IN THE COURT OF APPEAL OF NEW ZEALAND

CA255/2007
[2009] NZCA 84

BETWEEN	NEIL HARRIS Appellant
AND	THE COMMERCE COMMISSION Respondent

CA256/2007

AND BETWEEN	ELIAS AKLE Appellant
AND	THE COMMERCE COMMISSION Respondent

CA257/2007

AND BETWEEN	A R POYNTER Appellant
AND	THE COMMERCE COMMISSION Respondent

Hearing: 24 and 25 June 2008

Court: Hammond, O'Regan and Arnold JJ

Counsel: J G Miles QC, S C Keene and C Graf for A R Poynter
L McEntegart and T P Mullins for N Harris and E Akle
D J Goddard QC and M A Borrowdale for Commerce Commission

Judgment: 18 March 2009 at 4.00 pm

JUDGMENT OF THE COURT

A The appeals are dismissed.

B By consent, we make the following confidentiality orders:

(a) Material identified as confidential in the Case on Appeal is to be treated as confidential (the confidential material).

(b) The confidential material may not be disclosed to any person other than the Commerce Commission, its staff and counsel and counsel for the appellants.

(c) The Court file may not be searched without the leave of the Court, which must be sought on notice to the parties.

These orders will apply until further order of the Court, with leave reserved to any party to apply on notice for the orders to be varied or discharged.

C Each appellant must pay costs of $4,000 to the respondent, plus usual disbursements.

REASONS OF THE COURT

(Given by Arnold J)

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Introduction

[1] This case is part of the *Koppers Arch* litigation. The Commerce Commission alleged that between mid 1998 and mid 2002 manufacturers and suppliers of wood treatment chemicals, together with various named individuals, entered into and gave effect to price fixing understandings, contrary to ss 27 and 30 of the Commerce Act 1986 (the Act). The companies involved were members of the Koppers and Fernz Groups, and, after February 2001 when it purchased the Fernz companies, the Osmose Group. The individuals were officers and/or employees of the various companies, and included the three appellants.

[2] Of the 15 original defendants, 11 either had registered offices or resided outside New Zealand. The three appellants lived overseas at all material times, Messrs Akel and Poytner in Australia and Mr Harris in the United States and latterly in France. The Commission served all the overseas defendants without seeking the Court's leave, in reliance on r 219(a), (d) and (h) of the High Court Rules (the Rules). For the purposes of this appeal it was agreed that only r 219(h) remained relevant.

[3] Initially most of the overseas defendants, including the appellants, filed protests to jurisdiction under r 131 of the Rules. However, six ultimately admitted liability, and have been dealt with: HC AK CIV 2005-404-2080 6 April 2006 and 4 October 2006. The Commission discontinued the proceedings against two other overseas defendants, leaving the protests to jurisdiction of the three appellants to be addressed.

[4] The Commission applied to set aside the appellants' protests under r 131(5). Hugh Williams J considered that the Court had jurisdiction to hear and determine the Commission's claims against the appellants and set aside the protests under r 131(6)(a): HC AK CIV 2005-404-2080 16 March 2007. The appellants appeal from that decision.

Issues on appeal

[5] Rule 219(h) permitted service outside New Zealand "[w]here any person out of New Zealand is a necessary or proper party to a proceeding properly brought against some other person duly served … within New Zealand". There is no dispute that the present proceedings were properly brought against the New Zealand defendants. Nor is there any dispute that there were understandings of the type alleged by the Commission between at least some of the defendants, given the admissions as to liability.

[6] Further, the Commission accepts that:

(a) None of the three appellants was resident or carrying on business in New Zealand at any material time;

(b) Neither Mr Poynter nor Mr Akle personally engaged in any relevant acts in New Zealand, and neither addressed any relevant communications to persons in New Zealand;

(c) The only evidence directly linking Mr Harris personally to New Zealand was that he attended one meeting in New Zealand.

[7] Against this background, the central question in terms of r 219(h) was whether each of the appellants is a "necessary or proper" party to the proceedings. According to the authorities, a plaintiff must show that there is a good arguable case both as to compliance with r 219(h) and on the merits of the claim against the overseas person: *Stone v Newman* (2002) 16 PRNZ 77 at [24] (CA), *Baxter v RMC Group plc* [2003] 1 NZLR 304 at [21] – [25] (HC), applying *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 (HC).

[8] In this case, the focus was on the good arguable case on the merits. The parties formulated the principal issue on the appeal as being "whether the High Court Judge was right to find that there was a good arguable case that each appellant engaged in conduct which breached the Act". They identified six questions of law to be determined:

(a) In what circumstances does the Act apply to overseas defendants? This raises the question of the territorial scope of the Act and, in particular, the effect of s 4 of the Act.

(b) What is the meaning of the "good arguable case" threshold in relation to the merits?

(c) Where there is more than one cause of action against an overseas defendant, is satisfaction of the good arguable case threshold in respect of one cause of action (the qualifying cause of action) sufficient for a court to exercise jurisdiction in respect of:

- *all* causes of action,
- all *related* causes of action, or
- only the *qualifying* cause of action?

(d) Do the conspiracy causes of action disclose a cause of action separate from and not merged with the causes of action alleging breaches of ss 27 and 30?

(e) Are statements of facts agreed by those who accepted liability relevant and, if so, what weight should be given to them?

(f) Is evidence obtained after service of the proceedings relevant?

[9] After these there is a factual issue in respect of each appellant, namely whether the evidential threshold is met.

[10] We propose to deal with the case on the basis of these issues. We will address the factual background, and the Judge's reasoning, in the context of our discussion of the individual issues. However, we will at this point say a little more about the pleadings and the course of the proceedings.

The proceedings

[11] In its pleadings the Commission alleged a number of proscribed understandings in relation to two New Zealand (or North Island/South Island) markets for wood preservatives. Mr Goddard QC said that these understandings could be broken down into four broad categories, as follows:

(a) An overarching understanding: an understanding, in place from mid 1998 until mid 2002, to share price information, to avoid price competition, not to compete for long-standing customers, to avoid unrestrained competition and to keep price at levels higher than would occur in a fully competitive market.

(b) Customer specific understandings: these were price fixing understandings in relation to particular customers or particular tender processes, alleged to have occurred from mid 1998 until late 2001. Among them was an understanding in relation to Fletcher Forests.

(c) Price-rise understandings: two understandings to increase market prices were alleged, one in 1998 and another in 2000.

(d) An exclusionary agreement: this was an agreement between Koppers and Osmose entities (and individuals) aimed at a company called TimTech, which was intended to prevent or hinder its entry into the market from mid 2001.

[12] Seven overseas defendants admitted liability, including Koppers Arch Investments Pty Ltd, two Fernz companies (Nufarm Ltd and FChem (Aust) Ltd), Osmose Australia Pty Ltd and three individuals. Three New Zealand corporate defendants also admitted liability – Koppers Arch Wood Protection (NZ) Ltd, a Fernz company (TPL Ltd) and Osmose New Zealand Ltd.

[13] Agreed statements of fact were filed for the purpose of the pecuniary penalty hearings. The result is, then, that various companies and individuals have admitted a number of the understandings alleged, including the overarching understanding, some customer specific understandings (among them the Fletcher Forests understanding), the two price rise understandings and the TimTech exclusionary agreement: see Hugh Williams J's judgment at [96].

[14] One of the individuals who admitted liability was Mr Greenacre. He was the Group General Manager for Fernz' Australasian timber protection business from 1996 until early 2001, after which he became Group General Manager for Osmose for Australasia. He was heavily involved in various understandings: see Hugh Williams J's penalty judgment of 4 October 2006 at [23] – [24]. In the course of the Commission's investigation he was charged with various offences under s 103 of the Act relating to misleading the Commission. He entered guilty pleas in respect of these offences. Mr Greenacre will be a key Commission witness if the claims against the appellants proceed.

[15] As to the appellants:

(a) Mr Akle was the financial manager for the Fernz Australasian group until July 1998, when he became the group's commercial manager. From 1 February 2001 he performed that role for Osmose. The Commission alleges that he was involved in the overarching

understanding, the 1998 understanding and the TimTech exclusionary understanding.

(b) Mr Harris was employed by the Osmose group from January 1998. He was International Business Development Director from July 1999 and was Vice President and Director of International Business Development from October 2000. The Commission alleges that he was involved in the overarching understanding and the TimTech understanding.

(c) Mr Poynter was the Managing Director of Agrow, a division of Fernz, from 1996 until mid 1997. He then became Executive Manager of the Ferns Materials and Technology Group until October 2000. In that capacity he was Mr Greenacre's immediate superior. The Commission alleges that he was involved in the overarching understanding, the 1998 price rise understanding and the Fletcher Forests understanding.

[16] As the precise basis of the claims against the appellants is important to the discussion which follows, we should describe the operative paragraphs of the causes of action against the three appellants, namely causes of action 48 and 49 in the amended statement of claim dated 10 August 2006.

[17] In relation to cause of action 48, the operative paragraph is paragraph 190. It alleges that Messrs Greenacre, Poynter and Akle:

(a) contravened or attempted to contravene s 27 by virtue of their involvement in one or more of the contraventions by the Fernz Group defendants; and/or

(b) were directly or indirectly knowingly concerned in one or more of those contraventions; and/or

(c) conspired with other defendants to breach the Act as pleaded in the causes of action dealing with the Fernz defendants.

[18] The particulars went on to allege that each:

(a) Was an officer or employee of, or had managerial responsibility in relation to, or was concerned in the management and direction of, the Fernz Group;

(b) Was directly or indirectly knowingly concerned in and/or conspired with other defendants in certain specified matters.

(c) Had actual knowledge of the essential facts establishing breaches of the Act by the parties primarily liable.

[19] In relation to cause of action 49, the operative paragraph of the amended statement of claim is paragraph 192. It alleges breaches by Messrs Greenacre, Akle and Harris. The allegations are framed in identical terms to those just described, except that they relate to breaches by the Osmose Group defendants.

Application of Act to overseas defendants

[20] We begin by noting two important principles that together demonstrate the restraint that courts and legislatures have taken in relation to what might be described as the extra-territorial application of domestic law. They are:

(a) Persons who reside overseas and are not present in New Zealand will not lightly be subjected to the jurisdiction of the New Zealand courts: see *Kuwait Asia Bank EC v National Mutual Life Nominees Limited (No 2)* [1989] 2 NZLR 50 (CA) where this was described as an "established principle" (at 54). However, the courts have recognised that "developments in communications and transport have somewhat reduced the force of the practical considerations behind this principle" (as Asher J put it in *Worldwide NZ LLC v Quay Park Arena Management Ltd* [2008] 1 NZLR 106 at [20] (*QPAM*); see also *Agar v Hyde* [2000] 201 CLR 552, per Gaudron, McHugh, Gummow and Hayne JJ at [42]).

(b) The New Zealand legislature will be slow to assert jurisdiction over conduct occurring wholly outside New Zealand, even if that conduct has consequences within New Zealand. This is reflected in the presumption that statutes do not have extraterritorial effect except to the extent permitted by law: see *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA), at 438. That presumption reflects principles of international comity and respect for the sovereignty of foreign states in the regulation of conduct occurring within their territory. In the competition context, this principle has been subject to considerable modification, particularly in the United States where the so-called "effects" doctrine has been adopted: see *United States v Aluminium Co of America* (1945) 148 F 2d 416 (2nd Cir) and *Hartford Fire Insurance Co v California* (1993) 509 US 764, discussed in Sweeney "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?" (2007) 8 MJIL 2 at 20 - 27.

[21] Turning to the Act, we begin with s 4. It provides:

> **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.
>
> (3) Without limiting subsection (1) of this section, section 47 of this Act extends to the acquisition outside New Zealand by a person (whether or not the person is resident or carries on business in New Zealand) of the assets of a business or shares to the extent that the acquisition affects a market in New Zealand.

[22] The appellants do not fall within the terms of section 4(1), given that the Commission has accepted that they were not resident or carrying on business in New Zealand. The question is whether, despite that, the Act applies to their conduct, all of which the Commission accepts occurred overseas (apart from the participation

of Mr Harris in the meeting in New Zealand). The Commission said the Act did apply, and Hugh Williams J agreed.

[23] In essence, the Commission's position was that s 4 is not an exhaustive statement of the circumstances in which the Act applies to overseas conduct. Mr Goddard accepted that s 4(1) sets out the only circumstances in which the trade practices provisions (for example s 27) will apply where there has been no relevant conduct in New Zealand by anyone (albeit that there must be an effect in a New Zealand market). But he submitted that where there has been some conduct in New Zealand by someone (i.e., other than the overseas resident), s 4 does not address issues such as the liability of a overseas resident who procured the conduct in New Zealand or who was party to an unlawful agreement/conspiracy from which the conduct in New Zealand flowed. As s 4 was not exhaustive, Mr Goddard submitted, the Court should look to the general principles of territorial scope developed in the authorities, to the policy goals of the Act and to relevant concepts drawn from international public law in determining the territorial scope of the Act. All of these factors, he submitted, supported the Commission's position.

[24] On this basis Mr Goddard submitted that the appellants were caught by the Act and were liable to pecuniary penalties under s 80. He identified two alternative lines of analysis:

(a) Each of the appellants acted in New Zealand through agents (taking that concept "in a broad, non-technical sense") who participated in and performed unlawful agreements/conspiracies to fix prices in New Zealand. He relied in particular on *Bray v F Hoffman-La Roche Ltd* (2002) 190 ALR 1 (FCA) and, on appeal to the Full Court of the Federal Court, (2003) 200 ALR 607, and *Bomac*.

(b) Each of the appellants was a party to unlawful agreements/conspiracies in breach of the Act, pursuant to which other people did overt acts in New Zealand. Mr Goddard drew an analogy with the position in relation to conspiracy in criminal law, in particular ss 310 and 7 of the Crimes Act 1961. Section 310(1)

provides that "everyone who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence" commits an offence. Section 7 provides:

> For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

[25] In addition, in respect of Mr Harris, the Commission said that part of the conduct that he engaged in included participating in a meeting in New Zealand.

[26] In essence, Hugh Williams J accepted these submissions. He held that the Act applied where part of a defendant's conduct occurred in New Zealand (e.g., the sending of relevant communications to New Zealand from overseas), or where an agent carried out the contravening conduct in New Zealand (see in particular [75] – [78]). The Judge identified what would have to be shown to establish liability as an accessory (at [84] – [85]) and accepted the conspiracy analogy urged on him by Mr Goddard (at [88] – [90]).

[27] Broadly this issue requires consideration of two matters, namely:

(a) Whether s 4(1) of the Act identifies the only circumstances in which the trade practices provisions of the Act apply to a person whose conduct occurred entirely or substantially outside New Zealand?

(b) If not, in what circumstances the trade practices provisions apply to a person outside New Zealand as a consequence of conduct by a person within New Zealand?

[28] Mr Miles QC (in submissions largely echoed by Mr McEntegart) submitted that s 4(1) provided a complete answer to the issue of the application of the Act to conduct occurring outside New Zealand. He argued that the section identified the only circumstances in which the reach of the Act was extended to conduct occurring

outside New Zealand. So, the Act extends to a person doing (or refusing to do) any act outside New Zealand only if that person is resident or carrying on business in New Zealand. Given that the Commission accepted that s 4(1) did not apply to Mr Poynter, Mr Miles submitted that there was no jurisdiction with respect to him. (The same analysis applies in respect of Mr Akle.)

[29] Mr Miles relied in particular on the subsection's use of the word "extends". This, he submitted, meant that the coverage of the Act was "pushed out to" overseas conduct in the circumstances specified. Without that "pushing out", it would not apply. He relied on the observation of Tipping J in *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 (HC) that s 4 "seems to be the limit of the extra territorial reach of the Act and where that limit is clearly set out it is very difficult to imply extra territorial effect for s 3(3)" (at 759). Further, Mr Miles submitted that the legislative history showed that Parliament had worked on the basis that the Act applied only to conduct occurring within New Zealand. In his written submissions he said:

> 35 The history of [s 4] demonstrates that the starting point from which Parliament has consistently worked is that the Act has application only to acts/conduct occurring within the jurisdiction of New Zealand. The evolution of the provision reveals a progressive *addition* to the circumstances in which the Act will apply to conduct occurring overseas, combined with a recognition that s 4 is exhaustive of the circumstances in which this will occur. Were this not the case, Parliament would not have needed to make additions in 1989 and 1996, the express purpose of each being to extend the jurisdictional reach of the Act.

[30] Mr Miles also invoked the presumption of interpretation to which we referred at [20](b) above.

[31] In relation to *Bray* and *Bomac*, Mr Miles sought to distinguish them, on a basis which we discuss in more detail at [41] below. Mr Miles disputed the analogy that Mr Goddard sought to draw between conspiracy in the criminal law and the position under the Act. He also argued that conspiracy was not available as a basis of liability in this case as the alleged conspiracy was identical to the arrangement or understanding that was alleged to be the subject of it, relying on *Trade Practices Commission v Allied Mills Industries Pty Ltd* (1980) 32 ALR 570 (FCA).

[32] Accordingly, Mr Miles said:

> In the case of every alleged breach of ss 27 and 30 of the Act,
>
> - the location of the defendant's conduct that is alleged to have given rise to liability, and
> - the characteristics of the defendant,
>
> are determinative, by operation of s 4(1), as to whether the Act applies.
>
> (Emphasis in original.)

Our evaluation

[33] We start with two propositions about which there was no dispute:

(a) First, in accordance with the ordinary principles applicable to the territorial scope of statutes, the Act applies to proscribed conduct within New Zealand, including such conduct by overseas residents.

(b) Second, by virtue of s 4(1) the Act applies to relevant conduct which occurs overseas where it is committed by a person resident or carrying out business in New Zealand, provided that the conduct affects a market in New Zealand.

[34] Beyond that, we accept that, if overseas parties agree outside New Zealand to implement a course of conduct in New Zealand which contravenes ss 27 and 30, and a person in New Zealand takes action to give effect to that agreement, the overseas parties can properly be regarded as acting in New Zealand through the New Zealand actor, certainly in circumstances where they have some authority over him or her, as is alleged here. The liability of the overseas persons does not depend on the liability of the New Zealand actors – they may be innocent agents, as Hugh Williams J noted (at [78]).

[35] We find some support for this analysis in *Bray*, which we now discuss in more detail. Several international vitamin manufacturers entered into an international price fixing and market sharing arrangement in respect of vitamin products which they or their subsidiaries sold. A person in Australia brought a

representative action against the international manufacturers, claiming damages and other relief against them on the basis that they had contravened the Australian equivalent of s 27 of the Act, namely s 45 of the Trade Practices Act 1976 (TPA). It was pleaded that the overseas companies carried on business in Australia within the meaning of s 5(1) of the TPA (which is materially identical terms to s 4(1)) by virtue of the control that they exercised over their Australian subsidiaries.

[36] In the context of a challenge to jurisdiction Merkel J rejected this argument (at [80]). The Judge said:

> In my view something more than the indirect legal and commercial capacity of the parent companies to control and direct the subsidiaries, plus the parent's involvement in implementing the cartel arrangement, is required to lift the corporate veil between the subsidiaries and their parents to find that each of the subsidiaries is carrying on its business as agent for the parent. That is particularly so when it is contended (as it is in the present case) that the parent, rather than the subsidiary is engaging in all of its commercial activities on behalf of, and therefore as agent for, the parent.

[37] The Judge went on to say that the service of the overseas manufacturers out of the jurisdiction could only be justified on the basis that the manufacturers had committed conduct in Australia (at [82]). The Judge accepted that they had arguably committed conduct within Australia, so that s 5(1) of the TPA did not come into play. This was because:

(a) Quite apart from any issue of legal control, as a practical matter those acting within Australia were acting at the direction of the overseas manufacturers, so that the overseas manufacturers could be regarded as acting in Australia through agents. As the relevant Australian personnel were acting on behalf of the international manufacturers, the international manufacturers had acted in Australia.

(b) It was a reasonable inference that the overseas manufacturers sent communications and directions from overseas to personnel in Australia in relation to the anti-competitive arrangement. That constituted conduct in Australia.

The combination of these two factors was, Merkel J held, sufficient to establish jurisdiction (at [158]). On appeal, the Federal Court of Appeal accepted that Merkel J's analysis was available.

[38] It is important to emphasise that *Bray* did not go so far as to accept the effects doctrine applied by the United States Court. Jurisdiction was asserted on the basis of conduct occurring in Australia that was attributable to the overseas companies.

[39] *Bomac* concerned the New Zealand end of the same international cartel arrangement as was at issue in *Bray*, and adopted a similar approach. Breaches of s 27 of the Act were alleged. Having referred both to the presumption against a statute being construed to apply to acts of foreigners committed outside the jurisdiction and to s 4(1), Harrison J noted that s 27(1) was concerned with the implementation of, or giving effect to, anti-competitive arrangements in New Zealand. The Judge said (at [59]):

> There can be no complaint that the statute has extraterritorial effect when applied to an arrangement entered into overseas and implemented here. It is not extending its reach to other jurisdictions.

[40] The Judge went on to say that the task was to identify the legal and factual foundation for the argument that the overseas parties had given effect to the anti-competitive arrangements in New Zealand: at [60]. The Judge rejected an argument that the overseas companies were carrying on business in New Zealand through their local subsidiaries: at [74]. However, he concluded there was a "good or strongly arguable" case that the overseas companies had used the New Zealand companies as instruments to give effect to arrangements which they had made overseas and which were designed to affect the New Zealand market. This constituted conduct by the overseas company in New Zealand: at [75] – [83]. The Judge said:

> [89] The key to my conclusion that Bomac has a good arguable case on both causes of action under s 27(2) lies in my acceptance that, first, the issue of whether or not a foreign corporation can give effect to an arrangement through the instrumentality of a local subsidiary, whether by the doctrines of pure agency, s 90(2) *Commerce Act*, or attribution, is in the circumstances of this case a serious or substantial question to be tried and, second, there is a compelling factual basis for it. For the avoidance of doubt, I record that I am satisfied Bomac's argument is sufficiently strong to warrant the New Zealand Court in accepting jurisdiction; its case has a sound foundation.

(Emphasis in original.)

[41] Mr Miles sought to distinguish *Bray* and *Bomac*. He submitted that both involved overseas entities which had made a cartel arrangement overseas and had sent relevant communications or directions to local agents in furtherance of that arrangement. As a consequence, they were held to have given effect to the cartel arrangement in the relevant local jurisdiction through those local agents. Mr Miles said that it would amount to a "significant and unprincipled" extension of *Bray* and *Bromac* if the Court accepted that communications sent and received outside New Zealand could be treated as conduct within New Zealand.

[42] We accept that in *Bray* Merkel J found that there was a reasonable inference that the overseas manufacturers had sent relevant communications and directions from overseas to the local agents in Australia. We accept also that that factor does seem to have been important to Merkel J's decision (see the discussion in Carr J's judgment on appeal at [61]). Putting to one side the allegations about Mr Harris' participation in the New Zealand meeting, a similar inference is not available in this case, given the Commission's concessions.

[43] Despite this, we do not regard proof of personal conduct in New Zealand by the overseas residents as critical to liability. We do not consider that the Commission must show that the appellants participated in meetings in New Zealand or sent relevant communications or directions to persons in New Zealand in order to establish jurisdiction. In our view, it is sufficient that the communications or directions in furtherance of the anti-competitive arrangement were given to New Zealand actors while they were overseas. If the New Zealand actors then acted in New Zealand to give effect to the anti-competitive arrangement, they can properly be regarded as having acted at the direction of, or on behalf of, the overseas residents in that respect. The overseas residents will be regarded as having committed conduct in New Zealand, and s 4(1) will be irrelevant.

[44] We consider that this approach is consistent with basic principle and reflects the realities of globalisation. Increasingly, large international entities are responsible for the manufacture and distribution of goods. If such entities enter into anti-

competitive arrangements overseas directed at a New Zealand market, we do not accept that they can insulate themselves from liability in New Zealand by operating through local entities (whether or not they are subsidiaries) and taking care not to hold meetings in, or to send communications to, New Zealand in relation to the arrangements. The Commission may face practical problems in seeking to hold such entities to account, but there is, in our view, jurisdiction under the Act. As we discuss further below, we consider that this is consistent with the language and policy of the Act.

[45] Mr Miles submitted that this approach cut across the provisions of s 90, which deals with conduct by servants or agents. He said that some form of conduct is required to create an agency relationship under s 90 and that conduct was governed by s 4. As a consequence, in the case of a non-resident, there had to be conduct in New Zealand creating the agency.

[46] We reject that submission. We consider that it would be contrary to the policy of the Act, reflecting the legitimate interests of New Zealand, to require that the conduct on the part of an overseas principal establishing the agency relationship occur within New Zealand. That would create a significant loophole in the Act, particularly as New Zealand is a relatively small country with a heavy dependence on imported products and technology. We do not consider that either s 4 or principles of international comity require such an outcome. In our view, it is consistent with the policy and scheme of the Act that an overseas principal who implements, through a person or entity in New Zealand, an anti-competitive understanding formed overseas but directed at a New Zealand market be subjected to the jurisdiction of the New Zealand courts even if he or she has not personally acted in New Zealand. The case is likely to be stronger if the overseas principal has acted personally in New Zealand (by sending relevant communications to New Zealand or attending relevant meetings in New Zealand, for example), but we do not see such personal action as being a prerequisite to liability.

[47] We turn now to Mr Goddard's argument that there is a useful analogy to be drawn with the treatment of conspiracy at common law. As we have said, Mr Goddard relied on ss 7 and 310 of the Crimes Act. He also referred us to the

decisions of this Court in *R v Saunders* [1984] 1 NZLR 636 and *R v Johnston* (1986) 2 CRNZ 289.

[48] Those decisions turned mainly on the particular language of ss 6, 7 and 310 of the Crimes Act. Although the concept of conspiracy is imported into the Commerce Act, the particular provisions of the Crimes Act discussed by the Court in *Saunders* and *Johnston* were not. As Mr Miles noted, courts do not generally use one statute to interpret another by analogy, although it does happen in some circumstances: see Burrows *Statute Law in New Zealand* (3ed 2003) at 168 – 170.

[49] However, it seems clear that at common law the principles of territoriality in relation to conspiracy were wide: see the comprehensive discussion of the authorities in *Lipohar v The Queen* [1999] 200 CLR 485. At common law, a conspiracy formed abroad to do an illegal act in, say, England could be prosecuted in England even though no overt act had occurred in England in furtherance of the conspiracy. This was determined by the Privy Council in *Liangsiriprasert v United States* [1991] 1 AC 225 (at 251), having been identified as an open question by Lord Wilberforce in *R v Doot* [1973] AC 807 (at 818). Delivering the advice of the Privy Council, Lord Griffiths emphasised the policy considerations which justified this view (at 251):

> Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong.

[50] In the present case we are not asked to go so far. Here the understandings alleged were implemented in New Zealand. Lord Pearson's observations in *Doot* are apposite. His Lordship said (at 827):

> On principle, apart from authority, I think … that a conspiracy to commit in England an offence against English law ought to be triable in England if it has been wholly or partly performed in England. In such a case the conspiracy has been carried on in England with the consent and authority of

> all the conspirators. It is not necessary that they should all be present in England. One of them, acting on his own behalf and as agent for the others, has been performing their agreement, with their consent and authority, in England. In such a case the conspiracy has been committed by all of them in England.

[51] Although we are dealing with a breach of competition law rather than a criminal offence, and are interpreting the Act rather than the common law, we find this reasoning helpful. It recognises the important policy considerations that underlie this area of the law. In arguing that the conspiracy analogy was inapt, Mr Miles submitted that conspiracy was not available in the circumstances of this case. We address that argument in more detail at [74] – [78] below, but even if that is right, we do not agree that the analogy is inappropriate. As we have said, it acknowledges that legal analysis must reflect the reality of increased globalisation, and this is a particularly powerful factor in a case such as the present. Moreover, whether or not conspiracy is available in the present case, the incorporation of that concept into the Act is an indication that Parliament intended the Act to have extraterritorial application in circumstances beyond those referred to in s 4. Otherwise the concept of conspiracy in the Act would have to be limited (by implication) in some way. That is, we would have to find that the concept of conspiracy in the Act is more limited than the concept of conspiracy in the Crimes Act or at common law even though the Act does not itself specifically limit the concept.

[52] To summarise, then, we consider that:

(a) Section 4 extends the scope of the Act to encompass conduct committed overseas by persons resident or carrying on business in New Zealand if it affects a New Zealand market. It does not require positive conduct in New Zealand.

(b) Section 4 does not address the situation where overseas residents (who have not personally acted in New Zealand) have entered into an anti-competitive arrangement overseas in relation to a New Zealand market and that anti-competitive arrangement has been implemented in New Zealand by local persons who were themselves parties to the arrangement or acting at the direction or with the authority of the

overseas persons. That situation must be addressed as a matter of interpretation (which includes reference to the policy and purposes of the Act), and by reference to the relevant principles set out in the authorities.

(c) Adopting that approach, we consider that Hugh Williams J was right to accept that the Commission's claims against the appellants fell within the scope of the Act.

The "good arguable case" threshold

[53] Mr Miles submitted that Hugh Williams J had failed to apply the correct test of "good arguable case". He drew attention to the observation of Harrison J in *Bomac* (at [28](c)) that:

> The presence of the qualitative element of "good" necessarily means that the test is more rigorous than the threshold of tenability or arguability applied on an application to strike out…

(which Hugh Williams J referred to at [23]) and contrasted that with the following statement of Hugh Williams J (at [249]):

> … the satisfaction of the good arguable case test is not an unduly exacting hurdle for a plaintiff to clear. As the authorities show, it is much lower than the test to strike out a proceeding and lower than, say, the test for summary judgment, still less judgment after trial.

[54] Mr Miles said that the evidence must be "plausible and credible", not simply "speculative or conjectural", relying on Somers J's judgment in *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4 in a summary judgment context, and advocated that the court take a "robust" approach to evaluating conflicting affidavit evidence. He urged a "pragmatic assessment" which reflected commercial realities.

[55] Mr McEntegart made similar submissions, arguing that Hugh Williams J had effectively adopted an approach which meant that the Commission was required to do little more than simply make allegations. He submitted that in accordance with *Stone*, the Judge was required to apply a more rigorous test of plausibility given that

the Commission had had access to a significant amount of information. He then went on to address the position in relation to each of the relevant understandings in turn.

[56] For his part Mr Goddard submitted that the New Zealand authorities make it clear that the court is not required to hold a mini trial when dealing with a protest to jurisdiction. Rather, the court must be satisfied that the claim is more than "merely speculative or conjectural", having regard to the relevant evidence and pleadings. He referred to *Agar v Hyde*, where Gaudron, McHugh, Gummow and Hayne JJ held in their joint judgment that the relevant standard was the same as that applied on a defendant's application for summary judgment. They said:

> [60] [T]he same test should be applied in deciding whether originating process served outside Australia makes claims which have such poor prospects of success that the proceeding should not go to trial as is applied in an application for summary judgment by a defendant served locally.

Mr Goddard submitted that this approach was "correct in principle, and sensible from a practical perspective". He urged us to take account of "the commercial and practical realities of contemporary trans-Tasman dealings".

Our evaluation

[57] Ultimately, what a court must assess in a case such as this is whether "there are sufficient grounds for it to properly assume jurisdiction": *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd (No 2)* [1989] 2 NZLR 50 at 54 (CA). In *Stone* this Court said that the requirement that there be a good arguable case on the merits was in part directed at insuring that the claim against the foreign resident was "not speculative": at [24]. The court's focus would be on the allegations made in the statement of claim and the affidavit evidence provided by the plaintiff, at least where discovery had not been completed. But where the documentary evidence appeared to be available, the court was not obliged to accept uncritically what the plaintiff asserted: at [25]. The Court then said:

> [26] We do not think it constructive to be more specific as to what constitutes a good arguable case in this context. In particular we do not regard the gloss that "the plaintiff is probably right upon it" offered in the

> judgment of the Court of Appeal in *Attack Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 WLR 1147 (CA) at p 1155, as helpful in New Zealand. *What is a good arguable case is a straightforward test which comes down to a matter of judgment, in all the circumstances, having regard to the principle of restraint concerning a foreign citizen resident overseas*.
>
> (Emphasis added.)

[58] In *Bomac* Harrison J referred to the different formulations of the appropriate test in *Kuwait Asia Bank* and *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 at 452 per Lord Goff of Chieveley ("good arguable case" as opposed to "serious question to be tried") and said:

> [41] In my respectful opinion the distinction between the two tests is more semantic than real. It is illustrated by the approach, outlined above, which I intend to adopt when considering the merits on this application. There are two stages in this inquiry. First, is there a serious or substantial legal question to be tried or argued on a particular cause or causes of action? Second, if so, has Bomac established a credible or plausible factual basis for the legal question? At the second stage the touchstone is satisfaction that the claim is more than merely speculative or conjectural (*Stone* (supra) at para 24). All relevant evidence and the pleadings are to be considered. If both questions are answered affirmatively, Bomac's argument will be sufficiently strong to warrant the New Zealand Court accepting jurisdiction; its case will have a sound foundation. In that event, the Court's inquiry should cease, and its scope should not widen into disputed questions of fact.
>
> [42] On this approach I do not discern any significant difference between the tests of a good arguable case and a serious question to be tried. In practice, whichever label is adopted, the result is likely to be the same. Indeed, Mr Stevens submitted that ultimately Bomac would be able to satisfy either test.

[59] This approach was adopted in *Baxter*: at [24].

[60] While it seems that their Lordships in *Seaconsar* did see a difference between the two tests (see 456–457 per Lord Goff), we consider that the general approach articulated by Harrison J in *Bomac* at [41] is correct, at least under the High Court Rules as they stood. (We note that the new High Court Rules, rr 6.28 and 6.29, incorporate the *Seaconsar* formulation – serious question to be tried. We make no comment on whether that introduces a different test.) We see Harrison J's approach as being consistent with the "straight forward" test referred to by this Court in *Stone*. It follows from this that we do not agree with Hugh Williams J's observation that the test is "much lower than the test to strike out a proceeding" (see [53] above),

although we note that the Judge seems in fact to have applied a more rigorous test when analysing the individual claims against the appellants.

[61] In our view, the good arguable case test is met if the claim against the overseas resident is arguable as a matter of law and is plausible (as that concept is utilised in the context of summary judgment applications: see *Pemberton*) and not speculative. Clearly the test does not envisage a mini trial. We emphasise that the "plausibility" requirement does not mean that the court will determine credibility issues where there is a contest on the affidavits, except in exceptional cases where the court can be satisfied that the claim is meritless. An example might be where there is some objective evidence which shows that one version of events is untenable. But this will be comparatively rare.

[62] How much material will be required to persuade the court will depend in part on the stage that the case has reached. Here the Commission has required parties to produce documents and to attend interviews. So while the Commission need not show that it will ultimately succeed in establishing liability, the court's assessment of its claims must recognise that the Commission has had the opportunity to conduct a thorough investigation.

[63] As to Mr Goddard's submission that we should take account of the fact that the conduct alleged in this case is said to have occurred in Australia, while we do not want to suggest that there is one rule for foreign residents from Australia and another for foreign residents from elsewhere, we accept that the location of the foreign resident may be a factor to which the court may have regard in reaching a decision whether to allow the proceeding to continue. As Asher J said in *QPAM*, "[t]he principles that apply to the jurisdiction of the Court to hear causes against foreign companies have not changed, but it would be foolish to not acknowledge the reality of the close business ties between Australia and New Zealand": at [68].

[64] In the judgment under appeal, Hugh Williams J made the same point. He said:

> [241] This claim is concerned with the actions and interactions between two groups of companies both operating in the same market and each

> operating on both sides of the Tasman. Constant interactions between New Zealand and Australian members of the same group are accordingly inevitable, even commonplace, as both sought to maximize their financial performance and that of the group. Therefore, although the jurisdictional reach of the Court and the dicta in *Bray* need to be kept constantly in mind, it is somewhat artificial to try to maintain as rigid a division between actions in New Zealand and those of Australia as the protesting defendants sought to do. When Trans-Tasman travel and communications were as frequent and normal in Koppers and in Fernz/Osmose as the evidence demonstrates, even keeping the territorial limitations in *Bray* in mind, retrospective dissection of the parties' actions along a rigid Tasman division can be unrealistic.

[65] We agree with that assessment.

Does satisfaction of the good arguable case threshold in relation to one cause of action allow the court to exercise jurisdiction over other causes of action?

[66] Mr McEntegart advanced this argument on behalf of the appellants. He noted that Hugh Williams J had accepted the Commission's submission that the finding that there was one good arguable cause of action had the result that all causes of action against the particular defendant could be pursued, relying on *Bomac* at [45] and *Baxter* at [27]–[28], and on *Bray* on appeal, at [39] per Carr J and [190] per Branson J. He argued that the Judge was wrong to accept the Commission's submission, as it was inconsistent with established authority. Mr McEntegart relied in particular on *Jones v Flower* (1904) 24 NZLR 447 (SC), but also on other cases. In addition, he referred to the following extract from Dicey, Morris and Collins *The Conflict of Laws* (14ed 2006) at 11-154:

> It is not permissible to litigate any other cause of action which does not fall within one of the clauses. Where permission to serve out of the jurisdiction is based on one cause of action it cannot be treated as permission based on some other cause of action.

[67] Mr Goddard submitted that it was open to the Court to hold that if a plaintiff satisfies the rule's requirements in relation to any cause of action, the Court would have jurisdiction to hear all causes of action raised in the proceeding. Mr Goddard referred to *Bomac* at [45], *Baxte*r at [28] and *QPAM* at [54]. He submitted that this approach was consistent with the language of r 219, which allows a "proceeding" to be served if a cause of action falls within any limb of the rule.

[68] However, while saying that this was an available view, Mr Goddard submitted that the better view was that once jurisdiction was established against a defendant in relation to one cause of action, jurisdiction could be assumed in respect of all related causes of action. He referred to various authorities by way of analogy and noted that r 131(7) can be used to prevent wholly unrelated causes of action from being pursued in New Zealand. As far as the claims in the present case are concerned, Mr Goddard submitted that they are related, so that if there is an arguable case in relation to one, all can properly be litigated in New Zealand.

Our evaluation

[69] As it transpired, although Hugh Williams J addressed this point, it was unnecessary for him to do so as he found that there was a good arguable case in respect of all claims against the appellants. As we indicate below, we agree with the Judge's assessment in that respect. Accordingly, we do not propose to address this issue in any detail. Rather, we simply express a tentative view.

[70] We consider that where the causes of action are related, and a good arguable case is found on one, it is appropriate to permit the other causes of action to proceed as well. To adopt the very narrow approach advanced by the appellants seems to us wrong in principle and, in practical terms, to be artificial and wasteful of court resources.

[71] We acknowledge, however, that the position may be different where the causes of action do not arise out of the same sequence of events, so that they are largely independent of each other. The same may also apply where one cause of action can be shown to be certain to fail because, even accepting the facts alleged, the claim is unsustainable.

[72] While it is true that Harrison J in *Bomac* (at [45]) and O'Regan J in *Baxter* (at [28]) seem to have accepted the broader approach, in each case the causes of action arose out of the same sequence of events and so were connected. Accordingly, neither Judge needed to utilise the broader approach. Similarly in *Bray*, where the Full Court of the Federal Court appeared to accept the broader

approach even though the causes of action were clearly interrelated: see Carr J at [38] – [55], Branson J at [176] – [190] and Finkelson J at [221] – [230]. We are reluctant to go that far in the present case, however, as it is not necessary to do so, and because we see considerable force in the points Mr Goddard made in relation to the broader view.

[73] In the present case the various claims against each appellant are clearly related. An overarching understanding is alleged, together with a number of specific understandings arising out of that over-arching understanding. All the understandings relate to market manipulation of the timber preservatives market and all involve substantially the same players. Accordingly we consider that it would be sufficient to establish a good arguable case in relation to one claim to allow all to proceed.

Availability of conspiracy

[74] In the context of meeting Mr Goddard's argument that the law in relation to conspiracy provided a useful analogy in relation to the territorial scope of the Act, Mr Miles drew attention to the conspiracy allegation in cause of action 48. By a series of "and/or" alternatives, that cause of action includes an allegation of conspiracy to contravene s 27. Mr Miles submitted that the conspiracy and the proscribed agreement, arrangement or understanding under s 27 were one and the same, so that the conspiracy allegation was inappropriate. As we have said, he relied in particular on *Trade Practices Commission v Allied Mills Industries Pty Ltd*.

[75] In that case certain anti-competitive arrangements or understandings were alleged, together with conspiracies to enter into such arrangements or understandings. Sheppard J held that it was not appropriate to allege an anti-competitive arrangement or understanding and a conspiracy to enter such an arrangement or understanding where the particulars provided showed that the underlying agreement alleged to constitute the conspiracy was the same as that alleged to constitute the arrangement or understanding: at [578] – [579]. Put another way, it is not appropriate to charge conspiracies which are themselves proscribed arrangements or understandings.

[76] Mr Goddard accepted that there are logical difficulties in respect of an allegation against A of conspiring with B to enter into an anti-competitive agreement with B, but submitted that there was no logical difficulty with an allegation that A conspired with B to enter into an anti-competitive agreement with C. In the latter case, the conspiracy was logically and temporally prior to the anti-competitive agreement, which was a distinct agreement. Mr Goddard said that the conspiracy allegations in the present case did not suffer from the logical and temporal objection identified by Mr Miles.

Our evaluation

[77] There is in principle no reason why there could not be a conspiracy to enter into an anti-competitive agreement, arrangement or understanding. So, A and B might conspire with each other to enter into an anti-competitive agreement with C and D. Sheppard J recognised this in *Allied Mills*, and so focussed on what was alleged in the pleading before him: at 577 – 578. It was the fact that the pleaded particulars in support of the conspiracy allegation were identical to those in support of the anti-competitive agreement allegation that led him to his conclusion: at 579.

[78] Adopting that approach, we do not agree that the structure of the pleading produces the objectionable result identified by Mr Miles. But even if it did, we do not see that as having any particular significance in the present context. It does not destroy the value of the analogy that Mr Goddard drew and which we addressed earlier. Further, the conspiracy allegation is simply one alternative among a number of others.

Admissions in agreed statements of facts

[79] Mr Miles referred to the following passage from the judgment of Hugh Williams J:

> [245] … [A] third significant commercial factor impinging on this application, is that the Commission is not in the position of having to plead the various understandings and prove them at trial: it has the admissions of breach by most of the corporate and many of the individual defendants.

> Messrs Poynter, Akle and Harris, therefore, protest the jurisdiction of this Court to adjudicate on the Commission's claims against them against the background that their employers and a number of their competitors and fellow employees at the time – those who could direct their actions and those whose actions they could direct – have admitted their part in conduct significantly contravening the Act and are prepared to give evidence against them if the Commission's application to set aside their R 131 protests is successful.

[80] Mr Miles submitted that the Judge had failed to distinguish between evidence properly adduced in the protest hearing and admissions and statements filed in the proceeding generally. He said that the Judge was wrong to treat such agreed statements of fact as relevant for the purposes of determining whether the Commission had shown a good arguable case against the appellants. In any event, he submitted, since the statements were not given on oath, little weight could be given to them.

[81] Mr Goddard submitted that while the agreed statements were not directly admissible, they showed that the claim was not merely conjectural and that there was relevant evidence that could be given at trial.

Our evaluation

[82] This issue is related, in part at least, to the next issue, after-acquired evidence. As with that type of evidence, we consider it artificial to ignore the admissions concerning the undertakings by those companies and individuals which have made them. The effect of those admissions is to acknowledge the existence of the various understandings alleged by the Commission. Even if they are not admissible against the appellants, we consider that they are relevant to the court's assessment of whether or not the Commission has a good arguable case, as Mr Goddard argued. That assessment should not depend on the material being put forward by a plaintiff being admissible at trial. Such a requirement is likely to result in at least some applications to set aside protests turning into contests about the admissibility of evidence at what might be an early stage of the litigation.

[83] That there are admitted understandings does not, of course, mean that the appellants were parties to them. The Commission must be able to point to additional

evidence going to that aspect of the case. But subject to that, we see no reason why the fact that understandings have been admitted by others should be ignored by the court dealing with the protests.

Is evidence obtained after the service of the proceedings relevant?

[84] Mr Miles argued that the Commission had to have a reasonable evidential basis to justify its decision to serve outside the jurisdiction at the time of service, rather than at the time an application to set aside the protest was heard. He submitted that a plaintiff without a sufficient evidentiary basis to justify service of an overseas defendant at the time service could not rectify the defects in its evidence subsequently so as to justify its decision to serve.

[85] Mr Goddard submitted that the appellants' argument was "novel and misconceived". He argued that it was commonplace for parties to use material that had become available subsequent to service to establish its case against the party served. He submitted that the approach was unworkable as it would be difficult to identify what information the plaintiff had at the time of service and what became available subsequently. Further, as the Commission was seeking to establish only that it had a plausible, non speculative case, rules as to admissibility that would apply at trial did not operate to prevent reliance on things such as Commission reports, which inevitably contained hearsay.

Our evaluation

[86] We consider that Hugh Williams J was right to uphold the Commission's arguments on this point. As the Judge said (at [45]), litigation moves on. It makes no sense to limit a plaintiff to relying on material available at the time of service when subsequently more cogent or compelling evidence becomes available which confirms the strength of the plaintiff's case against the defendant. For example, at the time of service on the foreign defendant, the Commission may be forced to rely on inferences that it says can properly be drawn against the defendant on the basis of documentary material. By the time the application to set aside the defendant's

protest is heard, however, the Commission may be in possession of compelling evidence which shows that those inferences are irrefutable. It is difficult to see why, as a matter of principle or policy, the Commission should be limited to utilising the evidence that it had when it served the proceedings, and we see nothing in the Rules to require such an outcome.

[87] Apart from that, we agree with Mr Goddard that there would be significant practical problems, at least in some cases, if such an approach were to be adopted. It would require a plaintiff to take care to record precisely when it acquired particular information against the overseas defendant, and would lead to unproductive disputes about whether or not particular pieces of information could or could not be taken into account in the context of an application to set aside a protest.

Was there a good arguable case in relation to each appellant?

[88] Mr Miles on behalf of Mr Poynter and Mr McEntegart on behalf of Messrs Akle and Harris argued that the Judge was wrong to find that there was, on the pleadings and evidence, a good arguable case in respect of each appellant. Both acknowledged the difficulty of such an argument on an appeal. This is particularly so where the judge has carried out a detailed and comprehensive analysis of the evidence, as Hugh Williams J plainly did, and where the arguments raised on appeal are essentially those put to the judge, as they are here. Nevertheless, counsel submitted that in the circumstances of the case this Court should be prepared to interfere with the Judge's findings. Accordingly, we propose to address the position of each appellant in turn.

[89] All counsel drew our attention to a good deal of evidentiary material in an effort to challenge, or establish, that there was a good arguable case against each of the appellants. As we have said, most of it was put to Hugh Williams J. We cannot hope to address all the material referred to. More importantly, it is not our function to do so. Our role is limited to assessing whether there is, as Hugh Williams J held, a plausible, non-speculative case against each appellant. In that, we take account of the stage the Commission's investigation has reached. But we are not attempting to predict the outcome of the trial, and cannot make assessments as to credibility unless

there is objective evidence sufficient to satisfy us that particular claims are implausible. Accordingly, our treatment will be brief.

Mr Poynter

[90] Mr Miles submitted that the entire case against Mr Poynter rested on the suggestion (which Mr Poynter denied) that he knew of acquiesced or assisted in the alleged understandings entered into by Mr Greenacre, his subordinate at Fernz. He submitted that when Hugh Williams J had concluded that there was a sufficient basis for the Court to exercise its discretion to assume jurisdiction (at [263]) he had:

(a) disregarded the evidence filed by Mr Poynter;

(b) misunderstood the Commission's evidence;

(c) disregarded the lack of contemporaneous documentation and the passage of time since the events alleged; and

(d) disregarded the concerns raised by Mr Poynter about the reliability of Mr Greenacre.

[91] Mr Miles pointed to Mr Poynter's affidavit evidence, where he said that he had little day to day involvement with the New Zealand operations, and that it was Mr Greenacre and Mr Lea who were responsible for them.

[92] Mr Goddard argued that that there was sufficient evidence to support a good arguable case as to Mr Poynter's involvement in the overarching understanding, the 1998 price rise understanding and the Fletcher Forests understanding. He said that there was clear evidence of the existence of the relevant understandings, particularly given the admissions that had been made by other parties. Mr Greenacre was a key participant in the understandings, and Mr Poynter was his immediate supervisor. Mr Goddard emphasised Mr Poynter's role within Fernz and what Mr Greenacre said about Mr Poynter's interest and involvement in the New Zealand operations. He

pointed to evidence of Mr Poynter's participation in meetings with competitors, which, he said, dealt with pricing issues.

[93] In relation to the overarching understanding he referred to meetings in 1998, 1999 and 2000, which variously involved (among others) Mr Mullen, Mr Byron and Mr Langton, all of whom were employees or officers of various Koppers companies. The 1998 meeting was also, he submitted, relevant to the 1998 price rise understanding. He pointed to Mr Poynter's interest and involvement in the Fletcher Forests tender and said that, as with the overarching and 1998 price rise understandings, there was other evidence from which an inference could reasonably be drawn that Mr Poynter was involved. Mr Goddard submitted that, as Mr Greenacre's immediate superior and later as a director of Fernz, Mr Poynter effectively encouraged Mr Greenacre to continue to breach the Act by not intervening to put a stop to his activities.

Our evaluation

[94] Clearly Mr Greenacre's evidence is an important feature of the Commission's case against Mr Poynter in relation to the various understandings, particularly the overarching understanding. Mr Greenacre said that when Mr Poynter took over as his superior in early 1998 he briefed him about "the level of contact and the basis on which pricing issues were dealt with". He said that he made Mr Poynter aware of how things operated over the course of several meetings and that he had no concerns about discussing this with Mr Poynter as interactions with competitors over pricing were "the norm" in the industry and were "an open secret".

[95] Mr Miles described Mr Greenacre's allegations as "unsupported and vague" and said that Mr Greenacre had no credibility as a result of his conviction for misleading the Commission. Without some supporting material (such as contemporaneous documents) Mr Greenacre's evidence was insufficient to warrant the assumption of jurisdiction.

[96] The difficulty with this latter submission is, of course, that there may well be little in the way of supporting documentation where there is a sophisticated pricing

cartel. In such a case much will depend on the evidence of those involved and on circumstantial evidence (for example, the occurrence, composition and timing of meetings in relationship to relevant market events and the responsibilities of particular employees or officers within the relevant organisations) from which inferences may reasonably be drawn. As we understand it, this is the type of case that the Commission seeks to advance against Mr Poynter (and the other appellants), and the Commission will be in a position to lead evidence from witnesses (other than Mr Greenacre) who were involved in the various meetings on which it relies.

[97] It may be that following a trial, the court will conclude that the Commission has not established its case against Mr Poynter to the requisite standard. The court may not believe Mr Greenacre (or the other witnesses) and/or may not be prepared to draw the inferences that the Commission says can be drawn from the meetings and the position of responsibility that Mr Poynter had in respect of Mr Greenacre. But it is not our task to make such an assessment at this stage. We agree with Mr Goddard that the material before us does not enable us to say that Mr Greenacre's story is implausible, to the extent that we can safely discount it. That is a decision which can only be made at trial, when all the evidence is presented and tested. And, as we have said, there is other evidence on which the Commission will rely.

Mr Akle

[98] Mr McEntegart said that in the period 1997 – 2001 Mr Akle was Finance Manager and then Commercial Manger for the Fernz timber protection business in Australia. In that capacity he had no authority in relation to Fernz New Zealand operations. Rather, his day to day management responsibilities related to Australian operations. While he did on a monthly basis consolidate the accounts for the timber protection operations of the Fernz group (including New Zealand), local finance managers reported to their respective general managers rather than to him. The affidavit evidence of Fernz personnel, Mr McEntegart submitted, supported this position. The Commission's allegation that that Mr Akle had some responsibility for Fernz New Zealand operations depended principally on the conclusions of the Commission's investigator, and that was unreliable. Accordingly, there was no basis

for finding a good arguable case against Mr Akle in relation to activities of Fernz in New Zealand, including the overarching understanding and the 1998 price rise understanding.

[99] In relation to the activities of Osmose in New Zealand, Mr McEntegart said that Mr Akle similarly never had any reporting line in respect of the New Zealand operations, and the Commission's evidence was insufficient to show any responsibility. Further, the Commission's summary of the evidence did not allege any omissions against Mr Akle. Finally, Mr McEntegart submitted that even if Mr Akle was treated as having some relevant authority, there was no basis for finding a good arguable case against him in any of the respects alleged by the Commission.

[100] Mr Goddard submitted in response that there was evidence that Mr Akle knew about, and was involved in, Fernz New Zealand operations. Mr Goddard argued that the evidence showed that Mr Akle had attended relevant meetings and accepted responsibility for tasks in relation to New Zealand operations. In particular, Mr Goddard said that Mr Akle attended a critical meeting in June 1998, which was an important step in the establishment of the overarching understanding and the 1998 price rise understanding. He noted that Mr Akle had admitted that Australian prices were discussed at that meeting but denied hearing any discussion about New Zealand prices, and submitted that it was open for a court to infer that Mr Akle was aware that the understandings extended to New Zealand.

[101] Mr Goddard also referred to affidavit evidence to the effect that Mr Akle met with Koppers' executives in 2001 and attempted to encourage them to comply with the overarching understanding by not competing for customers, and that Mr Akle took steps to implement the TimTech exclusionary arrangement. Mr Goddard submitted that there was sufficient to establish a good arguable case against Mr Akle.

Our evaluation

[102] Mr Akle denies that he was involved in any understandings in relation to the New Zealand operations of Frenz or Osmose. But there is evidence that he knew of

the anti-competitive arrangements in Australia, and attended at meetings relevant to the New Zealand understandings. He reported to Mr Greenacre, who was heavily involved in the anti-competitive understandings and who described Mr Akle as "his right hand man". Undoubtedly Mr Greenacre's evidence implicates Mr Akle. Mr McEntegart characterised that evidence as "speculative", but Mr Greenacre was Mr Akle's immediate superior and is well placed to give evidence of the knowledge of those with whom he worked.

[103] Further, some of internal documents do, as Hugh Williams J noted (at [104]), suggest that Mr Akle had a greater role in relation to New Zealand operations that he now seems prepared to accept. It seems that Mr Akle had regular discussions with relevant New Zealand personnel about Fernz' and then Osmose's New Zealand business. In addition, there is evidence that he was copied in on emails to Mr Greenacre from New Zealand Osmose personnel about Koppers' price arrangements with particular customers, which were said to have breached the price understandings: see Hugh Williams J at [126].

[104] Mr McEntegart conducted a detailed and careful analysis of this and other evidence in an effort to demonstrate that it could be answered. That may be so. But, as we have said, it is not our function to make that assessment at this stage. Overall, we are satisfied that the Judge was right to find that there was a good arguable case against Mr Akle in the respects alleged by the Commission. Whether it is a case that will ultimately succeed is of course a different matter.

Mr Harris

[105] Again, Mr McEntegart undertook a detailed and careful examination of the evidence in an effort to persuade us that there was no good arguable case against Mr Harris in relation to the overarching understanding or the TimTech exclusionary arrangement. Much of his argument in relation to the evidence supporting Mr Harris' alleged involvement in the overarching understanding focussed on attempting to establish that the affidavit evidence of a Koppers New Zealand executive, Mr Boyle, and of Mr Greenacre was unreliable and/or misdirected.

[106] In relation to the TimTech exclusionary arrangement, Mr McEntegart's focus was on the evidence of Mr Greenacre and the Commission's investigator, Mr Sutton. He described Mr Greenacre's evidence as simply being "assertions". In part this was because Mr Greenacre referred to "general knowledge" among the senior management team (which included Mr Harris). Where specifics were given, Mr McEntegart sought to explain them away. Mr Sutton's evidence dealt mainly with what appeared from email communications. Again, Mr McEntegart said that it fell short of demonstrating Mr Harris' involvement.

[107] Mr Goddard drew attention to Mr Harris' role within the Osmose group. He emphasised that Mr Greenacre reported to him. Mr Greenacre said that he briefed Mr Harris on the overarching understanding in the context of the due diligence process that Osmose carried out prior to its purchase of Fernz. The evidence of Mr Boyle of Koppers is that Mr Harris met with him in Australia in October 2001 in an attempt to persuade him that Koppers should compete less aggressively and maintain the overarching understanding. Mr Goddard said that Mr Harris had attended a meeting in New Zealand in June 2002 at which the Osmose representatives complained about Koppers' aggressive conduct in the market place. Mr Harris, he said, had attempted, unsuccessfully, to secure Koppers' compliance with the overarching understanding.

[108] Mr Goddard also emphasised the steps that the Commission said Mr Harris took in relation to the TimTech exclusionary arrangement. Overall, Mr Goddard submitted that Mr Harris had knowledge of the relevant anti-competitive arrangements and could have stopped them, but failed to do so.

Our evaluation

[109] Again, we consider that the Judge was right to find that there was a good arguable case against Mr Harris as alleged by the Commission, for the reasons he gave. While Mr Harris was not involved in the day to day management of Osmose NZ, he was consulted about strategic and management issues in relation to the New Zealand business. Mr Greenacre reported directly to him, and kept in regular email communication with him. Further, Mr Harris visited New Zealand several

times a year for discussions with senior staff. And in his case there is the additional factor of evidence of conduct in New Zealand, namely participation in the June 2002 meeting. Again the background of this and the other evidence which the Judge discussed, we consider there is material on the basis of which a court could properly infer that Mr Harris was involved in the overarching understanding and the TimTech exclusionary arrangement.

[110] We have concluded that Hugh Williams J was right to find that there is a good arguable case against each appellant in the respects alleged by the Commission. We note, however, that it is sufficient to find a good arguable case on one element of the claim against an appellant (e.g., the overarching understanding) to allow the full claim against him to proceed given that the claims flow from the same sequence of events and so are interrelated.

Decision

[111] The appeals are dismissed. Each of the appellants must pay the Commission costs of $4,000, plus usual disbursements.

[112] We make the following confidentiality orders, by consent:

(a) Material identified as confidential in the Case on Appeal is to be treated as confidential (the confidential material).

(b) The confidential material may not be disclosed to any person other than the Commerce Commission, its staff and counsel and counsel for the appellants.

(c) The Court file may not be searched without the leave of the Court, which must be sought on notice to the parties.

These orders will apply until further order of the Court, with leave reserved to any party to apply on notice for the orders to be varied or discharged.

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