IN THE SUPREME COURT OF NEW ZEALAND

SC 91/2008
[2009] NZSC 92

BETWEEN	ASTRAZENECA LIMITED Appellant
AND	COMMERCE COMMISSION First Respondent
AND	PHARMACEUTICAL MANAGEMENT AGENCY Second Respondent

Hearing: 8 July 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: M N Dunning, T P Mullins and I T F Hikaka for Appellant
D Goddard QC, K L Clark QC and B Hamlin for First Respondent
M G Colson and R E Brown for Second Respondent

Judgment: 26 August 2009

JUDGMENT OF THE COURT

A The appeal is allowed.

B It is declared that the notice under s 98 of the Commerce Act 1986 given by the Commerce Commission on 31 October 2007 was ultra vires and invalid. It is ordered that the notice is quashed.

C The Commerce Commission is ordered to pay the appellant costs in this Court of $15,000 together with reasonable disbursements as fixed by the Registrar. Costs in the Court of Appeal and the High Court should now be fixed respectively by those Courts in light of this Court's judgment.

REASONS

(Given by Blanchard J)

Introduction

[1] This appeal concerns the lawfulness of a notice served on AstraZeneca Ltd, a pharmaceutical supplier, by the Commerce Commission. The notice required AstraZeneca to provide the Commission with specified documents and information relating to certain of its pharmaceutical products and some dealings with the Crown's drug funding agency, Pharmaceutical Management Agency (Pharmac). These included copies of correspondence relating to negotiations between AstraZeneca and Pharmac. The issue on the appeal is whether an exemption from Part 2 of the Commerce Act 1986 relating to pharmaceutical agreements to which Pharmac is a party has the consequence in the particular circumstances in which the notice was served on AstraZeneca that the Commerce Commission was exceeding its powers under the Commerce Act.

The statutory provisions

[2] Part 2 of the Commerce Act prohibits various restrictive practices, namely practices substantially lessening competition,[1] price fixing,[2] taking advantage of

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1 Sections 27 – 29.
2 Sections 30 – 34.

market power[3] and resale price maintenance.[4] It also provides for certain exceptions and savings.[5]

[3] The powers of the Commerce Commission are not conveniently set out in one place in the Act. Helpfully, however, they have been summarised by Cooke P in the following way in *Commerce Commission v Telecom Corporation of New Zealand Ltd*:[6]

> A survey of the Commerce Act brings out that the Commission's functions and powers under it are threefold. It is to consider and determine applications for clearances or authorisations for restrictive trade practices and business acquisitions; it has reporting and recommendatory functions regarding the imposition of price control on particular goods and services, and where price control is in force jurisdiction to authorise prices and make other decisions (eg to obtain or accept an undertaking under s 72); and it has the function or power of taking proceedings in Courts, by way of applications for penalties or injunctions or summary prosecutions, for alleged contraventions of the Act.

That description is not controversial. In order to be able to undertake the task of taking proceedings for alleged contraventions of the Act, the Commission obviously must have the power to conduct investigations and to gather evidence of anti-competitive activities. That process is assisted by the following explicit power in s 98 which is invoked in the present case:

> **98 Commission may require person to supply information or documents or give evidence**
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> Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person—
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> (a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or
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> (b) to produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice; or

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3 Sections 36 – 36B.
4 Sections 37 – 42.
5 Sections 43 – 46.
6 [1994] 2 NZLR 421 (CA) at p 428.

(c) to appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice.

[4] Pharmac is established under s 46 of the New Zealand Public Health and Disability Act 2000 (the NZPHD Act). It is owned by the Crown and is a Crown entity for the purposes of s 7 of the Crown Entities Act 2004. Its objectives include "secur[ing] for eligible people in need of pharmaceuticals, the best health outcomes that are reasonably achievable from pharmaceutical treatment and from within the amount of funding provided".[7] Its functions are "within the amount of funding provided to it", inter alia, "to maintain and manage a pharmaceutical schedule that applies consistently throughout New Zealand, including determining eligibility and criteria for the provision of subsidies".[8]

[5] Parliament plainly recognised that in establishing Pharmac it was creating a sole or predominant purchaser (monopsonist) for particular pharmaceutical products. From time to time, in order to be successful, Pharmac would need to adopt practices which would clash with the proscriptions in Part 2 of the Commerce Act. Accordingly, it provided in s 53 of the NZPHD Act for an exemption from Part 2:

53 Exemption from Part 2 of Commerce Act 1986

(1) In this section, unless the context otherwise requires,—

agreement—

(a) includes any agreement, arrangement, contract, covenant, deed, or understanding, whether oral or written, whether express or implied, and whether or not enforceable at law; and

(b) without limiting the generality of paragraph (a), includes any contract of service and any agreement, arrangement, contract, covenant, or deed, creating or evidencing a trust

pharmaceuticals means substances or things that are medicines, therapeutic medical devices, or products or things related to pharmaceuticals.

(2) It is declared that nothing in Part 2 of the Commerce Act 1986 applies to—

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7 Section 47(a) of the NZPHD Act 2000.
8 Section 48(a).

(a) any agreement to which Pharmac is a party and that relates to pharmaceuticals for which full or part-payments may be made from money appropriated under the Public Finance Act 1989; or

(b) any act, matter, or thing, done by any person for the purposes of entering into such an agreement; or

(c) any act, matter, or thing, done by any person to give effect to such an agreement.

[6] It goes without saying that the Commerce Commission can use its power to issue notices under s 98 requiring the furnishing of information, production of documents or the giving of evidence only for the purposes authorised expressly or impliedly by the Commerce Act. If and to the extent that it exceeds its powers in this respect the notice issued will be of no legal effect and can be disregarded by the recipient. AstraZeneca says that in the circumstances which existed when it was served with a s 98 notice, taking into account the background and what the Commerce Commission said at the time concerning its purpose, the Commission was on that occasion exceeding its powers, which have a particular limit placed on them when s 53(2) has application to the matter under investigation.

Facts

[7] The background is as follows. Pharmac is charged with managing expenditure by the Government on subsidising the cost of pharmaceuticals. It maintains a schedule of pharmaceuticals. It negotiates the prices and other terms on which they are supplied by pharmaceutical companies like AstraZeneca.

[8] The s 98 notice now in dispute was issued by the Commerce Commission in connection with an investigation related to two AstraZeneca products. One was Betaloc CR, a beta-blocker in tablet form used to treat heart conditions. At the relevant time, Betaloc CR's patent protection was about to expire. AstraZeneca, then the sole supplier of a product of this kind, would become exposed to competition from generic equivalents once regulatory approvals could be obtained. A supply agreement on an evergreen basis, that is, continuing until terminated after a

period of notice (six months) given by either party, existed between AstraZeneca and Pharmac.

[9] The other AstraZeneca pharmaceutical was Betaloc IV, a liquid solution administered intravenously. No agreement existed with Pharmac for this product, although it was listed on the schedule. It has been said by a deponent for AstraZeneca to be "a low volume product with marginal profitability". Apparently Pharmac believed there was no ready substitute for Betaloc IV.

[10] Negotiations between AstraZeneca and Pharmac were taking place in the first half of 2007. On 19 February Mr Gravatt, General Manager of AstraZeneca, wrote to the therapeutic manager of Pharmac. He referred to an agreement of 22 December 2003 relating to the terms of listing for Betaloc CR, pointing out that after 1 July 2007 AstraZeneca was able to increase the price on six months' notice and that Pharmac was able to review the listing. After referring to a view which had been expressed by Pharmac that generic competitors were likely in the medium-term and thus a long-term listing agreement for Betaloc CR was unlikely to be acceptable to Pharmac without very significant up-front price decreases, Mr Gravatt said that AstraZeneca had consistently made it clear to Pharmac that without long-term commercial certainty, pricing for pharmaceuticals would naturally reflect spot market levels. Thus, while stating that AstraZeneca "remained committed to re-negotiating a long term fixed subsidy agreement for Betaloc CR", Mr Gravatt gave notice of a price rise to apply from 1 September, specifying figures for different quantities of the drug.

[11] It seems that further negotiations followed for, on 23 May, in another letter from Mr Gravatt, AstraZeneca advised Pharmac of its commitment to good faith negotiations and made a proposal that prices be fixed at current levels until the end of the year and for pricing at different levels until the middle of 2010. The letter concluded:

> For the record, AstraZeneca is committed to reaching a negotiated resolution if at all possible. However, if we are unsuccessful in securing long-term commercial certainty for Betaloc CR then we will be forced to also review the commercial viability of Betaloc IV, which we currently distribute to DHB Hospitals as a service line.

[12] On 30 July Mr Gravatt wrote again. He referred to a communication by Pharmac to health professionals on 18 July which stated that Pharmac had been unable to reach agreement with AstraZeneca and, he said, "does not signal any on-going negotiations". Similarly, he said, a fax from Pharmac of 20 July had made no counter-proposal to AstraZeneca "and indicates that negotiations are unlikely to succeed". The letter went on:

> AstraZeneca, like PHARMAC, must now take steps on the basis that negotiations appear unlikely to succeed no matter what AstraZeneca proposes. We also note that PHARMAC propose to list generic extended release metoprolol succinate as soon as possible subject to a priority assessment by Medsafe. This would of course have a very significant negative impact on our Betaloc business.
>
> Betaloc IV Discontinuation
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> AstraZeneca have repeatedly indicated to PHARMAC (without response), as long ago as December 2003 and as recently as 23 May 2007, that loss of the Betaloc CR tablet business to a generic competitor (or through reference pricing) would risk the commercial viability of Betaloc IV as a low price/low volume service item. We must assume that PHARMAC is comfortable with this outcome and have therefore not placed any further forward orders for Betaloc IV. We estimate that current stocks will be exhausted by the end of August 2007 at the latest. We have written to health professionals to advise them of this outcome as attached for your information. Also attached is a formal notice of discontinuation for your records.

[13] Although Mr Gravatt expressed pessimism in this letter about the negotiations, it is noticeable that in the attached copy of AstraZeneca's draft letter intended to be sent by it to health professionals, he said that AstraZeneca remained committed to a negotiated solution and invited Pharmac to resume negotiations. In the same letter the following statement appears:

> PHARMAC has been repeatedly informed (without response), as early as December 2003 and as recently as 23 May 2007, that loss of the Betaloc CR tablet business to a generic competitor (or through reference pricing) would risk the supply of the low price/low volume service item Betaloc IV.

[14] Pharmac's response was a media statement headed "AstraZeneca holds patients to ransom" which, inter alia, accused AstraZeneca of "pursuing tactics to avoid or delay competition":

> The first tactic used by AstraZeneca was to notify PHARMAC of its intention to increase the price of Betaloc tablets, unless PHARMAC protected its market. This would mean that those using the medicine would need to pay a part-charge (in addition to the PHARMAC subsidy and the normal dispensing fee).

The statement described what it called "a further tactic":

> AstraZeneca is now pursuing a further tactic. In its latest communication with medical professionals, AstraZeneca has announced the termination of supply of Betaloc Injection – a market solely supplied by AstraZeneca due to its relatively small size.

[15] The ensuing media furore attracted the attention of the Commerce Commission. After an initial investigation an internal memorandum was prepared for the Chair of the Commission, Ms Rebstock, recommending the issue of a s 98 notice requiring AstraZeneca to supply specified information and documents. It referred to a newspaper article that suggested AstraZeneca was tying pharmaceutical products. This alleged behaviour might breach s 36 of the Commerce Act:

> The allegations related to the contracted supply of AstraZeneca's *Betaloc CR* tablets (a beta blocker pharmaceutical) prescribed to 200,000 patients in New Zealand to manage high blood pressure. Negotiations for the contract to supply these tablets were allegedly tied by AstraZeneca to its continued supply – direct to hospitals – of the *Betaloc IV* intravenous injection used to treat approximately 4000 heart attack victims every year.

[16] Section 36, which is in Part 2 of the Act, relevantly provides:

> **36 Taking advantage of market power**
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> (1) Nothing in this section applies to any practice or conduct to which this Part applies that has been authorised under Part 5.
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> (2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of—
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> (a) restricting the entry of a person into that or any other market; or
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> (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
>
> (c) eliminating a person from that or any other market.

[17] After describing interviews with Pharmac and AstraZeneca and referring to s 53(2) of the NZPHD Act, the memorandum said:

> On the basis of information acquired to date – primarily that provided by the independent medical specialists detailing the lack of suitable alternatives to the *Betaloc IV* intravenous injection – Commission staff consider that AstraZeneca may have market power in the market for the supply of intravenous injection beta blockers and may have taken advantage of that market power for an anti-competitive purpose. The proposed exercise of the Commission's powers in this case is relevant to establishing an anti-competitive purpose to AstraZeneca's behaviour and to what extent it endeavoured to prevent competition on the *Betaloc CR* tablet by tying the *Betaloc IV* intravenous injection to it.
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> …
>
> Whilst AstraZeneca has voluntarily provided information and some documentary evidence during recent interviews, Commission staff consider it necessary, in order to progress the investigation, to formally request details of all documentation and information relating to the alleged tie between the *Betaloc CR* tablet and *Betaloc IV* intravenous injection.

[18] The s 98 notice was issued under the hand of the Chair on 31 October 2007. In an accompanying letter, said not to form part of the notice but provided "to assist AstraZeneca in complying with the Notice", Ms Rebstock advised:

> The Commission is conducting an investigation into allegations that during negotiations with PHARMAC, AstraZeneca Limited may have illegally tied the proposed provision of *Betaloc CR* tablet pharmaceuticals to the continued supply of *Betaloc IV* intravenous injection pharmaceuticals in breach of section 36 of the Commerce Act 1986.

[19] On 20 November 2007 AstraZeneca applied to the High Court for judicial review of the Commission's decision to issue the s 98 notice on the ground that it was ultra vires and invalid, seeking declarations and an order quashing the notice.

[20] Pharmac and the Commission have not succeeded in negotiating a new long-term agreement in relation to Betaloc CR.

High Court

[21] The application was heard by Panckhurst J who gave his judgment on 16 April 2008.[9] Having rejected an argument for the Commission, not pursued on appeal, that s 53(2)(b) did not apply if no agreement was reached with Pharmac, the Judge said that the section did not provide that all conduct between Pharmac and pharmaceutical companies should be exempt. He proceeded on the assumption that the relevant conduct under inquiry was tying or linking of the ongoing supply of Betaloc IV to the conclusion of a new agreement for the subsidised supply of Betaloc CR. The letter accompanying the s 98 notice indicated that. The parties were seemingly in negotiation but the Judge said that the exemption applied only if the suspected anti-competitive behaviour occurred in the context of "initiatives directed towards entering into a pharmaceuticals agreement" and was something done by AstraZeneca "which amounted to anticompetitive conduct and for the purposes of securing a new agreement".[10]

[22] The Judge considered it was speculative to assume the behaviour took place in this context and for this purpose:[11]

> Until it is in full possession of the facts, the Commission is entitled (if not obliged) to take the view that it is necessary and desirable to issue a s 98 notice in order to carry out its statutory functions.

Referring to the objectives of Pharmac in s 47 of the NZPHD Act, the Judge commented that it was "no part of Pharmac's role to deter or lessen competition between pharmaceutical suppliers".[12] The purpose of s 53 was to protect Pharmac in relation to its concluding pharmaceutical arrangements that were in the public interest and for the public benefit. The exemption did not exist to enable a supplier with market power to engage in anti-competitive behaviour. It extended to pharmaceutical suppliers because this was necessary to ensure that Pharmac was free

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9 *AstraZeneca Ltd v Commerce Commission* (2008) 12 TCLR 116.
10 At para [66].
11 At para [67].
12 At para [72].

to enter into collusive purchasing arrangements. But there was nothing to suggest that the exemption existed for the protection of pharmaceutical suppliers generally:[13]

> In short, its availability is closely linked to actions occurring in the context of a pharmaceutical agreement or for the purpose of entering into such an agreement.

This tended to confirm his conclusion that in order to ascertain whether the exemption applied in any given situation it was first necessary to examine and establish the surrounding facts:

> Assumptions may be misplaced. The investigative role falls to the Commission. Its investigative powers should be available to that end.

The Judge dismissed the application for judicial review.

Court of Appeal

[23] Two of the Court of Appeal[14] Judges, Glazebrook and MacKenzie JJ, agreed with Panckhurst J that a ruling on the scope of s 53 should be made only when the full facts or background was known. They therefore agreed with him in upholding the validity of the s 98 notice and the appeal was accordingly dismissed.

[24] Glazebrook J said there was at least a "credible argument" that the exemption protected anti-competitive conduct only to the extent that it generated the requisite public benefit and that it was not designed to exempt anti-competitive behaviour that thwarted this purpose.[15] There might also be a credible argument that s 53 did not protect all types of anti-competitive behaviour on the part of either Pharmac or pharmaceutical companies. There might be a reasonableness requirement. But whether s 53(2)(b) should be "read down" in light of its purpose should not be decided, she said, in a factual vacuum. The Commission should be free to continue its investigation to ascertain the facts.[16] MacKenzie J was also of the view that it

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13 At para [76].
14 *AstraZeneca v Commerce Commission* (2008) 12 TCLR 302 (Glazebrook, Fogarty and MacKenzie JJ).
15 At para [12].
16 At paras [13] – [17].

was premature to venture upon a full examination of the purpose of s 53 without having the benefit of a detailed factual context in which to consider it.[17]

[25] Fogarty J dissented and would have quashed the notice. He said that the information or class of information that was the subject of a s 98 notice had to be considered necessary or desirable by the Commission, in this context, to investigate a breach of s 36 arising from conduct withdrawing supply of Betaloc IV.[18] He was of the opinion that subs (2)(b) had been introduced into the legislation in order to extend protection to Pharmac and persons dealing or intending to deal with Pharmac "within the terms of subs (2)(a)".[19] Subsection (2)(b) used very inclusive language: "any act" could include the linking of continued supply of products in different markets initiated by the pharmaceutical supplier.[20]

[26] Counsel for the Commission and Pharmac had argued that AstraZeneca's conduct should not be inferred to be for the purposes of entering into an agreement with Pharmac just because the conduct occurred contemporaneously with negotiations for an agreement. They had also argued that the purposes must not be to restrict competition between suppliers. The Judge said that the only anti-competitive purpose advanced on the facts was that AstraZeneca may have been attempting to prevent Pharmac from concluding or effecting agreements with generic manufacturers of beta-blockers. However, Fogarty J said, the only reason why AstraZeneca would attempt to prevent Pharmac from doing that was in order to pressure Pharmac to continue to take supply from AstraZeneca of Betaloc CR.[21] He rejected a submission that s 53 was only intended to have effect where the conduct that was exempt was anti-competitive conduct that generated the requisite public benefit. He thought that would be an extraordinary conclusion which the text of s 53 could not bear. If Parliament had intended not to exempt unilateral anti-competitive conduct, one would expect such an intent to be achieved, he said, by qualifying the text's reference to the applicable range of conduct, by confining the exempted conduct to being as a party to Pharmac's conduct. Such a limitation could not be

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17 At para [83].
18 At para [38].
19 At para [48].
20 At paras [58] – [59].
21 At para [65].

fitted into the existing text of "any act, matter or thing done".[22] Nor was the Judge prepared to read subs (2)(b) as if it applied only to an act, matter or thing done for the *sole* purpose of entering into an agreement with Pharmac. All market behaviour tended to have effects on both suppliers and buyers and could be characterised as being for multiple purposes. The Judge noted that subs (2)(b) refers to "purposes" in the plural, which he said plainly accommodated all conduct aimed at the goal of entering into an agreement with Pharmac. He was not prepared to give s 53 a construction which gave Pharmac a wider exemption than that given to the persons who had dealt with it.[23]

[27] Fogarty J's conclusion was that there was "no doubt that if AstraZeneca's withdrawal of Betaloc IV was anti-competitive to rival suppliers and to Pharmac as the buyer, it was nonetheless inevitably for the purposes of entering into a subs (2)(a) agreement with Pharmac". Accordingly the exemption applied even if AstraZeneca's conduct was for an anti-competitive purpose and there was no basis for issuing the s 98 notice.[24]

No breach of Commerce Act by AstraZeneca

[28] Following the Court of Appeal's decision AstraZeneca provided the Commission with access to the information sought under the disputed notice. The Commission has advised this Court that, for reasons it says are unrelated to the s 53 exemption, it has now concluded that no breach of the Commerce Act "is likely". It has closed its investigation. The present appeal is not moot, however, because the Commission has prepared a report for public release on the basis of the material provided by AstraZeneca. This appeal will determine whether any proposed use of that material in the report is lawful.

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22 At para [68].
23 At paras [75] – [76].
24 At paras [77] – [78].

Discussion

[29] A public body like the Commission must not exercise a power conferred upon it by statute for a purpose that is not within the contemplation of the enabling statute. Information may be sought under s 98 only where the Commission considers it "necessary or desirable for the purposes of carrying out its functions and exercising its powers" under the Act. As Gallen J pointed out in *Telecom Corporation of New Zealand Ltd v Commerce Commission*,[25] the nature of the information which can be sought is defined by the need to show that it is related to the particular subject matter which gives the Commission jurisdiction to investigate.

[30] In the case of a pharmaceutical company and its dealings with Pharmac, there is a further qualification by reference to the statutory exemption in s 53 of the NZPHD Act which may have the effect of limiting the scope of the power of investigation in circumstances falling within the exemption. The Commission's purpose in issuing a s 98 notice must be the investigation of some activity which may be unlawful under the Commerce Act. An activity which can be seen to be plainly not unlawful by reason of the s 53 exemption cannot be the subject of such a notice. Where that is the position, the Commission cannot resort to s 98 in the hope that a response to its notice may reveal some unsuspected anti-competitive conduct outside the scope of the investigation to which the notice relates. There must be a reasonable basis for the Commission to believe that there may be undiscovered facts that could give rise to a contravention. Brennan J, dealing with a broadly similar Australian provision, said in *W A Pines Pty Ltd v Bannerman*:[26]

> The character of the matter is determined objectively, and if it could be shown that a contravention would not be constituted by a concatenation of facts which exist or have existed and facts which might reasonably be suspected to exist or to be about to exist or to have existed, there would be no "matter" relating to which a person could furnish information etc, as provided for by s 155(1) [of the Trade Practices Act 1974 (Cth)].

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25 [1991] NZAR 155 (HC) at p 162.
26 (1980) 30 ALR 559 (FCA) at pp 565–566.

And Fisher and French JJ said in *SA Brewing Holdings Ltd v Baxt*[27] that the question for determination was ultimately an objective one: "is the matter identified in the notice capable, after allowing for undiscovered facts, of amounting to a contravention?" Mr Dunning correctly submitted in his persuasive submissions for AstraZeneca that the Commission does not have a power to use the notice to check whether it has the necessary power by reference to something it may discover on a "fishing expedition" pursuant to the notice.

[31] It is not unlawful under Part 2 for a pharmaceutical company to do something which would otherwise be in breach of s 36 if it is done for the purpose of entering into an agreement with Pharmac "that relates to pharmaceuticals for which full or part-payments may be made from money appropriated under the Public Finance Act 1989" or for the purpose of giving effect to such an agreement.[28] The question is whether, on the basis of the material already available to the Commission which has been described earlier in these reasons,[29] AstraZeneca's activity to which the Commission's notice was directed was so plainly within the scope of this exemption as to preclude the use by the Commission of the s 98 power in the particular circumstances.

[32] The Commerce Commission now concedes that the exemption extends to negotiations between a pharmaceutical company and Pharmac. That must, we think, encompass actions taken by a pharmaceutical company to try to engage Pharmac in a negotiation. It cannot be the case that an action intended to start a negotiating process is exempt only if it is taken up by Pharmac or that the lawfulness in terms of Part 2 of an action such as the making of an offer to Pharmac can depend upon Pharmac's reaction, that is, lawful if Pharmac accepts or counter-offers but unlawful if Pharmac simply rejects the offer. Mr Goddard QC, for the Commission, did not attempt to argue against that proposition. But he did advance two central arguments, the second of which appeared for the first time, at least in its more sophisticated form, late in his oral submissions.

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27 (1989) 23 FCR 357 at p 372. See also *Seven Network Ltd v Australian Competition and Consumer Commission* (2004) 140 FCR 170 at pp 182–183.

28 Section 53 of the NZPHD Act 2000.

29 At paras [10] to [17].

[33] Counsel's first argument was that the exemption does not apply to an action by a pharmaceutical company which is actually collateral to a negotiation, even if it is undertaken while a negotiation with Pharmac is ongoing. We can accept that argument because an action which is truly collateral is not properly to be seen as done as part of the negotiations. It is of no moment that it happens to occur at the same time or that it has some indirect connection with them. An example might be an agreement made between two pharmaceutical companies, at a time when one of them is negotiating with Pharmac for the supply of a drug, that the second company will not put in a competing bid. It may well be done to try to extract a better bargain from Pharmac because of the absence of a competitive offer. But it is better regarded as an action primarily undertaken to prevent an agreement between Pharmac and the other supplier, rather than for the purposes of entering into an agreement with Pharmac, although no doubt that might be a further but indirect consequence. Such an action would be unlawful if it occurred immediately prior to the commencement of proposed negotiations with Pharmac and it would be strange if it were to be rendered lawful by s 53 should it occur immediately after negotiations commenced.

[34] In summary, Mr Goddard's second argument was that the exemption was intended to enable Pharmac alone to exercise market power in a way which would normally contravene Part 2, and in particular s 36. Section 53 allows it to exercise its purchaser's "demand-side" market power. The exemption avails the negotiating pharmaceutical company, however, only to enable it to respond in a competitive manner to an anti-competitive exercise of power by Pharmac. By making itself a party to Pharmac's act it does not contravene Part 2 because Pharmac's action is declared by s 53(2) not to be unlawful. On the other hand, counsel's argument went, the exemption does not authorise the pharmaceutical company to exercise its vendor's "supply-side" market power. An action involving that could readily be distinguished, he said, from a lawful negotiating response to something done by Pharmac. Counsel submitted that it was open to the Court looking at the text and evident purpose of s 53(2) to read this qualification into para (b) of the subsection.

[35] Text and purpose are key drivers of statutory interpretation. But neither of them supports this argument. Acceptance of it would involve a considerable reading down of the words of the subsection, producing the consequence for the pharmaceutical company that behaviour on its part would be unlawful which on the face of the section would appear lawful. If the drafter had wanted to say that the exemption for a pharmaceutical company did not extend to taking advantage of its own market power contrary to s 36, or otherwise infringing Part 2, that could very easily have been stated.

[36] The evident purpose of the s 53 exemption is to enable Pharmac to attain its statutory objective of securing the best health outcomes reasonably achievable from pharmaceutical treatment within the funding available to it. If the Court were to find that s 53 operated in the limited way contended for by the Commission, pharmaceutical companies might feel restricted, or contend they were restricted, in the bargains they could make or endeavour to make with Pharmac because of the risk of being accused of having acted in breach of Part 2. That might sometimes work to the ultimate disadvantage of the public by restricting the flexibility of the process and possibly frustrating the objective of better health outcomes from the funding available to Pharmac. It is noteworthy that Pharmac's own published Operating Policies and Procedures[30] actually contemplate "cross deal or bundling arrangements".[31] Why should it make a difference how these are initiated? Furthermore, contrary to counsel's claim, it might very well be difficult in some cases to determine the legitimacy of a negotiating tactic in response to an anti-competitive exercise of market power by Pharmac, the lawfulness of which is itself an abnormal feature of a commercial negotiation in this country. In a trade-off in an unusual situation of this kind it may be difficult to tell whose market power has really been exercised and whether, in the case of the pharmaceutical company, it has acted anti-competitively. It is accordingly not at all certain that the suggested gloss on the plain language of s 53 could be justified by reference to legislative purpose. Consequently, we prefer the view which accords with the text of the section that,

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30 *Operating Policies and Procedures of the Pharmaceutical Management Agency ("PHARMAC")* (3rd ed, January 2006).

31 At p 7.

provided a pharmaceutical company's purpose is the negotiation of an agreement with Pharmac falling within para (a), the exemption applies to any anti-competitive behaviour on its part directed to that end during the negotiating process. What is therefore required is a factual assessment of whether, on the facts known to the Commission when it came to issue its notice, AstraZeneca's actions must have been covered by the exemption.

[37] When the particular events which occurred in this case leading up to the service of the s 98 notice are examined, it is clear that all of the relevant actions taken by AstraZeneca were done for the purposes of obtaining an agreement with Pharmac. It should not be overlooked that in this context an "agreement" is very widely defined in subs (1).[32] It includes an arrangement or understanding, whether oral or written, and even one which is not enforceable at law. It could, for example, extend to something done in order to secure the continuance of the evergreen contract for a further period by persuading Pharmac to delay exercising its right to give a notice of termination, and whether or not existing price levels were then re-set.

[38] Our examination of the correspondence passing between Pharmac and AstraZeneca leads us to the conclusion that at all times AstraZeneca was endeavouring to negotiate a form of agreement with Pharmac to continue listing and subsidisation of Betaloc CR. In the course of that negotiation AstraZeneca said that if it were no longer to be supplying Betaloc CR pursuant to an agreement with Pharmac, it might withdraw Betaloc IV from the market. In other words, it appears to have been seeking to tie the availability of the latter product to the supply of the former (which would normally be anti-competitive behaviour). As Mr Dunning convincingly pointed out, and as Fogarty J recognised in his dissenting judgment, AstraZeneca could have had no purpose in taking this stance but to obtain an agreement with Pharmac for continued supply of Betaloc CR. Mr Goddard was not able to suggest any other reason why, as a negotiating position, AstraZeneca would threaten to withdraw Betaloc IV. He did suggest that at the point when AstraZeneca

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[32] Section 53(1) of the NZPHD Act 2000.

adopted this stance negotiations were at an end. We consider this misreads the correspondence and surrounding material and that in reality AstraZeneca appears at the time to have adopted the tactic to try to get negotiations resumed. But, assuming Mr Goddard were right and the statement that Betaloc IV would be withdrawn was not made in the negotiations, then obviously it would not have been made for the purpose of obtaining a trade tie, since a tie is a form of connection to an agreement for the sale and purchase of goods or services. Absent a negotiation on Betaloc CR, withdrawal of Betaloc IV could only be understood as an announcement of a unilateral withdrawal of an unprofitable product. That is not anti-competitive behaviour, as Fogarty J also pointed out. So, in summary, either it was done in order to secure a trade tie as part of, or in connection with, an agreement (as defined), in which case the exemption applied, or it was not done as an anti-competitive act.

[39] When the Commission issued its s 98 notice it should have appreciated, contrary to what it said in its letter accompanying the notice, that no unlawful action had been taken or was in contemplation on the part of AstraZeneca concerning an illegal tie. There was therefore at that time no proper basis for the issuing of the notice. In so doing the Commission exceeded its powers. Mr Goddard submitted that there may have been some conduct on the part of AstraZeneca, unknown at that time to the Commission, which justified it in continuing its investigation. But, the Commission's internal documents confirm that the only conduct alleged or suspected by the Commission was an attempt to tie together the supply of the two drugs, and counsel was unable to explain what that other conduct might be. In the absence of a supply of one drug there would be nothing to which the supply of the second drug could attach. An attempt to obtain a tie can therefore occur in connection with negotiations with Pharmac, but not in the absence of any negotiation. The Commission accordingly had no reasonable basis for suspecting that any conduct on the part of AstraZeneca may have occurred or might be proposed that could possibly constitute a contravention of Part 2 of the Commerce Act, as qualified by s 53. Nothing the Commission could learn through further investigation about the attempt to obtain a tie, to which its notice was alone directed, could affect that position. A notice of this kind must be justified on the basis of the Commission's knowledge of the matter it is investigating (here the attempted tie) at the time of the notice. The

Commission is certainly not entitled to proceed on the basis that it can issue a notice first and then have its power to do so judged retrospectively by what it might find concerning some other conduct of the pharmaceutical company.

[40] For these reasons, which substantially mirror the conclusions of Fogarty J in the Court of Appeal, we consider that the Commission's notice was invalid.

Result

[41] The appeal is allowed. We make a declaration that the notice under s 98 of the Commerce Act 1986 purportedly given by the Commerce Commission on 31 October 2007 was ultra vires and invalid. We also make an order quashing the notice.

[42] AstraZeneca is awarded costs in this Court of $15,000 payable by the Commerce Commission together with AstraZeneca's reasonable disbursements as fixed by the Registrar. Costs in the Court of Appeal and the High Court should now be fixed respectively by those Courts in light of this Court's judgment.

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