IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2007-404-007237
[2014] NZHC 649

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	JAMES GEORGE HODGSON Sixth Defendant

Hearing: 12 March 2014

Appearances: J B Hamlin and J C L Dixon for Plaintiff
No appearance for Sixth Defendant

Judgment: 2 April 2014

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 2 April 2014 at 4.00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

Introduction

[1] This proceeding concerns an understanding reached between Amcor Ltd and its competitor Visy Board (NZ) Ltd and Visy Board Pty Ltd in contravention of the Commerce Act 1986 (the Over-arching Understanding).[1] All the claims have been resolved except that against the sixth defendant, James George Hodgson.[2] He is the former Group General Manager of Amcor Fibre Packaging Australasia (AFPA), an Amcor subsidiary. Mr Hodgson is alleged to have been involved in both the Over-arching Understanding and in a specific understanding relating to Fonterra Cooperative Group (the Fonterra Understanding).

[2] Mr Hodgson has taken no steps in the proceedings. The Commission is seeking judgment against him by formal proof on the 7th and 44th causes of action pleaded in the first amended statement of claim. In respect of those causes of action it seeks a pecuniary penalty of $70,000 together with costs of $38,352 and disbursements of $3,071.54. The remaining causes of action against Mr Hodgson are not pursued.

[3] It appears that proceedings for a civil pecuniary penalty under the Commerce Act 1986 have not previously proceeded by way of formal proof. Mr Hamlin, however, referred me to Wylie J's decision in *Department of Internal Affairs v Mansfield* in which a civil pecuniary penalty under the Unsolicited Electronic Messages Act 2007 was imposed following a formal proof hearing.[3] I respectfully agree with Wylie J that there is no reason that a claim for pecuniary penalties should not proceed in the same way, there being no alternative procedure available.

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1 The Over-arching Understanding was discovered by Amcor during unrelated litigation in Australia. Amcor approached the Australian Competition and Consumer Commission (ACCC) seeking leniency. Judgments have since been entered in both New Zealand and Australia (under the Australia Trade Practices Act 1974) against both the companies and individual executives responsible for the understanding.

2 *Commerce Commission v Visy Board (NZ) Ltd & Ors* [2013] NZHC 2097.

3 *Department of Internal Affairs v Mansfield* [2013] NZHC 2064.

The claim for a pecuniary penalty

Section 80 of the Commerce Act 1986

[4] By entering into the Over-arching Understanding and the Fonterra Understanding, Amcor contravened Part 2 of the Commerce Act, s 27(1) and (2) of which provides:

> (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.

[5] The Commission alleges that Mr Hodgson was a party to Amcor's breaches through his involvement in the Fonterra Understanding. Under s 80 the Commission can apply for a pecuniary penalty against any person who contravenes Part 2 or is a party to such contravention:

> (1) If the Court is satisfied on the application of the Commission that a person –
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> (a) has contravened any of the provisions of Part 2 of the Act; or
>
> ...
>
> (e) has been in any way directly or indirectly knowingly concerned in or party to the contravention by any other person of such a provision
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> ...
>
> the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate.

[6] The Commission claims that Mr Hodgson was "directly or indirectly, knowingly concerned in or party to, the contravention by" Amcor by reason of his involvement in the Fonterra tender. In advancing the application for a pecuniary penalty Mr Hamlin, for the Commission, relied on the broad meaning of "party to" taken by Miller J in *Commerce Commission v New Zealand Bus Ltd* in the context of the identically worded s 83(1)(e).[4] That approach, approved on appeal[5] and applied

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4 *Commerce Commission v New Zealand Bus Ltd* (2006) 8 NZBLC 101,774; (2006) 11 TCLR 679.

5 *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502.

in the context of s 80 in *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*[6] is:[7]

> It is true that much of s 83(1) is drawn from the criminal law, which requires that at accessory do something positive by way of assistance or encouragement. But the legislature has gone beyond the notions of aiding, abetting, inciting, counselling, procuring or conspiring. Section 83(1)(e) attaches to a person who has been in any way, directly or indirectly, knowingly concerned in or a party to, the contravention of s 47. In that context "party to" simply means "participate in" or "takes part in": *Re Maidstone Buildings Provisions Ltd* [1971] 1 WLR 1085; [1971] All ER 363 at p 1092; p 368. The term also includes one side to a contest, litigation, or contract as opposed to another, as the Shorter Oxford Dictionary makes clear ...

[7] This statement related only to the *actus reus*. Later Miller J described the requirements for the mental element of accessory liability (also affirmed on appeal and applied in *Koppers Arch Wood*):[8]

> ... An accessory is liable under s 83 only if its participation was intentionally aimed at the commission of the acts that form the principal's contravention, namely the acquisition of assets or shares. Mr Goddard pointed out that it will be a rare case in which participation is not deliberate. That may be true of the major participants but it need not be so of those at the margins of the transaction.

[8] It is for the Commission on this application to show, first, that Mr Hodgson took part in the Fonterra Understanding and, secondly, that he did so intentionally, knowing the essential matters that comprised the Fonterra Understanding. It is not necessary to show that he also knew that those matters amounted to a contravention of the Commerce Act.

The Over-arching Understanding

[9] At the relevant times the Visy and Amcor groups dominated the corrugated fibreboard packaging (CFP) market in Australia, where Amcor Australasia Ltd (Amcor) and Visy Australia were the two main competitors. In New Zealand there were three main competitors, namely Visy NZ and Amcor Packaging (New Zealand) Ltd and Carter Holt Harvey Ltd. As the Group General Manager of AFPA Mr Hodgson had responsibility for Amcor's New Zealand CFP operation. Amcor

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6 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805.
7 *Commerce Commission v New Zealand Bus Ltd,* above n 4, at [223].
8 At [230].

New Zealand's Group General Manager and Director, Peter McElroy, reported directly to him.

[10] Between 2000 and 2004 Visy and Amcor agreed, pursuant to the Over-arching Understanding, to maintain their respective market shares and not to deal with one another's customers. It was part of the Over-arching Understanding that in the event a customer did change suppliers the new supplier would give up one of its own customers by way of "compensation". The companies also agreed to collaborate on price. Pursuant to the Over-arching Understanding specific understandings were reached regarding particular customers. One of these was the Fonterra Understanding, which related to the 2004 tender for Fonterra business.

[11] The Commission alleges that Mr Hodgson was knowingly concerned in or party to Amcor's entry into the Fonterra arrangement with Visy pursuant to the Over-arching Arrangement. It relied to a large extent on admissions made by other Amcor executives and, to a lesser extent, on admissions by Mr Hodgson himself, to prove his involvement in the Over-arching Understanding.

[12] Edward Laidlaw, a former General Manager-Marketing for AFPA, provided an affidavit in this proceeding dated 13 August 2009 in which he described a meeting in July 2000 with Peter Brown, the Managing Director of Amcor Australia at which Mr Hodgson was also present. Mr Laidlaw described Mr Brown outlining the understanding that he had reached with the CEO of Visy Board Australia, Harry Debney, to the effect that Amcor and Visy would not seek to take one another's major customers, would allow market shares to stay at about their current levels and focus on increasing prices and improving margins.[9] Mr Laidlaw's understanding at that time was that the arrangement related only to CFP in Australia. He was told by Mr Brown that he was to be the Amcor contact and that he was to talk to Rod Carroll of Visy from time to time in relation to the understanding. Mr Brown then said words to the effect that "Jim Hodgson will need to arrange a meeting to introduce you to Carroll".

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[9] Although Mr Laidlaw's evidence centred mainly on discussion between him, Mr Hodgson and Mr Carroll, it was accepted by Amcor and Visy that their superiors also met and discussed the understanding.

[13] Mr Laidlaw described subsequent conversations with Mr Hodgson relating to the Over-arching Understanding, including an occasion on which Mr Hodgson said words to him to the effect that Amcor and Visy should seek to agree certain minimum floor prices for particular volumes of corrugated box products below which they would not quote. He described a meeting in July 2000 between himself, Mr Hodgson and Mr Carroll in a Melbourne hotel during which there was specific discussion about Amcor and Visy not poaching one another's major corrugated box customers.

[14] On Mr Laidlaw's evidence there were discussions in 2001 between Mr Hodgson and Mr Laidlaw about implementing the Over-arching Understanding in relation to specific tenders, namely for the Goodman Fielder, Coca-Cola, Smiths, Nestle and Fosters accounts. Mr Laidlaw also described requests from Mr Hodgson in 2001 regarding implementing the understanding in relation to the Lion Nathan account. In 2003 Mr Hodgson gave Mr Laidlaw pricing information and asked him to discuss it with Mr Carroll of Visy as a result of concerns having been raised that Visy was undercutting Amcor in New Zealand in relation to apple box pricing.

[15] In addition to Mr Laidlaw's evidence, the Commission put in evidence the transcript of an interview conducted with Mr Hodgson in November 2007. Among those present at the interview was Mr Sutton, a senior investigator for the Commerce Commission and Mr Hodgson's counsel, Mr Nguyen. The transcript records Mr Hodgson being advised that the interview was being recorded and that any information he provided could be used as evidence. In that interview Mr Hodgson was referred to the ACCC agreed statement of facts in which the Over-arching Understanding was acknowledged. He denied having any conversations about the Australian market in 2000. However, a little later in the interview, when he was asked again about the references in the ACCC agreed statement of facts, he said:

> I'm saying that I knew about the arrangement …
>
> I found out about it and when Amcor had taken Lion Nathan, as it turns out behind Visy Board's back and Visy was screaming about it, there was a discussion about compensation, that's in the agreed statement. And Brown gave Inghams to them and then they wanted to have Smiths as well and I said "No you can't have Smiths, don't give them that for God's sake that's Amcor's business to us" then Visy – Smith – Brown went and gave it to them and after that I said "I'm out of this, this is a joke" I didn't have any

> involvement for a year then I was asked to come back, that's when I saw Harry and talked about this isn't working and what are you going to do about a range of things and he just skirted around it and the only thing he agreed to was he would look at a price increase, a general price increase. And the general price increase only applied spasmodically, not everyone got it, it was just those that were under a sensible level, the ones that were high never got it.

[16] The Over-arching Understanding that Mr Hodgson acknowledged being aware of was the backdrop to the Fonterra Understanding in respect of which the pecuniary penalty is sought.

The Fonterra Understanding

[17] In 2004 Fonterra was the single biggest consumer of CFP in New Zealand, its total consumption being approximately $30m. Amcor was Fonterra's major supplier, supplying to Fonterra Ingredients, Mainland, Canpac and NZ Butter. Visy supplied the balance to Bonlac and Tip-Top.

[18] In February 2004 Fonterra requested proposals for its Australasian business. The Commission asserts that Visy and Amcor approached their respective tenders for Fonterra business in accordance with the Over-arching Understanding. However, although Mr Hodgson acknowledged that he was aware of the Over-arching Understanding, he denied any knowledge or involvement in the Fonterra Understanding.

[19] In addition to Mr Laidlaw's evidence, the Commission relied on evidence from executives of both Fonterra and Amcor, including the Procurement Category Manager, Packaging, for Fonterra, David Archer, the Group General Manager of Amcor, Peter McElroy and Mr McElroy's successor to that role, Todd Valentine. Neither Mr McElroy nor Mr Valentine was implicated in the Fonterra Understanding.

[20] Mr Laidlaw said that he understood Amcor's tender was being managed by Peter McElroy and being overseen by Mr Hodgson but that he, Mr Laidlaw, was later called in to assist in negotiations. He described a conversation with Mr Hodgson during which Mr Hodgson asked him to speak to Mr Carroll of Visy about Visy's intentions in relation to Fonterra. Mr Carroll told him that Visy would be seeking to retain the Tip-Top business but did not have the capacity to service the other Fonterra business. Mr Laidlaw had other discussions with Mr Carroll during the Fonterra

negotiations. The outcome of these discussions was an understanding that Visy would seek to retain the Tip-Top business and Amcor would target the rest of the Fonterra business. Mr Laidlaw spoke to Mr Hodgson before these various discussions and reported back to him afterwards. This understanding was consistent with the effect of the Over-arching Understanding under which the two groups would maintain their current market share.

[21] Mr Archer's account is contained in an affidavit sworn on 10 August 2009. The accounts given by Mr McElroy and Mr Valentine are contained in the transcript of their interviews with the Commerce Commission. The effect of their statements is as follows. Mr McElroy and Mr Valentine worked together on the Fonterra proposal but the major decisions were made by Mr Hodgson and Ian Sangster, who held roles within Amcor CFP in relation to both Australia and New Zealand. In particular, they made the final decisions on pricing, cost margins and product support. Mr McElroy described a long and complicated negotiation process with Fonterra and making weekly phone calls to Mr Hodgson and Mr Sangster about progress.

[22] Both Mr Hodgson and Mr Sangster came to New Zealand to work on the proposal in March 2004. Amcor submitted its proposal on 1 April 2004. It included a 3.5% increase from existing prices and, unusually, a sign-on incentive payment of NZ$6m to Fonterra if Amcor was granted the whole of Fonterra's business, save that the payment would still be made if it did not obtain the Tip-Top business, then held by Visy.

[23] Visy tendered for the Fonterra business, excluding Fonterra Ingredients. But Fonterra's executives were puzzled and concerned as they considered the Amcor and Visy tenders. Mr Archer said:

> 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 not 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 AFPA and Visy. Internally, we were starting to get concerned about the possibility of being exposed to what was allegedly occurring.

[24] The negotiations took much longer than Fonterra considered usual. Fonterra's suspicions were so strong that during one negotiation a Fonterra manager

put to Mr McElroy that there were rumours of an understanding between Amcor and Visy. Mr McElroy, however, strongly denied that.

[25] Mr Hodgson and Mr Sangster also came to New Zealand during the negotiations and had regular discussions with Mr McElroy. In May 2004 there was a meeting between Fonterra and Amcor that Mr McElroy did not attend. According to Mr Archer, Fonterra felt that it was getting stalemated by Mr McElroy and wanted to see if "we could negotiate a deal without him". Mr Valentine described negotiations reaching a position that he felt could be concluded and took the proposal back to Amcor. Mr Hodgson, however, was unhappy. He made a comment to the effect Amcor now had Fonterra "where we want them". Rather than proceeding with the proposal, Mr Hodgson removed Mr Valentine from the negotiating team.

[26] At the next negotiation Mr McElroy told Mr Archer that if Fonterra split the supply contracts other than for Tip-Top, Amcor would penalise it by imposing a price increase up to 20%. Reluctant to be pushed into accepting Amcor's proposal, Fonterra resumed negotiations with Carter Holt Harvey. However, Carter Holt was not in a position to supply Fonterra completely at that stage. As a result, Fonterra was left with little room to move and finally awarded the business to Amcor except for Tip-Top, which went to Visy. The resultant contracts gave effect to the Fonterra Understanding for terms of three years (the Visy contract for Tip-Top) and five years (the other Fonterra business with Amcor).

[27] During his interview with the Commerce Commission, Mr Hodgson denied that there was any understanding with Visy in relation to the Fonterra tender. In particular, he rejected Mr Laidlaw's statement that Mr Hodgson had asked Mr Laidlaw to speak to Mr Carroll about the Fonterra tender and obtain clarification of Visy's intentions. Mr Hodgson flatly denied that conversation and said:

> Just remember they don't owe me any favours, they all lost their jobs and they blamed me for it with the tapes. And there's a view about how could I possibly tape people, they have all got into trouble and they're all in court and I'm saying "hey you were the blokes who were colluding, you were the blokes who wouldn't stop it, you'd spread it right through your business, you'd become dependent on it, you'd pushed us out because we wouldn't be party to it then we tried to compete with you, you tried to wipe us off the face of the earth and you're worried because you lost your jobs", all self-inflicted.

[28] This statement is a reference to the fact that, in anticipation of leaving Amcor and out of concern for his own position should allegations of anti-competitive conduct be made later, Mr Hodgson had surreptitiously taped conversations with other Amcor executives. These tapes were discovered by chance when Amcor obtained an Anton Pillar order against Mr Hodgson who had, by then, left Amcor and set up in competition with it.

[29] Weighing Mr Hodgson's denial of knowing about the Fonterra arrangement against the other information, I am, however, bound to conclude that the Commission has proved to the requisite standard that Mr Hodgson did know about the understanding relating to the Fonterra tender and was directly involved in it. First, Mr Hodgson, on his own account, was aware of the Over-arching Understanding. Secondly, Fonterra was a significant client for Amcor, accounting for 10% of Amcor's NZ turnover. Mr Hodgson had direct responsibility for Amcor NZ, as Mr Elroy's immediate superior. Thirdly, the description of the negotiations given by Mr Archer, Mr McElroy, Mr Valentine and Mr Laidlaw are entirely consistent with the existence of a specific understanding in which Mr Hodgson was directly involved. Some aspects of them are explicable only by such an understanding.

Jurisdiction over Mr Hodgson

[30] Mr Hodgson resided in Australia and conducted most of his business there. In order to bring Mr Hodgson within the jurisdiction of this Court the Commission relied on Mr Hodgson's communications by phone and email as acts done in New Zealand.

[31] The Commission addressed the issue of jurisdiction by reference to r 15.11, which provides that where service has been effected outside New Zealand under r 6.27 and the party does not appear, judgment by default must not be sealed without the leave of the Court and that leave must not be granted unless (among other things) the party applying for leave was entitled to serve under r 6.27. Whilst r 15.11 is directed towards judgment obtained by default, I accept Mr Hamlin's treatment of it as analogously applying to judgment obtained by formal proof.

[32] Mr Hamlin submitted that the Commission was entitled to serve Mr Hodgson in Australia without leave under r 6.27(2)(j) and therefore will be entitled to seal a judgment obtained by formal proof in this proceeding. Under r 6.27(2)(j) service can be effected outside New Zealand without leave when the claim arises under an enactment and (among other things) any act or omission to which the claim relates was done or occurred in New Zealand. The Commission asserts that, as a matter of law, Mr Hodgson's communications into New Zealand by phone and email constituted an act done in New Zealand and, in addition, relies on Mr Hodgson's acts while he was in this country.

[33] Insofar as phone and email communications from Australia to New Zealand are concerned, I accept that these are to be regarded as acts done in New Zealand. In the context of the Fair Trading Act 1986 the Court of Appeal in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, held that representations made in emails sent to and received by a New Zealand resident in New Zealand was an act done in New Zealand.[10] In an earlier appeal in this proceeding, the Court of Appeal accepted that email and telephone communications initiated outside New Zealand to persons here were to be regarded as acts taking place in New Zealand.[11]

[34] It is evident from my discussion about the Fonterra Understanding that Mr Hodgson did have email communication and telephone calls, when he was in Australia, with Amcor managers in New Zealand, particularly Mr McElroy. In addition, when he came to New Zealand for the purposes of preparing Amcor's tender for the Fonterra business, the conversations he had here and steps that he took, such as removing Mr Valentine from the negotiating team, were acts done in New Zealand in furtherance of the Fonterra Understanding. I am therefore satisfied that Mr Hodgson did undertake acts in New Zealand and, in doing so, participated in the Fonterra Understanding.

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10 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502; [2011] 1 NZLR 754 at [106].

11 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 at [56].

Fixing a penalty assessment

The relevant factors

[35] Under s 80(2) the Court must impose a pecuniary penalty on individuals who have contravened the Commerce Act unless it considers there is a good reason not to do so. The rationale for this requirement is general and specific deterrence. The maximum penalty for individuals is $500,000.[12]

[36] The appropriate penalty is to be determined by having regard to all the relevant factors.[13] In *Telecom Corp of New Zealand Ltd v Commerce Commission* the Court of Appeal referred to the relevance of a number of recognised factors.[14] Relevant factors in this case include the nature and seriousness of the contravening conduct, the fact that it was deliberate and sustained, the seniority of the defendant and his role in the impugned conduct. Also relevant is the extent of any benefit derived from the contravening conduct and the extent of any loss or damage suffered as a result of the contravening conduct.

[37] Fixing a penalty in this case also requires me to have regard to the penalties imposed on other Amcor executives so as to ensure consistency within this group.

Commerce Commission v Visy Board (NZ) Ltd

[38] I accept as highly relevant this Court's decision involving the Visy executive Rod Carroll.[15] Mr Carroll had been the contact within Visy for the purposes of the Over-arching Understanding and the Fonterra Understanding. He had attended a meeting in New Zealand in early 2008 with Visy and Fonterra representatives regarding Visy's tender and subsequently advised Mr Lanaway an Amcor executive.

the Fonterra business.

[39] In sentencing, Venning J described Mr Carroll's conduct as integral to the understanding reached between Visy and Amcor on the Fonterra tender and that his

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12 Section 80(2B).
13 Section 80(2A).
14 *Telecom Corp of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [13].
15 *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097.

conduct was deliberate. However, he accepted that there had been no personal gain. Also significant in the sentencing exercise was the fact that Mr Carroll had already been ordered to pay a personal pecuniary penalty in Australia of AUS$500,000 and had admitted liability in respect of the New Zealand proceedings.

[40] Venning J did not identify a starting point but did refer to counsels' suggestion of starting points in the range between $30,000 and $40,000. Taking mitigating factors into account, the Commission sought (and Mr Carroll accepted as appropriate) a penalty of $25,000 which Venning J imposed.

Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd

[41] Mr Hamlin also relied on the penalties imposed in *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* as comparable.[16] This case concerned price fixing and exclusionary behaviour by two key players in the wood preservative chemicals market. The conduct continued over a period of about four years. The market had an estimated value of $14-$25m per annum which Mr Hamlin suggested was broadly comparable to the value of the Fonterra business up for tender in 2004 ($30m per annum). Penalties were imposed on three executives. In each case the penalties ultimately imposed reflected the varying degrees of cooperation and admissions made by the defendants. That is not the case here; it is the starting points rather than the penalties ultimately imposed that are relevant. However, the starting points indicated by the Court are of assistance.

[42] The most culpable was Mr Greenacres. Williams J indicated that, but for the mitigating factors, penalties of $150,000 to $170,000 and $35,000 to $37,500 for the price fixing and exclusionary conduct respectively would have been appropriate. For Mr Newell, whose conduct was viewed as the least serious because he did not instigate the understanding or initiate contact with competitors, Williams J considered that an appropriate penalty (but for the mitigating factors) would have been $30,000-$50,000. A third defendant, Mr Mullen, was also penalised. However, there was no clear discussion about the level of discount applied and I therefore do not focus on the penalty ultimately imposed.

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[16] *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, HC Auckland CIV-2005-404-2080, 4 October 2006.

Appropriate penalty in this case

[43] Mr Hamlin argued that the price fixing conduct by Amcor in which Mr Hodgson was involved was at the serious end of the spectrum of this kind of conduct, with price fixing deemed to be anti-competitive per se.

[44] Mr Hodgson was the senior Amcor executive who was responsible for the New Zealand operation. He knew of and facilitated the application of the Overarching Understanding to the Fonterra tender. It is significant that the New Zealand managers were not implicated in the Fonterra Understanding. It was Mr Hodgson who directed and facilitated the cooperation between Visy and Amcor in relation to the Fonterra tenders. Given Fonterra's size and significance in the New Zealand dairy industry and its high use of CFP or cardboard, Mr Hodgson's conduct ought to be regarded as serious. In particular, I accept the Commission's assertion that his conduct either did or was likely to adversely affect price competition and the competitive dynamics in the relevant market for CFP. In addition, it was likely that his conduct reduced the efficiency of both Visy and Amcor.

[45] The Commission could not point to any direct financial gain to Mr Hodgson from his conduct. I accept, however, that his conduct resulted or had the potential to result in gain for both Visy and Amcor. In any event, as Allan J observed in *Commerce Commission v Qantas Airways Ltd* the Court is concerned with deterrence and is obliged to impose a sanction that will be effective to that end without the need to closely analyse the incidents of detriment.[17]

[46] Mr Hodgson's conduct is to be viewed against the significance of the Fonterra business. The total value of the Fonterra tender in 2004 was approximately $30m or about six per cent of the total CFP market in New Zealand. Mr Hamlin invited me to assume the effect of the Fonterra Understanding was in the region of five to ten per cent, based on empirical evidence as to cartel overcharging. This, he submitted, suggests that the commercial gain (and resultant harm) was potentially very large, in the range of $1.5m to $3m per annum.

[47] There was no direct evidence put before me as to Mr Hodgson's financial position. The Commission did, however, draw my attention to the decision of the

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[17] *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011.

Victorian Supreme Court in 2012 in *Hodgson v Amcor Ltd* which produced a judgment in Mr Hodgson's favour of AUS$1.4m.[18]

[48] Mr Hamlin submitted that having regard to the nature of Mr Hodgson's offending and by comparison with other penalty decisions, an appropriate starting point would be $60,000 – $80,000. The Commission invited me to adopt the mid-point of $70,000. I accept that Mr Hodgson's conduct in relation to Fonterra was more serious than that of Mr Carroll of Visy because he was much more directly involved in managing the tender and the negotiations. I take as a starting point $60,000. There are no mitigating factors in this case; whilst it is true that Mr Hodgson cooperated in an interview with the Commission, he denied any involvement in the Fonterra Understanding and has taken no steps towards resolving the matter.

[49] There is, therefore, a pecuniary penalty imposed of $60,000.

Costs and disbursements

[50] I allow the Commission costs of $38,352, being costs on a 3B and 3C basis as outlined at paragraph 13 of Mr Hamlin's submissions. In addition, the Commission is entitled to disbursements totalling $3,071.54, being the filing and hearing fee.

P Courtney J

[18] *Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No 10)* [2012] VSC 294.