IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2006-485-2353

UNDER	The Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	CARDS NZ LIMITED AND OTHERS Defendants

CIV-2006-485-2693

AND BETWEEN	DSE (NZ) LIMITED AND OTHERS Plaintiffs
AND	CARDS NZ LIMITED AND OTHERS Defendants

Hearing: 22 July 2009

Appearances: DJ Goddard QC and H Wilson for Commerce Commission
JL Land and IR Hegerty for Retailers
A Galbraith QC and M Dean QC for Cards NZ Ltd
M Dunning for Visa International Service Association
VL Heine for MasterCard International Incorporated
D Shavin QC and M O'Brien for ANZ National Bank
J Miles QC, A Peterson and MJ Austin for ASB Bank Ltd
J Farmer QC and AK Rawlings for BNZ Bank
JS Kos QC and FJ Cuncannon for Westpac/TNPSL
L O'Gorman for Kiwibank and New Zealand Post
S McAnally for TSB

Judgment: 27 July 2009 at 11:00 am

JUDGMENT [NO. 2] OF ASHER J AND
DR RALPH LATTIMORE (LAY MEMBER)

This judgment was delivered by me on 27 July 2009 at 11.00 am
pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

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Date

Preliminary

[1] The Commerce Commission and a group of large New Zealand retailers have brought proceedings against Cards NZ Limited, Visa International Service Association, MasterCard International Incorporated, and a number of banks. It is alleged that the defendants, who operate the Visa and MasterCard credit card systems, have breached ss 27 and 30 of the Commerce Act 1986. The Commerce Commission seeks declarations, injunctive relief and pecuniary penalties, and the large New Zealand retailers seek injunctive relief and damages.

[2] The proceedings are set down for a ten-week hearing commencing on Monday 5 October 2009. A number of rulings have been sought as to the trial administration and procedure. The parties have resolved many of those issues over the last few months. However, there are some outstanding issues which must be determined. There is a further hearing day set aside for interlocutory matters on Wednesday 26 August 2009.

The mode of evidence of the economic experts

[3] Issues have arisen as to the number of experts to be called, and the way in which they should give their evidence. It now transpires that it is proposed that there will be eight economic experts who will directly address the competition issues, four to be called by the plaintiffs and four to be called by the defendants. It is agreed that they will all give evidence at the conclusion of the factual and other expert evidence. Their evidence will involve broad competition analysis, with a focus on market definition and the application of ss 27 and 30 of the Commerce Act.

[4] The Commerce Commission seeks a ruling as to the economic experts' mode of evidence under r 9.46 of the High Court Rules, which provides:

> **9.46 Evidence of expert witnesses at trial**
>
> The court may, at the hearing, direct that the evidence of expert witnesses is given after all or certain factual evidence is given or in a sequence the court thinks best suited to the circumstances of the proceeding.

[5] Under this rule the Commerce Commission seeks an order directing that the expert economic evidence be given by way of what is known as the "hot tub procedure". The hot tub procedure has developed in Australia and New Zealand over recent years as a mode of giving evidence where the orthodox procedure of evidence-in-chief, cross-examination and re-examination for each witness is not followed. Rather, each expert in turn gives a summary of that expert's evidence within a limited time frame, and each other expert may make a comment within a limited timeframe on that evidence. Once each expert has been through this process the experts are sequentially cross-examined. On some occasions cross-examining counsel have been allowed to refer answers to their experts for comment. There are other variations.

[6] The specific orders sought by the plaintiffs are as follows:

a) Each expert will have 20 minutes to summarise their evidence (commencing with the plaintiffs' experts).

b) Each expert will have 10 minutes to comment on the summaries provided by the other expert witnesses.

c) Once all summaries are complete, each witness will be cross-examined in turn, with the plaintiffs' experts being cross-examined first.

d) Counsel conducting the cross-examination will have the right to ask any other expert to comment briefly on an answer given by the expert being cross-examined.

e) Re-examination will then occur in the usual way.

[7] All defendants oppose the making of such an order, and submit that the evidence of the economic experts should be given in the usual way.

The parties' respective positions

[8] The plaintiffs submit that the provision of the evidence from the experts through a hot tub procedure will be a convenient and expedient way for the Court to hear the evidence. They submit that it will save time and will narrow issues by encouraging inter-reaction between the experts. There will be an immediate juxtaposition of the experts' positions. It is submitted, indeed, that the saving could be as great as one week. Reliance is placed on various judicial comments supportive of the hot tub procedure.

[9] The defendants accept that the hot tub procedure can be effective. However, in their view the benefits of the hot tub procedure arise primarily in situations where there are only a few experts present. They submit that with eight experts present, adopting the hot tub procedure would be unwieldy and ultimately counterproductive. They submit that there will be no timesaving. It was suggested that it was not proper to limit the experts to a certain period of time for their evidence-in-chief as this could be unfair and deprive parties of their right to be heard. It is submitted that the Commerce Commission's experts, who have had more experience than the defendants' experts in the hot tub procedure, would have an unfair advantage. The suggestion was that as experts have become more versed in the hot tub procedure, it is easier to abuse it by turning the opportunities for comment into occasions for deliberate advocacy.

[10] In the end, senior counsel for the defendants, Mr Farmer QC, Mr Shavin QC, Mr Galbraith QC, Mr Miles QC, Mr Kos QC and Ms Heine all expressed their strong personal opposition to the proposed course.

Discussion

[11] Mr Goddard QC, in support of the hot tub procedure, relied on statements of Maureen Brunt in *Economic Essays on Australian and New Zealand Competition Law (2003),* where she set out the history of the hot tub procedure and commented on its benefits (at 43-50). Professor Brunt's analysis of the nature of economic evidence and the argumentative nature of much of the expert testimony is referred to

in the earlier judgment in these proceedings relating to the admissibility of certain evidence of 29 June 2009: *Commerce Commission v Cards NZ Ltd & Ors* HC AK CIV-2006-485-2353 and *DSE (NZ) Ltd and Others v Cards NZ Ltd and Ors* HC AK CIV-2006-485-2693, 29 June 2009 at [21] – [24]. Professor Brunt in her book made the comment in relation to the hot tub procedure at 47:

> The advantages of the panel/seminar can be readily discerned:
>
> - It makes positive use of the adversarial nature of economists' evidence;
> - It uses the economists to criticise each other.
> - It permits the economists to develop their views in connected argument.
> - The testing process tends to reveal the quality and integrity of the economists' views.
> - Any antitrust judgment should make economic sense. It is more likely so when economists' views have been cogently expressed.

[12] The hot tub procedure was used in *Air New Zealand v Commerce Commission (No. 6)* (2004) 11 TCLR 347, where it was stated by Rodney Hansen J at [20]:

> Eight of the experts who swore affidavits gave evidence at the hearing in response to notices to appear for cross-examination. Cross-examination was permitted for the reasons discussed in paras [97] – [103] of Judgment (No 5) (supra). They gave their evidence in a collective process known colloquially as a "hot tub". Each expert was given the opportunity to state succinctly his or her position and respond to the statements of others. There was scope for intervention by opposing witnesses in the course of cross-examination. The process helped to expedite the oral evidence and to elucidate and narrow areas of difference.

Some anecdotal evidence was given about the procedure in that case by counsel who had been involved. I was advised that in fact only six of the experts could have been regarded as fully engaged in the hot tub procedure.

[13] The hot tub procedure was also used in *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679; *Commerce Commission v Bay of Plenty Electricity Ltd* HC WG CIV-2001-485-917, 13 December 2007, Clifford J, Professor Richardson; *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2008) 12 TCLR 168 (0867 Litigation); *Woolworths Ltd v Commerce Commission* (2008) 8 NZBLC 102,128, (six experts). In the *Woolworths Ltd v Commerce*

Commission decision Mallon J noted that the hot tub procedure "was of considerable assistance" (at [22]). The hot tub procedure is often used in Australia, and a variation on the procedure, which involved a real dialogue between experts in open Court, was referred to in *Qantas Airways Ltd* (2005) ATPR 42-065 at [215], where there were six experts.

[14] We accept that there are real benefits that arise from the use of the hot tub process. It will allow experts in the relatively short timeframe of two or three days to summarise and juxtapose their primary evidence, and their primary responses to the evidence of the other experts. While the process is not entirely interactive, it is dynamic, and the development of concessions or even agreement on points is possible. The primary benefit is that the process of relatively immediate comment from the other experts will lead to a quicker distillation of real issues, and a discarding of points not really in issue. A moderately interactive process between senior peers is likely to be productive. The long and unnecessary reading of briefs already read by the Court will not occur. Cross-examination can be limited, as it will follow the initial summary and commentary process, where the key points at issue should emerge. The dynamic process will enable the bench to better understand and focus on the points of difference, and any areas of agreement. While it does seem likely that there will be some overall time savings, because of more focused cross-examination, that is a benefit that is secondary to the clarification and elucidation of the real issues.

[15] Given the fact that the hot tub procedure has worked successfully in a number of cases, one of which involved eight experts and others six, the defendants' submission that a "mêlée" is likely to develop as a result of the hot tub procedure being used with eight experts is hard to accept. There is nothing to indicate that the experts in this case should be more prone to disorder than any other group. Indeed, these experts appear to be very well qualified, and high standards can be expected. Size alone should not make the exercise harder to control, in that the Court will intervene if certain witnesses try to dominate the commentary process. Experts who attempt to use the process for advocacy can expect short shrift. Experts have an overriding duty to assist the Court impartially, and to not be an advocate for the party that has engaged them (Code of conduct for expert witnesses, schedule 4 High Court

Rules, paras 1 and 2). Independence, balance and care will be valued, over oratorical skills.

[16] It is true that the more witnesses that are involved, the longer the gap between evidence and comment. There will be a loss of immediacy, and a greater danger that the point at issue gets diffused as the commentaries progress. We accept that the number of experts is a relevant factor, but are not persuaded that because there are eight the benefits of the hot tub process will be lost. Indeed, the greater number of experts means that if they gave their evidence in the traditional way seriatim, there could be gaps of over a week between experts, making it harder to compare and evaluate their positions. The hot tub with its immediacy has the attraction of getting all the experts to express summaries and comments in short temporal order.

[17] There was particular criticism by defence counsel of time constrictions being placed on the experts. It was suggested that a party's right to natural justice could be compromised. However, the briefs will be read by the Court, and the witness will have the opportunity to summarise their evidence. We note there has been no objection to other witnesses and non-economic theory experts having to summarise their briefs within a 20 minute time frame. Given that the briefs are read, the opportunity to summarise only improves a witness' opportunity to be heard. Moreover, the witness gets further opportunities to be heard during the commentary process. Provided there is close judicial supervision to ensure that there is flexibility to respond and vary if required, the hot tub procedure constitutes no breach of natural justice.

[18] Mr Goddard's suggestion of 20 minutes per witness might suit some witnesses, but not others. Given the fact that the briefs are all likely to be lengthy, the 20-minute summary period might be too short. A 30-minute period was applied in *Air New Zealand v Commerce Commission (No. 6)*. We will direct 20-minute summaries at this point, but will review that issue at a date closer to the giving of the evidence.

[19] Counsel for the defendants frankly expressed a concern that some of the plaintiffs' witnesses are very expert at giving evidence in the hot tub procedure,

while their experts are not. There was a suggestion that the process of giving hot tub evidence would become an exercise in advocacy, where the more bold and experienced expert might have an advantage. However, experts will vary similarly in their experience and skill levels in responding to cross-examination. The Court is used to making adjustments in the interests of justice, to assuage any such inequalities. Further, we have no reason to believe that the defendants' very senior experts will be disadvantaged once they understand the procedure.

[20] There is a practical problem in requiring experts from around the world to gather in one place for a certain period. However, this must arise when, as here, all the experts are in any event to gather together at the end of the fact and other industry evidence, to give their evidence in a block. Experts should not have committed themselves to give evidence if they do not have a general availability over the likely timeframe for the giving of evidence here in late November or in December 2009. Obviously the likely dates can be predicted with more accuracy as the trial progresses. We do not regard the question of convenience as weighing either for or against the use of the hot tub procedure. The experts will need to make themselves available for a certain period whichever process is adopted.

[21] There was particular criticism of a proposal that counsel conducting the cross-examination will have the right to ask any other expert to comment briefly on an answer given by the expert being cross-examined. It was suggested that this procedure could be manipulated by an expert experienced in the hot tub procedure. We do have reservations about this aspect of the procedure, but it can be reviewed at the conclusion of the interactive part in the hot tub procedure, before cross-examination. We will make an order in this regard, but will be prepared to re-visit it during the trial. An issue will be whether there should be a limit on the number and length of the comments.

[22] We conclude, therefore, that it is in accord with the objective of the High Court Rules to secure the just, speedy, and inexpensive determination of the proceeding, that the hot tub procedure be adopted, with the reservations expressed.

[23] We will seek submission from counsel at the 26 August 2009 hearing on whether all experts should be available for questions from the bench at the conclusion of the expert evidence.

The joint evidence of Professor Carlton and Doctor Bamberger

[24] Professor Carlton and Dr Bamberger have given a joint brief of evidence evaluating the likely economic effects of certain provisions of the Visa and MasterCard schemes. The Commerce Commission intends that they both be part of the hot tub procedure.

[25] It is not uncommon for economic experts to give joint briefs in cases such as this. A joint brief would appear to involve two experts saying exactly the same thing twice. However, it may be that the deponents have shared the task of preparation, and each have their own areas of domain within the brief. If the brief is truly a joint effort, and cross-examination can be directed at the relevant author, there may be no difficulties.

[26] Defence counsel submit that there should be cross- examination of only one of the two authors. Such a direction would leave the Court in the unsatisfactory position where there is a witness who has given contested evidence who is available, but who cannot be cross-examined. That would be unfair, although the defendants may indeed wish to waive their right to cross-examine one of them. There is agreement that the requirement to cross-examine in s 92 of the Evidence Act 2006, will not apply. At this point we make no direction in relation to the joint brief. The parties may apply further if they wish to do so.

Conference of experts

[27] Under r 9.44 the Court may on its own initiative or on the application of a party direct expert witnesses to confer. The defendants consider that such a conference would be of assistance. The plaintiffs resist such a proposal.

[28] We consider that there would be real benefit in a one day conference of experts preceding the hot tub procedure. Ideally that conference would proceed in accordance with a detailed agenda and have an independent chair. We note that a procedure along these lines was used in the *Qantas Airways Ltd* decision (see [213]). Following that meeting a written report was prepared by the economists. A panel discussion also took place in the *New Zealand Bus Ltd* case.

[29] The advantage of such a panel conference can be that, as well as narrowing issues and, better still, achieving some agreement, the experts attain a better understanding of each other's position before appearing in Court. This will make their evidence more focused. There are constraints on how far a Court may go in making orders under r 9.44. We do not propose making any order on this issue at this point but at the next hearing on Wednesday 26 August 2009 we will address it again and be assisted by submissions from counsel.

Closing

[30] The other issue that arises is whether the plaintiffs should have the same amount of time for closing as the defendants. We consider it premature to rule on this issue although we express the preliminary view that some allowance should be made for the fact that, unlike the two groups of plaintiffs, the interests and perspectives of the defendants may not be identical. Given the importance of the issues, each defendant should have the ability to present at least their core submissions in their own way without necessarily adopting the similar submissions of another party. Nevertheless, duplication of submissions will not be permitted. We would not be inclined to favour a significant differential such as 2/7 5/7, proposed by some counsel, but take the preliminary view that some time differential is justified. We will not rule on this until we have some better understanding of the issues, during the trial.

Other directions matters

[31] We do not propose setting out an indicative timetable, although we will revisit this issue at the hearing on Wednesday, 26 August 2009. We incline to the view that the experts should be available in weeks 8 and 9. If a non-binding timetable is to be indicated, it is our preliminary view that it is preferable for it to be more detailed than that which is presently proposed, so that it sets out indicative times for each party's openings and submissions and for each witness. We will be assisted by submissions on this at the hearing on 26 August 2009.

[32] We propose making directions in accordance with the common position of the parties in relation to openings, fact and industry evidence, and agreed bundle of documents.

[33] In accordance with the usual practice, the defendants will go first in closing, followed by the plaintiffs. The defendants may respond but strictly in reply.

Directions

[34] The plaintiffs' openings will be followed by 'skeleton' openings (no more than one day in total) from the defendants. Full openings will be provided by the defendants at the commencement of their case. The time for opening submissions is expected (on an indicative basis) to be equally allocated between the plaintiffs and defendants.

[35] The briefs of evidence of fact and industry witnesses will be taken as read. Each witness may give a short summary of their evidence of no more than 20 minutes before being cross-examined. Their evidence will otherwise be given in the usual way.

[36] In relation to the agreed bundle of documents, the parties are to nominate to the plaintiffs all documents to be included by 7 August 2009. A common bundle will be provided electronically by 24 August 2009. Hard copies are to be provided on request to any party by 31 August 2009 at the requesting party's expense.

[37] The evidence of those experts who will give evidence involving broad competition analysis will be given as follows:

a) Each expert, in the presence of the other experts, will have 20 minutes to summarise their evidence (commencing with the plaintiffs' experts).

b) Each expert will have 10 minutes to comment on the summaries provided by the other expert witnesses.

c) Once all summaries are complete, each witness will be cross-examined in turn, with the plaintiffs' experts being cross-examined first.

d) Counsel conducting the cross-examination will have the right to ask any other expert to comment briefly on an answer given by the expert being cross-examined.

e) Re-examination will then occur in the usual way.

The parties have leave to apply to vary this procedure.

[38] The defendants will present their closing submissions first, followed by the plaintiffs. The defendants may respond but strictly in reply.

[39] One Court hearing fee is payable in respect of the two proceedings.

[40] BNZ and MasterCard have not filed their economic evidence on time. MasterCard is to provide its expert economic evidence by 31 July 2009, and BNZ by 7 August 2009. The plaintiffs' expert economic briefs in reply are to be provided by 7 September 2009 (in relation to MasterCard) and 14 September 2009 (in relation to BNZ).

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Asher J

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R Lattimore