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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-7237

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	VISY BOARD (NZ) LIMITED First Defendant
AND	VISY BOARD PTY LIMITED Second Defendant
AND	JOHN RODERICK STEPHEN CARROLL Fifth Defendant
AND	JAMES GEORGE HODGSON Sixth Defendant

Hearing: 28, 29 October and 1 November 2010

Counsel: J G Miles QC, R Hart and B Hamlin for Commerce Commission
A R Galbraith QC and S C Keene for Visy Board Pty Ltd
S J Mills QC and W Blennerhassett for J R S Carroll
No appearance by or on behalf of remaining defendants

Judgment: 20 April 2011

JUDGMENT (NO. 2) OF HEATH J

This judgment was delivered by me at 4.00pm on 20 April 2011 pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Contents

Introduction [1]
Protests to jurisdiction – the High Court Rules
(a) Introductory comments [5]
(b) Extra-territorial effect of Commerce Act 1986 [9]
(c) A subsequent development [11]
(d) The protest to jurisdiction regime [13]
The Commission's case against Visy Australia and Mr Carroll [25]
Visy Australia's and Mr Carroll's responses [34]
Does s 27(1) extend to a trans-Tasman market? [40]
Admissibility issues [49]
The "overarching" understanding admitted in Australia [55]
Analysis: Can the Commission's claims proceed?
(a) Introductory comments [63]
(b) The Fonterra transaction [65]
(c) The "overarching understanding" [78]
(d) The balance of the causes of action [81]
Result [85]

Introduction

[1] Section 27 of the Commerce Act 1986 (the Act) proscribes conduct designed to substantially lessen competition in a relevant market in New Zealand. The Commerce Commission (the Commission) alleges that Visy Board (NZ) Ltd (Visy New Zealand), Visy Board Pty Ltd (Visy Australia), Mr Carroll and Mr Hodgson were parties to an arrangement that breached s 27.[1] The Commission asserts that those parties engaged in a price-fixing cartel, in respect of the corrugated fibre market. In the most recent version of its Statement of Claim, the Commission divides the relevant "market" into four: the manufacture and supply of corrugated fibre packaging in the North Island, South Island, New Zealand, and "New Zealand trans-Tasman".

[2] In earlier proceedings in Australia,[2] Visy Australia, Mr Debney (the Managing Director of Visy Australia) and Mr Carroll (the General Manager of Visy Australia) admitted that they were parties to a two party cartel in the Australian

[1] Earlier claims against Messrs Pratt (third defendant) and Debney (fourth defendant) have abated (due to death) and been discontinued, respectively.
[2] *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673 (FCA).

market. Visy Australia's collaborator was Amcor Ltd (Amcor), the parent company of the Amcor Group and a listed public company in Australia. While Visy and Amcor operated as a duopoly in Australia, there is a third participant in the New Zealand market; Carter Holt Harvey Ltd. No s 27 proceedings have been brought against that company.

[3] The Australian Competition and Consumer Commission brought proceedings in the Federal Court of Australia, alleging that Visy Australia and named directors and executives had engaged in unlawful price-fixing and market sharing with companies in the Amcor Group, contrary to s 45 of the Trade Practices Act 1974 (Cth).[3] The allegations were admitted in the form of an agreed summary of facts. The Court imposed pecuniary penalties of AUS$36,000,000 (Visy Australia), AUS$1,500,000 (Mr Debney) and AUS$500,000 (Mr Carroll) to mark the conduct.[4] No appeal was brought against those decisions.

[4] While Visy Australia and Mr Carroll accepted responsibility for anti-competitive price fixing in Australia, they deny that the "understandings"[5] into which they entered with Amcor extended to any relevant *"market in New Zealand"*.[6] Each has filed a protest to this Court's jurisdiction, contending that any conduct in which they were involved cannot be tried in New Zealand. The Commission applies to set aside the protests. Its applications are opposed.

Protests to jurisdiction – the High Court Rules

(a) Introductory comments

[5] The High Court Rules establish a regime for the service of proceedings issued in New Zealand on natural or corporate persons who reside or are situated overseas.[7] A party served overseas can protest the jurisdiction of this Court to hear

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[3] Now known as the Competition and Consumer Act 2010. Section 45 is the Australian equivalent of s 27 of the Commerce Act 1986.
[4] At para [333](38), (39) and (40) respectively.
[5] Discussed at paras [55]-[61] below.
[6] Commerce Act 1986, s 3(1A).
[7] High Court Rules, rr 6.27-6.35.

and determine the claim.[8] The underlying policy, developed from Commonwealth authorities going back as far as (at least) 1863,[9] is that foreigners ought not lightly to be subjected to the jurisdiction of a domestic court. Our Supreme Court, in *Poynter v Commerce Commission*, has held that a New Zealand Court should not *assume* that Parliament intended its legislation to affect non-resident foreigners; in consequence, the Court should exercise caution in asserting extra-territorial jurisdiction.[10]

[6] Where the Act is invoked, the extra-territorial reach of this Court is determined by s 4. In *Poynter*, the Supreme Court held that s 4(1) exhaustively defined the extent of the Court's jurisdiction in relation to acts or omissions that occur outside New Zealand.

[7] Mr Galbraith QC, for Visy Australia, and Mr Mills QC, for Mr Carroll, submitted that the Commission cannot, on its present pleading, as supplemented by its affidavit evidence, demonstrate a cause of action that comes within s 4. That is the basis on which they contend that the protests should be upheld and the Commission's applications dismissed.

[8] Mr Miles QC, for the Commission, contended that s 4 was wide enough to permit the claims to go to trial. While during the course of argument Mr Miles sought to widen the basis of the Commission's claims against Mr Carroll, I shall determine the issues arising in respect of his personal position by reference only to the pleaded case and relevant evidence. Mr Miles gave no indication that the Commission intended (or could) refine its pleading further, as against Mr Carroll. In determining the present applications, there is no warrant to step outside the self-imposed parameters of the Commission's case.

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[8] High Court Rules, r 5.49.

[9] See *Cail v Papayanni (The Amalia)* (1863) 1 Moo PC NS 471 at 474; 15 ER 778 at 779 (PC), cited in *Poynter v Commerce Commission* [2010] 3 NZLR 300 (SC) at para [38].

[10] *Poynter*, at [36]-[37] per Tipping, Blanchard, McGrath and Wilson JJ. Elias CJ appears to have concurred in Tipping J's observations on this point.

(b) Extra-territorial effect of the Commerce Act 1986

[9] The circumstances in which the Act extends to conduct outside New Zealand are set out in s 4(1) and (2) of the Act:

> **4 Application of Act to conduct outside New Zealand**
>
> (1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.
>
> (2) Without limiting subsection (1) of this section, section 36A of this Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that such conduct affects a market, not being a market exclusively for services, in New Zealand.
>
> ....

[10] The scope of s 4 of the Act was authoritatively determined by the Supreme Court in *Poynter*. Delivering the judgment of a plurality of four, Tipping J said:[11]

> [46] . . . we must examine the Commerce Act in order to see whether, there being no express language providing for extraterritorial reach other than s 4 (which does not apply), one can discern additional extraterritorial effect as a matter of necessary implication from other provisions of the Act. *It is important to recognise that the Act is a code and, for extraterritoriality purposes, the court should confine itself to the express terms of the Act and any additional extraterritorial effect which flows as a matter of inevitable logic from those express terms read contextually in the light of the purposes of the Act.* That is what necessary implication means. A necessary implication is not something judicially engrafted on to legislation as a judicial value or policy judgment, however reasonable that judgment may appear to be.
>
> (emphasis added; citations omitted)

(c) A subsequent development

[11] *Poynter* was decided by reference to s 4(1) of the Act and the protest regime established by (what were then) rr 131, 219 and 220 of the High Court Rules. Since *Poynter*, there have been changes to the terms of the relevant rules. I was advised by counsel that the Court of Appeal had heard argument (and reserved its decision) on

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[11] At paras [46]-[53]. See also Elias CJ at paras [15]-[17].

the extent to which the new rules might dictate a different approach or outcome from that foreshadowed by *Poynter*.

[12] On 5 November 2010, the Court of Appeal delivered its judgment in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*.[12] When that judgment came to my attention after the hearing had been completed, I invited further submissions. They have been provided in writing, the last of which was filed on 13 December 2010. The further delay in finalising preparation of this judgment (which I regret) has been caused primarily by the need to review some 38 causes of action individually,[13] to determine which ones (if any) should be allowed to proceed.

(d) The protest to jurisdiction regime

[13] Both Visy Australia and Mr Carroll were served overseas, without prior leave of the Court.[14] In those circumstances, they have the right to protest the jurisdiction of this Court to hear and determine the application.[15] The ultimate issue on an application to set aside a protest to jurisdiction is "whether the Court is satisfied that there are sufficient grounds for it properly to assume jurisdiction".[16] The actual inquiry is more nuanced and is guided by the terms of the rules, s 4 of the Act and the decisions in *Poynter* and *Wing Hung*.

[14] Because it considered the impact of the Supreme Court's judgment in *Poynter*, the best place to start is *Wing Hung*. The judgment of the Court of Appeal was delivered by Randerson J. The Judge analysed closely the terms of rr 5.49, 6.27, 6.28 and 6.29 of the High Court Rules, which, as he said, differ in significant respects from the pre-existing rr 131, 219 and 220.

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[12] *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2011] 1 NZLR 754 (CA) per O'Regan P, Ellen France and Randerson JJ. An application for leave to appeal to the Supreme Court has been dismissed: *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2011] NZSC 20.

[13] Listed in para [38] below.

[14] Rule 6.27 of the High Court Rules set out the circumstances in which service may be effected out of New Zealand without leave.

[15] High Court Rules, rr 5.49 and 6.29.

[16] *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd (No 2)* [1989] 2 NZLR 50 (CA) at 54; aff'd [1990] 3 NZLR 513 (PC) at 524-525.

[15] Relevantly, for present purposes, rr 6.27, 6.28 and 6.29 of the High Court Rules provide:

> **6.27 When allowed without leave**
>
> (1) This rule applies to a document that initiates a civil proceeding, or is a notice issued under subpart 4 of Part 4 (third, fourth and subsequent parties), which under these rules is required to be served but cannot be served in New Zealand under these rules (**an originating document**).
>
> (2) An originating document may be served out of New Zealand without leave in the following cases:
>
> ...
>
> (d) when the claim is for—
>
> (i) a permanent injunction to compel or restrain the performance of any act in New Zealand; or
>
> (ii) interim relief in support of judicial or arbitral proceedings commenced or to be commenced outside New Zealand:
>
> ...
>
> (h) when any person out of the jurisdiction is—
>
> (i) a necessary or proper party to proceedings properly brought against another defendant served or to be served (whether within New Zealand or outside New Zealand under any other provision of these rules), and there is a real issue between the plaintiff and that defendant that the court ought to try; or
>
> (ii) a defendant to a claim for contribution or indemnity in respect of a liability enforceable by proceedings in the court:
>
> ...
>
> (j) when the claim arises under an enactment and either—
>
> (i) any act or omission to which the claim relates was done or occurred in New Zealand; or
>
> (ii) any loss or damage to which the claim relates was sustained in New Zealand; or
>
> (iii) the enactment applies expressly or by implication to an act or omission that was done or occurred outside New Zealand in the circumstances alleged; or
>
> (iv) the enactment expressly confers jurisdiction on the court over persons outside New Zealand (in which case any

requirements of the enactment relating to service must be complied with):

....

6.28 When allowed with leave

(1) In any proceeding when service is not allowed under rule 6.27, an originating document may be served out of New Zealand with the leave of the court.

...

(5) The court may grant an application for leave if the applicant establishes that—

(a) the claim has a real and substantial connection with New Zealand; and

(b) there is a serious issue to be tried on the merits; and

(c) New Zealand is the appropriate forum for the trial; and

(d) any other relevant circumstances support an assumption of jurisdiction.

6.29 Courts' discretion whether to assume jurisdiction

(1) If service of process has been effected out of New Zealand without leave, and the courts' jurisdiction is protested under rule 5.49, the court must dismiss the proceeding unless the party effecting service establishes—

(a) that there is—

(i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and

(ii) the court should assume jurisdiction by reason of the matters set out in rule 6.28(5)(b) to (d); or

(b) that, had the party applied for leave under rule 6.28,—

(i) leave would have been granted; and

(ii) it is in the interests of justice that the failure to apply for leave should be excused.

...

(2) If service of process has been effected out of New Zealand under rule 6.28, and the courts' jurisdiction is protested under rule 5.49, and it is claimed that leave was wrongly granted under rule 6.28, the court must dismiss the proceeding unless the party effecting service establishes that in the light of the evidence now before the court leave was correctly granted.

....

[16] To summarise, when a proceeding has been served on a person resident or situated overseas without leave of the Court, the plaintiff must establish:

a) a good arguable case[17] that the claim falls wholly within one or more of the types of claim listed in r 6.27(2).

b) that there is a serious issue to be tried on the merits of such a claim.[18]

c) that New Zealand is the appropriate forum for the trial,[19] and

d) any other relevant circumstances supporting an assumption of jurisdiction.[20]

[17] Neither Visy Australia nor Mr Carroll dispute that New Zealand would be an appropriate forum, in the event that the protests to jurisdiction are set aside. No other relevant circumstances supporting an assumption of jurisdiction have been put forward. Therefore, for present purposes, the "good arguable case" and "serious issue to be tried on the merits" criteria require consideration. In *Wing Hung*, Randerson J explained the essential difference between those inquiries:

(a) The "good arguable case" criterion is a "gateway or threshold" inquiry.[21] At this stage, there is no consideration of the merits of the case. Rather, analysis is directed to whether the claim falls within one or more of the circumstances in which service overseas may be effected without leave.[22]

(b) The "serious issue" criterion focuses on the merits of the plaintiff's claim. In determining the "serious issue" point, a Court must satisfy itself that there is a serious legal issue to be tried. In doing so, the

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[17] High Court Rules, r 6.29(1)(a)(ii).
[18] Ibid, rr 6.29(1)(a)(ii) and 6.28(5)(b).
[19] Ibid, rr 6.29(1)(a)(ii) and 6.28(5)(c).
[20] Ibid, rr 6.29(1)(a)(ii) and 6.28(5)(c) and (d).
[21] *Wing Hung*, at para [32].
[22] At [33].

> Court must assess whether there is a sufficiently strong factual basis, on the available evidence, to support the legal right asserted.[23]

[18] At first blush, it is difficult to discern any difference in standard between a "good arguable case" and a "serious issue to be tried". One of the questions addressed in *Wing Hung* was the nature of the tests to be applied at each stage of the inquiry.

[19] The Court of Appeal acknowledged that "the distinction between the two standards may be difficult to draw".[24] It held that the "good arguable case" test did not require a plaintiff to establish a *prima facie* case, recognising that "disputed questions of fact cannot be readily resolved on affidavit evidence".[25] What is required is "a sufficiently plausible foundation" to establish that the claim falls within one of the criteria set out in rr 6.27(2). The Court of Appeal warned against engaging in speculation, on that score.[26]

[20] Randerson J pointed out that the "serious issue" test seemed to have been taken from the opinion of Lord Goff of Chieveley (with whom other members of the House of Lords agreed) in *Seaconsar Far East Ltd v Bank Markazi*.[27] Referring to Lord Goff's remarks, Randerson J observed it was apparent the "serious issue standard was less stringent than the good arguable case criterion".[28]

[21] Another issue is whether, if one of the causes of action were to fail to meet the tests, the whole proceeding must be dismissed. *Wing Hung* also considers that point. It was argued that the way in which the Rules are now framed in effect restored the position to an earlier authority of the Court of Appeal, which required all the causes of action to meet the r 6.27 tests before service out of New Zealand was permitted.[29]

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[23] At [37]-[41].
[24] *Wing Hung*, at para [41].
[25] Ibid.
[26] Ibid.
[27] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL) at 452.
[28] At para [40].
[29] *Jones v Flower* (1904) 25 NZLR 447 (CA).

[22] In considering that issue, the Court of Appeal took the view that a court determining an application to set aside a protest to jurisdiction ought to be able to exercise its jurisdiction flexibly.[30] If the Court were satisfied there was a serious issue to be tried on the merits in relation to only some of the causes of action, an "all or nothing" approach was undesirable. In that type of case, it was open to the Court to dismiss the proceeding unless an amended statement of claim was filed confining the causes of action to those considered to have merit.[31] That, in fact, was the order made in *Wing Hung*.[32]

[23] As to the way in which separate causes of action should be considered under r 6.29, Randerson J added:

> [71] . . . At the threshold stage of the inquiry, the question whether a particular cause of action falls within r 6.27 will depend on which (if any) of the circumstances set out in that rule applies. As this case demonstrates, this aspect requires an assessment of whether the cause of action is in contract, tort, a claim under an enactment or none of those. And in the second stage, an assessment is required as to whether there is a serious issue to be tried will require separate assessment of both the factual and legal bases for each cause of action. *There may be commonalities but it is not permissible to reason that if one cause of action passes muster, the others arising from the same or similar facts must meet the criteria too.*
>
> [72] *That said, it will often be appropriate to assess the appropriate forum issue and any other relevant factors supporting the assumption of jurisdiction on a global basis where there are multiple causes of action.*
>
> (emphasis added)

[24] Applying *Wing Hung*, the questions arising in this case are:

(a) Is there a good arguable case that the conduct alleged by the Commission falls within one or more of the types of claim to which r 6.27(2)(d), (h) and (j) refer?

(b) Is there a serious issue to be tried in New Zealand, on any claim of that type?

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[30] *Wing Hung*, at para [68].
[31] Ibid, at para [67].
[32] Ibid, at para [146].

The Commission's case against Visy Australia and Mr Carroll

[25] The Commission relies on ss 27(1) and 30 of the Act. Section 27 creates the prohibition of conduct that does or is likely to substantially lessen competition,[33] while s 30 deems particular price fixing arrangements to have the effect of substantially lessening competition. Section 27(1) and (2) provides:

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
>
> (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> ...

[26] The allegations of anti-competitive conduct in New Zealand span a period from early 2000 (when the "overarching understanding" was reached in Australia),[34] to sometime in late 2004. Mr Carroll was General Manager of Visy New Zealand between 1997 and February 2000 and of Visy Australia from February 2000 until December 2004. Mr Carroll is not alleged to have engaged in conduct in breach of s 27 during the time that he was based in New Zealand, as General Manager of Visy New Zealand.

[27] The Commission's case is that Visy's business interests in New Zealand were run in the same way as each of the States and Territories of Australia. Amcor is alleged to have operated its business in a similar way. On that basis, the Commission contends that the "overarching understanding" reached in Australia was intended to extend (or was substantially extended through words or conduct) to both trans-Tasman customers and domestic New Zealand markets.

[33] The phrase "lessening of competition" is defined by s 3(2) of the Act to include references to the hindering or preventing of competition.

[34] See para [57] below.

[28] The Commission contends that its claims fall within r 6.27(2)(j) of the High Court Rules,[35] being claims arising under a specific enactment. It submits that the Court should assume jurisdiction because there are serious issues to be tried on the merits, in respect of the involvement of each of the protestors in the alleged arrangements or understanding.

[29] Insofar as the claims relate to Visy Australia, the Commission's case is that:

(a) Generally, Visy Australia carried on business in New Zealand, both in its own right and through the agency of Visy New Zealand, with the latter in effect operating no more than as a "branch office" of Visy Australia; and

(b) On occasion, Visy Australia acted directly in New Zealand through the conduct of persons doing things in this country which were attributable to Visy Australia.[36]

[30] The claim against Mr Carroll is based on his role as a "servant or agent" of Visy New Zealand, acting within the actual or apparent authority of Visy New Zealand. He is alleged to have been a regular visitor to New Zealand, both to oversee the operations of the "branch" office and to liaise with customers in this country. On one occasion, he is said to have been directly involved in negotiations in New Zealand to implement the "overarching understanding" in a specific transactional setting.[37] The Commission's case is that Mr Carroll engaged in anti-competitive conduct on behalf of a body corporate.[38]

[31] The Commission relies primarily on r 6.27(2)(j) to found its submission that it is entitled to bring Visy Australia and Mr Carroll within the jurisdiction of this Court. On the Commission's case, in order to pass the threshold test, a plausible foundation must exist to establish that either:

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[35] See para [15] above.
[36] Commerce Act 1986, s 90(2).
[37] This refers to the Fonterra transaction. See paras [64]-[76] below.
[38] Within the meaning of s 90(2) of the Commerce Act 1986.

(a) Visy Australia and/or Mr Carroll carried out "any act or omission ... in New Zealand" or that any loss or damage was suffered in New Zealand;[39] or

(b) Visy Australia and/or Mr Carroll engaged in conduct outside New Zealand while carrying on business in New Zealand or resident in this country to the extent that such conduct affects a market in New Zealand.[40]

In either case, the acts of which complaint are made must fall within s 27 of the Act.

[32] It was argued only faintly that r 6.27(d) and (h) applied. In my view, those rules cannot be engaged independently of a cause of action under the Act because the conduct in issue is only justiciable in New Zealand if s 27 applies, through whatever route. There is no distinction between Visy Australia and Mr Carroll in that regard.

[33] To determine whether a "good arguable case" has been established, I must consider the evidence adduced on behalf of the Commission at the highest level at which it could be accepted if the proceeding went to trial. An interlocutory application, at which no oral evidence is given, is not the occasion to embark on a reliability assessment by way of a comparison of the evidence the Commission proposes to call against that filed on behalf of Visy Australia and Mr Carroll. In *Stone v Newman*,[41] the Court of Appeal said:

> [24] The requirement that there be a good arguable case on the merits is in part directed at ensuring that a claim against a foreign resident defendant is not speculative. It must be borne in mind, however, in assessing that factor that, as the Court pointed out in its substantive decision in *Kuwait Asia Bank* ..., r 131 makes no explicit provision for trial of issues of fact or discovery in relation to questions raised under the rule. Indeed a trial of the jurisdiction issue in most cases would subvert the purpose of the policy behind r 131. The general expectation is rather that protests concerning jurisdiction under r 131 are to be decided at the outset of the case on affidavit evidence. To some extent the picture the Court has of the case may accordingly at this stage be incomplete in important respects.

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[39] High Court Rules, r 6.27(j)(i) and (ii).
[40] Ibid, r 6.27(j)(iii) and Commerce Act 1986, s 4(1).
[41] *Stone v Newman* (2002) 16 PRNZ 77 (CA).

> [25] In that context *the focus of the Court in considering an application to dismiss for want of jurisdiction under r 131 must be on the allegations made in the statement of claim and the affidavit evidence the plaintiff has put forward in support of them. The Judge will of course have regard to the plausibility of that evidence, in light of all the material before the Court, including that in the defendant's affidavits. But in considering whether the plaintiff's account meets the required standard the Court should take into account the inability of the plaintiff to obtain for discovery at this stage especially in relation to matters that might be within the exclusive knowledge of the foreign defendant.* On the other hand where the principal documentary evidence in the case appears to be available and the plaintiff's assertions contradicting it vague or improbable, a Judge is certainly not required to accept uncritically the factual assertions on which it is submitted on behalf of a plaintiff that there is a good arguable case.
>
> (emphasis added; citations omitted)

Visy Australia's and Mr Carroll's responses

[34] Visy Australia denies that it has ever carried on business in New Zealand, whether through Visy New Zealand or otherwise. Its position is that the two companies acted independently of each other and in different markets. Therefore Visy Australia contends that the Act cannot apply to its activities. Supporting Visy Australia's stance, Mr Carroll says that he carried out no qualifying activities in New Zealand on behalf of Visy Australia; nor did he do any acts in Australia at a time when he was resident in New Zealand.

[35] Further, counsel for both Visy Australia and Mr Carroll submit that a "trans-Tasman" market is not one to which s 27 can apply. That is a legal issue that I consider independently.[42]

The current pleading

[36] Apart from the "overarching understanding", there are eight discrete transactions in which the Commission says that price-fixing arrangements were undertaken in New Zealand. Five are alleged to fall within the umbrella of a "New Zealand trans-Tasman" market. The balance are directly associated with the three

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[42] See paras [40]-[48] below.

identified New Zealand markets: the North Island, South Island and New Zealand markets for the manufacture and supply of corrugated fibre packaging.

[37] At the outset, there are two aspects of the Commission's pleading that require mention. First, in its Second Amended Statement of Claim, the Commission bundles up its claims against both Visy New Zealand and Visy Australia, by referring to the two companies collectively as "Visy". Notwithstanding that pleading technique, the prayers for relief are directed (as they must be) against Visy Australia and Visy New Zealand individually. Second, the claims are broken down into components of s 27, rather than listing the various types of conduct said to breach the section as particulars. This means that separate causes of action involving, for example, entry into a price fixing arrangement and giving effect to it are pleaded distinctly. I have chosen to deal with each substantive allegation, rather than to analyse each aspect.

[38] On that basis, the specific causes of action with which I deal are:[43]

(a) **First, second, third and fourth causes of action: the "overarching understanding"**

These allege that Visy Australia and Mr Carroll, through conduct that occurred in Australia between January 2000 and February 2004, breached s 27(1) and (2) of the Act, via s 30, by entering into and giving effect to the overarching understanding in New Zealand. The claim against Mr Carroll relates to a breach of s 27(2) only.

(b) **Sixth, seventh, eighth and ninth causes of action: the Coca-Cola transaction**

These causes of action allege conduct in Australia between approximately January to September 2001 that had the effect of breaching s 27(1) and (2) via s 30 in a New Zealand or trans-Tasman market. The causes of action involve claims against both Visy

[43] While the references in the pleading are to "Visy", I refer to "Visy Australia" to ensure the focus of the claim is understood.

Australia and Mr Carroll. The claim against Mr Carroll relates to a breach of s 27(2) only.

(c) Eleventh, twelfth, thirteenth, fourteenth, sixteenth and seventeenth causes of action: the Goodman Fielder transaction

These causes of action plead that Visy Australia and Mr Carroll, as a result of conduct occurring in early 2001 to December 2001, breached s 27(1) and (2) of the Act, via s 30. These allegations relate to "a trans-Tasman customer of Amcor" and are derived from discussions held in Australia (allegedly) between Mr Carroll and an Amcor executive. The claims against Mr Carroll here involve breaches of both s 27(1) and (2).

(d) Eighteenth and nineteenth causes of action: the Inghams transaction

These allege that Visy Australia, by conduct occurring in early 2001, breached s 27(1), via s 30. The allegation is that Amcor and "Visy" arrived at an understanding that the latter would be compensated for the loss of a trans-Tasman account, Lion Nathan, through Visy's ability to secure, among other things, the Inghams accounts in both Australia and New Zealand. Mr Carroll is not alleged to have played any role in relation to this alleged understanding.

(e) Twenty-first, twenty-third and twenty-fifth causes of action: the Mainland transaction

These causes of action allege that Visy Australia breached s 27(1) and (2), via s 30, by dint of conduct occurring in the period between early to mid 2002. The allegation is that Amcor would not seek to enter into contracts for supply if Amcor priced its offer to another company at a level that would enable Visy Australia to retain that particular contract; with Visy Australia then keeping its tender price at a

sufficiently low level to enable Amcor to retain another contract. The markets to which this transaction relates are the relevant North Island, South Island and New Zealand markets. Mr Carroll is not alleged to have had a part to play in this particular transaction.

(f) Twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth causes of action: apple box pricing

Visy Australia is alleged to have entered into and given effect to an understanding in respect of apple box prices by conduct that occurred in mid to late 2003. This transaction is alleged to be an understanding between Amcor and Visy Australia that apple boxes would be priced in lists known to each party, so that the two companies would not "poach" each other's major apple box companies in the relevant North Island, South Island and New Zealand markets. Mr Carroll is alleged to have been involved in discussions in 2003 with an Amcor executive during which certain information was provided about apple box pricing levels in New Zealand, in breach of s 27(2) of the Act.

(g) Thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-sixth causes of action: the Fonterra transactions

Visy Australia and Mr Carroll are alleged to have engaged in conduct between April and June 2004 that breached s 27(1) via s 30, by entering into a price-fixing arrangement. Part of this cause of action involves allegations that Mr Carroll involved himself in conduct in New Zealand that had the effect of substantially lessening competition in a New Zealand or trans-Tasman market.[44] Visy Australia is also alleged to have breached s 27(2) by giving effect to the understanding.

(h) Thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty-second and forty-third causes of action: the PPCS/Richmond transaction

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[44] This transaction is discussed at length in paras [64]-[76] below.

By reason of conduct that occurred between July and August 2004, Visy Australia and Mr Carroll are alleged to have been parties to conduct breaching s 27(1) and (2), via s 30, in relation to the PPCS/Richmond understanding. The alleged arrangement involved Amcor compensating Visy Australia for the loss of its share of the Richmond Meats account by providing it with a list of accounts Visy Australia could secure, and arose out of discussions between Mr Carroll and Amcor executives in July or August 2004.

(i) Forty-fifth, forty-sixth, forty-seventh and forty-eighth causes of action: the Huhtamaki transaction

Visy Australia and Mr Carroll are alleged to have entered into an understanding that contravened s 27(1) of the Act, via s 30. The Commission's allegation is that Visy Australia would allow Amcor to retain a trans-Tasman account, Huhtamaki, by pricing its proposal to Huhtamaki at a level that would allow the customer to be retained. The discussions giving rise to that understanding are alleged to have taken place between Mr Carroll and an Amcor executive in the period between March and June 2003.

[39] Generally, *Wing Hung*[45] requires an individual assessment of the causes of action, both in respect of the gateway and merits questions. An exception to that rule is where it is possible to group particular causes of action on a global basis. Having reviewed the specific claims individually, I consider that they can be considered under three heads:

(a) Those relating to the "overarching understanding"[46]; and

(b) Claims arising out of the Fonterra transaction[47]; and

[45] *Wing Hung*, at paras [71]-[72], set out at para [23] above.
[46] First, second, third and fourth causes of action: see para [38](a) above.
[47] Thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-sixth causes of action: see para [38](g) above.

(c) The remaining causes of action.

Does s 27(1) extend to a trans-Tasman market?

[40] The Commission pleads that five of the specific transactions involve trans-Tasman customers, in relation to a "New Zealand trans-Tasman market". The four main ones are:

(a) the Coca Cola transaction;

(b) the Goodman Fielder transaction;

(c) the Inghams transaction; and

(d) the Huhtamaki transaction;

The Fonterra transaction is in a slightly different category. While it too is alleged to involve a "New Zealand trans-Tasman market", the transaction is capable of being distinguished from the others by reason of the fact that only one of the six Fonterra companies actually traded in Australia. The alleged discussions were almost exclusively directed to a New Zealand market.

[41] If, as a matter of law, s 27(1) does not extend to a trans-Tasman market, the first four of the "New Zealand trans-Tasman markets" pleaded on the basis of substantial lessening of competition in such markets cannot succeed. The Fonterra transaction requires discrete consideration. I consider first whether, as a matter of law, the claim in relation to such markets is tenable.

[42] The phrase "New Zealand trans-Tasman market" seems to have been chosen deliberately, in an attempt to bring trans-Tasman trade within the scope of the s 27 claim. I say that because s 27(1) and (2) requires any substantial "lessening [of] competition" to be in "a market". The term "market" is limited, by definition, to one for goods or services in New Zealand.[48] Both Mr Galbraith and Mr Mills submitted

[48] Commerce Act 1986, s 3(1A).

that an Australasian market was not contemplated by s 27. While they referred, primarily, to s 3(1A) of the Act, ss 3(1B) and 3(1C) and 36A are also relevant. Those provisions state:

> **3 Certain terms defined in relation to competition**
>
> ...
>
> (1A) Every reference in this Act, except the reference in section 36A(2)(b) and (c) of this Act, to the term **market** is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.
>
> (1B) The reference in section 36A(2)(b) of this Act to the term **market**, in relation to a market in Australia, is a reference to a market in Australia for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.
>
> (1C) The reference in section 36A(2)(c) of this Act to the term **market** in relation to a market in New Zealand and Australia, *is a reference to a market in New Zealand and Australia* for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.
>
> ...
>
> (emphasis added)
>
> **36A Taking advantage of market power in trans-Tasman markets**
>
> ...
>
> (2) A person must not, for any of the purposes specified in subsection (3), take advantage of the person's substantial degree of power (if any)—
>
> (a) in a market; or
>
> (b) in a market in Australia; or
>
> (c) in a market in New Zealand and Australia.
>
> (3) The purposes are as follows:
>
> (a) restricting the entry of a person into a market that is not a market exclusively for services:
>
> (b) preventing or deterring a person from engaging in competitive conduct in a market that is not a market exclusively for services:
>
> (c) eliminating a person from a market that is not a market exclusively for services.
>
> ....

[43] Section 3(1A), (1B) and (1C) all refer to s 36A. Those three subsections, together with s 36A, were introduced by ss 3(1) and 15 of the Commerce Amendment Act 1990, which came into force on 1 July 1990. Section 36A of the Act appears in that part of the Act which deals with taking advantage of market power. That is relevant because, in its heading, s 36A refers specifically to a "trans-Tasman market" a term that does not appear in either the definitions of "market"[49] or in s 4 itself. In contrast to the reference to a "market in New Zealand" in s 3(1A) of the Act, s 3(1C) provides a specific definition of the s 36A concept of a market.

[44] Plainly, there was a legislative intent to restrict the taking advantage of market power in a market that encompasses both New Zealand and Australia.[50] But the concept was not extended to other parts of the Act, such as s 27. In my view, the way in which the term "market" is defined in s 3(1A) means that s 27 can only apply to a market that is wholly (or, perhaps, substantially) in New Zealand. That is reinforced by s 3(4):

> **3 Certain terms defined in relation to competition**
>
> ...
>
> (4) In sections 27 and 28, a reference to a **market** in relation to the purpose or effect in respect of competition of a provision of a contract, arrangement, or understanding, or of a covenant, or of conduct, shall be read as including a reference to—
>
> (a) a market in which a person who is a party to the contract, arrangement, or understanding, or any interconnected body corporate, or, as the case may be, the person or any associated person (within the meaning of section 28(7)) who requires the giving of, or gives the covenant, supplies or acquires or is likely to supply or acquire, or would, but for that provision, covenant, or conduct, supply or acquire or be likely to supply or acquire goods or services; and
>
> (b) any other market in which those goods or services may be supplied or acquired.

[45] Mr Miles sought to meet the point by reference to Australian decisions under the Trade Practices Act 1974 (Cth). He submitted that judgments of the Federal Court of Australia in *Australian Competition and Consumer Commission v Qantas*

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[49] Commerce Act 1986, s 3(1A); see also s 3(4).
[50] Commerce Act 1986, s 36A(2)(c).

Airways Ltd,[51] *Emirates v Australian Competition and Consumer Commission*[52] and *Australian Competition and Consumer Commission v Singapore Airlines Cargo Pte Ltd*[53] supported his argument.

[46] Mr Miles advanced two propositions, taken from *Emirates:*

(a) A market which is partly in or includes Australia is capable of being a "market in Australia" notwithstanding that it may also be a market somewhere else.

(b) Goods and services may be acquired from outside of Australia, under contracts entered into outside Australia, but still be part of a "market in Australia".

[47] With respect, I do not accept Mr Miles' submission that the authorities to which he refers meet the objection to jurisdiction for a trans-Tasman market-based claim. The New Zealand legislation is explicit. In my view, it is incapable of an interpretation that brings a trans-Tasman market within the scope of s 27. While the Australian decisions deal with a similar point, they do so in a different context. They are focussed on the question whether a "market" can be regarded as being in Australia, notwithstanding that it may also be characterised as a market situated in another country. The authorities to which Mr Miles referred do not deal with trade between Australia and New Zealand specifically, which is the type of market a "trans-Tasman" market describes. This is reinforced by the existence of a s 36A equivalent in the Trade Practices Act 1974 (Cth), in relation to the misuse of market power in a trans-Tasman market:

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[51] *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89 (FCA) at paras [33]-[34].

[52] *Emirates v Australian Competition and Consumer Commission* (2009) 255 ALR 35 (FCA) at paras [66]-[72].

[53] *Australian Competition and Consumer Commission v Singapore Airlines Cargo Pte Ltd* (2009) 256 ALR 458 (FCA) at para [64].

> **46A Misuse of market power—corporation with substantial degree of power in trans-Tasman market**
>
> (1) In this section:
>
> ***trans-Tasman market*** means a market in Australia, New Zealand or Australia and New Zealand for goods or services.
>
> ....

[48] I hold, as a matter of law, that there is no arguable case for s 27 infringement in respect of alleged trans-Tasman markets, save for the claim based on the Fonterra transaction, which I consider separately.[54]

Admissibility issues

[49] In determining whether there is a good arguable case against Visy Australia and Mr Carroll under s 27 of the Act, it is necessary to have regard only to admissible evidence. Mr Galbraith challenged admissibility in respect of certain aspects of the evidence. I have concluded that the evidence in issue is relevant and admissible.

[50] Mr Galbraith objected on a number of grounds: that the evidence was not relevant,[55] had an unfairly prejudicial effect outweighing its probative value,[56] and was hearsay.[57] The bases of objection are best put in counsel's own words, as appearing in the written submissions in opposition to the applications to set aside the protests:

> 5.13 [Visy Australia] objects to [the relevant] statements on the following grounds:
>
> (a) the statements are hearsay statements and not otherwise admissible under the Evidence Act 2006;
>
> (b) the hearsay statements gratuitously allege the involvement of [a Visy New Zealand executive] in the arrangements the subject of the proceeding, and allege that there was an understanding between all New Zealand competitors,

[54] See para [75] below.
[55] Evidence Act 2006, s 7.
[56] Ibid, s 8.
[57] Ibid, ss 4(1) (definitions of "hearsay rule" and "hearsay statement") and 16-20.

neither of which is an allegation made by the Commission in the proceeding; and

(c) the circumstances in which the statements were made mean the statements have no probative value and in any event any probative value would be outweighed by the risk that the statements would have an unfairly prejudicial effect on the conduct of this application; and

(d) the probative weight of the statement is put in further question by other evidence filed by the Commission which appears to contradict the statement. ...

[51] There are two answers to the hearsay objection:

(a) First, this is an interlocutory application, in which hearsay evidence may be admitted.[58] The nature of the evidence is something to which the Court has regard in evaluating its probative value, for the purpose for which it is adduced.

(b) Second, the Commission's case is about collusion - an unlawful collaboration (in the nature of a conspiracy) to sabotage a market's effectiveness through price-fixing. Those alleged to be involved are said to have acted in concert in order to implement the "overarching understanding" reached in Australia by senior executives within both Visy Australia and Amcor. In consequence:

(i) Hearsay evidence may be admitted on the basis of what is known as the co-conspirators' statements rule. That common law rule is expressly preserved by s 12A of the Evidence Act 2006. Its nature and purpose is explained in *R v Qiu.*[59]

(ii) While s 12A(a) refers to "persons involved in joint criminal enterprises", it does so disjunctively from the term "co-conspirators", a term that is equally apt to cover those who

[58] High Court Rules, rr 7.30 and 9.76. See also *Makin v Hayward* (1991) 5 PRNZ 139 (HC) at 141-142.
[59] *R v Qiu* [2008] 1 NZLR 1 (SC) at paras [24]-[28].

collaborate to make an arrangement in contravention of s 27.[60] In my view, the rule applies equally to a civil proceeding in which an arrangement in the nature of a quasi-penal conspiracy is alleged.[61]

(iii) As explained in *Qiu*,[62] out of Court statements made by others who are alleged to be co-conspirators is admissible. The threshold test is whether there is "reasonable evidence" that there was a conspiracy and that it involved the accused.[63] The statements and or acts must also have been done in furtherance of the conspiracy. I am satisfied the standard has been reached in this case.

[52] The relevance objection is unsustainable. To be "relevant", evidence must have a "tendency to prove or disprove anything that is of consequence to the determination of the proceeding".[64] All relevant evidence is admissible unless excluded by the Act or any other Act; neither exception applies in this case.

[53] The evidence in issue is relevant because it is from a person who (on the face of it) has personal knowledge of the existence of the "overarching understanding" and its alleged implementation in New Zealand. The evidence is contextualised by reference to specific people and transactions. The fact that the Commission has elected not to pursue other individuals has nothing to do with the essence of the allegations against the particular defendants in this case.

[54] Section 8 of the Evidence Act 2006 entitles the Court to exclude evidence if the probative value is outweighed by the risk that the evidence will have an unfairly

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[60] Compare *R v Gemmell* [1985] 2 NZLR 740 (CA) at 743-744, discussing the elements of a criminal conspiracy.

[61] See also See *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805 (HC) at [89] and *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 (FCA) at paras [52]-[53]. Such a characterisation is justified by the fact that "penalties" are imposed on those who engage in anti-competitive conduct, contrary to the Act.

[62] *R v Qiu* [2008] 1 NZLR 1 (SC) at paras [14], [24]-[28].

[63] Ibid, at [14] and [24].

[64] Evidence Act 2006, s 7(3).

prejudicial effect on the proceeding or needlessly prolong it.[65] That provision cannot assist Visy Australia and Mr Carroll because:

(a) The evidence in issue goes to the central allegation of collaboration. Evidence of that type cannot be regarded as "needlessly prolonging a proceeding". On the contrary, it would be necessary to establish the Commission's case.

(b) Nor is it appropriate to regard the deponent's evidence as "unfairly prejudicial". Both Visy Australia and Mr Carroll are entitled to meet that evidence at trial. The executive named in para 5.13(b) of Mr Galbraith's submissions has provided an affidavit in opposition to the Commission's present applications and is clearly available to give evidence at trial.

The "overarching understanding" admitted in Australia

[55] Before analysing the specific claims, it is necessary to appreciate the nature and extent of the "overarching understanding" in which both Visy Australia and Mr Carroll admitted involvement in Australia.

[56] In late 1999, Mr Debney (the Chief Executive Officer of Visy Australia) and Mr Brown (the Managing Director of Amcor) met by chance during a holiday in Queensland. They agreed to meet again early the following year to discuss the possibility of "co-operation" between Visy Australia and Amcor, in the way in which each did business with major customers.

[57] In the Australian proceeding, the "overarching understanding" reached between Mr Debney and Mr Brown in the period between January and April 2000 was admitted in the following terms:[66]

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[65] Ibid, s 8(1).
[66] See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673 (FCA) at para [41].

(a) Visy Australia and Amcor would permit each other to maintain approximately their then-current share of the corrugated fibre product market.

(b) Neither company would seek to enter into contracts for the supply of corrugated fibre packaging with the other's principal corrugated fibre packaging customers.

(c) If, for one or more unavoidable reasons, Visy Australia did enter into a contract for the supply of corrugated fibre packaging with a principal corrugated fibre packaging customer of Amcor, Visy Australia would not prevent or seek to prevent Amcor from entering into a supply contract with a customer or customers of Visy Australia, in order to replace the share of the corrugated fibre packaging market that it had lost as a result of losing the supply contract to Visy Australia.

(d) The converse would apply when Amcor entered into a contract with a principal corrugated fibre packaging customer of Visy Australia.

(e) Visy Australia and Amcor would, in future, collaborate with each other in order to increase the prices at which they supplied corrugated fibre packaging.

(f) Visy Australia would appoint Mr Carroll as its nominated contact person with Amcor to effect the implementation of the overarching understanding.

(g) Amcor would appoint Mr Laidlaw as its nominated contact person with Visy Australia.

[58] Mr Debney and Mr Brown reached the "overarching understanding" following discussions in Melbourne, between January and April 2000. There was no mention of New Zealand markets, in the agreed facts.

[59] During the discussions in Melbourne, Mr Debney told Mr Brown that he believed it was not in the interests of Visy Australia to continue a "price war" with Amcor. He added that he wanted Visy Australia to increase its prices for corrugated fibre products to more realistic levels. To do that, Mr Debney proposed that the "intense competition" between Visy Australia and Amcor should cease, so that each company could sell its products "at sustainable price levels".[67]

[60] Mr Debney's proposal had the benefit of enabling both Visy Australia and Amcor to continue to enjoy about the same share each had in the corrugated fibre product market. Mr Debney and Mr Brown agreed that their companies would not "poach each other's customers and prices would be increased from their current unsustainable levels".[68]

[61] From July 2000 until sometime in early 2004, Visy Australia and Amcor entered into arrangements in relation to specific products to give effect to the overarching agreement. Sometimes that took the form of a "manufactured" tender one designed to ensure prices offered by one or the other were accepted. In some cases, compensation was paid when a customer changed from one supplier to the other in breach of the parties' "understanding". Somewhat perversely, such compensation was regarded as being payable on the basis of a "moral" obligation assumed by one party in favour of the other.

Analysis: Can the Commission's claims proceed?

(a) Introductory comments

[62] I analyse the causes of action in the groupings identified at para [39] above. The first relates to the entry into and giving effect of the overarching understanding in New Zealand. However, I prefer to begin my analysis by reference to the Fonterra transaction because that provides the sole example of conduct undertaken by Mr Carroll in New Zealand that is alleged to have contravened s 27 of the Act.

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[67] Ibid, at para [43].
[68] Ibid, at para [44].

[63] In analysing the particular causes of action I do not discuss at length the evidentiary foundation for each. To do so would lengthen a judgment that is already far too long. Having said that, I confirm that I have considered all relevant evidence put to me by the Commission in identifying the highest point at which its case can be put. That process includes the drawing of inferences from those primary facts on which the Commission relies.[69]

(b) The Fonterra transaction

[64] The Commission's pleading alleges that the "overarching understanding" was extended to include New Zealand only accounts in mid-2002. In only five of the causes of action does the Commission allege that something occurred in New Zealand that evidenced the implementation of the overarching understanding in this country. That conduct is alleged to have been carried out by Mr Carroll, on behalf of Visy Australia, in relation to a transaction involving the Fonterra group of companies. The Commission pleads that the arrangement was entered into between Visy Australia (apparently through Visy New Zealand) and Amcor, in relation to tenders for the supply of corrugated fibre products to six members of the Fonterra group.

[65] It is alleged that both Amcor and Visy New Zealand agreed to tender for the supply contracts. Their tenders were to be priced in a way that enabled Visy New Zealand to secure a contract for supply with Tip Top Ice-Cream Company Ltd (Tip Top), with Amcor securing contractual arrangements with Mainland Products Ltd (Mainland), Fonterra Ingredients Ltd, Bonlac Foods Ltd, Canpac International Ltd and NZ Butter Canners Ltd. It is the tenders in respect of Tip Top and Mainland that form the basis of the cause of action involving the Fonterra companies.

[66] While the Commission alleges that the arrangement was reached as a result of a meeting between Mr Carroll and an Amcor executive between April and June 2004, the arrangement is alleged to have been progressed in January 2004 when Mr Carroll attended a meeting with Fonterra representatives in Auckland, in preparation

[69] Although I received some lengthy submissions on the question of inferences, the law to be applied is expressed succinctly in *R v Puttick* (1985) 1 CRNZ 644 (CA), at 647.

for the forthcoming tenders. It is said that this meeting was held in a public park at Balwyn, in Victoria.

[67] Visy Australia and Mr Carroll dispute that the pleading gives rise to a cause of action under s 27. They say that any conversation between Mr Carroll and an Amcor representative in April 2004 post-dates Mr Carroll's attendance at the meeting with Fonterra executives in January 2004. Further, they contend that the meeting in Balwyn was not proximate to the time at which the Commission allege the "understanding" was reached in Australia.

[68] Mr Archer, who has been the Procurement Category Manager, Packaging for Fonterra Co-operative Group Ltd since 2003, has provided affidavit evidence as to what occurred at the Auckland meeting in early 2004.

[69] Mr Archer deposes that Fonterra issued a "Request for Proposals" document on 26 February 2004, inviting tenders for the supply of corrugated cases to the six Fonterra companies. That document was sent to Amcor and Visy New Zealand, as well as to three other suppliers, one each from New Zealand, Malaysia and Philippines. Mr Archer says:

> 9. ... As we wanted just one proposal from each company, the New Zealand entities of Amcor and Visy managed the proposals in conjunction with their Australian colleagues as they were the most accessible people to Fonterra's [Request for Proposals] team.
>
> 10. This was a trans-Tasman tender, as the Bonlac business was based in Australia. ...

[70] Mr Archer refers to a meeting with Mr Carroll and Visy New Zealand's General Manager in anticipation of the "Requests for Proposals" being issued. The meeting took place at Visy New Zealand's plant at Wiri. Both are said to have "assured [the Fonterra companies] that Visy were keen to participate" in the tender. Mr John Savery, of Visy New Zealand, was the contact person nominated for the tender process.

[71] Mr Archer's evidence, if accepted at trial, could establish that both Visy Australia and Visy New Zealand were jointly involved in the tender process - in

other words, Visy New Zealand was not participating in the tender process as an independent entity without input from its parent. Mr Archer's evidence as to what occurred after Visy's tender for the Tip Top business tends to establish a plausible foundation for involvement by Visy Australia in an uncompetitive tender for Tip Top's business.

[72] Mr Archer continued:

> 18. After receiving Visy's response to the [Request for Proposals], I spoke with John Savery by telephone to see if Visy would resubmit a proposal for the non-Tip Top business, as the submitted proposal was incomplete and uncompetitive. My understanding from Mr McVitty's analysis was that Visy had only provided pricing for a small parcel of the business, which made it difficult to gauge exactly how competitive or uncompetitive they were.
>
> 19. Mr Savery did not seem to understand the Fonterra Ingredients part of the business very well. From those discussions, I got the impression that Visy was only interested in the Tip Top business and was not willing to submit a competitive proposal for the remainder of the Fonterra business.
>
> 20. As a result of Visy maintaining its uncompetitive position, there was not a great deal of post-submission negotiation.
>
> 21. I recall that the Procurement Manager at Tip Top, Dave Clarke, entered into negotiations directly with Visy, in particular in relation to a rebate that had been offered by Visy at Peters & Brownes in Australia, which Tip Top was also seeking.
>
> 22. On approximately 6 July 2004 Visy and Tip Top entered into an agreement for the supply of [corrugated fibre products]. ...

[73] On the other side of the equation, responses by Amcor to the tender process also contained information suggesting irregularities. In that regard, Mr Archer says:

> 25. The [Amcor Fibre Packaging Australasia] submission included a sign-on incentive of a $6 million one-off payment if Fonterra signed with [Amcor Fibre Packaging Australasia]. [Amcor Fibre Packaging Australasia's] submission included, at page 9, the following statement:
>
> > "*Full and exclusive supply of corrugated packaging to Tip Top Ice Cream Company is* <u>*not*</u> *a condition of this supply proposal.*"
>
> 26. I considered this statement to be highly unusual. Normally, a one-off sign-on fee is offered in respect of the whole business, yet it seemed that Amcor had pre-determined that it was not going to obtain the Tip Top business. Sign on payments were something that we as a

company regarded very much as a last resort option. We went back to [Amcor Fibre Packaging Australasia] and said that this was not our preferred medium of pricing and that we would prefer to have the total price set out in one packaging price. I could not understand why [Amcor Fibre Packaging Australasia] did not want to secure the Tip Top business. Further, the prices submitted by [Amcor Fibre Packaging Australasia] for the Tip Top business were 20.8% higher than the prices submitted by Visy and 8.7% higher than the prices submitted by [Carter Holt Harvey].

27. Fonterra suggested to [Amcor Fibre Packaging Australasia] that it might like to consider improving its position in relation to Tip Top, but Mr McElroy, or one of his support team, replied that it did not suit their model of pricing due to the unique style of carton required for the Tip Top product and the higher related service costs. I was very suspicious of this, and thought that there may have been some collusive arrangements between Visy and [Amcor Fibre Packaging Australasia] regarding the Tip Top business, as clearly there was little interest in securing this account.

28. When we were going through our tender process, we found that the pricing that was eventuating was suspicious. Visy were very competitive on sites and items that they currently supplied, but were non-competitive on sites and items that they did not. Amcor were the same. I do not recall exactly what I heard or from whom, but there were rumours in the market that filtered through from our sites of an anti-competitive arrangement between [Amcor Fibre Packaging Australasia] and Visy. Internally, we were starting to get concerned about the possibility of being exposed to what was allegedly occurring.

29. Accordingly, at one of the negotiation meetings at [Amcor Fibre Packaging Australasia's] Wiri plant (attended by Ian Maynard, Kieran Chapman and me from Fonterra, and three or four people from [Amcor Kiwi Packaging], Ian said to Peter McElroy that we had heard rumours of an understanding between [Amcor Fibre Packaging Australasia] and Visy. Mr McElroy was very strong in his rebuttal of the accusation. He said words to the effect that he "stringently refuted the accusation and was in fact offended by it".

30. [Amcor Fibre Packaging Australasia's] pricing for the remainder of the business was approximately 3.5% higher than its existing pricing. The terms and conditions of supply were similar to the previous contract.

[74] While it is true that the meeting in Auckland preceded the date on which tenders were issued, there is a plausible narrative, from which appropriate inferences could be drawn, to suggest that Mr Carroll's attendance was for the purpose of understanding the nature of the tender process, so that he could return to Australia and discuss, with the nominated Amcor representative, the possibility of implementing the overarching understanding to this particular process. There is a

good arguable case that deliberate engagement in a preparatory meeting of that type occurred in breach of s 27, bringing the claim with r 6.27(2)(j) of the High Court Rules. There is also a serious issue to be tried, on the merits.

[75] Save for one entity (Bonlac Foods Ltd, based in Tasmania[70]), the tenders invited for the Fonterra businesses all related to the New Zealand market. I consider that there is a good arguable case that tenders which relate almost exclusively to a New Zealand market are actionable under the Act, notwithstanding that one component is directed to a market in Australia.

[76] For those reasons, I am satisfied that there is a plausible foundation for a case that both Visy Australia and Mr Carroll engaged in conduct that could be the subject of a s 27 claim. I am also satisfied that there is a serious issue to be tried on the merits, in relation to the various aspects of s 27 on which those claims are based. Those conclusions mean that the thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-sixth causes of action can proceed.

(c) The "overarching understanding"

[77] There is little reference in the Commission's evidence to activities undertaken in New Zealand by representatives of Visy Australia or Visy New Zealand that could be seen as entry into or the giving effect of an overarching understanding of the type agreed in Australia in New Zealand, in the form admitted. Indeed, the evidence adduced by the Commission tends to limit involvement in the overarching understanding to Australian markets. While there are conversations between Mr Carroll and an Amcor representative that include references to New Zealand customers, those discussions did not occur at a time when either Visy Australia was carrying on business in New Zealand or Mr Carroll was resident here.

[78] The existence, however, of a tenable cause of action based on the Fonterra transaction means that an allegation can legitimately be made that the overarching understanding reached in Australia was given effect in New Zealand by Mr Carroll,

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[70] See para 10 of Mr Archer's affidavit, set out at para [69] above.

acting on behalf of both Visy Australia and Visy New Zealand in January 2004 while preparing for the Fonterra tender. The pleading and evidence against Mr Carroll on that issue has already been the subject of analysis.[71] Visy Australia can be placed in the mix as a potential tenderer in respect of that particular transaction, though not as an active participant in the tender process itself.

[79] Based on what occurred in the course of that transaction, I am satisfied there is a good arguable case that Visy Australia entered into, and either attempted to give effect or did give effect to the overarching understanding reached in Australia through its participation in the meeting attended by Mr Carroll in January 2004. Likewise, there is a good arguable case that Mr Carroll aided and abetted that conduct. I also consider there is a serious issue to be tried on the merits, in respect of those claims. Those conclusions mean that the first, second, third and fourth causes of action can proceed.

(d) The balance of the causes of action

[80] I can deal with each of the allegations set out in the remaining causes of action together. In each case, I am satisfied that a good arguable case does not exist against either Visy Australia or Mr Carroll.

[81] There are two reasons why I reach that view. One is of general application. The other is specific to particular causes of action.

[82] The general ground divides into two:

(a) Save for his involvement in the Fonterra transaction, Mr Carroll was not resident in New Zealand at any time when acts were undertaken by him in Australia that might otherwise be regarded as giving effect to the "overarching understanding" reached in Australia. Based on the terms of s 4(1) of the Act, as interpreted in *Poynter*,[72] no additional claim may be brought against him.

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[71] See paras [64]-[76] above.
[72] See para [10] above.

(b) I am not satisfied there is any plausible foundation for the proposition that Visy New Zealand acted as Visy Australia's agent in respect of all of the transactions into which it entered in New Zealand that are alleged to be caught under s 27. No safe inference to that effect could be drawn, even if all pleaded facts were true.

[83] At a more specific level, the four causes of action to which the allegations of involvement in a trans-Tasman market are relevant cannot succeed. I am not satisfied that there is a good arguable case that the claim falls within r 6.27(2)(j), or any of the other paragraphs in r 6.27.

Result

[84] In my judgment, the protests ought to be upheld, save in respect of the first, second, third, fourth, thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-sixth causes of action. In some respects, there may need to be re-pleading of these causes of action. I have not considered and do not address the extent to which any further amendment may be appropriate once discovery has been completed in respect of allegations that may proceed to trial.

[85] Adopting the approach taken in *Wing Hung*, I order:

(a) If the Commission files and serves a Third Amended Statement of Claim, restricting its pleading to the causes of action against Visy Australia and Mr Carroll that I have determined can proceed, the Commission's applications to set aside the protests to jurisdiction shall be granted. The Third Amended Statement of Claim shall be filed and served on or before Friday 27 May 2011.

(b) If a Third Amended Statement of Claim complying with order (a) is not filed and served on or before Friday 27 May 2011, the Commission's applications to set aside the protests to jurisdiction will be dismissed.

[86] I did not hear from counsel fully on questions of costs. Counsel are invited to confer. I direct the Registrar to arrange a telephone conference before me at 9am on the first available date after 1 June 2011 to ascertain whether agreement on costs has been reached and, if not, what timetabling arrangements are necessary to enable any application to be determined.

[87] Counsel shall file short memoranda (no more than three pages) at least 24 hours before the appointed time setting out the respective stances of the parties on any disputed questions of costs.

[88] I thank counsel for their assistance.

P R Heath J

Delivered at 4.00pm on 20 April 2011

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