**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**
**COMMERCIAL LIST**

**CIV-2010-404-005479**
**[2014] NZHC 705**

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| UNDER | Sections 27, 30 and 80 of the Commerce Act 1986 |
| BETWEEN | COMMERCE COMMISSION<br>Plaintiff |
| AND | KUEHNE + NAGEL INTERNATIONAL AG<br>Defendant |

Hearing: 4 April 2014

Appearances: N F Flanagan and F Cuncannon for Plaintiff
I Thain and C Stacey for Defendant

Judgment: 8 April 2014

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## JUDGMENT OF VENNING J

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**This judgment was delivered by me on 8 April 2014 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**.....

Solicitors: Meredith Connell, Auckland
DLA Phillips Fox, Auckland

## Introduction

[1] Following an investigation the Commerce Commission (the Commission) commenced proceedings against a number of freight forwarders, including Kuehne + Nagel International AG (KNI) for breaches of the Commerce Act 1986 (the Act). In its third amended statement of claim the Commission alleges KNI participated in anti-competitive agreements with a number of other freight forwarders in relation to various fees imposed on their customers.

[2] KNI has filed a notice of admission that records it admits:

(a) that it contravened s 27(2) via s 30 of the Act by giving effect to what is known as the UK NES agreement (sixth cause of action); and

(b) that it contravened s 27(2) of the Act by giving effect to the UK NES agreement (eighth cause of action).

[3] The parties have reached the position that if the Court approves the proposed penalty for those breaches the Commission will discontinue the remaining causes of action against KNI relating to other surcharges. A similar approach has been taken by the Commission and approved by the Court in relation to each of the other defendants to this litigation.

## Background

[4] KNI is incorporated in Switzerland. It is the ultimate parent of the other companies in the Kuehne + Nagel Group (KN Group). The KN Group is a global provider of freight forwarding services. It has over a thousand offices worldwide (including New Zealand) and approximately 63,000 employees. KNI is the sole shareholder of the New Zealand entity Kuehne + Nagel Ltd (KN NZ). KN NZ carries on business in New Zealand as part of the KN Group. The KN Group is one of the largest freight forwarding groups operating in New Zealand. It has a significant market presence in both air and sea freight.

[5] The international air freight industry involves all facets of the logistical arrangements for the movement of goods by air from origin to destination. It facilitates the efficient transportation of cargo to and from New Zealand. In 2009 the freight forwarding industry processed 0.18 million tonnes of cargo into and out of New Zealand generating revenue of approximately NZD$600 million.

[6] Importers and exporters are the source of demand for freight forwarding services. The quality and cost of freight forwarding services impacts throughout the New Zealand economy.

[7] Freight forwarders compete with each other to provide services to exporters and importers. Freight forwarding rates are typically expressed as a price per kilogram in the currency at the point of origin. The price is structured as:

(a) a flat rate per kilogram; or

(b) a flat rate per kilogram plus various surcharges and/or origin and destination charges and/or third party costs; or

(c) a pass through of third party costs plus a margin and/or origin and destination charges.

**The markets**

[8] At all material times there existed in New Zealand markets for the provision of freight forwarding services for goods, both inbound freight forwarding markets and outbound freight forwarding markets. The inbound markets were from the following regions:

(a) South East Asia (including Singapore and Malaysia);

(b) East Asia (including China and Hong Kong);

(c) North East Asia (including Japan);

(d) South West Asia (including India);

(e) North America;

(f) Central America;

(g) South America;

(h) Europe (including all countries in the European Union plus Norway and Switzerland); and

(i) Australia.

[9] During all or part of the period from October 2001 to October 2007 the KN Group participated in the inbound freight forwarding markets and the outbound freight forwarding markets in competition with the following relevant parties:

(a) The Agility Group (previously called Geologistics);

(b) BAX;

(c) Deutsche Post Group (Danzas/DHL);

(d) The CEVA Group, previously called EGL; and

(e) Exel.

**UK NES agreement**

[10] In 2002 Her Majesty's Customs and Excise (HMCE) in the United Kingdom introduced new security measures at airports for exports from the United Kingdom. Freight forwarders were required to integrate their computer systems with the HMCE system to ensure relevant data was entered. The additional requirements increased freight forwarders' costs.

[11] KNI (by virtue of s 90(2) of the Act) together with other freight forwarders, relevantly Agility, BAX, Danzas/DHL, EGL and Exel, entered into an agreement to impose a fee (UK NES fee) ostensibly to cover the costs incurred by freight forwarders as a result of complying with increased security measures imposed by HMCE in the United Kingdom on shipments from the United Kingdom to other countries including to New Zealand (UK NES agreement). The UK NES agreement was reached by representatives from the participating freight forwarders who referred to themselves as the Garden Club and/or the Gardening Club.

[12] Members of the Gardening Club participated in covert, hard core cartel conduct. They arranged to meet outside work hours and off site. They used code words in their communications to describe the arrangements and each other.

[13] The employee from the KN Group who attended Gardening Club meetings and was a party to the communications was Chris Edwards. At the time of entering into the UK NES agreement Mr Edwards was the national air freight manager for Kuehne + Nagel UK (KN UK). He was the senior member of the KN UK management team and had significant industry experience. His responsibilities included pricing decisions.

[14] At a meeting on 1 October 2002 at a restaurant in Staines, England the members of the Gardening Club agreed that:

(a) customers would be charged a UK NES fee for the additional costs incurred by freight forwarders in complying with the additional security measures imposed by HMCE;

(b) the UK NES fee would be charged to customers in relation to goods exported by air freight from the United Kingdom to countries outside the European Union;

(c) the UK NES fee would be one standard tariff (the ordinary rate applied to ad hoc customers):

(i) a full tariff of GBP25.00 for the first two items being shipped after which a charge of between GBP2.50 and GBP4.50 per item would apply;

(ii) a contractual tariff (a negotiated rate applied to contracted customers); a guideline tariff of GBP14.00 to GBP16.00 for the first two items being shipped after which a charge of between GBP1.00 and GBP2.00 per item would apply;

(iii) a commercial bulk quality (for large pond customers), contractual tariff to apply subject to limited discounting if required.

[15] The UK NES fee applied to shipments from the United Kingdom to New Zealand. Members of the Gardening Club also agreed to share with each other their communications to customers showing the actual pricing. On 10 October 2002 an email was circulated among the Gardening Club members, including Mr Edwards, confirming the agreement reached on 1 October 2002. Members of the Gardening Club, including Mr Edwards, communicated thereafter on a regular basis about the implementation of the UK NES fee.

[16] The members of the Gardening Club also policed the implementation of the UK NES fee arrangement to ensure that cartel members were not cheating on the cartel or failing to implement it.

[17] At a further Gardening Club meeting on 5 November 2002 members confirmed their agreement and discussed issues arising in relation to the implementation of the UK NES fee.

[18] Mr Edwards organised for the UK NES arrangement to be given effect within the KM Group.

[19] As a result of the conduct described KNI gave effect to the UK NES agreement in New Zealand as follows:

(a) from October 2002 to October 2007 freight was shipped to New Zealand pursuant to and accompanied by House Air Way Bills (commonly known as HAWBs) that included charges set in accordance with the UK NES agreement; and

(b) from October 2002 to October 2007 KN NZ charged customers in the inbound freight forwarding markets in accordance with the UK NES agreement (KN NZ was however unaware of the operation of the cartel).

[20] The Commission commenced its investigation into allegations of cartel conduct in the freight forwarding industry in September 2007. These proceedings were commenced in August 2010.

**Sentencing procedure**

[21] Under s 80(1) of the Act the Court imposes the penalty for contravention of the Act. However, as has been confirmed by the full Court in *Commerce Commission v NZ Milk Corporation Ltd* and adopted in a number of subsequent cases, there can be no objection to a joint view of the parties on submissions as to penalty.[1] Nor is there any issue with the view being reached as a result of negotiations so that it represents what could be described as a settlement.[2] Such settlements are in the interests of the parties, the community and the judicial system enabling as they do early disposal of the proceedings. They also encourage a realistic view of the culpability and penalty and avoid the need for a full hearing with the attendant costs associated with such a hearing.

[22] Ultimately however, it is for the Court to approve the final figure.[3] The Court must be satisfied the figure proposed is within a range which satisfies the objectives of the Act and the particular circumstances of the case before it.

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1 *Commerce Commission v NZ Milk Corporation Ltd* [1994] 2 NZLR 730 at 733.
2 Ibid.
3 *CC v Port Nelson Ltd* (1995) 6 TCLR 406; 5 NZBLC 103,762 (HC) at 445; 103,790.

[23] I propose to adopt the approach taken in a number of previous cases, namely to:[4]

(a) determine the maximum penalty;

(b) establish the appropriate starting point for the offending that will achieve the objective of deterrence in light of the relevant factors applying to this case; and

(c) adjust the starting point for the defendant's specific factors.

**Maximum penalty**

[24] Section 80(2B) provides the statutory maximum for each breach of the Act in this case to be the greater of:

(a) $10 million; or

(b) either:

(i) three times the commercial gain obtained by KNI from the breach;

(ii) 10 per cent of KNI's turnover from trading within New Zealand, if the commercial gain from the breach cannot be readily ascertained.

[25] The parties agree that the commercial gain to KNI is not really ascertainable and that KNI's turnover in each relevant year within New Zealand has either been less than 100 million or so little over it that nothing turns on that. Accordingly the maximum penalty per breach can be taken as $10 million.

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[4] As derived from analogy with criminal sentencing principles: *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [14]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [14]-[15].

[26] While KNI has admitted two causes of action, under s 80(6) of the Act no person is liable to more than one pecuniary penalty in respect of the same conduct. As both the sixth and eighth causes of action concern the same conduct, namely giving effect to the UK NES agreement, the maximum penalty is $10 million.

**The starting point**

*Deterrence*

[27] A number of considerations are relevant to the starting point applicable to this case. General and specific deterrence is an important factor in cases of this nature as has been emphasised by the Court in a number of cases.[5] I accept the submission for the Commission that in cases with an international agreement entered into offshore and outside the jurisdiction of the Act (and where s 4 is not satisfied) the role of penalties is to deter parties from extending the operation of those agreements into New Zealand. It follows that the penalty must therefore be set at a level to achieve that deterrent objective bearing in mind the significant size of the companies involved.

*Nature, seriousness and duration of the contravening conduct*

[28] KNI gave effect to the UK NES agreement from October 2002 to October 2007. The conduct was a price fixing arrangement. It is the type of conduct which is deemed anti-competitive per se.

[29] The conduct is at the serious end of the spectrum because it was not a one-off transgression but part of a sustained course of conduct that gave effect to a covert hard core arrangement. Such conduct is particularly difficult to detect and prosecute. It operated for a significant period of time, namely five years. I accept the Commission's submission that it no doubt survived for that length of time because of the active concealment through the covert meetings, the use of code words and names, and the active policing of its implementation by the participants.

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5 See, for example, *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [53].

[30] As the UK NES agreement involved an agreement to impose a surcharge on all air freight sent from the United Kingdom to other countries, including to New Zealand, it fixed a component of the price rather than the whole price. That also has made it difficult to assess the benefit to KNI of its activity.

*The importance and type of the market*

[31] International freight forwarding services provide essential connections between New Zealand and the international economy. The cost of air freight is an important input for many goods and services supplied throughout the New Zealand economy. The conduct occurred in a significant market of fundamental importance to New Zealand. The conduct was obviously deliberate by KNI, although as noted, KN NZ was unaware of the arrangement.

*Seniority of employees*

[32] Mr Edwards was a senior employee and was active in agreeing and implementing the UK NES agreement. This was deliberate and deceitful conduct at a senior level.

[33] However, while Mr Edwards received the various communications about the policing of the UK NES agreement he was not a ringleader and did not actively participate in coercing other freight forwarders to comply with it.

*Benefit derived*

[34] As noted the parties agree the commercial gain cannot be readily ascertained but the Commission's view (which KNI does not contest) is that it must have been substantial because of the volume of affected cargo and the length of time for which the agreement applied. The reality is that the cost of losses to New Zealand consumers can never be known with precision but that is a common feature of conduct of this nature.

[35] Further, even where it may be difficult to quantify the gain, as Allan J observed in *Commerce Commission v Cathay Pacific Airways Ltd*:[6]

> … commercial gain is relegated in importance to the need for both general and specific deterrence.

[36] Next, as the Court observed in *Commerce Commission v Geologistics International (Bermuda) Limited*[7] the harm to consumers does not stop at the basic amount of the price that was fixed. In this case the cartel arrangement:[8]

> … enabled participants to impose a surcharge without the need to consider the likely commercial response of competitors. So there was an effect both on price competition and upon competitive dynamics in the industry, with a corresponding reduction in efficiency incentives.

*Market share and resources of KNI*

[37] The KN Group is one of the largest freight forwarders operating in New Zealand. It has a significant market presence in both air and sea freight. In its 2013 business year KN Group's turnover worldwide was CHF 20.929 billion or just in excess of NZD $28.5 billion.

*Role of the defendant*

[38] Through Mr Edwards, KNI was aware of the policing of the UK NES agreement but as noted neither he nor KNI actively participated in coercing other freight forwarders to comply.

*Comparison with other cases*

[39] In my judgment the particularly relevant cases for comparison are the fines imposed on other defendants in the present case:

(a) In EGL's case the starting range was $2.3 to $2.8 million for entering into and giving effect to the UK NES agreement.[9] The commercial

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6 *Commerce Commission v Cathay Pacific Airways Ltd* [2013] NZHC 843 at [48].
7 *Commerce Commission v Geologistics International (Bermuda) Limited*, above n 4.
8 At [23].
9 *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [18].

gain was estimated in the low six figure range. It is accepted that KNI, through KN NZ, has a larger market share in New Zealand than EGL.

(b) In Geologistics International's case the starting range of $3.75 to $4.25 million was taken for entering into and giving effect to the Air AMS agreement over a five year period.[10] The Air AMS agreement however, applied to both inbound and outbound freight, whereas the present case only involves inbound freight.

(c) In *Commerce Commission v Deutsche Bahn AG* the Court took a starting point of $2.6 to $3.4 million for BAX entering into and giving effect to the UK NES arrangement.[11] Again, BAX's market share in the New Zealand market is less than KNI's.

(d) In the case of Panalpina, the Court took a starting point of $3.3 to $4 million in relation to the Air AMS fee.[12]

[40] I agree with the submissions for the Commission that a higher starting point is warranted in the present case compared to that for EGL, primarily because EGL had a significantly smaller market share than KNI, meaning the harm to the New Zealand consumer and the potential gain to EGL was inevitably significantly less. The Commerce Commission's recommended starting point of $3.5 to $4 million is similar to that applied to Panalpina and Geologistics International in relation to the Air AMS agreement. The Air AMS agreement may not be seen as so covert or hard core as the UK NES agreement but the UK NES agreement only applied to inbound freight.

[41] Having regard to the above features and the comparison with other cases I agree that the starting point of $3.5 to $4 million is within an available range for the

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10 *Commerce Commission v Geologistics International (Bermuda) Ltd*, above n 4 at [29].
11 *Commerce Commission v Deutsche Bahn AG* HC Auckland CIV-2010-404-5479, 13 June 2011 at [38].
12 At [54].

penalty in this case, although I consider it should be towards the higher end of that range.

**Mitigating factors**

[42] The aggravating features of the conduct have been considered in fixing the starting point. It is necessary to address the mitigating factors. First, KNI has admitted the allegations in relation to the UK NES agreement.

[43] KNI has not cooperated with the Commission's investigation. It protested the jurisdiction of this Court. The Commission accepts, however, that:

(a) KNI accepted service of the proceedings by way of its New Zealand solicitors without prejudice of its right to protest jurisdiction; and

(b) acknowledged liability before the briefing of witnesses was required to commence, but only after providing what the Commission (but not KNI) considers to be incomplete discovery.

[44] Mr Thain, counsel for KNI, also emphasised that KN NZ had allowed its employees to be interviewed and provided some discovery before being compelled. I accept that a limited reduction in penalty is applicable in relation to KNI's conduct.

[45] Next, KNI has also not previously been found to have contravened the Act and has not previously been warned by the Commission in respect of the conduct.

[46] KNI has now introduced a comprehensive global compliance programme in response to the investigations into its conduct.

[47] There is no issue as to KNI's ability to pay the recommended penalty. KNI has already been fined overseas for its participation in the UK NES agreement:

(a) US$1,116,552 by the Department of Justice of the United States; and

(b) €5,320,000 by the European Commission of the European Union in relation to its involvement in the UK NES agreement in those jurisdictions.

[48] In light of these factors the Commission and KNI jointly submit a total discount of 20 per cent is appropriate. That discount is less than that applied to other freight forwarding defendants which reflects that the other entities admitted liability much earlier in time and without protesting jurisdiction.

[49] Again, in the circumstances and having regard to previous cases, I accept a discount of 20 per cent is available for mitigating factors. While I consider the discount of 20 per cent to be as much as could possibly be available in this particular case, I am prepared to accept it, particularly if it is applied to a starting point towards the higher end of the range.

**Result/orders**

[50] For the breaches of the Act identified earlier,[13] KNI is to pay a penalty of $3.1 million. In addition KNI is to pay a contribution of $100,000 towards the Commission's costs.

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Venning J

[13] At [2].