition in the Wellington regional market for rights to supply subsidised scheduled public and school bus services, and so contravened s 47" (at [256]).

- Kerry Waddell and Ian Waddell were held to have contravened s 83(1)(c) and (e) "by participating in the waiver with knowledge of essential facts sufficient to establish contravention of s 47" (at [257]).

- Infratil was held to be not liable as an accessory under s 83, as the Commission could not show that Infratil deliberately assisted NZ Bus with knowledge of the essential facts sufficient to establish contravention of s 47 (at [252]).

The reasoning in the High Court. as to liability

[54] The High Court judgment under review was necessarily a very full one. The essence of the Judge's reasoning appears to have been as follows.

[55] The Judge considered there was a potential for competition between NZ Bus and Mana, particularly in north Wellington. But the absence of competition was explicable by deliberate restraint, on both sides (at [87]).

[56] The Judge held that there was something of a cosy understanding between NZ Bus and Mana that they would not compete for anything other than the Ministry technical routes. The Judge considered that Mana had initiated the acquisition to protect itself from competition. This ambition explained the willingness of the Waddell interests to grant NZ Bus pre-emptive rights, restraints of trade, negative control over major transactions, some control over dividend policy, and a seat on the board (at [84]).

[57] The acquisition of the Waddell interests' shareholding which occurred on 15 March 2006 was likely to substantially lessen competition. If the transaction went ahead, there would be a loss of existing competition between NZ Bus and Mana on Ministry technical routes (at [204]). There would also be the residual risk that Mana or NZ Bus might tender for GWRC contracts in the others area. The various practical problems such as restructuring of GWRC contracts, the bundling of routes and lead times meant that *de novo* entry would be possible, but would be unlikely to occur in an effective and timely way. The "tacit understanding" the Judge identified between NZ Bus and Mana, that neither would compete for GWRC contracts in the other's area, would be unlikely to survive the transfer of control to a new entrant (at [201]). There was also the practical difficulty that Mana and NZ Bus had possession of local assets and were the lowest cost providers. While potential

entry would only be a possibility if the transaction went ahead (thereby making it only a relatively weak constraining force), entry would likely occur if the acquisition did not go ahead. This would create a major and unusual opportunity for substantial firms to enter the Wellington market, which all potential entrants had indicated that they would prefer to do by acquisition rather than *de novo* entry. The capacity to alter conditions of entry that facilitate competition did afford the GWRC a degree of countervailing power. But that would be modest unless and until entry occurred on a substantial scale. Many tenders would attract only one bid (at [196] - [197]).

[58] The Judge further held that NZ Bus and Mana were not associated parties for the purposes of s 47. He was of the view that it would "turn the section on its head to presume that it creates an exception where acquirer and target are already associated" (at [211]), whether or not the acquisition substantially lessens competition on the facts. Had the legislature intended to create an exception to s 47, it could and should have done so explicitly. NZ Bus could not prevent Mana from competing with it by reason of its 26 per cent shareholding and its seat on the board. The right to appoint a director did not of itself establish that NZ Bus was able to exercise a substantial degree of influence. The appointee was only one of four directors. There was no control over board decisions and in any event the director had to act in the best interests of Mana (at [213]).

[59] In relation to s 83, the Judge held that an accessory is liable only if its participation was intentionally aimed at the commission of the acts that form the principal's contravention, namely the acquisition of assets or shares (at [230]). An accessory must know the essential facts, being facts that sufficiently establish a contravention of s 47 (at [236]); actual, not constructive, knowledge is required (at [234]). In determining the essential facts that an accessory must know, the test must be directed to the facts that have led the Court to conclude, as against the acquirer, that the transaction is likely to substantially lessen competition (at [239]).

[60] Applying these principles, the Judge held that the Waddell interests had the requisite knowledge to establish accessory liability under s 83 (at [250]).

[61] The accessory liability claim against Infratil failed. The Commission had to show that Infratil deliberately assisted NZ Bus, knowing essential facts sufficient to establish contravention (at [252]). Infratil was plainly aware of the waiver and hence the acquisition itself (at [253]). However, knowledge that Mana could compete was not enough to establish knowledge of facts establishing a substantial lessening of competition under s 47 (at [254]).

Penalties

[62] Consistent with what he saw to be the deterrent purpose of the legislation, the Judge considered that the "starting point" for penalties should be to estimate NZ Bus' potential unlawful gain. This he estimated at $2 million. He said that this sum should be discounted to reflect the Commission's contribution to the breach (relating to the meeting between representatives of NZ Bus and the Commission on 14 March 2006), the absence of loss, the risk of error in the calculation of gains, and the stigma associated with the Court's findings. His Honour considered that some credit should also be given for the absence of any previous breaches. Acknowledging that his decision owed more to judgment than to calculation, he considered that a substantial discount was warranted and ordered NZ Bus to pay to the Crown a pecuniary penalty of $500,000 (at [66] - [67] of the penalties judgment).

[63] There was no room for an inference that the Waddells gained from the transaction. And, knowing nothing of the Commission's concerns, they reasonably relied on advice that a clearance was not necessary. On any view the Waddells were at the "low end of the culpability scale" and any penalty "would be reduced to a token sum" (at [68]). In the circumstances, the Judge declined to impose a pecuniary penalty on the Waddells.

Costs

[64] To complete the general narrative, I note that substantial costs and witness expenses were awarded in favour of the Commission. There is an appeal point with respect to the technical area of expert witness expenses which will be dealt with later in this judgment.

The appeal against the finding of an anti-competitive transaction

Introduction

[65] The proceedings in the High Court were brought by the Commission as an action for a declaration, an order cancelling the agreement, an injunction, and orders for pecuniary penalties. All of those claims came within s 75 of the Act, which gives the High Court jurisdiction in such matters, and it was never suggested that the High Court did not have jurisdiction. It follows that any appeal to this Court is a general appeal, from a series of determinations by the High Court. Accordingly, leave to appeal was not required, as it is in some other circumstances, by s 97 of the Act.

[66] In relation to liability under s 47, the Notice of Appeal extends to 15 pages under a variety of headings with particularised complaints under each head: no substantial lessening of competition; market definition; existing competition; factual/ counterfactual; barriers to entry/expansion; and countervailing power.

[67] To my mind, this initial approach – essentially that the High Court Judge had got just about everything wrong in relation to liability – has become a somewhat unfortunate feature of appeals in commercial causes to this Court in recent years. It has the unfortunate effect of endeavouring to inflict on the appellate court a complete *de novo* reconsideration of the case, which is the very thing it is enjoined from undertaking. It is true that a "rehearing" is required, but that relates to the evidence which was adduced in the court below, and such further evidence as is permitted on the appeal. It may also be a sign of considerable weakness in an appeal if counsel are unable to identify with some real precision precisely where it is that the court appealed from is said to have gone wrong.

The more specific grounds of appeal

[68] In fairness to counsel for the appellants, the grounds in the Notice of Appeal were subsequently refined somewhat in the written submissions. They were summarised by Ms O'Gorman as follows:

… the position of NZ Bus and Infratil is that the trial Judge erred in fact and in law in concluding that the acquisition constituted a contravention of s 47:

(a) **Relevant market:** Given the unique factual characteristics of the subsidised bus services industry in the greater Wellington Region, particularly geographic considerations, the most useful tool for analysis for the purposes of s 47 of the Commerce Act would have been the five separate Area markets within greater Wellington.

(b) **Existing competition:** There was no basis for finding a tacit understanding between NZ Bus and Mana about whether they would compete in each other's incumbent areas. The restraints of trade in the 2000 Heads of Agreement were permitted under the Commerce Act 1986, and in any event those restraints were never triggered and have been extinguished. Furthermore, there was no proper factual basis for any finding that NZ Bus and Mana were achieving excess profits. To the contrary, they were operating on narrow margins and achieving relatively low returns for the capital invested. This explains the low numbers of bids on any given tender in the greater Wellington Region and why new entry has been rare.

(c) **Barriers to entry/conditions of entry:** Using the LET test and examining each condition of entry/expansion as against a 3 year time period, the correct conclusion based on the evidence should have been that potential entry imposes a sufficient constraint under the factual such that no substantial lessening of competition would result from the proposed acquisition by NZ Bus of the remaining 74% shareholding in Mana.

(d) **Significance of countervailing power:** GWRC has significant countervailing power so that it can set the terms of the market and create the appropriate conditions for new entry should it be dissatisfied with the competitive results that its tender process achieves.

(e) **Factual:** Accordingly, under that "factual" scenario prices are already at an appropriately competitive level, and new entry would occur in an effective and timely way if prices were to rise to a supra-competitive level. The threat of new entry and competition from existing operators already provides an effective constraint in a tender market.

(f) **Counterfactual:** Under the counterfactual, Mana under new ownership would not be in any better position compared with other potential entrants when considering entry into areas where NZ Bus is already incumbent but Mana does not operate. Therefore it was incorrect to find that Mana would inevitably use its existing operations as a springboard to compete in other areas in the greater Wellington regional market.

(g) **Likely effect on competition:** Accordingly, the acquisition is unlikely to result in a substantial lessening of competition when comparing the factual with the counterfactual.

[69] In oral argument, Ms O'Gorman further refined matters by suggesting that the Judge's decision as to liability under s 47 had really been driven by two factors: a finding that there was a "cosy arrangement" between NZ Bus and Mana; and a finding that NZ Bus and Mana were achieving supra-competitive profits. Understandably therefore, her oral submissions were directed in large part to persuading us that neither of these propositions could be sustained.

[70] In the result, some of the arguments set out at [68] above simply fell away before us and the views of the High Court Judge were essentially accepted on them. For instance, the concern about the relevant market received little, if any, emphasis before us.

Areas of agreement

[71] Given the difficulties in precisely defining the issues, it is useful to recall what was not in dispute on the merits in this appeal.

[72] There was no dispute before the High Court, nor is there now on appeal, as to the principles to be applied under s 47. The question is simply whether there is likely to be a real – that is, a "non-trivial" – lessening of competition for a significant number of routes in Wellington within the relevant timeframe, when one compares the situation where the acquisition proceeds, with the position if it does not.

[73] Nor does there seem to have been any dispute as to the economic principles which are relevant as to the liability of NZ Bus in this case. The dispute was and is as to the application of those principles to the facts of this case.

[74] A number of important matters were common ground:

- All the economic witnesses thought market definition to be not particularly important in this case, and definitely not decisive here.

- The likely effect of the acquisition should be examined over a period of three years from the date of acquisition.

- In considering the likely effects of the acquisition, and the prospect of entry by other providers on conditions of trade, other factors that affect the likelihood, extent or timeliness of entry have to be looked at, not just long-run barriers to entry.

- On most routes an incumbent provider will have the lowest costs.

- As to bid markets – which existed in this case – a merger will materially reduce competitive constraints or lessen competition if it combines the lowest and second lowest cost bidders and other bidders have materially higher costs.

The heart of it all

[75] It is important not to lose sight of the forest for the trees in a case like this. The central legal issue was simply whether the acquisition of 74 per cent of the shares in Mana by NZ Bus would substantially lessen competition to a degree that could be described as "real" under s 47 of the Act. Essentially, under this head this case is one of degree: some lessening of competition was always likely to result from this transaction, but was it enough to infringe the Act?

[76] The Judge took the view that what had come about in the Wellington bus market was the result of what he termed a "tacit understanding" which led to the development of anti-competitive pricing. Competitive conditions would not be better under one operator; indeed they would likely be worse. The Judge considered that in the result, the line of anti-competitive behaviour had been crossed by a sufficient margin for the purposes of liability.

A cosy arrangement?

[77] Given the attention to this point by Ms O'Gorman – and the concern it has given rise to on the part of the appellants, who plainly think the lower Court was simply wrong on this point – I will deal first with the Judge's finding that there was an operative tacit understanding.

[78] It is important to observe at the outset that s 47 of the Act is concerned with effects and not motives. It asks whether, if a certain state of affairs exists, this will have the effect of substantially lessening competition in the market. Why something was brought about or came about is not directly relevant to liability as such, though it helps to understand how things came about, and the existence of a discernible malignant scheme would always be highly relevant to relief.

[79] A second general point is that the Act proscribes articulated contracts and arrangements (for instance see Part 2 of the Act on restrictive trade practices). The analysis is much more difficult as to what occurs in the absence of an explicit agreement. Competition lawyers and economists have had a good deal of difficulty with tacit or unstated collusive arrangements. (In the Australian context, see Wylie "Understanding "understandings" under the Trade Practices Act – an enforcement abyss?" (2008) 16(1) TPLJ 20).

[80] The standard model of competition describes every firm as a price-taker, which means that each firm takes the market prices as given and then expands production until marginal cost is just equal to price. In essence, the only information the competitive firm needs is the location of customers, the firm's own costs, and the market price. The firm does not need and is not troubled by the actions of competing firms. However, firms in oligopolistic industries take a keen interest in the actions of their rivals, and take actions in response to those rivals. "Parallelism" occurs where there are few sellers in a market who take the reactions of competitors into account when deciding how much they are going to produce, and what price to set.

[81] While it is difficult to set out an all-encompassing formula, what is thought to be undesirable is a form of tacit collusion in which each firm in a particular market knows that it is in the interests of them all to maintain a high price or to avoid vigorous price competition, and the firms act in accordance with that realisation. This does not amount to a conspiracy, at least in the traditional criminal law sense. At its worst, the behaviour may have an impact equivalent to price fixing; at its least malignant, firms do not compete as vigorously as they might have done otherwise.

[82] The High Court Judge explained why he thought there was a tacit understanding in this case thus (at [83] - [89]):

> [83] In this case, NZ Bus witnesses observed that NZ Bus would suffer loss should it compete with Mana, in that Mana's earnings (and hence dividends and presumably the value of its shares) would be affected. Ms Waddell agreed that if Mana were to enter the Wellington area in any serious way then NZ Bus would likely retaliate, but that NZ Bus is unlikely to think it is in its interests to compete so long as Mana does not initiate competition. NZ Bus witnesses confirmed that good cause to enter Mana's territory would exist, were Mana to compete in Wellington or the Hutt Valley. Mr Martin also made that point in an interview with the Commission, saying that if Mana did that "we'll just tender in their area next time." Indeed, NZ Bus made a good deal of the risk of retaliation should Mana enter its area, arguing that a new owner of Mana would opt to behave just as Mana does now. Explaining why NZ Bus as a minority shareholder would discourage Mana from competing with it, Mr Ridley-Smith said that the threat of retaliation was something that Mana would have to take into account should it try to compete with NZ Bus. In short, the defendants maintained that self-interest leads the two firms not to compete despite low barriers to entry, while firmly denying a consensus or meeting of minds about competition.
>
> [84] I find that there does exist between NZ Bus and Mana an understanding that they will not compete for anything other than Ministry technical routes. The evidence begins with the fact that the Waddell interests approached Stagecoach. They did not do so because of its expertise in running a bus company. Ms Waddell's evidence led me to conclude that their purpose in seeking out Stagecoach as a shareholder was to secure a quiet life. This is not a case of the larger firm buying a stake in its rival uninvited. I am satisfied that Mana initiated the acquisition to protect itself from competition. This ambition explains the willingness of the Waddell interests to grant NZ Bus pre-emptive rights, restraints of trade, negative control over major transactions, some control over dividend policy, and a seat on the board. These things collectively have considerable value.
>
> [85] The restraints of trade in the Heads of Agreement tend to confirm the understanding, particularly clause 6, which operated whether or not the bid was accepted. I do not think it matters that negotiations were concluded, and the agreement signed, after the bid was accepted: clause 6 was part of a closely negotiated agreement and must be taken to record the parties' bargain. In reaching this conclusion, I do not find it necessary to draw an inference against NZ Bus because of Mr Martin's absence, as Mr Goddard invited me to do. The agreement speaks for itself. I accept the Commission's contention that it is scarcely plausible in the circumstances that the parties would devote so much attention to restraints upon competition following a future sale of shares by the Waddell interests without also reaching an understanding about competition in the meantime.
>
> [86] There is competition at the margin and a degree of overlap in services, but it is not inconsistent with such an understanding. As already noted, the two firms compete for Ministry of Education technical routes, some of which Mana has operated in Wellington City for a number of years.

> They also competed for a single GWRC route between Porirua and the Hutt Valley. Ms Waddell explained that by saying Mana thought the route was in "our" area.
>
> [87] For reasons elaborated on later in this judgment I am also satisfied that there is potential for competition between NZ Bus and Mana, particularly in north Wellington. The absence of competition is explained by deliberate restraint on both sides. Of course that is not conclusive, since the firms might have reached their decisions independently, but it does lend support to my finding.
>
> [88] The witnesses denied an understanding, but while I found their evidence credible in other respects I do not accept what they had to say on this point. To some extent they were also debating the question whether the understanding amounts to an agreement. The evidence that an understanding exists is compelling. I do accept that it falls short of a contract or agreement that the parties consider enforceable. The appointment of Mr Waddell as NZ Bus' representative on the Mana Board and the practice of keeping very commercially sensitive information from Mr Turner tend to support that conclusion. The scope of the understanding is also uncertain at the margin, as evidenced by competition over the Hutt Valley-Porirua route. Rather, the stake in Mana creates an incentive for NZ Bus not to compete in Mana's territory without good cause and the parties have reached an understanding that good cause would exist were Mana to provoke NZ Bus by initiating competition.
>
> [89] Whether or not I am correct in this conclusion, the evidence establishes that the parties have chosen to refrain from competing in circumstances where competition is possible. It is the effect of their behaviour that must be taken into account when evaluating the likelihood of competition in the counterfactual. Put another way, analysis of the effect of the transaction on competition does not depend on the conclusion that their behaviour is attributable to a meeting of minds rather than decisions independently reached. It rests rather on the question whether a new owner would behave differently.

[83] The Judge noted that this "tacit understanding" is "not likely to survive transfer of control of Mana to a new entrant [and that] the importance of this conclusion cannot be underestimated" (at [201]).

[84] I intend no disrespect to Mr Goddard QC's submissions under this head in saying that they reduce to the proposition that the appellant is endeavouring inappropriately to displace factual findings on this point, to the extent that they were necessary and appropriate to the High Court judgment. And with all respect to counsel for the appellants, Mr Goddard was correct: they really are trying to displace the inference the Judge drew on this general point.

[85] It seems inescapable that there has been a very real degree of competitive restraint in the relationship between NZ Bus and Mana. The question is why this is. A real degree of risk aversion? A tacit understanding? Or what?

[86] In fairness to Mana, there was some evidence that it was generally a risk averse company. On the other hand, the Judge was entitled to and did point to Ms Waddell's evidence in which she openly referred to "our" area, and to each company's "patch". Even more tellingly she said that Mana approached NZ Bus in the way it initially did to secure a "quiet life".

[87] A judge is also perfectly entitled to have regard to the probabilities, and "comfort", or a relatively easy fit, is not implausible but indeed distinctly likely in a context in which Mana had not had a trouble-free internal history. Why, when it was having its own internal problems, would it want to generate an external commercial contest?

[88] The restraint of trade provisions in the 2000 Heads of Agreement must also be relevant in the current context. The Judge was entitled to attach significant weight to that feature. Why should there be a concern about the future if there was nothing of concern about the present?

[89] The whole of the business context was also highly relevant. The thrust of the economic evidence indicated that NZ Bus and Mana were sound companies turning respectable, though not supra-competitive profits.

[90] I am not satisfied, after looking at all the evidence to which counsel drew our attention on the appeal, and after my own consideration of the matter, that the Judge was wrong in his finding that a "tacit understanding" existed between NZ Bus and Mana. Where that finding takes one is another matter.

A substantial lessening of competition?

[91] I appreciate the authority in this Court that there should be a comparison of the factual and the counterfactual in determining whether a substantial lessening of

competition is likely: see *Tru Tone Ltd v Festival Records* [1998] 2 NZLR 352 (CA). That said, the heart of this case was always going to be where things would likely come to rest if the transaction went ahead. I consider the essential points are quite apparent, even in the usual smog of a competition law case.

[92] The relevant market is the greater Wellington regional market.

[93] The particular concern is the provision of subsidised bus services in that market.

[94] There are presently two major suppliers of subsidised bus services in that market. I have indicated the extent of their holdings and operations. They do not presently compete vigorously, but there is still competition, at least at the margins. Competition exists for Ministry routes, rather than GWRC contracts.

[95] If the proposed transaction went ahead the new "combined" company would hold 97 per cent by value of the contracts in the market.

[96] Such a new purchaser would have effective control of Mana; it could determine its competitive strategy without interference by NZ Bus.

[97] If the particular transaction were to go ahead, the practical outcome would be only one very large supplier in the market, with an almost monopolistic market share and few competitive restraints.

[98] Although it is true that some constraints would remain, as Ms O'Gorman contends, two major suppliers are always going to give rise to a more competitive situation than one. With one supplier, tender prices could be expected to rise, which is a concern for the GWRC and the Ministry; if those bodies were not prepared to pay raised prices, then the quality of service would typically fall.

[99] It also seems to me that Mr Goddard was right to suggest that it is highly relevant to ask whether NZ Bus and Mana are the lowest cost suppliers of services for a material number of routes in the Wellington region. The High Court Judge found, as a question of fact which has not been challenged before us, that the two

companies are the lowest cost competitors (at [203]). If the lowest cost supplier and the next lowest cost supplier merge, the removal of competitive restraints is very significant, and prices are likely to rise.

[100] Perhaps the strongest feature of the appeal was the proposition advanced by Ms O'Gorman that the price correlation evidence was wrong in some respects. With reference to the evidence, she maintained that prices are at competitive levels, that the return on capital is not supra-competitive, and that barriers to entry are relatively low.

[101] All of this was directed, as I apprehend it, towards an overall submission that potential entry by other companies, coupled with existing competition and GWRC's countervailing powers, would ensure that prices remain properly competitive in the factual.

[102] In straightforward terms, what the Court held was that potential entry and these other factors would not be a sufficient constraint to ensure that the acquisition does not substantially lessen competition within the relevant three year timeframe.

[103] In consequence, the appellant's argument was somewhat misplaced: the High Court was less concerned about supra-competitive prices as such than with the more practical question of what the constraints were going to be, as best the Court could determine them, if the transaction went ahead.

[104] With respect, the Judge was correct that to a real extent there was an exercise of judgment and evaluation involved here. A court is always required to simplify to some extent. As it is sometimes said, a competition law court cannot explore the world economy in order to decide a single monopoly case. What a court is doing when it draws a line around the relevant market and how various behaviours will be construed within it is making a critical judgment. It is true that some data will be weighed or considered in deciding whether the law is violated and some will not. Yet all the suggestions about more systematic ways to inform that judgment are merely techniques, or hand tools. In short, this Court should not allow a kind of

false scientism to overtake what is in the end a fundamental judgment which is required by the Act itself.

[105] In this case, the evidence was quite diffuse. But it seems to me that the Judge had regard to all the relevant factors. He then came to an ultimate determination that the constraints which would exist if the transaction proceeded were not sufficient to deflect a finding that the acquisition would substantially lessen competition in the relevant market. I have not been persuaded that he was wrong in that conclusion. I therefore join in the dismissal of the liability appeal point.

Accessory liability

Introduction

[106] In the High Court, the Commission sought pecuniary penalties under s 83 against the Waddell interests and Infratil.

[107] In relation to the Waddells, its contention was that by agreeing to waive the condition requiring Commission clearance or authorisation, they had aided and abetted or conspired with NZ Bus to contravene s 47, or were directly or indirectly concerned in, or party to, the contravention by NZ Bus.

[108] The same allegations were made against Infratil with the added gloss that Infratil counselled or procured NZ Bus to contravene s 47.

[109] The accessory liability claim against the Waddells was successful while the claim against Infratil failed.

The legislation

[110] Section 83 of the Act provides as follows:

> **83 Pecuniary penalties**
>
> (1) If the Court is satisfied on the application of the Commission that a person—

(a) has contravened section 47:

(b) has attempted to contravene that section:

(c) has aided, abetted, counselled, or procured any other person to contravene that section:

(d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene that section:

(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of that section:

(f) has conspired with any other person to contravene that section,—

the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate, not exceeding $500,000 in the case of a person not being a body corporate, or $5,000,000 in the case of a body corporate, in respect of each such act or omission.

(2) In determining an appropriate penalty under this section, the Court shall have regard to all relevant matters, including—

(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 to have engaged in any similar conduct.

(3) The standard of proof in proceedings under this section shall be the standard of proof applying in civil proceedings.

(4) In any proceedings under this section, the Commission, upon the order of the Court, may obtain discovery and administer interrogatories.

(5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention arose.

(6) A person is not liable to a pecuniary penalty under both section 80 and this section in respect of the same conduct.

[111] This is the first case in which the Commission has invoked the accessory liability provisions of s 83, which was enacted pursuant to the Commerce Amendment Act 1990.

[112] There is little in the parliamentary material which is of assistance, as to the provenance and scope of this section. However two years after the enactment of s 83, a review team said the following in relation to pecuniary penalties and their application to professional advisors:

> 7.27 The High Court may impose pecuniary penalties under section 83 of the Act if an anticompetitive merger is implemented without being authorised by the Commission. Section 83 was enacted in conjunction with the introduction of the voluntary premerger notification regime in 1990. The Court is able to impose penalties on, among others, a person who aids, abets, counsels or procures any other person to contravene the merger prohibition. One submission has expressed concern about the manner in which this provision may apply to professional advisors to merger participants.
>
> 7.28 The review team does not share these concerns. We consider it to be appropriate that a professional advisor who is aware or should be aware of the facts that gave rise to a contravention of the merger law be subject to penalties under the Act. A similar provision applies to contraventions of the prohibitions on anticompetitive behaviour and has done so since the Act came into force in 1986.

[113] That review team, comprising representatives from the Ministry of Commerce, The Treasury, the Department of Justice and the Department of the Prime Minister and Cabinet, consulted very extensively in New Zealand before reporting as it did.

[114] Plainly, an over-broad formulation of s 83 would have significant implications for commerce and professional practice: it could impact on mere vendors of assets or shares and advisors who may be involved in a transaction but who do not necessarily share in the resulting gains; there is the stigma of a breach and penalty; and there may be difficult insurance and indemnity issues. There has been some discussion about the proper approach to, and reach of, this provision in the aftermath of the High Court judgments in this case. See, for example, Horner and Quigg "Business vendors beware: Accessory liability in New Zealand" Lawyers Wkly (29 August 2006).

[115] On the other hand, an unduly narrow view could "neuter" the section.

[116] The issue of accessory liability is in turn closely intertwined with the clearance procedures in Part 2 of the Act. As the Act stood in 1986, all merger or

take-over proposals above certain floor figures had to receive a clearance from the Commission. This resulted in many mergers being notified to the Commission that did not raise genuine competition concerns. The compliance costs for business were thought to be inappropriate. In 1990 the compulsory notification regime was amended to one of voluntary notification. See Berry and Riley "Beware the new business acquisitions provisions in the Commerce Amendment Act 1990" (1991) 21 VUWLR 91.

The construction of s 83 in the High Court

[117] Conscious of the history of the legislation, and the implications of catching innocent or "mere" vendors, Mr Goddard endeavoured to formulate a test for liability under s 83 in a way that would not ordinarily capture vendors. He focused on the actions required for accessory liability which, as a matter of convenient shorthand, counsel characterised as the *actus reus* aspect of liability. As the Judge said, this proposed test sought, for example, to distinguish between a vendor who sells shares or assets of a business without insisting upon a condition requiring clearance or authorisation from a vendor who waives such a condition (at [218]).

[118] The Judge appreciated what was driving these kinds of concerns. But he took the view that what Mr Goddard was suggesting "asks too much of the language of the statute", indicating that "the statutory language is plainly apt to capture a vendor". Rather, the protection of the innocent "must lie in the mental element" (at [223]).

[119] After considering the mental element of accessory liability, the Judge concluded (at [230]):

> … an accessory is liable under s 83 only if its participation was intentionally aimed at the commission of the acts that form the principal's contravention, namely the acquisition of assets or shares … it will be a rare case in which participation is not deliberate. That may be true of the major participants, but it need not be so of those at the margins of the transaction.

[120] This passage has since been cited with approval by Williams J in *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805 at [79] (HC).

[121] It was accepted by all counsel in the High Court that an accessory must at least know the essential facts that sufficiently establish a contravention of s 47. The more contentious issue – as is so often the case with legislation of this character – is whether the accessory must also be conscious that the facts known to it established a contravention of the section.

[122] The Judge held that the test must be directed to knowledge of the "essential" facts that have led the Court to conclude, as against the acquirer, that the acquisition is likely to substantially lessen competition. This must begin with knowledge of the number, and size of the market participants; an appreciation of the extent to which substitution occurs; and an appreciation of the things that create market power (such as barriers to entry, product differentiation and vertical integration). The Judge said that was "an imposing list", but businessmen could be expected to know these things "because success in business depends on them" (at [239]). In transactional terms, the essential facts would include facts that led to the Court's conclusions about the likely market position of a merged firm and what is likely to happen to the assets or shares if the transaction does not proceed, and facts that establish a significant competitive advantage is likely to result from the transaction.

The Waddells' appeal

[123] Before us, counsel for the Waddells accepted that accessory liability must contain a mental element requiring actual knowledge of the circumstances and an intention to, for instance, aid and abet. In other words, constructive knowledge will not suffice.

[124] The principal submission is that the Judge erred in requiring knowledge of those "facts" which have led the Court to conclude, as against the acquirer, that the acquisition is likely to substantially lessen competition. It was said that the "facts" in the current context are not simple facts or, in some cases, even facts at all. It was

said, they are conclusions, predictions, and judgements that must be deduced from facts and that reasonable people may disagree on. Mr Tizard argued that it is unlikely that Parliament intended to impose accessory liability for the purposes of pecuniary penalties where there is room for differences over the determination of the ultimate effect of a transaction.

[125] He further said that the Waddells granted the waiver of Commission clearance in good faith on the belief that clearance was not required. Mr Tizard concluded by arguing that there was insufficient evidence to establish that either of the Waddells had the requisite knowledge of the matters upon which the Judge relied to conclude that the sale of the shares was likely to substantially lessen competition.

The submissions for the Commission

[126] Mr Goddard argued that accessory liability would not be workable in the context of the Act if accessories needed to know that the facts are capable of characterisation in the language of the statute. In terms of the knowledge requirement in s 83, the vendor must know, or be reckless as to, the essential facts which make the acquisition a breach of s 47. He said that the essential facts in the s 47 context were the nature of the business of the two parties; the general market environment in which they operate; and the fact that the two parties are actual or potential competitors, and that the transaction will lessen this competition. He suggested that the degree of culpability of the vendor can be addressed through the level of penalty imposed.

The law

(i) Some general observations

[127] It will be apparent from the way this case was approached by counsel and the Judge in the High Court that there was an acceptance that this subject area of the law is closely analogous to the criminal law relating to accessory liability, requiring both an *actus reus* and a degree of intention based on knowledge. Accordingly, the

argument was as to the extent of the required knowledge which the alleged accessory must be shown to have possessed.

[128] It is true that much of the language of s 83 mirrors the language in s 66 of the Crimes Act 1961, relating to parties to offences. Similarly, the Australian courts have adopted a criminal law construction of ss 75B and 76 of the Trade Practices Act 1974. See the authorities canvassed in Pearce "Accessorial Liability for Misleading or Deceptive Conduct" (2006) 80 ALJ 104 and, in particular, *Yorke v Lucas* (1985) 158 CLR 661.

[129] In relation to overtly collusive activity such as cartels and price fixing, the *actus reus* can appropriately be regarded as inherently wrong, and something like the North American *per se* approach to antitrust liability can make sense. In *Broadcast Music, Inc. v Columbia Broadcasting System, Inc.*, 441 US 1 at 8 (1979), the United States Supreme Court held that certain agreements or practices are so "plainly anti-competitive" and so "lack redeeming virtue" that they are conclusively presumed illegal without further examination. What is to be regarded as a *per se* wrong is contentious; the area is not static, and may be reviewed from time to time as to what is to be regarded as bad *per se* behaviour. See generally, Black *Conceptual Foundations of Antitrust* (2005) at 62-93. However, that is not the context of this case, where the central difficulty is prospectively knowing whether an acquisition of shares is going to have the effect of substantially lessening competition in the relevant market. See Castle and Writer "More than a little wary: Applying the criminal law to competition regulation in Australia" (2002) 10 CCLJ 5 at 13: "[w]hen one introduces the inherent ambiguity of economic criminality, the traditional view of criminal responsibility based on a view that all criminal acts are wrong at some fundamental level … begins to fall down".

[130] A number of problems need to be addressed.

[131] First, is the strict criminal law analogy the correct approach? Generally, the law should only resort to criminal law principles where the particular acts complained of are always harmful to society. But the harm caused by "illegal" acts in competition law terms can be much more ambiguous; and parties can

"accidentally" breach the statute. See King "Commentary: The Economics of Penalties and the Penalty of Being an Economist" in Berry and Evans (eds) *Competition Law at the Turn of the Century: A New Zealand Perspective* (2003) 213 at 216.

[132] Indeed, although it did not give any reasons for this, this Court has already shown real caution about being drawn into a rigid "classification" of the pecuniary penalties provisions in the Act. As Cooke P put it in *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435 at 437:

> The proceeding … is indeed as the Act says a penalty proceeding. It has some analogy to a criminal proceeding; it has some analogy to a civil proceeding; it has been called a hybrid; but we are content to take the Act's own term, a proceeding for the recovery of pecuniary penalty, and it is true that heavy maximum penalties are provided.

[133] Secondly, lawyers and judges develop bad habits in relation to uncritical doctrinal transposition. As Harpum rightly pointed out in "The Basis of Equitable Liability" in Birks (ed) *The Frontiers of Liability* (1994) 9 at 9, there is the danger of courts being over-willing to apply authorities on one ground of liability to another that is conceptually discrete; of preferences for applying, as if they were statutory provisions, judicial dicta that were conditioned by the factual context in which they were made; and what the author thought to be an obsessive concern with what might be described as the *mens rea* necessary for liability without sufficient consideration of the *actus reus* in this sort of area.

[134] Thirdly, the practical results of an "over-reach" in accessory liability are significant. There are real consequences not just for the company which is caught, but also for corporations who may feel compelled to compete less aggressively as a result, with significant ramifications for consumers as well. There is also a serious question as to whether the traditional competition law doctrine of the twentieth century is, in this sort of area at least, adequately in line with contemporary organisational structures and economics. See generally, Sautet "The shaky foundations of competition law" (2007) New Zealand L.J. 186.

[135] This Court is not bound by prior authority in the construction of s 83, although real respect is to be accorded to the Australian authorities, and there is much to be said for trans-Tasman uniformity in this area. See *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 at 700 (HC):

> … the 1986 Act clearly follows in a general way a number of approaches adopted in Australia under the Trade Practices Act 1974 … Developments and approaches in those jurisdictions can be kept in mind accordingly.

But in a case of first impression in this country, I think it is appropriate to ask: what is the correct approach to accessory liability under the Act to be?

[136] For convenience of analysis, I will group my observations under two heads. Firstly, I will address more closely what I will call the criminal law analogy. Secondly, I will suggest that a "dishonest participation" model may be a more appropriate approach. I emphasise that in this judgment I am concerned only with cases where there has been a contravention of s 47 of the Act, in the area of business acquisitions.

(ii) The criminal law analogy

[137] The criminal law analogy is the current orthodoxy in the interpretation of the accessory liability provisions in the Act pertaining to restrictive trade practices (s 80). It holds that accessories must know of the essential facts which make up the contravention, and intentionally participate in it. (In the criminal law context, see generally Duff "'Can I help you?' Accessorial liability and the intention to assist" (1990) LS 165).

[138] The standard Australian authority is *Yorke v Lucas* (see above at [128]), which involved a statutory provision (s 76 of the Trade Practices Act) that is almost identical to s 83 of the New Zealand Act. As to the equivalent of our s 83(1)(c), the majority of the High Court of Australia held that in the criminal law, one cannot aid or abet without intentionally participating in the offence having knowledge of the essential matters which go to make up the offence (whether one knows, or not, that those matters amount to an offence). Liability under the equivalent of our party

provision in s 83(1)(e) requires "a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention" (at 670).

[139] This approach conforms with orthodox criminal law reasoning pertaining to derivative liability. See for instance *Giorgianni v R* (1985) 156 CLR 473. That was a dangerous driving case in which the appellant, who was the employer of the driver, was charged as an accessory. The High Court of Australia held that both knowledge of the circumstances and an intention to aid, abet, counsel or procure were necessary to render a person liable as a secondary party. This reflects a general concern that inadvertent or accidental assistance is not, or should not be, culpable. *Giorgianni* reflects the insight that intention may be necessitated for secondary participation even where the principal's liability is strict.

[140] *Giorgianni* was followed in New Zealand in *Specialised Livestock Imports Ltd v Borrie* CA72/01 20 September 2002 where this Court held, as to the accessory liability provisions of the Fair Trading Act 1986, that as those provisions import the requirements of the criminal law, accessories must know of the contraventions and, in the appropriate sense, intentionally participate in them (at [156]). See also *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 5 NZBLC 103 834 at 103, 850 (HC) (per Tipping J): "I can see no injustice or conflict with the policy of the [Fair Trading] Act for the law to require that the secondary party must be shown to have mens rea – in the present case knowledge of the falsity of the representation". For discussion, see Weston "Primary or Accessory Liability of Directors: Metaphysical Bifurcation?" in Rowe and Hawes (eds) *Commercial Law Essays: A New Zealand Collection* (2003) 79 at 94.

(iii) Section 83 redux: dishonest (or unlawful) participation?

[141] The principal difficulty with the criminal law analogy is well exemplified by this case. It is that of having to articulate, in the context of a suggested lessening of competition, just what are the "essential facts" that go to make up that "lessening", and what it is that the "guilty" party must be shown to have known about them. Given that there can be "grey" areas of facts, the parties and the Commission are

faced with real problems of trying to anticipate the likely ultimate outcome of a case, and in a context where there is the possibility of a $5 million pecuniary penalty for body corporates (s 83(1)), determined only at the civil law standard of proof (s 83(3))!

[142] This then prompts the inquiry: is it possible to state the requirements of s 83 liability in a lessening of competition case in a more appropriate and comprehensible way?

[143] Certain things must be incontrovertible. First, the provisions of s 83(1)(c), (d), (e) and (f) *all* require that there has first been a contravention of s 47 of the Act: there cannot be accessory liability without there being an underlying infraction. But it is worth noting that under the Australian authorities, it is not a pre-condition that proceedings be brought against the primary violator; it is possible to sue (only) the secondary party, although the underlying infraction would still have to be proved: *Matheson Engineers Pty Ltd v El Raghy* (1992) 37 FCR 6 (FCA).

[144] Secondly, liability under s 47 is strict liability; the pecuniary penalty provision in s 83 is *discretionary*. Under s 83 the Commission makes an application to the Court. If the Court is satisfied (to the civil standard) that there has been an infraction, in one of the ways set out in s 83(1), then the Court "may" order that a penalty be paid having regard to the matters set out in s 83(2) which are not exclusive.

[145] Thirdly, the various subsections in s 83 require little, if any, exegesis. Terms such as "aided", "induced" and "conspired" are all commonplace in the law. As Brennan J sagely noted in *Yorke v Lucas*, in relation to the Australian party provision, "the term adds little to the more specific terms to be found in s 5 of the Crimes Act, but it ensures that none is omitted from the net of criminal liability whom the common law would include" (at 677). It must be shown that the defendant acted in one or more of those ways.

[146] Fourthly, it follows that a context specific evaluation is required in the particular case. It does not at all follow that how a Court should approach (say) a

price fixing case is necessarily the same as how it should approach a lessening of competition case. To put this another way, although the section provides an overall framework, it does not necessarily provide a "one-size-fits-all" solution.

[147] A much more difficult question is this. Is there a golden thread of principle which runs through the accessorial liability categories that should be recognised by the law in respect of the enumerated acts, if they are shown to have been committed?

[148] The answer to this question seems to date to be based on attempts to define, conceptually, the sort of knowledge that is required, much in the same way as we struggle to define *mens rea* in the criminal law. This, I think, is a blind alley.

[149] Firstly, the Act should be approached purposively and we should pay distinct regard to what it is that the Act is trying to achieve. There are sound policy reasons for saying that accessories to violations of the Act should be penalised, but only when the circumstances justify such a course.

[150] Secondly, a "degrees of knowledge" approach is unworkable. Trying to come up with water-tight classifications of knowledge was, with respect, rightly called "unhelpful and …unrememberable" by Blanchard J in *Nimmo v Westpac Banking Corporation* [1993] 3 NZLR 218 at 228 (HC). And as Lord Nicholls of Birkenhead said in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 392 (PC): "'Knowingly' is better avoided as a defining ingredient of the [accessory liability] principle and … scale[s] of knowledge [are] best forgotten." This is precisely where, for some period of time, the civil law on accessory liability went wrong, and ultimately the blind alley had to be avoided there, too.

[151] Thirdly, a knowledge based test can be very unfair in a close-run case, because there is room for very real and not unreasonable divergences of view.

[152] Fourthly, what people actually "know" is one thing, but is hardly a satisfactory determinant for a penalty by itself. It is surely when that knowledge is dishonestly put to use for an improper purpose that the line is crossed. This was Lord Nicholls' insight, admittedly in the civil arena, in *Royal Brunei Airlines*:

"… dishonesty is a *necessary* ingredient of accessory liability. It is also a *sufficient ingredient"* (at 392) (emphasis added).

[153] It strikes me that the same thing is true of s 83. There is a grave danger of over-analysing the section. It is *sui generis*. In other words, it stands alone. The section is aimed at deterring and punishing seriously unacceptable commercial behaviour, in relation to business acquisitions that substantially lessen competition under the Act. One form of seriously unacceptable behaviour is to dishonestly participate in a lessening of competition, which then has deleterious consequences for consumers, and society at large.

[154] Some caveats should be entered here. By "dishonest", I do not mean "unconscionable". The latter term is far too open-textured in an area of the law where there can be real room for debate about where the broad merits of the case fall. What I do mean is that the "dishonesty" is to be assessed objectively: was the particular defendant guilty of "commercially unacceptable conduct" in the particular context of the case, to borrow a phrase from Knox J in *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 at 761 (Ch D). It may be thought that the term "dishonest" is too strong for behaviour of this kind. "Unlawful" is another possible term, though it rather begs the question – "unlawful" in what respect?

[155] This conception would put accessory liability under this statutory provision on the jurisprudential footing of fault-based liability, founded on participatory dishonesty of the kind I have indicated, in contradistinction to the strict liability of s 47.

[156] To take stock of all of this, the approach to the accessory liability provisions of s 83 would then be, first, to establish whether there was a contravention of s 47 of the Act; then secondly, to inquire whether an alleged accessory party dishonestly participated in that contravention in one of the ways noted in s 83. The state of knowledge of a defendant would be directly relevant to that enquiry, but not dispositive. A defendant may be shown to have had conscious knowledge of impropriety, which is the easy case. But he or she could not impose their own

standard of honesty. The standard is objective: that view which would be taken by an honest person placed in the particular circumstances.

[157] A number of concerns would doubtless be raised by way of objection to such an approach. In particular it may be said that it is difficult to know when the line of "dishonesty" in the sense I have used that term is crossed. It is true this may not be the easiest of tasks. But it is at least an analytical task, and moreover one which has to be (and is) performed in many settings by Judges, and sometimes juries.

[158] There is, I acknowledge, a possible difficulty that the test for a lessening of competition would not then (on the existing authorities) be the same as for trade practices cases. However there is room for argument that the latter subject-area is becoming somewhat redundant after the important recent decision of the High Court of Australia in *Houghton v Arms* (2006) 225 CLR 553 (discussed in Dietrich, "The (almost) redundant civil accessorial liability provisions of the Trade Practices Act" (2008) 16 TPLJ 37), which held inter alia that persons acting on behalf of a corporation can be liable as principals for misleading conduct, even where such conduct also constitutes the corporation's liability. Whether that be so or not, s 47 and s 83 are two distinct provisions – on of strict liability and one of discretionary liability. There is no logical reason why the tests should be conflated.

[159] A dishonest participation approach would have the virtue of circumscribing somewhat the potential areas of liability for financial and other advisors, a gloss that Mr Goddard tried to achieve in his submissions (see [117] above). And it would have what in this day and age is a relatively rare and priceless virtue – that of rendering the law more certain and knowable.

[160] The approach I have outlined is that which I would prefer to take to this case. Admittedly counsel confined themselves to the attempted application of the existing Australian authorities, by analogy, to s 83, although Mr Goddard responsibly recognised that the present "fit" between accessory liability and s 83 is very awkward in lessening of competition cases. He sought himself to achieve some gloss on the wording of the section.

[161] As it transpires for reasons I will shortly come to, whatever test is adopted, in my view the Judge was wrong: the Waddells should not be subjected to accessory liability. Neither should Infratil be, as Mr Goddard contended.

Application to this case

(a) The Waddells

[162] Whether the position of the Waddells is approached in terms of the *Yorke v Lucas* formula, or on the participatory dishonesty footing I have suggested, in my view the Judge was wrong: accessory liability should not have been imposed on these defendants.

[163] In general terms, their involvement was limited; their knowledge was somewhat circumscribed; and their conduct could not be described as objectively "dishonest".

[164] It is correct that the letter of 9 November 2005, whereby the Waddell interests agreed to sell the remaining 74 per cent of shares in Mana, required NZ Bus to involve the Waddells in the clearance application and update them regularly as to progress. Clause 7.2 of the 23 December 2005 agreement for sale and purchase of the Mana shareholding to NZ Bus was to similar effect. It is clear that Infratil and NZ Bus did involve the Waddell interests in the clearance application to some extent. Some of the correspondence from the Commission went to the Waddells, but significantly Ms Waddell did not see the letter of 9 March 2006, detailing the Commission's concern about the proposed acquisition. Ms Waddell was present at discussions with Mr Tizard in which the Waddell interests agreed to waive the clearance condition which was, as the Judge said, a form of participation in the breach. But significantly, as Mr Tizard emphasised, Ms Waddell was not involved in the discussions between the Commission and NZ Bus. She did not know that the Commission was being told by other operators that they would only enter Wellington by acquiring Mana. She was not told that there was a real risk that the Commission would decline the clearance application. To the contrary, she was told

that the Commission had "hinted" that the application should be withdrawn. Indeed she was told that NZ Bus' legal advice was that the application need not have been made at all.

[165] In these circumstances I would allow the Waddells' appeal in relation to accessory liability.

(ii) Infratil

[166] It will be recalled that the Commission cross-appealed the High Court Judge's dismissal of the accessory liability claim against Infratil. The Commission seeks a penalty against Infratil on the basis that Infratil:

- was actively involved in the acquisition;
- was aware of the essential facts giving rise to a Commerce Act concern;
- was aware of the Commission's concerns in relation to the acquisition, and that there was a Commerce Act risk; and
- actively encouraged and procured NZ Bus to take that risk by pursuing the acquisition, waiving the condition and settling without a clearance or authorisation.

[167] It is clear on the High Court Judge's findings that Infratil's actual involvement in the transaction was well established to the standard required by s 83(1)(c) and (e). Infratil therefore had the necessary *actus reus*; the High Court seems to have been concerned as to whether Infratil had the necessary mental element.

[168] Mr Goddard submitted that whatever threshold of knowledge is required for s 83 purposes, Infratil "had met it". And further, "the accessory provisions must be intended to capture a parent company that effectively runs a transaction, makes all

the relevant decisions, and is aware of but elects to run a Commerce Act risk" (at [252]).

[169] It is relevant to recall at this point that s 90 of the Act provides for the state of mind or conduct of a director, servant or agent of a body corporate to be attributed to the body corporate.

[170] The individuals whose conduct or state of mind needs to be scrutinised in this case, for the purposes of attribution to Infratil, were Mr Ridley-Smith and certain other employees and agents of Infratil who were involved in the due diligence.

[171] Mr Ridley-Smith was an executive employed by H R L Morrison and Co Ltd, which managed Infratil. He was responsible for the purchase of NZ Bus from Stagecoach plc and oversaw the due diligence of both NZ Bus and Mana. In the latter role, he familiarised himself with the business of each of the companies, admittedly in a relatively short period. By the time of the Commission's interim injunction application to prevent settlement of the share purchase, Mr Ridley-Smith thought that he had sufficient knowledge of the market and transactions to express a view on whether the acquisition would have, or be likely to have, the effect of substantially lessening competition. He said that he originally considered that the geographic proximity of Mana's and Stagecoach's operations might raise competition issues. But after learning "a considerable amount more about the bus business", he considered that the geographic proximity was not of distinct relevance. In short, Mr Ridley-Smith seems to have come to the view that there would not be a substantial lessening of competition, on the facts as he understood them to be.

[172] The High Court Judge held that (at [254]):

> … in this case, knowledge that Mana could compete is not enough to establish knowledge of facts establishing a substantial lessening of competition. NZ Bus' position in the clearance application, in which Mr Ridley-Smith was involved, was that Mana could compete but that it was in no better position to do so than any new entrant, in that it too would have to acquire a new depot, fleet, and staff. There is no evidence that Mr Ridley-Smith knew that Mana could use its existing assets to compete on northern routes; the Waddell interests disclosed that in the earlier negotiations with Stagecoach plc. Nor does the evidence show that he knew of the tacit understanding, or at least that Mana and NZ Bus had chosen not to compete

> in circumstances where competition was viable. He did not attend the 14 February meeting with the Commission, at which Mr Martin made it clear that NZ Bus would retaliate if Mana initiated competition.

[173] Again, it appears to me that whether one follows the *Yorke v Lucas* approach, or has regard to a requirement for objective "dishonesty", a claim of accessory liability against Infratil necessarily fail. The Commission's cross-appeal should be dismissed.

[174] Firstly, the claim fails "on the facts". The concerns which the Judge had on that score have not been displaced and he has not been shown to be wrong. That alone is sufficient to dispose of the cross-appeal.

[175] Secondly, even if Infratil knew all the material facts – and assuming solely for the purpose of this point that it did so – it is difficult to say that it was objectively dishonest. What Infratil did was to take a rather unwise "punt" in a borderline case. In failing to see the Commission clearance process through, Infratil was taking a very real chance. I would have been inclined to the view that this amounts to commercially unacceptable conduct of the requisite character for s 83 liability. A gamble on the Commission not taking action may be acceptable in commercial terms, but it is not in legal terms. However, the complication in this case is the vexed issue of whether there was a "nod" or a "wink", by Commission staff. The factual issues here are relevant to both liability and penalty in my view and I now turn to deal with that discrete issue.

[176] NZ Bus applied for a clearance from the Commission in order to obtain the immunity set out in the Act. There were then undoubtedly vexing delays with the clearance progress. Requests for extensions of time were sought by the Commission on several occasions. It seemed as if a further extension might have been required, just at the critical time in the transaction.

[177] NZ Bus' decision to withdraw the clearance application came about as a result of discussions in a meeting with Commission staff on 14 March 2006.

[178] Certain things seem clear enough:

- the Commission took the view that it needed to be affirmatively satisfied that the acquisition would not breach s 47; and

- the industry was in a state of flux and industry participants had given differing views. There were difficulties for the Commission in reaching that level of satisfaction.

[179] What was hotly contested was whether Commission staff indicated that it was open to NZ Bus to proceed without a clearance or somehow encouraged it to do so. That the issue was at least "aired" is quite apparent from the recorded transcript of the 14 March meeting where Mr Finchham, one of the Commission's staff, is recorded as saying, "You know, deciding on, you know, assessing your view of whether there's going to be lessening in competition and *going ahead without clearance*" (emphasis added).

[180] A fuller record of the transcript is set out at [6] of the High Court's penalties judgment. The transcript records an exasperated NZ Bus representative, Mr Martin, saying, "What, so we would just go ahead and sit there on our hands waiting for you to decide to challenge it?" Mr Finchham replied, "I don't know, that's your call to make."

[181] The High Court Judge dealt fully with the withdrawal of the clearance application and the meetings between NZ Bus and the Commission at [103] - [113] of the liability judgment. He returned to the issue in the penalties judgment (at [9] and [10]):

> [9] It was common ground that NZ Bus assumed the risk that the Commission would sue if it withdrew the clearance application. Its representatives knew the staff they were dealing with were not the Commission's decision-makers, and Mr Ridley-Smith accepted in evidence at trial that NZ Bus was not given any comfort about whether the Commission would intervene. Its representatives understood quite clearly that the Commission might sue, and might win; that was the point of Mr Ridley-Smith's paper for the Infratil directors.
>
> [10] However, I am also satisfied that the Commission staff did hint that NZ Bus might consider withdrawing. That is apparent from the transcript

> and confirmed by the tenor of the sound file. They pointed out that the Commission would decline the application unless satisfied that it did not have the effect of substantially lessening competition, and that NZ Bus would then have the option of proceeding without the clearance and waiting to see whether the Commission or anyone else took action. They raised that possibility because they were having difficulty reaching a conclusion about the effect of the transaction. Their observations led NZ Bus to fear that the clearance application was likely to fail. It also believed that the Commission would be likely to sue should NZ Bus settle the transaction after a clearance was declined; I infer that NZ Bus believed the Commission would feel compelled to act in that case, not because it necessarily believed the transaction was anti-competitive but to protect what it saw as the integrity of the clearance regime. The less confrontational approach was to withdraw the clearance application and settle, in the hope that the Commission, with limited resources and more pressing issues to deal with, would not sue. Hence the decision to withdraw just two days before the Commission was to issue its decision. The application had been filed on 9 January and the Commission and NZ Bus had agreed to extensions of time, but the Commission's decision was due on 17 March and no further extension had been sought. The transaction was not due to settle until 3 April at the earliest and there was provision to delay settlement until 30 June.

[182] Those were findings of fact which the Judge was entitled to come to. He heard from the witnesses first hand and listened to the sound file of the 14 March meeting. The Judge's impression of the witnesses and what happened overall is critical.

[183] The most significant thing is the Judge's finding that the Commission staff did "hint" that NZ Bus might consider withdrawing the clearance application. That was a most unusual occurrence. It plainly had at least some bearing on the decision that NZ Bus actually took.

[184] In those circumstances, it is difficult to say – although it is not an easy case – that this was "objective dishonesty". If there had not been the particular finding of fact, I would have decided this issue the other way.

[185] I would therefore dismiss the Commission's cross-appeal in relation to the accessory liability of Infratil.

Penalty

Introduction

[186] In the High Court, the Commission sought a penalty against NZ Bus of between $1.5 million and $2.5 million on the basis that:

- this amount is necessary for realistic deterrence of people choosing to go ahead with borderline acquisitions of substantial businesses, without seeking a clearance or authorisation from the Commission;

- if the same broad approach to penalties under ss 47 and 83 is adopted as in the ss 27 and 80 context, pertaining to restrictive trade practices, this amount is consistent with previous penalty decisions in New Zealand; and

- and this amount was consistent with Australian authority.

[187] In his submissions on penalty to this Court, Mr Goddard maintained that:

> The Commission's principal concern [is] that a substantial penalty be awarded in order to deter people from proceeding with acquisitions that they consider to be marginal from a Commerce Act perspective, especially where they might consciously take the view that there is a prospect that the Commission will not take action because of resource constraints.

[188] Given this viewpoint, the Commission has cross-appealed against the penalty actually awarded in the High Court. Unsurprisingly, NZ Bus claims that the penalty of $500,000, even if substantive liability under s 47 is maintained, is excessive in the circumstances. NZ Bus maintains that no penalty should have been imposed.

[189] NZ Bus and Infratil, in case it should incur accessory liability on appeal, jointly submitted that the Judge's starting point of $2 million was flawed and without a proper evidential basis. It is said that it was based on an incorrect assumption that NZ Bus and Mana were achieving supra-competitive profits and failed to take into account the costs of business.

[190] It was further submitted that the $500,000 penalty imposed was inconsistent with the principles of a voluntary and optional clearance regime, particularly in circumstances where the shares were never transferred and the acquirer had a genuine belief that no substantial lessening of competition would result.

[191] NZ Bus and Infratil also argued that the Judge did not take adequate account of various mitigating factors.

The jurisprudence of penalties

[192] Any system of competition law must have both sound doctrine and enforcement mechanisms that ensure, at reasonable cost, a respectable degree of compliance with the law.

[193] A basic objective of any remedial system is to deter people from violating the law. One way to deter unlawful activity is by making it costly to engage in. However, a difficult but crucial question is: just how costly should it be made? See Becker "Crime and Punishment: an Economic Approach" (1968) 76(2) J.Pol.Econ. 169 and Posner *Economic Analysis of Law* (5 ed 1998) at Ch 7.

[194] There are some relatively easy cases. A potential violator may reckon that the punishment cost to him is a figure lower than the social cost. Such a deliberate violator, taking advantage of low penalties, is the easy case. This doubtless explains why there is a $5 million maximum penalty to deter body corporates under s 83(1).

[195] At the other end of the scale, there may be some uncertainty in the definition of the prohibited conduct or the application of that definition to particular cases. Heavy penalties may have the effect of deterring lawful conduct at the margin, requiring potential defendants to steer too far clear of the intended zone.

[196] These sorts of issues have given rise to a vast law and economics literature, and some of the more complex techniques of analysis ever employed in a legal context. Some commentators want to limit the application of penalties to practises that cause a net social loss; others want to move away from a quasi-criminal

approach; still others suggest something more in the nature of a compensatory approach.

[197] At least as the law stands in Australia and New Zealand, deterrence is seen to be the most significant factor to be considered in the imposition of penalties for anti-competitive conduct. Deterrence is thought to be what would be referred to as "general deterrence" in criminal law parlance: that is the sending of a message to all persons in the commercial community who might contemplate engaging in such activity. See, for instance, *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC) (the latest penalties and costs judgment is HC AK CIV 2005-404-2080 8 February 2008); *ACCC v Leahy Petroleum Pty Ltd (No. 3)* (2005) 215 ALR 301 (FCA); and *Commerce Commission v Herberts Bakery Ltd* [1991] 2 NZLR 726 (HC).

[198] There is some rather indirect parliamentary support for a deterrent approach to pecuniary penalties. The Commerce Select Committee recorded that "the purpose of penalty and remedy provisions in competition law is to penalise today's offender with sufficient severity to discourage others from committing similar acts": Select Committee *Commerce Amendment Bill* (Report 1999) at 23. A similar notion was expressed in the 1992 governmental review of the Act (see above at [112]), which suggested that the main "incentive" to comply is the threat of the heavy penalties which are proscribed.

[199] As I have indicated, there is room for a great deal of debate about the purpose and effectiveness of remedies in the competition law area. However, the overwhelming weight of authority in Australasia presently is that deterrence must be the prime objective. Indeed, counsel did not suggest that we should proceed on any other basis.

[200] That said, as with any lawsuit, at the end of the day the particular facts and circumstances are all important. The Act does not require a "blind" deterrence approach. Section 83(2) requires that all relevant matters be considered in determining an appropriate penalty. Those factors will include:

- the nature and extent of the contravening conduct (s 83(2)(a));
- the amount and extent of loss or damage caused (s 83(2)(b));
- the circumstances in which the conduct took place (s 83(2)(c));
- whether the defendant has a generally compliant record (s 83(2)(d));
- how deliberate and persistent the conduct was; and
- and the financial position of the defendant.

[201] I now turn to the factors which were in distinct dispute in this case.

Potential gains

[202] The Judge considered that NZ Bus' potential unlawful gains from the transaction were unlikely to be less than $2 million and may have been more (at [52] of penalties judgment). This was based on the following considerations:

- Under the SSNIP test (which inquires whether a supplier would be able to impose a small yet significant and non-transitory increase in price, which the Commission generally defines as a 5 to 10 per cent increase that is sustained for a period of one year), NZ Bus stood to earn 5 to 10 per cent more revenue each year on approximately half the $20 million greater Wellington market for the next five years (at [48]).
- A penalty of $2 million was about 10 per cent of the annual turnover of the greater Wellington market.
- Based on alleged differences between EBIT levels, a post-merger NZ Bus would have been able to sustain market prices that were 10 per cent above competitive levels.

[203] The High Court then "discounted" that amount to $500,000 in order to reflect the Commission's "contribution" to the breach, the absence of loss, the risk of error in the calculation of gains, and the stigma associated with the Court's finding (at [66]).

[204] Ms O'Gorman suggested that despite the fact that the persuasive onus was on the Commission – which it was – the Court accepted mere speculation that NZ Bus would have achieved supra-competitive profits post-acquisition. She said that there was no valid evidence that supra-competitive profits had been achieved by the parties, or could be achieved following the proposed acquisition. In any event, the amounts referred to by the High Court were gross amounts which did not reflect the gains that could be anticipated because they did not take into account the costs of business.

[205] There is real force in the points advanced by Ms O'Gorman, in particular that it is extremely difficult to determine, as an artificial exercise, whether supra-competitive profits would in fact have been made. However, there is no question that the Judge allowed a very significant discount for that very uncertainty, along with other factors.

The Commission staff indicator

[206] I have detailed the factual context to this issue at [176] to [183] above.

[207] Mr Goddard strenuously sought to persuade us that the behaviour of Commission staff did not contribute to the breach of the Act and should not be taken into account. I understand the technical force of the argument but I do not think it should bear on the separate question of what penalty is appropriate in the particular circumstances. A particular difficulty I have is that I do not know what precise percentage the trial Judge allowed for the Commission's so-called contribution to the breach.

[208] I do not wish to leave this point without saying something more about the importance of the clearance procedure in Part 5 of the Act. It must be sound legal

advice that, at the outset of a business acquisition, a party to that transaction should make up their mind as to whether a clearance application is to be lodged with the Commission. If it is deemed appropriate to approach the Commission, then it is distinctly unwise not to complete the clearance process. It really should be an all-or-nothing situation: go to the Commission and complete the clearance procedure, or do not go at all because anything in between is fraught with risk. Practitioners will be well enough aware that there can be delays with Commission clearances. Technically, there is no time limit in the Act and commercial transactions can be at the mercy of prompt decisions by the Commission. The Commission has a heavy obligation to see that commercial transactions are not thwarted for lack of timely delivery of clearances. But the clearance provisions have been mandated by Parliament for what it considers to be good and sufficient reason, and it is to take an unusually large and potentially very expensive risk not to go through with the process, once initiated.

Other factors

[209] Other factors going to penalty included the stigma of a finding of breach, the absence of previous breaches, and the absence of actual loss. All of these things were adequately taken into account by the Judge.

Conclusion on penalty

[210] It is arguable that the High Court Judge may have adopted an overly high starting point as to penalty. But he did give a very large discount – around 75 per cent – from the head figure for the various mitigating factors discussed above.

[211] In terms of fundamental principle, $500,000 was an appropriately deterrent pecuniary penalty in a marginal case. NZ Bus was to an extent precipitate and risk-taking in what it did. But a penalty ordered by a lower court should not be altered unless there is a sound reason for doing so. In the end, I think the Judge's "situation sense" has not been shown to have been wrong. I would dismiss the cross-appeals on penalties.

[212] It should be noted that even if Infratil were held to be an accessory, I would not have thought an "additional" penalty against it to be appropriate. NZ Bus was a wholly owned subsidiary of Infratil, and there is consequently a "flow-through" effect for Infratil itself. It is hard to see why a "double penalty" should be imposed in this case, particularly where no application for a penalty has been made against particular individuals.

Costs

Background

[213] In the High Court penalties judgment, the Commission was awarded full reimbursements for its expert fees, being a total sum of $466,058.34. NZ Bus and (to the extent that it may be responsible for them) Infratil appeal against the decision of the Judge to grant that full reimbursement.

[214] The essential submission is that the expenses sought by the Commission were not reasonable in amount, and were much higher than those incurred by the appellants. This appears to be because the Commission had engaged two off-shore economists, one English and one American.

[215] The Commission's position is that the High Court was in the best position to evaluate the helpfulness of the Commission's expert evidence and the reasonableness of those costs. Mr Goddard submitted that in circumstances where it has done so carefully, taking all relevant factors into account, and there is no error of principle in its approach, the threshold for this Court to intervene is simply not met.

The High Court determination

[216] The High Court Judge said (at [100]) of the penalties judgment:

> I accept that it would not be reasonable to order a losing party to pay experts' costs to the extent that they exceed those of an equally satisfactory local expert. But in this case the Commission went to some effort to obtain New Zealand or Australian experts. Indeed, it approached [an expert for NZ Bus] but found he was already engaged … In the circumstances, I am

> satisfied that the Commission acted reasonably by engaging overseas experts.

The relevant legal principles

[217] Disbursements are subject to r 48H of the High Court Rules. Witness expenses are a matter for the discretion of the Court in accordance with r 48H(2).

[218] Since the enactment of r 48H, a successful party is generally entitled to recover the actual expenses of its expert witnesses, provided they satisfy the criteria in r 48H(2) that they are both necessary for the conduct of the proceeding and reasonable in amount.

[219] There is no "two-thirds" rule so far as expert fees recovery is concerned. In supporting that proposition, this Court in *Air New Zealand Ltd v Commerce Commission* [2007] 2 NZLR 494 at [47] found the High Court Judge's "careful exegesis" in the penalties judgment to be particularly helpful: "we have no doubt that, since the enactment of r 48H the winning party is generally entitled to recover the actual expenses of its expert witnesses, provided they satisfy the criteria in r 48H(2)".

Conclusion on costs

[220] The point being advanced on appeal comes down to the proposition that the fees of the overseas experts were unreasonable by comparison to that of local experts.

[221] In this case, the Judge was particularly well placed to evaluate whether the work was appropriate and necessary and he clearly thought it was. There is simply no basis for the inference that the expert fees of each party should in effect "equate".

[222] I would dismiss this distinctly makeweight appeal point.

Conclusion

[223] I would therefore:

(a) Confirm the dismissal of the appeal by NZ Bus against liability in respect of s 47 of the Act.

(b) Allow the appeal by the Waddells, as to their liability as accessories under s 83 of the Act.

(c) Dismiss the cross-appeal by the Commission against Infratil, as to its liability as an accessory under s 83 of the Act.

(d) Dismiss the cross-appeals as to the penalty amount ordered by the High Court.

(e) Dismiss the costs appeal by NZ Bus.

[224] As to costs, the precise order in the High Court was that NZ Bus pay to the Commission the following sums:

(a) the sum of $117.190.00 (being costs of the application calculated on a 3C basis at pre-2006 amendment levels ($110,080.00) and costs of the application calculated on a 3C basis at 2006 amendment levels ($7,110.00));

(b) the sum of $16,590.00 (being costs of the penalty hearing calculated on a 3B basis at 2006 amendment levels); and

(c) disbursements of $485,849.87.

That order will stand.

[225] In this Court, all the parties enjoyed some measure of success, and the case has been very much a test one, in an area of public importance. Costs will therefore lie where they fall in this Court.

[226] Finally, I would not wish to leave the case without expressing my gratitude to counsel. In particular, Ms O'Gorman picked up a difficult burden at short notice

when senior counsel fell ill. That allowed the appeal to proceed. She said all that could have been said, and said it well.

ARNOLD J

[227] I concur in the conclusions set out in Hammond J's judgment at [223] – [224]. I also agree with his reasons in relation to penalty and costs and have nothing to add. I do wish to provide a brief summary of my reasons on two aspects of the case, however – the liability of NZ Bus and accessory liability.

Liability of NZ Bus

[228] Like Hammond and Wilson JJ, I consider that the acquisition by NZ Bus of the Waddell interests' 74 per cent shareholding in Mana breached s 47 of the Commerce Act. My reasons are essentially the same as those of Miller J. I make the following brief comments, adopting the structure adopted by Ms O'Gorman in her issues sheet, albeit that I will address the issues in a different order:

(a) Market definition;

(b) Existing competition;

(c) Significance of countervailing power;

(d) Conditions of entry; and

(e) Factual/counterfactual.

Market definition

[229] Miller J found that the relevant market was the market for subsidised bus services in the greater Wellington region (excluding the Wairarapa). On appeal NZ Bus maintained its stance at trial that the geographic dimension comprised not a single regional market but five distinct geographic markets or sub-markets within

that region. However, Ms O'Gorman did not press the point strongly. Given the instrumental nature of market analysis, she seemed prepared to accept that the broader definition permitted satisfactory consideration of the competition issues raised by the proposed acquisition despite her preference for the narrower market/sub-market analysis. I agree with that approach and treat the relevant market as that found by Miller J.

[230] The purchasers of services in this market are GWRC and the Ministry. The GWRC subsidises scheduled bus services and dedicated school bus services on scheduled public transport service routes, and also licenses commercial (ie, unsubsidised) bus services. The Ministry subsidises school bus services in areas not served by public transport and for pupils to attend technical classes (technical routes).

[231] Land Transport New Zealand (LTNZ) disburses subsidies to regional councils on behalf of central government. It provides about 45 per cent of GWRC's annual bus subsidy payments, the remainder coming from ratepayers. Under statutory authority LTNZ publishes the Competitive Pricing Procedures Manual (the CPP Manual), which contains approved procurement procedures with which GWRC must comply if it wishes to obtain government funding.

[232] The two principal suppliers in the market are NZ Bus and Mana, which between them have 97 per cent of the market by contract value (NZ Bus 69 per cent and Mana 28 per cent). They operate largely in discrete geographic areas of the market. The remaining contracts are held by various firms, none of which has a substantial market presence.

Existing competition

[233] The evidence showed that there had been limited competition between NZ Bus and Mana in tenders for bus routes within the greater Wellington regional market. While there had been some competition between the two operators for technical routes tendered by the Ministry, in relation to slightly under 90 per cent of the routes tendered by GWRC only one or other company had bid.

[234] The parties disagreed as to the reasons for this, both at trial and before us. The Commerce Commission said that the two companies enjoyed a "cosy relationship" in terms of which they chose not to compete with each other. Mr Goddard noted the restraints in the Heads of Agreement (see [19] above). He submitted that there was no point in these unless (a) there was the potential for competition between NZ Bus and Mana and (b) the potential competitive threat that each posed to the other was greater than the threat posed to either by a *de novo* entrant. Mr Goddard also noted the references to the potential for "retaliation" and the use of language such as "our" patch by the NZ Bus and Mana witnesses.

[235] For its part, NZ Bus denied that there was any understanding between the parties that they would not compete. Reference was made to the evidence of Mr Turner (an executive director of NZ Bus) and Ms Waddell (the Managing Director of Mana) to the effect that there was no such understanding. Ms O'Gorman said that the limited competition came about because NZ Bus and Mana were operating on low margins and achieving low returns on capital invested within their particular areas of operation. The evidence did not show, she said, that they were earning supra-competitive profits, as the Judge suggested. Ms O'Gorman submitted that the parties had not competed for the same reasons that there had been no *de novo* entrants in the market, namely the need to make considerable capital investments in order to operate in the other's area of operation.

[236] The Judge accepted the Commission's arguments and concluded that the absence of past competition between NZ Bus and Mana was "in substantial part" the result of a tacit understanding that they would not compete with each other (at [127]). Further, while recognising that the information before him was not perfect, the Judge concluded that NZ Bus and Mana were very profitable by international standards despite the fact that NZ Bus faced some operational inefficiencies (at [138]). The Judge also noted that other operators had expressed interest in entering the Wellington regional market, with acquisition of an existing operator being the preferred means of entry (at [143]).

[237] I make two points about these arguments. First, care needs to be taken in relation to evidence of past market behaviour in this context. As the Australian

Trade Practices Tribunal said in *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 516, "whether firms compete is very much a matter of the structure of the markets in which they operate". In a merger or acquisition case factors going to market structure will generally be critical (market structure includes, most importantly, conditions of entry, but also factors such as the degree of market concentration and any long term contractual or other arrangements that restrict the ability of market participants to compete). The analysis is a forward-looking one, comparing the likely state of competition if the merger or acquisition proceeds with the likely state of competition if it does not. Evidence of past conduct may be relevant – it may, for example, cast light on market structure, indicate the likely response of an incumbent to new entry or provide pointers to likely future developments within the market. But to the extent that behaviour within a market is discretionary, it can change, and so may not be a reliable indicator for the future. In principle, market structures which drive market participants to act competitively are the best assurance of competitive outcomes.

[238] As I have said, past behaviour was raised in two ways in the present context. First, the parties agreed that there had been limited competition between NZ Bus and Mana in the past but disagreed as whether that was the result of the structure of the market (in particular, its geographic characteristics), or whether it simply reflected decisions made by the two companies. The Judge found that it was principally the latter. Second, NZ Bus and Mana relied on past behaviour when they argued that neither was earning supra-competitive profits, so that prices must have been competitive. As I will shortly indicate, that conclusion does not follow. But even if it did, it would be of little significance if those prices resulted from voluntary restraint on the part of the companies rather than the effect of competitive forces.

[239] The second point is that disputes about whether companies are or are not earning supra-competitive profits are, in my view, often unhelpful. (In fairness to the Commission, the Judge said that it did not set out to prove that NZ Bus and Mana were earning monopoly profits (at [137]).) The important question is whether prices are competitive (although price does not always tell the full story as market power can be exercised other than through pricing, eg, by lowering the quality of services or goods without lowering price). Prices may be above competitive levels because

they recover inefficiently incurred costs whether or not they also capture supra-competitive returns. So, demonstrating that profits or rates of return are not above competitive levels does not mean that prices are at competitive levels.

[240] As Hammond J says (at [103] above), an important theme of NZ Bus' submissions was that the Judge wrongly found that NZ Bus and Mana were earning supra-competitive profits and this error permeated his entire analysis. NZ Bus said that neither company was earning supra-competitive profits, so that "current prices are at competitive levels". But that conclusion does not follow. It overlooks the possibility that existing prices are recovering inefficiently incurred costs.

[241] I accept that evidence of rates of return in excess of industry norms may provide some evidence that prices are above competitive levels. But the earning of "normal" rates of return does not preclude the possibility of supra-competitive pricing.

[242] Further, in this context, it must be remembered that the material necessary to make economic (as opposed to accounting) assessments on these issues is rarely available. It was not available in this case, as the Judge recognised.

[243] That said, I agree that the evidence demonstrates that NZ Bus and Mana have each pulled their competitive punches so as not to provoke a competitive response from the other. I accept that there was no explicit agreement or arrangement to this effect. But there was, as the Judge found, a tacit understanding (perhaps better expressed as conscious mutual restraint). The restrictive terms in the Heads of Agreement are confirmatory of this. So also is the fact that NZ Bus was prepared to pay the Waddell interests a non-refundable deposit of $3m in consideration for the letter agreement of November 2005. As the Judge said, this payment was an acknowledgement that Mana would pose a competitive threat to NZ Bus in Wellington should the parties not reach agreement about the sale of the Waddell interests' shares in Mana (at [93]).

[244] In my view, the Judge's conclusion that there was a tacit understanding was not only open on the evidence – it was inevitable. Against this background, a

finding that prices in the market were not "competitive" (in the sense that they were not set solely or principally in response to competitive pressures) must inevitably follow.

Significance of countervailing power

[245] NZ Bus argued that both the GWRC and the Ministry had a wide range of powers available to them under the current CPP Manual framework and could use these to eliminate any barriers to entry and to ensure competitive outcomes.

[246] While acknowledging the difficulties with the concept, the Judge accepted that countervailing power has a part to play in competition analysis generally, and was relevant in this case in particular (at [192] – [194]). However, he held that any countervailing power possessed by GWRC (or the Ministry) would be limited until there was new entry on a substantial scale because most tenders attract only one bid (at [197]). Given the necessity to provide a bus service, this meant that GWRC was in a weak position in relation to NZ Bus and Mana. In addition, GWRC was at an informational disadvantage as compared to the two operators.

[247] I accept that there are mechanisms available to GWRC (and the Ministry) to place pressure on the operators, as NZ Bus submitted. But some would take time to implement as changes to the CPP Manual would be required. In any event, I agree with the Judge that the extent of any countervailing power is modest. Given the need to provide bus services and the lack of detailed information, GWRC is not in a strong position when seeking to place pressure on a single tenderer. It lacks credible alternatives, whether in the form of alternative suppliers or the capacity to provide the service itself rather than contracting for its provision (ie, to "make" rather than "buy").

[248] In short, then, where it receives only one tender (as it does for 90 per cent of its tenders), GWRC cannot credibly threaten to by-pass the tenderer, and so has little countervailing power.

Conditions of entry

[249] In its submissions NZ Bus placed considerable emphasis on the constraining effect of potential entry on the merged entity should it attempt to raise prices to supra-competitive levels. It noted the presence in the Wellington area of at least one other substantial bus operator (Tranzit) which could potentially play a greater role in the market, and pointed to the potential for small operators to obtain contracts. (This latter point presumably recognises that competition at the margins can influence competition in the broader market.) Further, NZ Bus emphasised the Judge's finding (at [185]) that some of the conditions that made entry difficult (short lead times for tenders and maximum contract sizes) would be ameliorated over time by GWRC.

[250] Overall, NZ Bus challenged the Judge's conclusion, based on his analysis of the conditions of entry, that if the acquisition was allowed to proceed new entry was possible, but unlikely to occur in an effective and timely way (at [188]). By contrast, under the counterfactual the 74 per cent interest in Mana would be acquired by a new entrant, which would use the shareholding as a springboard to compete in the Wellington regional market (at [190]). The mutual restraint, which had characterised the NZ Bus/Mana relationship, was unlikely to survive.

[251] For my part, I found it difficult to reconcile this aspect of NZ Bus' submissions with its explanation for the fact that historically there has been little competition between NZ Bus and Mana. The principal reason for that was said to be the geographic features of the market, which meant that both NZ Bus and Mana would have been required to make significant capital investments (for example, to acquire additional depots and additional buses) in order to compete against each other. There were substantial risks in doing this. NZ Bus said that this also explained why there had been no *de novo* entry into the Wellington regional market.

[252] While costs of this type may not qualify as a barrier to entry in economic terms, being costs that must be borne by an incumbent as well as a new entrant, they are relevant to the assessment of whether new entry is likely, sufficient in extent and timely if the acquisition is allowed to proceed. In other words, they are factors that will weigh heavily with potential new entrants and will operate as substantial

obstacles to timely and significant new entry. As the High Court said in *Air New Zealand v Commerce Commission (No 6)* (2004) 11 TCLR 347 at [102]:

> [T]he question of whether conditions in a market which have the potential to prevent, impede or slow entry and expansion, are or are not barriers to entry or expansion, may be less important than whether or how they will affect the likelihood, extent and timeliness of entry – the LET test – in the factual as compared to the counterfactual.

[253] In short, NZ Bus' explanation for the lack of competition between it and Mana, and for the lack of *de novo* entry, seems to involve some acknowledgement of the substantial difficulties facing new entrants. In my view, this undermines, to some extent at least, the significance of the threat to the merged entity from potential competition, upon which NZ Bus placed so much reliance.

[254] In any event, the Judge's analysis of conditions of entry was, in my view, correct. It may be that, over time, some of the impediments to entry will be removed or minimised (for example, lead times could change). But the Judge found that such changes are unlikely within the relevant time frame (at [186]). In any event, they would not address all entry conditions. The Judge's conclusion that *de novo* entrants are currently at a substantial disadvantage, and would remain so over the relevant time frame, was well justified on the material before him. So also was his assessment that under the counterfactual the 74 per cent shareholding in Mana would be acquired by a substantial entrant which would use it as a springboard to compete in the Wellington regional market. The evidence established that there are others who are interested in entering this market, and that realistically they can enter on a sufficient scale only by way of acquisition of an existing operator and then by incremental growth. Entry in any other way would be much more risky, costly and difficult.

Factual/counterfactual

[255] As Hammond J notes (at [74]), the economists in this case agreed that the merger of two rivals with the lowest costs of service would lessen competition in a bid or auction market and would do so substantially if other bidders or potential bidders had substantially higher costs. The economists also agreed that, in

circumstances where bids from firms without local assets are rare, it could properly be inferred that bidders with local assets will be the lowest cost bidders.

[256] The Judge found (at [203]) that NZ Bus and Mana were the lowest cost competitors in the Wellington regional market and that Mana was significantly more efficient than NZ Bus. He concluded that the acquisition of Mana by NZ Bus would lessen competition relative to the counterfactual because, in the counterfactual, rivalry between NZ Bus and Mana (under its new ownership) would cause prices to fall towards competitive levels. In addition, in the factual the relatively minor existing competition between NZ Bus and Mana on the Ministry's technical routes would go. The Judge did not agree that another acquirer of the 74 per cent shareholding would operate Mana as the Waddell interests had. Rather, he considered that it would use the shareholding in Mana as a springboard to compete with NZ Bus (at [189] – [190]).

[257] NZ Bus argued that, under the counterfactual, Mana would have no particular advantage over other new entrants competing for contracts. In my view, it is clear that it would. It has local knowledge and local assets, which it could use as a base for incremental incursions into NZ Bus' area of operation. The economic evidence showed that it would have a substantial cost advantage over a new entrant from outside the market. The evidence of potential entrants also supports this view.

[258] In the result, then, I consider that the Judge was right to find that the acquisition breached s 47.

Accessory liability

[259] Section 83 of the Commerce Act and s 43 of its companion Act, the Fair Trading Act, deal with accessory liability. They are in identical terms and are based on the equivalent provision in the Australian Trade Practices Act (s 75B).

[260] The orthodox view is that the approach to be taken to the application of these sections is the same as that taken in respect of accessory liability in the criminal law. Accordingly, an accessory will be liable only if he or she intentionally participates in

the contravention, which means simply that the person must have knowledge of the essential matters which go to make up the contravention (see *Yorke v Lucas*). In the Commerce Act context, an alleged accessory need not know how the facts might be characterised in terms of the language of the Act. So, for example, to be liable as an accessory to a contravention of s 27 a person need not understand that the arrangement at issue had the likely effect of substantially lessening competition in the relevant market (see *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 per Gummow, Hayne and Heydon JJ at [48]).

[261] As Hammond J says, there are difficulties in applying the same approach to the accessory provisions in s 83 as is applied in relation to accessory liability in the criminal law. While that approach seems to be workable in relation to accessory liability under the Fair Trading Act, it is more problematic under the Commerce Act, at least in relation to contraventions of s 47. There are two reasons for this:

(a) First, the requirement that accessories have knowledge of the essential facts that comprise the contravention is difficult to apply.

(b) Second, a finding that s 47 has been contravened requires an evaluative assessment on the part of the court.

I deal with each point in turn.

[262] To conclude that a merger or acquisition will, or is likely to, have the effect of substantially lessening competition in a market a court will have to make an evaluative assessment that takes account of a wide range of facts and circumstances. The court will have to:

(a) Identify the relevant market;

(b) Assess the state of competition within that market, including identifying and assessing relevant conditions of entry;

(c) Consider the likely state of competition in the factual and in the counterfactual;

(d) Contrast the two; and, having done all this,

(e) Undertake an evaluative assessment as to likely competitive effect of the merger or acquisition.

[263] In reaching a view on these points, a court will draw on evidence from present and potential market participants, experts and others with knowledge of the particular industry. Accordingly, where a court concludes that there has been a contravention of s 47, that conclusion will almost inevitably be based on a wide range of "essential facts". On the orthodox approach, then, to establish liability as an accessory to a contravention of s 47 it would be necessary to show that the alleged accessory knew all the "essential facts" that led the court to conclude that the merger or acquisition breached s 47.

[264] Confronted with this difficulty, a court might be tempted to say that where the alleged accessory is an industry participant he or she must be familiar with the details of the industry and that this will suffice for accessory liability. This seems essentially to have been the approach adopted by Miller J in respect of the Waddells (at [246] – [250]). Such an approach has its own difficulties, but might be justifiable in this context were it not for the second difficulty, namely the evaluative nature of a decision that s 47 has been contravened.

[265] As I have said, a court's decision about whether or not s 47 has been breached involves what is ultimately an evaluative assessment. This results from the nature of the issues the court is required to address. In some cases, the conclusion that s 47 has been breached will be obvious, but in many it will not. An approach to accessory liability which does not recognise the difficulty of predicting with assurance whether a particular merger or acquisition will be held to contravene s 47 may result in the scope of accessory liability being widened to the point that it has a "chilling" effect. Such an approach may promote excessive caution by encouraging unnecessary applications for clearance. In a voluntary clearance regime it is difficult to see what purpose is being served by drawing in as accessories individuals who do not seem, in any real sense, to be blameworthy in terms of the policy of the Act.

While this outcome can be mitigated by imposing no penalty, that does not seem a particularly attractive solution.

[266] Hammond J has suggested that the Courts should adopt a standard which he describes as "dishonest participation". While I agree that the application of the criminal law approach in this context is difficult, if not impossible, I am not attracted to Hammond J's solution. To me his approach seems to swap one set of difficulties for another, principally because it provides no effective standard that can be discerned in advance. Rather, it seems to rely on the court's intuitive judgment as to what is commercially appropriate on the facts of the individual case. In my view, greater certainty is required.

[267] That said, I doubt that I am able to offer a better solution. Assuming that the requirement for knowledge of essential facts unduly limits the scope of accessory liability in this context, an alternative would be to require knowledge of a real risk of contravention. That may better serve the policy of the Act. If a person understands that there is a real risk that a merger or acquisition will be found to breach s 47 but, with that knowledge, facilitates the merger or acquisition, the imposition of accessory liability seems an appropriate response. It may provide an incentive for such persons to refuse to facilitate a merger or acquisition in the absence of a clearance or authorisation.

[268] Be that as it may, adopting the orthodox approach to s 83, I agree with Hammond J (at [161] above) that neither the Waddells nor Infratil had the knowledge necessary for accessory liability.

WILSON J

[269] I have read in draft the judgment of Hammond J, and am in agreement as to both reasoning and result. I have also read in draft the judgment of Arnold J, and am in general agreement with his observations. I wish to add my own brief observations on two matters, first the possibility of authorisation and secondly the relationship between Infratil Ltd (Infratil) and New Zealand Bus Ltd (NZ Bus) for the purpose of fixing penalty.

[270] The substantial lessening of competition test imposed by s 47 of the Commerce Act 1986 is a low one. "Substantial" is defined in s 2(1A) as "real or of substance", with the consequence that any lessening of competition which is more than illusory or transitory is caught by s 47. Accordingly, the minor competitive impact of the acquisition by NZ Bus of the shareholding of Mana Coach Services Ltd (Mana) which it did not already own was sufficient to bring the acquisition within s 47. More particularly, pre-acquisition competition between NZ Bus and Mana in tendering for a small number of routes is of itself sufficient to establish that substantial (in the sense of real) lessening of competition would result. As a matter of commercial reality, there is no way that, following acquisition, NZ Bus and Mana would each tender for the same route in the knowledge that the lower of their tenders would in all probability be accepted.

[271] But that does not mean that the acquisition could not proceed. As a counterpoint to the adoption of the low "substantial lessening of competition" test, the Act in s 67 permits the Commerce Commission to authorise an acquisition which is likely to have the effect of substantially lessening competition if the public benefits resulting from the acquisition outweigh the detriments caused by the substantial lessening of competition. As the Commission correctly held in *Goodman Fielder Ltd/Wattie Industries Ltd* (1987) 1 NZBLC (Com) 104,108 at 104,147 and in *Air New Zealand Ltd/Qantas Airways Ltd* (23 October 2003 Decision 511) at para [897], all benefits must be taken into account whereas only detriments in a market where competition is lessened will be relevant.

[272] On the present facts, only very minor lessening of competition would result and the consequent detriment would be modest. NZ Bus would therefore not face a difficult task in establishing sufficient public benefit to outweigh that detriment. Greater efficiencies of scale in all the services of Mana and NZ Bus could well in themselves be sufficient to do so, as could rationalisation of their operations in the limited areas where they overlap.

[273] As I have said, I agree with the conclusion of Hammond J that the Commission's cross-appeal against the dismissal of the claim against Infratil should itself be dismissed. Moreover, even if Infratil were technically liable as an

accessory, I have difficulty in understanding the purpose of the Commission in proceeding against the parent of a wholly-owned subsidiary which is the participant and which plainly has the capacity to pay any penalty which might realistically be imposed. While NZ Bus would obviously not have entered such a major transaction without the support of its parent, I cannot see why that support should result in a penalty being imposed on Infratil in addition to that properly payable by NZ Bus.

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