IN THE SUPREME COURT OF NEW ZEALAND

SC 37/2008
[2008] NZSC 73

BETWEEN	COMMERCE COMMISSION Applicant
AND	INFRATIL LIMITED Respondent

Court: Elias CJ and Blanchard J

Counsel: D J Goddard QC and L Theron for Applicant
C R Carruthers QC and L A O'Gorman for Respondent

Judgment: 19 September 2008

JUDGMENT OF THE COURT

The application for leave to appeal is refused, with costs of $2,500 to the respondent.

[1] The judgment of the Court of Appeal dismissed an appeal by New Zealand Bus Limited against a judgment of the High Court[1] holding that NZ Bus had infringed s 47 of the Commerce Act 1986 which prohibits acquisitions having the effect of substantially lessening competition in a market. The infringing conduct of NZ Bus lay in proceeding with the acquisition of the 74 percent shareholding in Mana Coach Services Ltd that Infratil Limited, the parent of NZ Bus, did not already own. A claim by the Commerce Commission that Infratil was also liable as an accessory was rejected by the High Court and the Court of Appeal[2] dismissed a cross-appeal by the Commission against that finding.

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1 *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679.
2 *New Zealand Bus Ltd v Commerce Commission* (2008) 12 TCLR 69 (CA).

[2] The Commission now seeks leave to appeal to this Court against the finding that Infratil is not liable as an accessory.

[3] In the High Court Miller J held that the Commission must show that Infratil deliberately assisted NZ Bus knowing, as it did so, essential facts sufficient to establish contravention of s 47. He decided that knowledge that the target company could compete with NZ Bus was not enough to establish knowledge of facts establishing a substantial lessening of competition. NZ Bus had taken the position when it had applied for clearance that Mana was in no better position to compete than any new entrant would be, because Mana would have to acquire a new depot, fleet and staff. The person representing Infratil (which was about to take over NZ Bus) in relation to the proposed takeover was Mr Ridley-Smith. Miller J found there was no evidence that he knew that Mana could use existing assets to compete on certain routes. There was also no evidence that he knew of an understanding that Mana and NZ Bus had chosen not to compete in circumstances where competition was viable. Miller J accordingly decided that Infratil did not have enough knowledge to be able to appreciate that there would be a substantial lessening of competition.

[4] In the Court of Appeal all Judges agreed with this view: see Hammond J at [161] and [174], Arnold J at [268] and Wilson J at [269]. Both Hammond and Arnold JJ articulated alternative approaches which they preferred to accessory liability (Arnold J rather more tentatively), but neither decided the case on that basis. The appeal accordingly failed on the facts as found by Miller J.

[5] The Commerce Commission wishes to argue that the Court of Appeal decision is unclear as to what level of knowledge of the relevant facts is required, on the orthodox test, and what if any relevance knowledge of legal consequences may have. But it seems reasonably apparent that if Miller J had found that Mr Ridley-Smith appreciated that Mana could use its existing assets to compete, and had known of the tacit understanding, he would have found that Infratil had sufficient knowledge of facts establishing a substantial lessening of competition, ie not that it was necessary for Infratil actually to have appreciated that there was substantial lessening, but that it knew enough that it could have formed that view. The legal

issue dividing the parties in the High Court was whether the accessory must be conscious that the facts known to it established a contravention. But on the factual finding this could never have been proved because it was not established that Infratil had knowledge of facts from which it could be established that there was a substantial lessening of competition.

[6] The applicant's submissions do not suggest that Miller J's factual findings about what Mr Ridley-Smith knew or did not know are to be challenged and there are now concurrent findings as to those facts.

[7] It follows that the appellant's submissions do not demonstrate an arguable basis that might lead to this Court imposing accessory liability on the appeal, which seems to be provoked by the varying obiter dicta of Hammond and Arnold JJ.

[8] In those circumstances it is not in the interests of justice that this Court hear the proposed appeal and the Commissioner's application for leave to appeal is refused with costs to Infratil of $2,500.

Solicitors:
Commerce Commission, Wellington for Applicant
Buddle Findlay, Auckland for Respondent