IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-1353
[2019] NZHC 2303

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986 (conduct before 15 May 2018)
AND UNDER	Sections 30 and 80 of the Commerce Act 1986 (conduct on or after 15 May 2018)
BETWEEN	COMMERCE COMMISSION
	Plaintiff
AND	RONOVATION LIMITED
	Defendant

Hearing: 6 September 2019

Counsel: J Dixon QC and J M Phillips for plaintiff
M N Dunning QC and D A K Blacktop for defendant

Judgment: 13 September 2019

JUDGMENT OF KATZ J

This judgment was delivered by me on 13 September 2019 at 3:30pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Solicitors: Meredith Connell, Auckland
Blacktop Lawyers, Auckland

Counsel: J Dixon QC, Barrister, Auckland
M N Dunning QC, Barrister, Auckland

Table of Contents

Introduction ..... [1]

Ronovation's anticompetitive conduct ..... [6]

Origins of the Agreement [7]

Entry into and giving effect to the Agreement [12]

Relevant law ..... [16]

Ronovation's admissions ..... [20]

The Court's approach to recommended penalties ..... [23]

The framework for penalty assessment ..... [27]

The maximum penalty ..... [29]

The starting point ..... [31]

Relevant factors [31]

The nature and seriousness of the contravening conduct [33]

Importance and type of market [41]

Whether the conduct was deliberate or not [43]

The duration of the conduct/potential harm from the conduct [47]

Ronovation's role in the contravening conduct [54]

Potential commercial gain to Ronovation [55]

The market share/degree of market power held by the defendant [57]

Assessment of relevant case law [58]

Conclusion on starting point [61]

Adjustment for defendant-specific factors ..... [63]

Previous contraventions [64]

The nature, size and resources of the defendant [65]

Engagement with the Commission/admissions of liability [67]

Discount [71]

Conclusion ..... [73]

Result ..... [75]

Introduction

[1] Ronovation Limited ("Ronovation") is a company owned by the family of Ronald Ng Hoy Fong. Mr Hoy Fong was also the director of the company at the relevant times.

[2] Ronovation (which traded as RonovatioNZ) provided advisory services to clients (referred to as "members" or "students") who wanted to acquire residential real estate in the Auckland area, for investment purposes. Ronovation's advice included information about what to look for in a property; how to negotiate with the vendor or bid at auction; how to renovate the property after acquisition; and how to find and manage tenants. Ronovation operated a Facebook page, accessible only to members, for the sharing and exchanging of information about property investments.

[3] In August/September 2011, Mr Hoy Fong implemented rules ("the Priority Rules") to avoid members competing against each other to purchase properties. In essence, the first member to notify the group of their interest in a property had priority over other members, who were not permitted to negotiate or bid for that property in competition with the member who had priority. The Priority Rules were posted on Ronovation's Facebook page on or about 10 September 2011 and agreed to by members ("the Agreement"). The Agreement potentially affected up to 471 properties, over a seven-year period.

[4] Although Mr Hoy Fong was unaware of it at the time, the Agreement breached Part 2 of the Commerce Act 1986 ("the Act"). The Commerce Commission ("the Commission") accordingly brought proceedings against Ronovation (the first time the Commission has brought proceedings against a "buyer-side" cartel). Ronovation promptly admitted the Commission's claims against it. The parties have conferred and agree that a penalty of $400,000 would be appropriate in all the circumstances. They jointly request that the Court impose a penalty in that amount. The parties have filed an agreed statement of facts.

[5] Although Ronovation agreed in general terms with the Commission's approach to, and explanation of, the factors relevant to determining an appropriate penalty, there were some differences between the parties as to the relevance and weight that should

be accorded to particular factors. I address those differences in my discussion of the relevant factors below.

Ronovation's anticompetitive conduct

[6] The relevant conduct occurred between 28 August 2011 and August 2018. Ronovation's membership grew over that time from 39 members in September 2011 to over 400 in August 2017. Members gained access to Ronovation's services by paying a membership fee.

Origins of the Agreement

[7] On or about 10 September 2011, Mr Hoy Fong posted the Priority Rules on Ronovation's Facebook page, and proposed that members follow those rules when seeking to acquire a property for sale by negotiation. About ten days later, Mr Hoy Fong amended the Priority Rules by a further post on the Ronovation Facebook page, extending the rules to cover situations where a member was seeking to purchase a property at auction.

[8] The Priority Rules, in essence, provided that once a member had advised other members of his or her interest in a property, by posting on the Facebook page, other members were not permitted to negotiate for that property (in a private treaty situation) or bid on that property (at auction). The first interested member had priority over all other members. Even if another member was prepared to pay more for the property, they were not permitted to negotiate or bid for the property until the member with priority had advised that he or she was no longer seeking to acquire the property, or if their highest bid at auction had been exceeded.

[9] As Mr Hoy Fong expressed it:

> The point here is not to have students bidding [against] each other. If a second student wants to be in on the buy, then expressions of interest should be indicated in case an outside bidder becomes involved. Eg Student "A" bids up to their max of $200K and wins, then that [is] the end of the auction. However if the auction should continue because of an outsider continues bidding above $200k max, then Student "B" may takeover the bidding above $200k against the outsider but not directly against Student "A's" last bid of $200k.

[10] Or as a member posted to the Facebook page:

> Make sure you are not competing against each other…-:) and end up paying more than needed.

[11] Similarly:

> The intention is to get everyone to play on the same team… we are a group, so shouldn't have to compete against each other because when you do, the vendor is really the only one that wins.

Entry into and giving effect to the Agreement

[12] Ronovation's members agreed to the Priority Rules and became parties to the Agreement, as did Ronovation. From the date that they each entered into the Agreement until 29 August 2018, members:

(a) posted on the Ronovation Facebook page in accordance with the Agreement;

(b) refrained from taking steps to acquire a property previously allocated to a fellow member until that member signalled that they were no longer interested in purchasing that property;

(c) participated in auctions on the basis of the Priority Rules; and

(d) permitted the member with priority to have first opportunity to acquire the property regardless of whether or not another member would have paid more.

[13] From 10 September 2011 until 29 August 2018, Ronovation gave effect to the Agreement by:

(a) administering the Ronovation Facebook page and monitoring it to ensure members' compliance with the Priority Rules;

(b) attending auctions and bidding on behalf of members in accordance with the Priority Rules;

(c) resolving disputes between members as to the application of the Priority Rules; and

(d) imposing supplemental rules and procedures relating to the implementation and administration of the Agreement, such as a requirement to post a "selfie" photograph of the member outside a property, in order to obtain priority for the attempted purchase of that property.

[14] The purpose of the Priority Rules is reflected in posts to the Ronovation Facebook page by members. For example, one post noted that "Group members should be backup, not competition." Another post stated that:

> …the outcome [of the Priority Rules] being that we aren't competing against each other for properties and pushing prices needlessly higher.

[15] In December 2016, Ronovation prepared an induction booklet for new members, called "Tagging 101", which stated that: "We do not bid against another student and drive the sale price up!"

Relevant law

[16] Section 2 of the Act provides that services include any rights in relation to, and interests in, real or personal property that are provided, granted, or conferred in trade. Therefore, the acquisition of an interest in residential property, where acquired in trade, is a service under the Act.

[17] During the relevant period, s 30 of the Act was amended as follows:

(a) Prior to 15 May 2018, s 30 operated as a deeming provision, whereby agreements between competitors in relation to price were deemed to have, or be likely to have, the effect of substantially lessening competition in a market for the purpose of s 27.

(b) For conduct on or after 15 May 2018, s 30 as amended provides that the entry into, or giving effect to, a cartel provision[1] is prohibited without need for recourse to s 27.[2]

[18] In either case, whether pre or post amendment, the Act prohibited an arrangement or understanding containing a provision that has the purpose, effect, or likely effect, of price-fixing between competitors in respect of the supply or acquisition of goods or services in New Zealand.

[19] Section 30 does not require that all parties to the contract, arrangement or understanding be in competition with each other; it only requires that two or more of the parties are in competition with each other. Accordingly, while Ronovation itself did not compete with members for the acquisition of investment properties, the fact that two or more of those members were in competition with each other means that Ronovation is liable for a breach of s 30.

Ronovation's admissions

[20] Ronovation accepts that, because it engaged in the conduct set out in the agreed statement of facts (as summarised above) the Commission is entitled to seek judgment under s 80(1)(a) of the Act. In essence, Ronovation admits that it has:

(a) contravened s 27(1) of the Act, via s 30 of the Act, by entering into the Agreement (for conduct before 15 May 2018) (the first cause of action);

(b) contravened s 27(2) of the Act, via s 30 of the Act, by giving effect to the Agreement (for conduct before 15 May 2018) (the second cause of action); and

(c) contravened s 30 of the Act by giving effect to the Agreement (for conduct on or after 15 May 2018) (the third cause of action).

---

1 Defined under s 30A of the Commerce Act 1986 as price fixing, restricting output, or market allocating.

2 Section 30 has subsequently been further amended, by s 5 Commerce (Criminalisation of Cartels) Amendment Act 2019. Those amendments, however, only come into force on 8 April 2021.

[21] The admitted conduct covers two different formulations of the statutory prohibition.

(a) Liability under the first and second causes of action arises by way of a price fixing agreement under s 30 being deemed to substantially lessen competition under s 27. The deemed substantial lessening of competition carries over to justify a penalty under s 80. However, the penalty assessment still turns on an inquiry into the particular facts and circumstances of the case.[3]

(b) Liability under the third cause of action arises because 'cartel provisions' as defined in s 30A give rise directly to liability. There is no deemed substantial lessening of competition. Ronovation accordingly submitted that the penalty must be assessed based on the facts and circumstances of the case.

[22] In my view nothing material turns on the distinction drawn by Ronovation. Any penalty imposed will be a global penalty reflecting the totality of Ronovation's conduct and circumstances, adjusted for any relevant defendant-specific factors.

The Court's approach to recommended penalties

[23] The Commission and Ronovation have jointly recommended to this Court that a penalty of $400,000 be imposed on Ronovation. The Court must be satisfied, however, that the proposed penalty is appropriate in all the circumstances.

[24] In *Commerce Commission v New Zealand Milk Corporation Ltd* the full Court observed that the agreed penalty procedure is in the interests of both the parties and the community, enabling early disposal of potentially complex and lengthy proceedings and encouraging a realistic view of culpability and penalty.[4] The Court further observed that there is no objection to the parties tendering a joint view on the appropriate penalty.

---

3 *Commerce Commission v Taylor Preston Ltd* [1998] 3 NZLR 498.
4 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730.

[25] The role of the Court in such circumstances is to consider whether the proposed penalty is in the appropriate range, rather than to embark on its own enquiry independently.[5] This recognises the "significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time consuming and costly investigation and litigation".[6] The Court should play its part in promoting responsible resolutions of proceedings under the Act.[7]

[26] Ultimately, the Court must be satisfied that the final figure proposed satisfies the objectives of the Act and the particular circumstances of the case before it. It is not necessary, however, that each step of the proposed methodology is accepted by the Court, so long as the Court is satisfied that the recommended penalty is appropriate. As is the case with sentence appeals in the criminal context, it is the final figure that matters.[8]

The framework for penalty assessment

[27] Due to the significant potential for harm posed by agreements that breach s 30, s 80 of the Act provides for substantial penalties for such conduct in order to deter both the particular defendant and others. Section 80(2A) requires the Court, on application of the Commission, to determine an appropriate penalty, subject to the statutory maximum, by:

(a) having regard to all relevant matters; and

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

---

5 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18], see also *NW Frozen Foods v Australian Competition and Consumer Commission* (1996) 71 FCR 285; *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [38] and *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21].

6 *Alstom,* above n 5, at [18].

7 At [18].

8 *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414 at [27].

[28] The approach taken to the assessment of pecuniary penalties under the Act is broadly analogous to the established approach for criminal sentencing.[9] The accepted approach is to:[10]

(a) determine the maximum penalty for the defendant;

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

(c) adjust the starting point to discount or increase the penalty on the basis of any considerations specific to the defendant.

The maximum penalty

[29] Pursuant to s 80 of the Act, the maximum penalty that can be imposed on Ronovation for each breach of s 27 is the greater of:

(a) $10 million; or

(b) three times the value of any commercial gain resulting from the contravention (if the commercial gain can be readily ascertained); or

(c) 10 per cent of the turnover of the company and all of its interconnected bodies corporate as a result of trading in New Zealand (if the commercial gain cannot be readily ascertained).[11]

[30] The parties agree that commercial gain is not readily ascertainable for the purposes of this case. Therefore, the maximum penalty is the greater of $10 million

---

9 For example: *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC); *Alstom*, above n 5; *Commerce Commission v EGL Inc* (HC Auckland CIV-2010-404-5474, 16 December 2010); *Commerce Commission v Whirlpool* SA HC Auckland CIV-2011-404-6362, 19 December 2011.

10 See, for example, *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097 at [35] and *Commerce Commission v PGG Wrightson Limited* [2015] NZHC 3360 at [34].

11 From 15 August 2017, s 80(2B)(b)(ii)(B) provides this is measured by 10% of turnover in each accounting period in which the contravention occurred. However as, even on the amended approach, $10 million is the applicable maximum penalty (per breach), the Commission does not make any further submission on that amendment.

or 10 per cent of Ronovation's relevant turnover. In this case, $10 million is greater, so that is the maximum penalty.

The starting point

Relevant factors

[31] The paramount concern for the Courts when imposing civil pecuniary penalties under the Act is to generally and specifically deter conduct of this type. In assessing the level of penalty necessary to meet the deterrence objective, the Court must have regard to "all relevant matters" including:[12]

(a) the nature and seriousness of the contravening conduct;

(b) the importance and type of market;

(c) whether the conduct was deliberate or not;

(d) the duration of the contravening conduct;

(e) the seniority of employees or officers involved in the contravention;

(f) the extent of any commercial gain derived from the contriving conduct; and the size and resources of the defendant.[13]

(g) the extent of any loss or damage suffered by any person as a result of the contravening conduct;

(h) the market share/degree of market power held by the defendant;

(i) the role of the defendant in the impugned conduct; and

(j) the size and resources of the defendant.

---

12 See *Alstom*, above n 5, at [20]; *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC) at [17]; *Commerce Commission v New Zealand Bus (No 2)* (2006) 3 NZCCLR 854 at [20]; *Visy*, above n 10, at [40]-[52]; *Commerce Commission v Unique Realty* [2016] NZHC 1064 at [31]–[39]; and *Trade Practices Commission v Annand & Thompson Pty Ltd* (1987) 9 ATPR 48,390 at 48,394. See also *Telecom Corporation of New Zealand v Commerce Commission* [2012] NZCA 344 at [13].

13 This is of particular importance, as specified in s 80(2A).

[32] Ronovation agreed in general terms with the Commission's approach to, and explanation of, the factors relevant to determining an appropriate penalty. The parties differed, however, as to the relevance and weight that should be accorded to the different factors. I address those differences, where appropriate, below.

The nature and seriousness of the contravening conduct

[33] The Commission submitted that Ronovation's contravening conduct was plainly serious. Mr Dixon QC noted that the *type* of conduct in this case, essentially price fixing, is at the serious end of the spectrum of the types of conduct prohibited by the Act. From the Commission's perspective, the fact that the conduct 'buyer side' rather than 'seller side' conduct does not reduce the overall seriousness of what took place.

[34] Ronovation, on the other hand, submitted that the distinction between buyer side and seller side conduct is significant, and must necessarily impact on the Court's assessment of the seriousness of the contravening conduct. Ronovation's position, in essence, was that buyer side conduct will generally be significantly less harmful to competition than seller side conduct, and that the facts of this case illustrate that.

[35] The Commission accepted that in some circumstances buyer side coordination may not be harmful and may even be pro-competitive. Indeed, the Act expressly provides exemptions for such pro-competitive conduct (see, for example, s 33 of the Act, both pre and post amendment, which provides for a joint buying exemption). The Commission submitted, however that the conduct in this case does not fall within the scope of any exceptions. Mr Dunning QC, for Ronovation, did not accept that and suggested that a more accurate description would be that for the purposes of settling the proceedings, Ronovation has not sought to rely on any such exception. The distinction is a subtle one. Given that Ronovation has not sought to rely on any exemptions in the Act, I proceed on the basis that none of the exemptions apply.

[36] Mr Dunning referred to the Commission's Mergers and Acquisitions Guidelines (relating to decisions involving mergers between competing buyers) in

support of his argument. In that document, the Commission identified the competitive harm arising from buyers working together as follows:[14]

> Buyer market power is, in many ways, the mirror image of market power on the selling side. In particular, it is the ability to profitably depress prices paid to suppliers to a level below the competitive price for a significant period of time such that the amount of input sold is reduced. That is, the price of the product is depressed so low that (some) suppliers no longer cover their supply costs and so withdraw supply (or related services) from the market. Such an outcome reduces the amount of product being supplied, damaging the economy.
>
> As both supplier and buyer market power involve decreases in the amount of product sold, our assessment of buyer market power is similar to the assessment of supplier market power.

[37] Mr Dunning submitted that this analysis supports the conclusion that competition harm arises only when collective buyer action results in a reduction in supply or capacity. The Priority Rules, however, have not resulted in a reduction of supply or capacity in the Auckland residential property housing market, or reduced market wide prices for residential property in Auckland (as discussed further below).

[38] Although each case will turn on its own facts, I am not persuaded that collective buyer action is intrinsically less harmful than seller side conduct, or that it is not harmful unless and until it clearly results in a reduction in supply or capacity. The issue requires a somewhat more nuanced analysis. The learned authors of *Antitrust Law: An Analysis of Antitrust Principles and their Application* helpfully summarise the rationale for applying liability under competition legislation to buyer cartels, as follows:[15]

> In many buying situations in particular, the defendants would seem to lack market power in any relevant market. A good example is the cartel of buyers agreeing not to bid against each other at a particular auction…
>
> ….
>
> Nevertheless, there are several good reasons for applying the per se rule and even criminal antitrust liability to naked bid-rigging behaviour at auctions, notwithstanding the apparent lack of power. *First*, auctions are "discrete" markets in the sense that once they are scheduled and bidders show up, the

---

14 Commerce Commission *Mergers and Acquisitions Guidelines* (July 2019) at [4.2].

15 "Buyers' and Sellers' Naked Cartels Equally Harmful" in Phillip E. Areeda and Herbert Hovenkamp (eds) *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (3rd ed, Wolters Kluwer, Boston, 1978, Supplement No. 5/2019, May 2019) at [2011c].

> sellers have committed themselves to a particular set of transactions. In the market as a whole there may be numerous other buyers, but these are not involved in the auction covered by the bid-rigging scheme. Significantly, because the cartel is secret, the fact that prices will be lower is not communicated to sellers before they make their commitment.
>
> …
>
> To be sure, the cartel might often be unsuccessful because nonparticipating buyers show up and outbid the cartel; but even if the cartel is successful only part of the time, it could be both profitable to cartel members and damaging to sellers.
>
> *Second*, although no output reduction is apparent if one looks at the short run of a single auction, over the long run buyer bid-rigging reduces the profitability of auctions and thus the incentive of sellers to sell. Thus, over the long run we presume that reduced prices for auctioned goods do in fact have the same output effects as buyers' cartels and tend to reduce both the number and size of such auctions.
>
> *Third,* presumably the naked buyers' cartel covering a single auction has no redeeming social value. As a result, there is no occasion to balance social benefits against the threat of an anticompetitive exercise of market power. But if lack of market power were accepted as a defense in some auction cases, the issue would be raised and litigated in virtually all. The result would be greatly increased costs of administering the antitrust rules against collusive behaviour, for the benefit of those whose only defense is that while their conduct had no social utility and even did some harm, the result was not monopoly.
>
> *Fourth,* an unambiguous price-fixing rule is the best deterrent to harmful conduct. A rule that tells potential colluders that their collusion is permissible if power is lacking invites many quick and uninformed assessments of power, and presumably many errors. The rate of harmful collusion would almost certainly go up, just as would the rate of possible harmless collusion.

[39] I find this reasoning persuasive and accept the Commission's submission that buyer side conduct can result in material harm even where there is no clear reduction in supply or capacity. However, if the contravening conduct did not materially distort the market, or result in a reduction in supply or capacity, that will clearly be relevant to the issue of penalty.

[40] I assess the actual harm (or potential harm) arising in this case further at [47] to [53] below. In terms of the *general* nature and seriousness of the contravening conduct, however, I am satisfied that the conduct was of a type or nature that is moderately serious. The clear aim of the Agreement was to suppress competition between members, due to concerns that increased competition between members would drive up prices for the properties they were seeking to acquire. The conduct

was therefore designed to suppress the normal rivalry between members that would arise in a competitive sale process, in a manner that was to the detriment of any vendors who were directly impacted by the operation of the Agreement.

Importance and type of market

[41] I accept the Commission's submission that the contravening conduct in this case involved investment properties in the Auckland residential property market, which is of significant importance and interest in New Zealand. A house is generally an individual's most valuable asset. Therefore, any behaviour that suppresses competition and thus is likely to decrease the sale price of that asset can obviously have a significant impact on the individual vendor.

[42] As the Commission accepted, however, the conduct only impacted a small segment of the market. Even then, it could not be said to be to the exclusion of all competition, due to the existence of other non-member potential purchasers.

Whether the conduct was deliberate or not

[43] In assessing whether the conduct was deliberate or not, Mr Dunning submitted that the Priority Rules (and the quotes I have set out at [9], [10] and [11] above) must be seen in their full context. Mr Hoy Fong established Ronovation's business in 2009. His objective was to assist people to enter the investment property market so that those people could build an asset base that would provide them with a passive income as they moved toward retirement. Often the people attracted to the services provided by Ronovation were nervous about entering the market or had difficulty doing so because English was not their first language. Ronovation's services assisted those people to acquire investment properties.

[44] Against this background, Mr Dunning submitted that Ronovation was set up to be and has remained a collegial group of like-minded people seeking to participate in the investment property market. Ronovation's aim is for its members to acquire as many properties as possible. Mr Dunning suggested that the development of the Priority Rules is a perfectly understandable instinct where there is a group of affiliated people seeking to make the most of their scarce capital across the market.

[45] Viewed in context, Mr Dunning submitted that the Priority Rules were not deliberately anticompetitive. Rather, they supported members within the Ronovation group to secure as many properties as they could, and also helped to ensure that all members had the opportunity to do so. The Priority Rules, Mr Dunning submitted, facilitated members, as a group, to compete against other buyers of investment properties throughout the market.

[46] I accept that the Priority Rules may well have supported group members in the manner outlined by Mr Dunning. Nevertheless, I am satisfied that the Priority Rules were deliberately anticompetitive and designed to suppress competition between members. They were explicitly stated to be necessary due to a perception that increased competition among members would drive up prices for the properties they were seeking to acquire. The conduct was designed to suppress the normal rivalry between members of a competitive sale and purchase of a property, in a way that was potentially to the detriment of vendors. There is no evidence, however, that Mr Hoy Fong, or the members, realised that this type of anticompetitive conduct breached New Zealand's competition laws. In that sense, the conduct involved an unwitting breach of the Act (as the Commission accepted).

The duration of the conduct/potential harm from the conduct

[47] I consider these two factors together. They are inter-related, given that harm will generally increase with duration.

[48] Ronovation engaged in the contravening conduct for seven years, albeit at the beginning of the period Ronovation only had a small number of members. Nevertheless, seven years is a considerable period of time.

[49] As I have noted previously, the Priority Rules were designed to suppress competition between members, due to a perception that increased competition among members would drive up prices for the properties they were seeking to acquire. The Agreement had the potential to reduce the competitive tension in an auction through fewer active bidders, or to reduce the number of purchasers participating in a negotiation. I also accept the Commission's submission that by reducing the visible number of purchasers interested in an investment property during a sale process, the

contravening conduct could have impacted a vendor's assessment of the likely end-value of their property.

[50] Taking all of these matters into account, the Agreement could ultimately have resulted in lower prices being paid for investment properties. Whether it did or not, however, is not known. Mr Dunning noted that although 471 properties were "tagged" by members who claimed priority in respect of that property, there is no evidence that another member was actually prepared to pay more for any of those properties and would have done so but for the existence of the Agreement. Mr Dunning further noted that 85 of the 471 properties were sold by either an unknown method or a method not covered by the Priority Rules (e.g., a multi-offer or tender situation).

[51] For comparison purposes, Mr Dunning noted that 570 properties were sold in Auckland City in the month of July 2019 alone. The number of properties potentially impacted by the Agreement (at most 471 over seven years) was therefore only a very small fraction of the properties sold in Auckland during that time. Given that comparatively small number, Mr Dunning submitted that the Agreement would not have had any material impact on Auckland market prices. Further, any member who missed out on purchasing a property due to the Agreement would have been able to spend their capital on another property. Hence, even though the vendor of the first property may have received a lower sale price, the vendor of the second property would likely have benefited from increased competition for their property. Taking this into account, Mr Dunning submitted that it is not self-evident that there would have been any material overall impact in the market.

[52] All previous s 30 cases brought by the Commission have involved agreements between sellers of goods and services agreeing to increase prices to their customers. In contrast, the Priority Rules involve competing buyers engaging in conduct that the Commission says was designed to *reduce* prices paid for houses rather than increase them. Mr Dunning submitted that this difference has important implications for any assessment of harm to competition. It is somewhat ironic, he submitted, that the Commission's case rests on prices for Auckland property being reduced during a period of time in which there was considerable concern about Auckland house price inflation.

[53] I accept that the overall impact of the contravening conduct on the market was likely minimal, for the reasons outlined by Mr Dunning. Although there was potential for harm to individual vendors in relation to specific properties, that harm did not extend across the market as a whole. Although the precise degree of harm cannot be assessed, it was almost certainly at the low end of the scale.

Ronovation's role in the contravening conduct

[54] It is accepted by both parties that Ronovation was the orchestrator of the conduct. Where breaches occur with the involvement or knowledge of high level personnel, a more significant penalty will usually be required. This is the case here, as the conduct was carried out by Mr Hoy Fong, the director of Ronovation. However, the Commission recognised that his involvement was inevitable, given that Ronovation is a small, closely-held company.

Potential commercial gain to Ronovation

[55] As is common with price-fixing cases, any commercial gain arising from the Agreement is difficult to quantify. Although members may have paid less for their individual property purchases than they otherwise would have, Ronovation itself was not a participant in the housing market and did not receive any direct financial benefit from the Agreement. I accept Mr Dunning's submission that this puts Ronovation in a different position to the defendants in the cases referred to by the Commission (discussed further below) as all of those defendants were participants in the relevant market.

[56] Even though Ronovation does not appear to have directly benefitted from the Agreement, it may have indirectly benefitted, to the extent that new members were attracted to Ronovation because of the Priority Rules. However, as would be expected, there is no evidence of the reasons why members joined Ronovation. Overall, the parties agreed that the scope for any indirect gain to Ronovation was limited.

The market share/degree of market power held by the defendant

[57] Ronovation did not maintain any degree of market share, as it was not a market participant. The market power of the combined resources of the members is difficult to ascertain, but likely to be relatively small in relation to the overall market.

Assessment of relevant case law

[58] The Commission referred, in an Appendix to its submissions, to a number of recent price fixing cases.[16] The penalties imposed in those cases ranged from $550,000 to $650,000 in *Enviro Waste,* to $3.4 million to $4.3 million in *PGG Wrightson.* *Enviro Waste* was an attempt case, involving what would have been quite serious cartel conduct had it come to fruition.[17]

[59] The Court of Appeal has observed that assessments of penalty in analogous cases may provide guidance to the court to ensure that there is parity of treatment in similar circumstances.[18] The Court cautioned, however, that differing circumstances between cases (including in relation to conduct, size, market power and responsibility for the contraventions) will necessarily prevent previous case law being followed in a mechanical way and will complicate any attempt to compare penalties imposed in one case with those imposed in another.

[60] Those observations are particularly apt here, given that all previous New Zealand case law has involved seller side cartels. Further, Ronovation is a very small company relative to the defendants in previous cases, and (unusually) received no direct commercial benefit as a result of the contravening conduct. Given this context, I accept the submissions (of both counsel) that the appropriateness of the proposed penalty in this case is best assessed on a "first principles" basis, rather than

---

16 See *Commerce Commission v Enviro Waste Services Ltd* [2015] NZHC 2936; *PGG Wrightson,* above n 10; *Commerce Commission v Rural Livestock* [2015] NZHC 3361; *Commerce Commission v Barfoot Thompson Limited & Ors* [2016] NZHC 3111; *Commerce Commission v Success Realty* [2016] NZHC 1494; *Commerce Commission v Lodge Real Estate Limited & Ors* [2016] NZHC 3115; *Commerce Commission v Property Brokers Limited* [2016] NZHC 2851; *Unique Realty* above n 12; *Commerce Commission v Bayley Corporation Limited* [2016] NZHC 1493; *Commerce Commission v Lodge Real Estate Ltd (Online Realty Ltd*) [2017] NZHC 1875; *Commerce Commission v Property Brokers Limited* [2017] NZHC 681; and *Commerce Commission v Gea Milfos International Limited* [2019] NZHC 1426.

17 *Commerce Commission v Enviro Waste Ltd* [2015] NZHC 2936.

18 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [62].

with reference to previous case law. The previous price fixing penalty decisions are simply not sufficiently analogous to be of any material assistance in setting an appropriate penalty in this case.

Conclusion on starting point

[61] The Commission and Ronovation propose a starting point for the pecuniary penalty in the range of $550,000 to $650,000. The Commission and Ronovation reached that figure primarily by reference to the various factors I have discussed above (albeit they disagreed as to how some of these factors should be assessed). With reference to those factors, I am satisfied that the proposed starting point range is appropriate.

[62] A starting point within the proposed range recognises that the *type* of conduct involved (buyers agreeing not to compete against each other with the deliberate aim of driving down prices) was moderately serious. However, the actual harm resulting was very much at the lower end of the spectrum, as the number of properties involved was a very small fraction of the overall market. Further, any harm that did arise out of the Agreement would have primarily impacted on individual vendors, rather than the market as a whole. Although the conduct was deliberately anticompetitive, it did not involve a deliberate flouting of the law. Ronovation simply did not realise that this type of conduct is unlawful. It is also of note that the potential commercial gain to Ronovation was minimal, as Ronovation was not itself a participant in the marketplace.

Adjustment for defendant-specific factors

[63] Having identified the appropriate starting point range of $550,000 to $650,000, it is now necessary to consider what adjustments are appropriate, having regard to defendant-specific factors.

Previous contraventions

[64] Ronovation has not previously been found to have contravened the Act, and has not previously been warned by the Commission in respect of conduct likely to breach the Act.

The nature, size and resources of the defendant[19]

[65] Ronovation is a small, privately owned company. Mr Hoy Fong was its only director for much of the relevant period, and its shareholdings were effectively family held. Ronovation relied largely on its director to perform its services, together with a small number of contractors from 2016. Ronovation had no other employees or agents. In those respects, in comparison with the defendants in previous pecuniary penalty cases for price-fixing (involving seller side conduct) Ronovation is a very small corporate defendant.

[66] I have been provided with information regarding Ronovation's turnover and profits. Ronovation's annual turnover (derived from fees paid by new members) and its profits for most of the period of the Agreement were relatively modest. It is clear that a penalty of $400,000 will have a significant impact on Ronovation, and in turn its shareholders.

Engagement with the Commission/admissions of liability

[67] Ronovation has cooperated with the Commission's investigation from the outset. It ceased the contravening conduct by revoking the Agreement immediately upon receipt (on 29 August 2018) of the Commission's letter advising Ronovation that the Commission considered the conduct was a breach of the Act.

[68] Ronovation then provided key evidence and information to the Commission voluntarily. It provided the Commission with access to its Facebook page, which contained numerous documents that formed the basis for the Commission's case and would otherwise have been technically complex for the Commission to retrieve. Ronovation also made its sole director (and other staff) available to voluntarily attend an interview with the Commission.

---

19 The Commission, in its submissions, included "the size and resources of the defendant" as a factor relevant to setting the starting point, and "the nature and resources of the defendant" as a factor relevant to adjusting the starting point for defendant-specific factors. In my view this factor is only relevant at the second stage of the inquiry. It is a factor that is specific to the defendant and will not generally be relevant to an assessment of the culpability of the contravening conduct itself, in terms of being a mitigating or aggravating feature of that conduct.

[69] Ronovation agreed to settle the proceedings, on terms acceptable to the Commission, prior to the Commission commencing its proceedings, and promptly signed an agreed statement of facts and admission of liability.

[70] Ronovation's acceptance of responsibility, significant cooperation with the Commission's investigation, and willingness to settle the Commission's claim at the earliest possible stage are commendable and warrant a material discount to the starting point.

Discount

[71] It was common ground that a discount of 35 per cent would be appropriate to reflect the defendant-specific mitigating factors referred to above.[20] The Commission submitted that such a discount would be consistent with the discounts given in previous penalty decisions, including:

(a) 33 per cent for an early offer to settle and submission to the jurisdiction of the New Zealand courts (resulting in increased efficiency);[21]

(b) 25 to 30 per cent for cooperation, admission of responsibility at an early stage, and no previous contravention of the Act;[22]

(c) 25 per cent for accepting responsibility and promptly ending the collusive conduct, but no active cooperation with the Commission in the course of its investigation;[23] and

(d) 20 per cent for a firm that complied with statutory notices and had a good competition compliance program, but only made admissions after discovery and a number of pre-trial hearings.[24]

---

20 *Hessell v R* [2011] NZSC 135, [2011] 1 NZLR 607; *Kuehne +Nagel*, above n 5; *Visy*, above n 10; *Alstom*, above n 5.
21 *Whirlpool*, above n 9.
22 *Unique Realty*, above n 12; *Property Brokers*, above n 16.
23 *Rural Livestock Limited*, above n 16, at [54]; *PGG Wrightson*, above n 10, at [59].
24 *Air New Zealand*, above n 8.

[72] I accept that a discount of 35 per cent from the starting point is appropriate to reflect the defendant-specific factors I have outlined above. The very constructive manner in which Ronovation engaged with the Commission deserves appropriate recognition from the Court. It is also appropriate to take into account that Ronovation is a small family company with relatively limited resources. The Commission acknowledged that a penalty of $400,000 is likely the maximum level of penalty Ronovation could afford without threatening the company's ongoing viability.

Conclusion

[73] Applying a 35 per cent discount to the starting range of $550,000 to $650,000 results in a penalty range of approximately $355,000 to $425,000. The proposed penalty of $400,000 falls within that range, and I am satisfied that it is an appropriate penalty figure in all the circumstances.

[74] Although penalties in previous (seller side) cases have generally been higher, those cases are not analogous to this one, for the reasons I have outlined previously. A penalty of $400,000 is a very significant penalty for a company of the size and with the resources of Ronovation. I am satisfied that it will achieve the objectives of specific and general deterrence. Publication of the facts of this case, and the penalty imposed, will likely lead to greater public awareness of the unlawfulness of anticompetitive buyer side conduct of this nature, and the serious consequences that can result from engaging in such conduct.

Result

[75] I make a declaration that Ronovation's conduct contravened s 27 via s 30 of the Act (for conduct before 15 May 2018) and s 30 of the Act (for conduct after 15 May 2018).

[76] I order Ronovation to pay a pecuniary penalty in the sum of $400,000.

[77] As the Commission did not seek costs, I make no order as to costs.

Katz J