IN THE SUPREME COURT OF NEW ZEALAND

SC 32/2009
[2010] NZSC 38

	BETWEEN	ANDREW ROBERT POYNTER Appellant
	AND	COMMERCE COMMISSION Respondent

Hearing: 17 November 2009

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

Counsel: J G Miles QC, S C Keene and A J Fincham for Appellant
D J Goddard QC and M-A M Borrowdale for Respondent

Judgment: 16 April 2010

JUDGMENT OF THE COURT

A The appeal is allowed.

B The orders made by the Courts below are set aside.

C The Commission's application to set aside Mr Poynter's protest to the jurisdiction is dismissed and Mr Poynter is dismissed from the proceeding.

D The Commission must pay Mr Poynter for his costs in this Court the sum of $15,000.00 plus disbursements to be fixed if necessary by the Registrar. Mr Poynter should also have costs in the Court of Appeal and the High Court either as agreed or as fixed by those Courts.

REASONS

Para No

ELIAS CJ

[1] The Commerce Commission alleges that the appellant, Mr Poynter, is liable to penalty under s 80 of the Commerce Act 1986 in respect of price manipulation contrary to ss 27 and 30 of the Act. It is accepted that Mr Poynter does not reside or carry on business in New Zealand. His direct participation in the alleged breaches of the Act is accepted to have taken place outside New Zealand. Nor did it involve communications into New Zealand. It is claimed however that Mr Poynter had managerial responsibility within the Fernz group of companies named as defendants in the proceedings issued by the Commerce Commission.[1] The Fernz defendants have admitted liability by reason of arrangements or understandings to substantially lessen competition in New Zealand in relation to the market in timber treatment products.[2] The Commerce Commission claims that Mr Poynter became personally liable by his "involvement in one or more of the breaches by the Fernz Group defendants", by being "directly or indirectly, knowingly concerned in one or more of the breaches by the Fernz Group defendants", and by reason of his having "conspired with another defendant or defendants to breach [the provisions of the Act]". These claims against him are based on s 80(1) of the Act, which is set out below at [11]. Mr Poynter has not yet pleaded to the claim. He entered an appearance under protest to jurisdiction and takes the preliminary point that the Commerce Act does not extend to his conduct because it is not covered by s 4.

[2] Section 4 describes the circumstances in which the Commerce Act applies to conduct outside New Zealand. It provides:

---

1 TPL Ltd (formerly known as Fernz Timber Protection Ltd), Nufarm Ltd, and FChem (Aust) Ltd.

2 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* HC Auckland CIV 2005-404-2080, 8 February 2008 at [16].

> **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 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 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.

[3] It is accepted that subs (2) and (3) have no application. Mr Poynter maintains that the only basis upon which the Act could attach to his conduct is if s 4(1) applies. It is common ground that it does not because he is not resident in New Zealand and it has been conceded by the Commerce Commission that he does not carry on business in New Zealand.

[4] The Commerce Commission does not rely on s 4(1). It maintains instead that the conduct of Mr Poynter's subordinates within New Zealand is attributed to him by operation of law. On this basis it is said that no question arises of extraterritorial application of the Act, against which there is a common law presumption of statutory interpretation.[3] Since the conduct for which Mr Poynter is responsible is the conduct of his subordinates within New Zealand, the restricted extraterritorial scope of the Act under s 4 is irrelevant.

[5] The protest to jurisdiction was not upheld in the High Court.[4] Mr Poynter's appeal to the Court of Appeal was dismissed.[5] The Court of Appeal concluded that it was "sufficient that the communications or directions [by Mr Poynter] in furtherance

---

3 *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 438 per Richardson J; *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 where the authorities are canvassed at [11] per Lord Bingham, and at [45] per Lord Rodger. See also FAR Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, Wellington, 2008) at 371.

4 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805 (HC).

5 *Harris v Commerce Commission* [2009] NZCA 84, (2009) 12 TCLR 379.

of the anti-competitive arrangement were given to New Zealand actors while they were overseas":[6]

> [43] 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.

[6] The Court of Appeal rejected the submission on behalf of Mr Poynter that its approach cut across the provisions of s 90 (the statutory provision dealing with attribution of the conduct of agents). In addition to reliance upon a form of agency, the Court accepted the argument of the Commission that there is a "useful analogy to be drawn with the treatment of conspiracy at common law"[7] in interpreting the statute. The Court concluded, in summary:[8]

> [52] ... (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.

---

6 At [43]–[44].
7 At [47].
8 At [52].

[7] I have come to the conclusion that the appeal should be allowed and the protest to jurisdiction upheld. The argument addressed to this Court on behalf of the Commerce Commission shifted from that apparently addressed to the lower Courts. To the extent that the Court of Appeal relied upon its view that s 4 is not an exhaustive statement of the circumstances in which the Act has extraterritorial application (a view with which I respectfully disagree given the role and stated purpose of s 4 within the legislation) and found jurisdiction in order to plug a "loophole" (an approach which in my view is inconsistent with the explicit extraterritorial scheme contained in s 4 read as a whole and which exceeds permissible interpretation), it is not supported by the argument ultimately advanced to this Court by the Commerce Commission. That argument disavowed reliance on extraterritorial conduct by Mr Poynter. Instead it depends on attribution to Mr Poynter of conduct carried out within New Zealand by others. My conclusion that no such attribution is available under the Act is dispositive of the appeal.

Attribution of conduct under s 90 of the Commerce Act

[8] Section 90 of the Commerce Act deals with the attribution of the conduct and state of mind of servants or agents to their employers or principals. It provides:

> **90 Conduct by servants or agents**
>
> (1) Where, in proceedings under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of his actual or apparent authority, had that state of mind.
>
> (2) Any conduct engaged in on behalf of a body corporate—
>
> (a) by a director, servant, or agent of the body corporate, acting within the scope of his actual or apparent authority: or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

> (3) Where, in a proceeding under this Part in respect of any conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of this Act applies, it is necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, acting within the scope of his actual or apparent authority, had that state of mind.
>
> (4) Any conduct engaged in on behalf of a person other than a body corporate—
>
> (a) by a servant or agent of the person acting within the scope of his actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, given within the scope of the actual or apparent authority of the servant or agent—
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.
>
> (5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that intention, opinion, belief or purpose.

[9] Initially, Mr Goddard, for the Commerce Commission, argued that Mr Poynter was liable through attribution under s 90. It became common ground in the course of argument however that s 90 does not apply. It is concerned with attribution of the conduct and state of mind of its directors, servants or agents to a corporation (ss 90(1) and (2)) and the attribution of the state of mind or conduct of a servant or agent to a non-corporate employer or principal (ss 90(3) and (4)). The section does not deal with attribution of the state of mind or conduct of a subordinate to a superior who is not the employer or principal. It does not therefore apply to the relationship between Mr Poynter and those who carried out the breaches in New Zealand, as was accepted during the course of the hearing of the appeal.

Attribution of the conduct of others is not implicit in s 80

[10] Mr Goddard maintained at first that there is attribution at common law whenever conduct is at the direction or with the consent or agreement of another, in what was described by counsel in the Court of Appeal as "a broad, non-technical

sense" of agency.[9] That argument runs up against the specific statutory provision for attribution of the conduct of agents in s 90, which would be otiose if such loose linkage was sufficient for attribution. In the end, however, Mr Goddard argued, rather, that Mr Poynter was liable by attribution under s 80, because that section contemplates liability for participating in the contravention by another of the provisions of the Act or in joining a conspiracy to contravene the provisions of the Act. In particular, he argued in respect of the conspiracy alleged that actions by co-conspirators in furtherance of a conspiracy are attributable to other conspirators at common law.

[11] Section 80 provides:

> **80 Pecuniary penalties**
>
> (1) If the Court is satisfied on the application of the Commission that a person—
>
> (a) has contravened any of the provisions of Part 2; or
>
> (b) has attempted to contravene such a provision; or
>
> (c) has aided, abetted, counselled, or procured any other person to contravene such a provision; or
>
> (d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; 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; or
>
> (f) has conspired with any other person to contravene such a provision,—
>
> the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate. ...

[12] The difficulty with the argument for the Commerce Commission is that the participating conduct under s 80 which links Mr Poynter to the contravention or the conspiracy to contravene, and which makes him liable, is his own conduct outside New Zealand in conspiring, or being concerned with the contravention by another. This is not a case where the conspiracy is joined or the necessary connection is

---

[9] At [24].

through the conduct of an agent which is then attributed to the principal. The breaches of s 80 claimed against Mr Poynter consist of his own conduct in conspiring with others to contravene the Act, or in being knowingly concerned in the contravention by another of the provisions of the Act. There is no implicit attribution contained in s 80 because it is the joining or conspiring and so on that is the occasion for liability. Mr Poynter's conduct outside New Zealand must therefore be relied upon for liability under s 80. And since it is accepted that his conduct outside New Zealand was in circumstances where the extraterritorial extension under s 4 does not apply, it is necessary to find some principled basis for such extraterritorial application of the statute. None was identified.

The concept of conspiracy in s 80(1)(f) does not suggest extraterritorial application beyond the circumstances of s 4.

[13] The Court of Appeal took the view that the incorporation of the concept of conspiracy into s 80(1)(f) of the Commerce Act was an indication that "Parliament intended the Act to have extraterritorial application in circumstances beyond those referred to in s 4":[10]

> 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.

[14] I am unable to agree with this analysis. The scope of s 80(1)(f) (making someone liable to penalty for conspiring with another to contravene the Act) is unaffected as a matter of domestic law if s 4 is construed as a general limitation of the Act to conduct within New Zealand. Whether s 4 is exhaustive of the circumstances in which conduct outside the jurisdiction falls within the scope of the Act, turns on the meaning of s 4. I do not think the reference to conspiring in s 80(1)(f) is of assistance in the interpretation of s 4, as the Court of Appeal seems to have thought. In much the same way the domestic scope of s 80(1)(c) (aiding, procuring and so on) or s 80(1)(e) (being knowingly concerned in or a party to the contravention of the Act) sheds no light on the extraterritorial application of the Act.

---

[10] At [51].

It is the terms of s 4 which govern the application of the Act to conduct outside New Zealand, not the scope of conduct which renders someone liable to penalty in New Zealand under s 80. There is no incongruity in confining the conduct which is the occasion for penalty under s 80 to conduct undertaken in New Zealand.

Section 4 is exhaustive of the circumstances in which the Act applies to conduct outside New Zealand

[15] It is a common law principle of general application in the interpretation of statutes that they are presumed not to have extraterritorial effect.[11] Where statutes are silent on the question of extraterritorial application, the content and purpose of the legislation may overcome the presumption. But the Commerce Act is not silent on the question of extraterritorial application. It is clear that the Act proceeds on the basis that it does not have extraterritorial effect because that is the assumption on which s 4 is drafted. As the heading to the section suggests, it describes the only circumstances in which the Act applies to conduct outside New Zealand.

[16] The reasoning of the Court of Appeal set out above at [5]–[6] (that s 4 "does not address the situation") puts matters on the wrong basis. Section 4 is concerned with how the Act is to apply to conduct outside New Zealand. To the extent that the Act is not explicitly extended to conduct outside New Zealand by s 4, it does not apply.

[17] The Legislature responded to perceived deficiencies in the reach of the Act by amendments to s 4 to add subs (2) in 1990 and subs (3) in 1996. Whether s 4(1) should be amended to include the conduct of someone in the position of Mr Poynter is similarly a question of policy for the Legislature.

---

[11] See authorities cited in footnote 3 above.

BLANCHARD, TIPPING, McGRATH AND WILSON JJ

(Given by Tipping J)

Introduction

[18] The appellant, Mr Poynter, is a resident of Australia. The Commerce Commission served proceedings on him issued out of the High Court at Auckland, alleging contraventions by him and others of the Commerce Act 1986. Mr Poynter entered an appearance under protest to the jurisdiction of the New Zealand courts,[12] claiming that the Commerce Act has no such extraterritorial effect as would extend to what the Commission alleged against him – essentially involvement in price fixing in relation to the supply in New Zealand of timber preservatives and allied services. The Commission contends that, although Mr Poynter is a resident of Australia, the New Zealand courts have jurisdiction to determine the allegations made against him and to impose pecuniary penalties and other relief on him, if contraventions are established. The basis of the Commission's contention appears to have undergone some refinement as the issue has proceeded through to this Court.

[19] The High Court dismissed Mr Poynter's protest to the jurisdiction.[13] The Court of Appeal dismissed his appeal from that determination.[14] We consider that the protest should have been upheld and that Mr Poynter's appeal to this Court should be allowed. This is because the allegations made against him are not susceptible to the jurisdiction of the New Zealand courts, essentially because they do not fall within the terms of s 4 of the Act, that being the only section which provides with the necessary clarity for the Act to apply to overseas conduct.

---

12 See High Court Rules, r 5.49.

13 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805 (HC).

14 *Harris v Commerce Commission* [2009] NZCA 84, (2009) 12 TCLR 379.

The allegations

[20] The allegations do not involve any suggestion that Mr Poynter personally did anything relevant in New Zealand nor is it alleged that he personally made any communication from Australia to New Zealand. Mr Poynter has never physically come within the jurisdiction of the New Zealand courts in any material way. He is alleged to have been an officer or an employee or to have had managerial responsibility in relation to companies described, for short, as Fernz NZ, Nufarm and FChem. The essence of the allegations is that the companies referred to, and others, described as comprising the Koppers Group, the Fernz Group and the Osmose Group, entered into an arrangement or understanding that their businesses in New Zealand would share price information, would not compete on price, and would not compete for each other's longstanding or significant customers. It is further alleged that the companies and corporate groups identified above colluded to maintain market share, to avoid any unrestrained competition and to keep prices at a level above that which would have prevailed in a fully competitive market. Mr Poynter is said to have entered into the arrangement or understanding in Australia on behalf of the Fernz Group.

[21] The Commission's first statement of claim contained 49 causes of action, reflecting the fact that there were 15 defendants of which Mr Poynter was the 11th. Various other subsidiary understandings and arrangements in contravention of the Act are set out in this pleading. It is not necessary to refer to them in detail. It is only when one reaches the 48th and 49th causes of action that any relief is claimed against Mr Poynter himself, as opposed to companies of which he is said to have been an officer or employee. In the 48th cause of action, the Commission alleged that Mr Poynter and two other officers or employees of the Fernz Group, Mark Greenacre and Elias Akle, in their capacity as such officers or employees:

> 1 contravened or attempted to contravene section 27 of the Act by virtue of their involvement in the breaches by the Koppers Group defendants pleaded in causes of action [as enumerated]; and/or
>
> 2 were directly or indirectly, knowingly concerned in the breaches by the Koppers Group defendants pleaded in causes of action [as enumerated].

[22] Essentially the same allegations were made against Mr Poynter and others, including Messrs Greenacre and Akle, in the 49th cause of action in which they were said to have contravened the Act and to have been, directly or indirectly, knowingly concerned in breaches as officers or employees of the Osmose Group. The particulars given in support of these allegations make reference to the conduct of Mr Poynter whenever he is specifically referred to in Schedule A to the statement of claim. That document comprises 13 pages, under the general heading "The meetings, telephone calls or other communications which were attended/carried out by the parties listed, among others, on or about the times detailed." The scheduled material is presented in three columns, identifying those alleged to have participated in the meetings, telephone calls or other communications, the dates on which they took place, and their details. The first entry in Schedule A serves as an example. Mr Poynter is shown as a party to a communication on a date or dates unknown in 1998 between himself and others named, the details being described as "a lunch meeting in Sydney where discussions were held about pricing and customers". The relief claimed against Mr Poynter includes injunctions and pecuniary penalties.

[23] Mr Poynter's appearance under protest to the jurisdiction records his objection to the jurisdiction of the High Court of New Zealand as being based on the grounds that he is a foreign citizen, resident in Australia, and does not carry on business or have assets in New Zealand. He contends that the Commission does not have a good arguable case that any of the claims made against him fall within the jurisdiction of the High Court of New Zealand.

[24] The Commission joined issue on the question of jurisdiction, by filing an application to set aside the protest. After doing so the Commission filed an amended statement of claim which added a further allegation against Mr Poynter, namely one of conspiring with other defendants to breach the Act. As well, Mr Poynter was no longer included in the allegations made in the 49th cause of action. Hence, when the protest to jurisdiction was determined by the High Court, the allegations against Mr Poynter were that he, Mark Greenacre and Elias Akle:

1 contravened or attempted to contravene section 27 of the Act by virtue of their involvement in one or more of the breaches by the Fernz Group defendants pleaded in causes of action [as enumerated]; and/or

2 were directly or indirectly, knowingly concerned in one or more of the breaches by the Fernz Group defendants pleaded in causes of action [as enumerated];

3 conspired with another defendant or defendants to breach the Act as pleaded in one or more of causes of action [as enumerated].

Relevant legislative provisions

[25] It is convenient here to set out those provisions of the Commerce Act which are of particular relevance to the issues arising. First, there is s 4 which is the only section in the Act which is expressly directed to conduct outside New Zealand. 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 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 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.

[26] Next there is s 80(1) which sets out the circumstances in which the court may order persons to pay pecuniary penalties. The relevance of this section derives principally from its reference to conspiracy in subs (1)(f).

> **80 Pecuniary penalties**
>
> (1) If the Court is satisfied on the application of the Commission that a person—
>
> (a) has contravened any of the provisions of Part 2; or

(b) has attempted to contravene such a provision; or

(c) has aided, abetted, counselled, or procured any other person to contravene such a provision; or

(d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; 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; or

(f) has conspired with any other person to contravene such a provision,—

the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate. …

[27] Thirdly, there is s 90 which deals with the subject of conduct by servants or agents. It provides:

90 Conduct by servants or agents

(1) Where, in proceedings under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of his actual or apparent authority, had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate—

(a) by a director, servant, or agent of the body corporate, acting within the scope of his actual or apparent authority: or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

(3) Where, in a proceeding under this Part in respect of any conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of this Act applies, it is necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, acting within the scope of his actual or apparent authority, had that state of mind.

(4) Any conduct engaged in on behalf of a person other than a body corporate—

(a) by a servant or agent of the person acting within the scope of his actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, given within the scope of the actual or apparent authority of the servant or agent—

shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that intention, opinion, belief or purpose.

For reasons to be addressed below, it was ultimately accepted that this case is not governed by s 90. Its terms are, however, relevant to the compass of the Act as a whole.

Decisions below

[28] The Commission's application to set aside Mr Poynter's protest to the jurisdiction came before Hugh Williams J in the High Court in Auckland and was granted. This, of course, had the effect of rejecting Mr Poynter's protest. In his judgment the Judge recorded that the only basis on which the Commission claimed to have served Mr Poynter overseas without leave was r 219(h) of the High Court Rules.[15] It is not, however, necessary to pursue that aspect of the matter in these reasons. The Judge also recorded that the Commission accepted that s 4(1) of the Act did not apply as Mr Poynter was neither resident nor carried on business in New Zealand.[16] His Honour then referred to the key submission of Mr Miles QC on behalf of Mr Poynter that, as s 4(1) did not apply, it must necessarily follow that the Act had no application to Mr Poynter. The Judge rejected that argument saying simply that if persons outside New Zealand do or omit acts which infringe the Act they can be named as parties to New Zealand litigation, although any penalties imposed on them may prove to be unenforceable.[17]

---

15 At [3].
16 At [68].
17 At [69].

[29] The Judge did not at this point in his reasons elaborate on how he came to that conclusion. He embarked next on a review of counsels' submissions and ultimately held that s 4 was not an exhaustive statement of the Act's extraterritorial reach. He expressed the view that Mr Poynter was liable to the jurisdiction of the New Zealand courts on the basis of accessory liability or conspiracy, but, in this respect, the Judge did not refer to s 90 of the Act which, as we have seen, deals with the general subject of conduct involving servants or agents.

[30] The Court of Appeal discussed the application of the Act to overseas defendants at [20]–[52] of its reasons. The Court had earlier recorded that not only did Mr Poynter neither reside nor carry on business in New Zealand, he had not personally engaged in any relevant acts in New Zealand, nor had he addressed any relevant communications to persons resident in New Zealand.[18] In an important passage the Court said:[19]

> 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 extraterritorial 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] HCA 41, (2000) 201 CLR 552 at [42] per Gaudron, McHugh, Gummow and Hayne JJ).
>
> (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* 148 F 2d 416

---

18 At [6].
19 At [20].

(2nd Cir 1945) and *Hartford Fire Insurance Co v California* (1993) 509 US 764, discussed in Brendan Sweeney "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?" (2007) 8 MJIL 2 at 20–27.

[31] We agree with the two important principles which the Court of Appeal there identified but, for reasons to be developed later, we do not agree that these principles should be diminished on the basis suggested by the Court.

[32] Having reiterated that the Commission did not claim Mr Poynter's conduct came within s 4, the Court described the Commission's position as being that s 4 is not an exhaustive statement of the circumstances in which the Act applies to overseas conduct.[20] It went on to refer to the proposition advanced by Mr Goddard QC, for the Commission, that s 4 does not address issues such as the liability of an overseas resident who procures contravening conduct in New Zealand or who is a party to an unlawful agreement/conspiracy from which the conduct in New Zealand flows.[21] In this area, which is not governed by s 4, the Commission submitted that the common law authorities were relevant and applicable.

[33] The Court then proceeded to identify two alternative lines of analysis, advanced on behalf of the Commission, namely the agency line and the conspiracy line. The agency argument was that Mr Poynter acted in New Zealand through agents (taking that concept "in a broad, non-technical sense") who participated in price fixing agreements there. This line of argument, the Court said, relied in particular on *Bray v F Hoffman-La Roche Ltd*[22] and the decision of the High Court of New Zealand in *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd*.[23]

[34] The conspiracy argument was that Mr Poynter was a party to an unlawful agreement/conspiracy pursuant to which other people did overt acts in New Zealand which should be attributed to him. The Court of Appeal viewed Hugh Williams J as having "in essence" accepted the agency and conspiracy arguments.[24] The Court

---

20 At [23].
21 At [23].
22 *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243, (2002) 118 FCR 1 and, on appeal to the Full Court of the Federal Court, *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153, (2003) 130 FCR 317.
23 *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 (HC).
24 At [26].

then traversed Mr Miles' argument in opposition. We will not set out his submissions here as they will feature in our own analysis later. In the course of its evaluation of the competing arguments, the Court of Appeal said it accepted that, if overseas parties agree outside New Zealand to implement a course of conduct in New Zealand which contravenes the Act, 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, particularly in circumstances where, as here, they are said to have some authority over the New Zealand actor.[25] Their Honours said that they found some support for this analysis in *Bray* which they then discussed in detail.

[35] The Court of Appeal concluded by discussing the conspiracy line of argument, indicating that they considered it to be helpful by analogy. In summary the Court held that:[26]

> 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.
>
> 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.

Extraterritoriality generally

[36] *Bennion on Statutory Interpretation* states, as a general proposition, that an enactment is to be treated as not having extraterritorial effect unless a contrary intention appears and subject to any relevant rules of private international law.[27] *Craies on Legislation* states, to the same effect, that, in the absence of contrary evidence, a legislative proposition is addressed to anyone who is within the territory

---

25 At [34].
26 At [52].
27 FAR Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, Wellington, 2008) at 371.

to which the proposition extends.[28] An enactment will generally apply to things done and people in the territory to which it extends, and no further.[29] There is a presumption that Parliament does not intend to assert extraterritorial jurisdiction, which can be rebutted only by clear words or necessary implication.[30]

[37] These principles are underpinned by considerations of international comity. As Lord Lindley MR put it in *Re A B & Co*,[31] "unless Parliament has conferred upon the Court that power in language which is unmistakable, the Court is not to assume that Parliament intended to do that which might so seriously affect foreigners who are not resident here, and might give offence to foreign Governments." More recently, Lord Simon (dissenting but not on this point) reiterated this policy consideration when he said in *Goldstar Publications Ltd v Director of Public Prosecutions*[32] that "[o]ther than quite exceptionally, sovereigns do not meddle with the subjects of foreign sovereigns within the jurisdiction of those foreign sovereigns – a consideration inherently potent in matters where international standards vary greatly". The subject-matter of the present case is of a kind where international standards are by no means consistent. Nor must it be overlooked that although Mr Poynter is a resident of Australia, the approach taken by the Court of Appeal would necessarily apply wherever the overseas person resided.

[38] As early as 1863, Dr Lushington stressed the same point as that made by Lord Simon when he said in *The Amalia*[33] that "[t]he British Parliament has no proper authority to legislate for foreigners out of its jurisdiction ... [no] statute ought, therefore, be held to apply to foreigners with respect to transactions out of British jurisdiction, unless the words of the statute are perfectly clear". This principle has

---

28 Daniel Greenberg (ed) *Craies on Legislation* (9th ed, Sweet & Maxwell, London, 2008) at [11.2.2].

29 *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130 (HL) at 151 per Lord Wilberforce; *Lawson v Serco Ltd* [2004] EWCA Civ 12, [2004] 2 All ER 200 at 204 per Pill LJ; and *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153 at [44]–[45] per Lord Rodger.

30 *Craies* at [11.2.5]. In *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 438 Richardson J applied this approach in the cognate field of statutory override of sovereign immunity. See also Millett J in *Arab Bank plc v Merchantile Holdings Ltd* [1994] Ch 71 (Ch) at 82.

31 *Re A B & Co* [1900] 1 QB 541 (CA) at 544 per Lord Lindley MR.

32 *Goldstar Publications Ltd v Director of Public Prosecutions* [1981] 1 WLR 732 (HL) at 737.

33 *Cail v Papayanni ("The Amalia")* (1863) 1 Moore PCCNS 471 at 474, 15 ER 778 at 780 (PC).

been said to apply with even greater strength to Acts which impose penalties.[34] The tenor of these authorities has very recently been affirmed in a context not dissimilar to that in the present case by the decision of the House of Lords in *Office of Fair Trading v Lloyds TSB Bank plc* in which Lord Hoffmann[35] said that there is a presumption that legislation is not intended to have extraterritorial effect. The key principle which derives from these authorities is that the courts should not treat legislation as having extraterritorial effect unless and then only to the extent Parliament has made that clear by means of express words or necessary implication.

[39] Mr Goddard argued that despite the weight of the authorities to which we have referred, a more relaxed approach should be taken to the extraterritorial scope of domestic legislation. For that submission he relied significantly on the speech of Lord Diplock in *Treacy v Director of Public Prosecutions*.[36] That was a case which concerned the scope of the Theft Act 1968 (UK). Mr Treacy had posted in England a letter demanding money with menaces addressed to a person in Germany. A majority of their Lordships held that the Act applied in those circumstances on the basis that the demand, being the essence of the offence, should be regarded as having been made when the letter was posted in England. On the point of principle relevant to the present case, Lord Diplock said that he could see no reason in comity to prevent Parliament from rendering liable to punishment, *if they subsequently came to England*, persons who had done, outside the United Kingdom, physical acts which had harmful consequences upon victims in England. This statement, which did not apply directly to the facts of *Treacy*, was made in the course of his Lordship's general review of extraterritorial issues. The key point is, of course, that here Mr Poynter has not subsequently come to New Zealand.

[40] Although he dissented on the facts in *Treacy*, Lord Reid made a strong statement, with which we respectfully agree, about the general presumption against extraterritorial reach of domestic statutes. He said:[37]

---

34 See Staughton LJ in *BBC Enterprises Ltd v Hi-Tech Xtravision Ltd* [1990] 1 Ch 609 (CA) at 613.
35 *Office of Fair Trading v Lloyds TSB Bank plc* [2007] UKHL 48, [2008] AC 316 at [4].
36 *Treacy v Director of Public Prosecutions* [1971] AC 537 (HL).
37 At 551.

> It has been recognised from time immemorial that there is a strong presumption that when Parliament, in an Act applying to England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England. Parliament, being sovereign, is fully entitled to make an enactment on a wider basis. But the presumption is well known to draftsmen, and where there is an intention to make an English Act or part of such an Act apply to acts done outside England that intention is and must be made clear in the Act.

This is a convenient place at which to point out that s 4 of the Act is a good example of what Lord Reid was speaking about. When first enacted s 4 contained only what is now subs (1). Parliament added subs (2) in 1990. A little later subs (3) was added. These were express and precisely focussed extensions of the Act's reach to the specified types of overseas conduct. These legislative additions to s 4 make it all the more unlikely that the Act was meant to reach yet further overseas conduct not expressly provided for.

[41] Returning to the general question being addressed, we do not consider the other authorities relied on by Mr Goddard for his suggestion that in modern times this approach has been relaxed throw serious doubt on the proposition that Parliament should not be taken to have legislated with extraterritorial effect unless its enactment signals that purpose by express words or necessary implication. By extraterritorial effect we mean with the effect that someone who has not personally done anything within New Zealand and is not present in New Zealand is nevertheless able to be subjected to proceedings in New Zealand on account of the conduct of others within New Zealand.

[42] The main cases relied on by Mr Goddard in addition to *Treacy* were *Lipohar v The Queen*,[38] *Liangsiriprasert v United States*[39] and *Libman v The Queen*.[40] We will take the Privy Council decision in *Liangsiriprasert* as an example. A conspiracy was formed in Thailand to traffic in drugs in Hong Kong and also in the United States. The appellant, who was a Thai national, went to Hong Kong to collect money payable in terms of the conspiracy. He was arrested in Hong Kong. The Privy Council had no difficulty in holding that he could be tried for the conspiracy in Hong

---

38 *Lipohar v The Queen* [1999] HCA 65, (1999) 200 CLR 485.
39 *Liangsiriprasert v United States* [1991] 1 AC 225 (PC).
40 *Libman v The Queen* [1985] 2 SCR 178.

Kong because he was now within the territorial boundaries of Hong Kong. There are similarities between that case and *Director of Public Prosecutions v Doot*,[41] which will be the subject of more detailed discussion below.

[43] We return to the "two important principles" identified by the Court of Appeal and that Court's diminution of them in [20] of its reasons.[42] The Court there spoke of the "practical considerations" behind the principles. But comity between nations is the chief rationale for these principles, and it is not diminished by changing practical considerations.[43] We do not read the decision of the High Court of Australia in *Agar v Hyde*[44] as eroding the general principles. That case contains no support for giving practical considerations the weight which the Court of Appeal appears to have placed on them. The indication in *Worldwide NZ LLC v Quay Park Arena Management Ltd*[45] that they did warrant that weight, which was largely based on observations in *Bomac*, was in error. Furthermore, the decisions in *Worldwide* and *Bomac* do not provide convincing support for a retreat from the underlying principles the Court of Appeal correctly identified.

[44] Nor do we consider that the fact the issue arises in a competition law context justifies a modification of the general principles. The Court of Appeal mentioned the so-called "effects" doctrine that exists in the United States but did not expand on why in a country like New Zealand, which has no such doctrine, there was nevertheless a case for modification of the ordinary principles.

[45] We are by no means insensitive to the suggestion that extraterritoriality issues should now be viewed from the perspective of the substantial changes that have taken place in recent times in the way people and businesses communicate with each other. Nor are we insensitive to what the Court of Appeal called the realities of globalisation. We do not, however, consider it is appropriate in the present context for the courts to impose piecemeal common law glosses onto a statutory code. The

---

41 *Director of Public Prosecutions v Doot* [1973] AC 807 (HL). See [73]–[77] below.

42 See [30] above.

43 In *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL) at 455 Lord Goff acknowledged the changes brought about by modern methods of communication but said that the point of principle remained.

44 *Agar v Hyde* [2000] HCA 41, (2000) 201 CLR 552.

45 *Worldwide NZ LLC v Quay Park Arena Management Ltd* [2008] 1 NZLR 106 (HC) at [20].

more is this so if such glosses require significant development of the common law. It is far better, both in principle and pragmatically, for Parliament to address the issues arising in a comprehensive way rather than for the courts to effect ad hoc additions by a process which does not accord with appropriate principles of statutory interpretation. The presumption that express language or necessary implication is required to achieve extraterritorial effect exists to reinforce the proposition that it is for Parliament not the courts to decide what extraterritorial effect an enactment should have. The policy issues in making that assessment are for Parliament not the courts. The courts simply give effect to such extraterritorial reach as Parliament has clearly specified.

The Commerce Act and extraterritoriality

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

[47] The Act is directed at conduct of both human beings and corporate bodies. In some circumstances the conduct of one person is regarded, for the purposes of the Act, as being additionally the conduct of another person. That is the effect of s 90 which, as will be recalled, deals with the subject of conduct by servants or agents.

---

[46] See *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [45] per Lord Hobhouse; *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26]; and *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [140].

[48] Subsection (1) of s 90 deals with conduct engaged in by a body corporate when it is necessary to establish the state of mind of the body corporate. The subsection makes it sufficient for that purpose to show that a director, servant or agent of the body corporate, acting within the scope of actual or apparent authority, had the necessary state of mind. In other words, in that situation the subsection attributes the state of mind of the director, servant or agent to the body corporate. Subsection (3) attributes the state of mind of a servant or agent of a human employer or principal, when acting within actual or apparent authority, to the human employer or principal.

[49] Subsection (2) deems the conduct of a director, servant or agent of a body corporate within actual or apparent authority to be additionally ("also") the conduct of the body corporate itself. It additionally deems the conduct of any person entered into at the direction or with the consent of a director, servant or agent of a body corporate, to be the conduct also of the body corporate itself. Subsection (4) deems the conduct of a servant or agent of a human principal acting within actual or apparent authority also to be the conduct of the human principal. As well it deems any conduct engaged in on behalf of a human employer or principal, by any other person at the direction, or with the consent or agreement, of a servant or agent of the human employer or principal, to have been engaged in also by that human employer or principal.

[50] These are comprehensive rules governing cases where one person acts on behalf of or at the direction of another person in an employment or agency context. In the present case, one of the allegations against Mr Poynter is that he directed or encouraged persons in New Zealand to breach the Act. The only subsection of s 90 which could possibly apply is subs (4). However, as Mr Goddard was constrained ultimately to accept, that subsection does not fit the circumstances of this case. The people who acted in New Zealand were not doing so on behalf of Mr Poynter personally. They were doing so on behalf of the company of which he was a servant or agent, as they were. While Mr Poynter was a servant or agent of the company by which he was employed, it cannot be said that those whom he directed or encouraged were acting on his personal behalf, nor can it be said that those who acted in

New Zealand were servants or agents of his. In short, there was no human employer or principal for the purposes of s 90(4).

[51] There is therefore no basis under s 90 whereby the conduct of those carrying out Mr Poynter's alleged directions or encouragement to breach the Act can be treated as if it were Mr Poynter's own conduct carried out in New Zealand, thereby rendering him subject to the jurisdiction of the New Zealand courts. If s 90 had applied, all relevant conduct in New Zealand of persons whom Mr Poynter directed or encouraged to engage in price fixing would have been attributable to him because of the s 90 relationship. As any such attributed conduct took place in New Zealand no extraterritoriality would have been involved. For the purposes of the Commerce Act Mr Poynter would, in that event, have been in the same position as if he had personally engaged in the contravening conduct in New Zealand. That conduct would not have been engaged in outside New Zealand, as s 4 puts it. But, as s 90 does not apply to the circumstances alleged, it cannot assist the Commission's argument.

[52] In view of the comprehensive terms of s 90, there is no basis upon which it would be appropriate to invoke the common law and to hold that at common law, if that be the case, the concept of attributing conduct of one person to another allows the conduct of those who acted in New Zealand to be regarded as Mr Poynter's own conduct in New Zealand for Commerce Act purposes. Nor, as we have said, do we consider it follows by necessary implication from the terms of s 90 that Mr Poynter's conduct out of New Zealand can be supplemented, for extraterritoriality purposes, by treating him as if he had additionally engaged in conduct in New Zealand.

[53] We have therefore reached the point, which ultimately became common ground in argument in this Court, that neither s 4 nor s 90 applies to the conduct alleged against Mr Poynter. Neither section assists the Commission to bring Mr Poynter within the jurisdiction of the New Zealand courts. We do not consider that the Act can properly be construed as providing that, in addition to the agency circumstances dealt with in s 90, there are other unspecified "agency" situations, not dealt with in that section, whereunder the conduct of persons in New Zealand can be attributed to persons outside New Zealand. No such extension of the connotations of

"agency" is evident from the language of the Act, either expressly or by necessary implication.

[54] The remaining basis upon which the Commission contends that this attribution can and should be achieved is through s 80 and, in particular, the reference in subs (1)(f) to a pecuniary penalty being able to be imposed on a person who has conspired with any other person to contravene any of the provisions of Part 2 of the Act.[47] The first thing that must be said about s 80(1)(f) and its reference to conspiracy is that it does not thereby say anything about extraterritoriality. Neither expressly nor by necessary implication does s 80(1) extend the operation of the Act to those like Mr Poynter who are resident overseas and who do not personally carry on business in New Zealand. If the concept of conspiracy is, in itself, to have the effect of extending the extraterritorial reach of the Act beyond that stated in s 4, it must do so on a premise similar to that which the Commission sought to attribute to s 90. The proposition, as Mr Goddard recognised, has to be that, whereas Mr Poynter is not susceptible to the New Zealand jurisdiction through s 4, or through the employment and agency provisions in s 90, he is so liable via the common law incidents of conspiracy. The proposition is that although Mr Poynter entered into the conspiracy overseas, the conduct of anyone carrying out the purposes of the conspiracy in New Zealand is to be treated as Mr Poynter's conduct and he must thereby be taken to have acted himself within the jurisdiction of the New Zealand courts.

[55] There are two problems with this proposition before one reaches the common law incidents of conspiracy. First, the proposition is not supported by any express language in the Act nor by necessary implication from the language of the Act. Secondly, in the case of a statute which represents a self-contained code, it seems improbable that Parliament legislated on the basis that an unexpressed common law gloss would extend the reach of the Act beyond its self-contained terms. Put more bluntly, it is by no means apparent that Parliament's purpose was to bring an overseas conspirator within the reach of the Act, if that person was not within the reach of either s 4 or s 90.

---

[47] They include ss 27 and 30 which deal, respectively, with practices substantially lessening competition and, specifically, price fixing.

[56] Even if those difficulties could be overcome, the common law of conspiracy does not support the Commission's argument. As we will explain in more detail when we address the common law of conspiracy and its extraterritorial aspects,[48] the conventional view is that a person who has entered into a conspiracy overseas is amenable to the jurisdiction of the domestic court only if they physically come within that jurisdiction. There is no authority supporting the proposition that the acts of those who implement the conspiracy within the jurisdiction may be attributed to a conspirator who has at no time come within the jurisdiction.

Commission's submissions/views of Court of Appeal

[57] It is appropriate now to explain why we cannot accept the argument presented by Mr Goddard in support of the conclusions reached by the Court of Appeal. Our reasons are inherent in what we have already written but, in deference to the views of the Court of Appeal and counsel's argument, we will be more specific.

[58] Mr Goddard's essential submission, as developed in this Court, was that this was not a case about extraterritoriality at all. The relevant conduct took place in New Zealand. It was to be treated as being, in law, Mr Poynter's conduct on the basis that it was legally attributable to him. That being the argument, it is appropriate to consider the circumstances in which the suggested attribution may take place.

[59] There are two bases upon which the conduct of one person may be "attributed" to, and treated in law, as the conduct of another person in the sense contended for here.[49] The first depends on there being a relationship between the parties which gives rise to that consequence. The classic relationships in this respect are those of employer and employee (servant), and principal and agent. In cases of that kind the attribution of one person's conduct to the other, in the sense of that other being responsible in law for the first person's conduct, derives from the relationship. The second basis of attribution is when one person becomes liable for

---

[48] See [73]–[77] below.

[49] We are here using the concept of attribution to encompass both attribution in the strict sense and vicarious liability.

the conduct of another as a result of that first person's conduct; as a result, for example, of the first person directing or encouraging the other person to engage in the conduct in question. Put simply, in the first kind of case, the attribution results from the relationship. In the second, it results from conduct.

[60] Section 90 is directed at the classic relationships of employer and employee (servant) and principal and agent. The Act does not expressly address the second kind of case. It does so indirectly by means of s 80(1) and the paragraphs in that subsection which refer, for example, to aiding, abetting, counselling, procuring and conspiring or, more generally, being knowingly concerned in or a party to a contravention by another person. When it is a person's conduct which gives rise to the attribution to him of the conduct of another person, the first person's conduct is an essential link in the attribution process. When, as here, that conduct takes place overseas, it cannot be said that the case has no extraterritorial dimension. It is the overseas conduct which is said to give rise to the attribution of the New Zealand conduct.

[61] The position is therefore not as simple as Mr Goddard's argument implied. The only thing that would render Mr Poynter liable to the jurisdiction of the New Zealand courts, on the basis of the argument under consideration, is his conduct overseas. Without it there would be no basis for attributing to him the conduct of those he is alleged to have directed or encouraged to undertake contravening conduct in New Zealand. That can be extended to saying that if, as here, an overseas person is alleged to have conspired overseas to contravene New Zealand's Commerce Act, the conduct of those who acted in implementation of the conspiracy in New Zealand can only be attributed to the overseas person as a result of that person's overseas conduct. It is by no means clear, either from the express language of the Commerce Act or by necessary implication from that language, that our Parliament intended to include such persons within the jurisdictional reach of the Act. It is important to reiterate that a necessary implication is not the same thing as a reasonable implication. Mr Goddard made much, as did the Court of Appeal, of the desirability and reasonableness of construing the Act as applying to people in Mr Poynter's circumstances. Whether that is so is a matter for Parliament. But even if it is so, that

does not give the courts the ability to construe the Act so as to achieve an extraterritorial reach which Parliament has not clearly signalled.

[62] We accept Mr Miles' submission that only s 4 is designed to extend the reach of the Act to overseas conduct. No other provision in the Act carries within it the necessary implication that the Act's extra territorial reach was intended to go beyond the conduct expressly provided for in s 4. In the present context the only effect of s 90, if it applies, is to attribute to an overseas person conduct engaged in within New Zealand. Section 4 is the only section which brings conduct engaged in outside New Zealand within the reach of the Act, and should therefore be regarded as an exhaustive statement of the Act's intended scope in relation to overseas conduct. This was the view expressed by the High Court in *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd*,[50] to which the Court of Appeal made reference.

[63] For the reasons given we cannot accept the Court of Appeal's view[51] that it does not matter, for jurisdictional purposes, that Mr Poynter did not attend meetings in New Zealand or send relevant communications to persons in New Zealand. Nor can we accept that Court's view that it is sufficient the communications or directions in furtherance of the anti-competitive arrangements were given to New Zealand actors while they were overseas and they then acted in furtherance of the arrangements in New Zealand. It does not follow that in these circumstances an overseas person should be regarded as having engaged in conduct in New Zealand. The Court of Appeal sought to justify its approach by reference to "basic principle" and the "realities of globalisation".[52] With respect, we consider that basic principle points the other way and that (as Mr Miles submitted) the realities of globalisation do not necessarily support the Court of Appeal's decision. Policy factors cannot lightly overturn the correct application of the principles of interpretation applicable to the extra-territoriality of statutes.

---

50 *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 (HC).
51 At [43].
52 At [44].

[64] The strong policy overlay[53] in the Court of Appeal's reasons is evident from its suggestion that acceptance of Mr Poynter's argument would not reflect "the legitimate interests of New Zealand" and that such acceptance 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".[54] The Court did not consider that either s 4 or principles of international comity required such an outcome. In the Court's view it was:[55]

> ... 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.

[65] At the start of this passage the Court refers to the policy and scheme of the Act. That, in our respectful view, was to invoke a scheme which is not objectively discernible and a policy which Parliament has not signalled with the necessary clarity. It is very important in the potentially sensitive area of extraterritoriality that Parliament make the necessary policy determinations and evidence them clearly in the resulting legislation. Parliament is in a much better position than the courts to ascertain and reconcile all the potential ramifications for this country's international relations and trade. As Mr Miles submitted, the ramifications of extending the reach of a New Zealand statute into other countries may not universally be beneficial. The matter must be looked at from all relevant perspectives and only Parliament, with the assistance of the Executive, can satisfactorily undertake the necessary exercise.

---

53 Relying on what the Court perceived as a reasonable implication, but not a necessary implication.

54 At [46]. To describe the failure of the Act to reach Mr Poynter's alleged conduct as a loophole rather begs the question being addressed. On conventional principles that failure is the product of Parliament's decision to limit the Act's extraterritorial reach to the circumstances set out in s 4.

55 Ibid.

[66] We should finally refer to the Court of Appeal's view[56] that the incorporation of the concept of conspiracy into the Act was an indication that Parliament intended the Act to have extraterritorial application in circumstances beyond those referred to in s 4. Their Honours added that otherwise the concept of conspiracy in the Act would have to be "limited (by implication) in some way". The reason for such limitation was that the Court would be concluding that the concept of conspiracy in the Act was more limited than the concept of conspiracy in the Crimes Act 1961, or at common law, even though the Commerce Act does not itself specifically limit the concept of conspiracy. The extraterritorial reach of the Crimes Act is, of course, expressly dealt with in ss 6 and 7 of that Act and we do not consider that creates any difficulty because those provisions are by no means the same as those contained in s 4 of the Commerce Act.

[67] For the reasons which we have already given, and those to be addressed below in respect of the extraterritorial aspects of conspiracy at common law, we cannot accept that simply by including the concept of conspiracy as one of the means by which the Commerce Act can be contravened, Parliament has in any way signalled, let alone with the necessary clarity, that the Act was meant to extend to overseas conspirators simply on account of their entering into the conspiracy overseas or via the implementation of the conspiracy in New Zealand without their coming to New Zealand.

The *Bray* and *Bomac* cases

[68] We move now to indicate why the decision of Merkel J in *Bray*, upon which the Court of Appeal relied and on which Mr Goddard placed some emphasis in his submissions, does not carry the Commerce Commission to its intended destination. What was in issue in that case was s 5(1) of the Trade Practices Act 1974 (Cth) which provided that the Act extended "to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia". The crucial first question was therefore whether the alleged contraveners, they being

---

[56] At [51].

parent companies with subsidiaries in Australia, were carrying on business in Australia and were thus amenable to the jurisdiction of the Australian courts, despite their being incorporated overseas and not themselves directly carrying on business in Australia. This was a similar issue to that which would have arisen if the Commission had endeavoured to invoke s 4(1) of the New Zealand Act in the present case. Merkel J held that the evidence did not establish that the overseas corporations carried on business in Australia through their Australian subsidiaries. His Honour considered that the corporate veil could not be lifted so as to treat the conduct of the Australian subsidiaries as the conduct of their overseas parents in that way.[57] Nor was his Honour satisfied that, for his purposes, the subsidiaries could be treated as the agents of their parents, so as to attribute the conduct of the subsidiaries to the parents on that basis.[58]

[69] The consequence was that, if the overseas parents were to be amenable to the jurisdiction of the Australian courts, that had to be on the basis of conduct by those parents in Australia. The case against the overseas parents in this respect was that by the conduct of their Australian subsidiaries the parents gave effect to, or were persons involved in, the alleged cartel arrangements in Australia. After a detailed review of the evidence Merkel J held that the implementation of the cartel arrangement in Australia was controlled and directed, directly or indirectly, by the parent companies.[59] That control was effected, at least in part, by means of communications by officers of the parent companies to officers of the subsidiaries in Australia. The Judge held that these communications by the parents *into* Australia represented sufficient conduct by the parents *in* Australia to enable him to find that the parents had engaged in relevant conduct in Australia for the purposes of the Australian legislation.[60] In the present case it is common ground that Mr Poynter himself made no communications from Australia into New Zealand. This is a crucial point of distinction between the two cases.

---

57 At [80].
58 At [81].
59 At [142].
60 At [147].

[70] In *Bray* Merkel J also held that the conduct of the subsidiaries was conduct which they were undertaking "on behalf of" their parents.[61] In this case it cannot, for reasons already given, be said that the conduct of the actors in New Zealand was undertaken on behalf of Mr Poynter. It was undertaken on behalf of the corporate body or bodies by whom they were all employed. One employee does not undertake conduct on behalf of another employee, even if that other employee is directing or encouraging that conduct. Nor can the New Zealand actors be regarded as the servants or agents of Mr Poynter for reasons which are essentially the same as those applying to the "on behalf of" analysis. Section 90, and the New Zealand Act generally, must be interpreted and applied in accordance with ordinary legal principles. There is no basis for concluding that the position was intended to be otherwise so as to allow the courts, for extraterritoriality purposes, if not generally, to treat concepts such as agency in some broad, unspecific and non legal way in order to accommodate the Commission's view of what the outcome should be.

[71] For these reasons we do not consider the decision in *Bray*'s case assists the Commission's argument in the present case. We should mention that *Bray* went on appeal but nothing of consequence to the present issue arises from the views of the three members of the Federal Court who determined the appeal.[62]

[72] Nor do we consider that the decision of Harrison J in *Bomac* provides support for the Commission's argument, quite apart from our earlier reservations about the reasoning in that decision. In that case the Judge accepted jurisdiction essentially on the basis that the parties he called the international defendants had carried on business in New Zealand – in effect, as the Judge put it, a situation the reverse of that contemplated by s 4(1).[63] In *Bomac* the relevant conduct was therefore that of a person who was held to be carrying on business in New Zealand at the relevant time and by that means there was the necessary connection with New Zealand to render the international defendants susceptible to the jurisdiction of the New Zealand courts. Mr Poynter, of course, has never himself carried on business in New Zealand so the *Bomac* case is distinguishable on that account.

---

61 At [148].
62 See *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153, (2003) 130 FCR 317.
63 At [82].

Conspiracy and extraterritoriality at common law

[73] Although, for the reasons given, the conspiracy aspect of the Commission's argument does not produce the outcome for which it contends, we will, for completeness, make relatively brief reference to the common law incidents of conspiracy in order to demonstrate that even if they had been relevant, they do not, without further substantial development, support the Commission's argument. Mr Goddard cited several cases but the decision which seems to us to be the closest to the present facts and, at first blush, the most helpful to his argument, is that of the House of Lords in *Doot*.

[74] Mr Doot was an American citizen. Together with five other American citizens he formed a plan outside England to import cannabis into the United States from Morocco via England. In furtherance of this conspiracy two vans with cannabis concealed in them were shipped from Morocco to England. The cannabis in one of the vans was discovered in Southampton and the cannabis in the other van was discovered in Liverpool. Mr Doot and his associates, being now in England, were arrested and charged with conspiracy to import cannabis into England. They contended that the English courts had no jurisdiction to try them since the conspiracy had been formed abroad. Lawson J rejected that submission but the Court of Appeal accepted it. The appeal of the Director of Public Prosecutions to the House of Lords was allowed.

[75] Their Lordships held that although a conspiracy is complete, as a crime, when the unlawful agreement is made, it continues in existence for so long as there are two or more parties to it intending to carry out its purpose. The English courts had jurisdiction to try the offence, whenever and wherever the conspiracy was formed, if it was still in existence and the accused persons were physically present in England.[64] In the instant case the conduct of Doot and his associates in England established that the conspiracy was still in existence at the time that conduct took place. It will immediately be seen that the jurisdiction of the English courts in those circumstances

[64] At 823 per Viscount Dilhorne.

depended on the physical presence of Mr Doot and his fellow conspirators in England.

[76] Mr Poynter is not alleged to have physically been in New Zealand, at least not when the conspiracy in which he is alleged to have been involved was ongoing. This fundamental and crucial point of distinction renders *Doot*'s case of no assistance to the Commission in the present case. It is a relatively uncontroversial proposition at common law that someone who is within the territorial jurisdiction of a country's courts can be prosecuted on account of a crime which that person commits or continues within that jurisdiction, despite the fact that other conduct associated with the crime may have been committed overseas. The House of Lords' extension of the concept of conspiracy beyond formation to include implementation would have been of no avail to the Director of Public Prosecutions had that implementation not been undertaken by Doot and the others personally in England.

[77] *Doot*'s case does not constitute authority for the proposition that the acts of co-conspirators or others implementing the conspiracy within a country's territorial jurisdiction may be attributed to a conspirator who enters into the conspiracy abroad and who has never personally been within that country's territorial limits. To develop the common law to accommodate that situation would be to take a step well beyond that taken in *Doot*. There is no common law precedent of which we are aware which supports the taking of that step. Its taking cannot possibly be said to be mandated by necessary implication from the inclusion in s 80(1) of conspiracy as one of the ways in which a contravention of the Commerce Act can take place.

Summary

[78] An Act of Parliament should not be held to have extraterritorial effect unless that effect is signalled by express language or by necessary implication. A necessary implication is not the same as a reasonable implication. When, as in this case, Parliament has stated expressly the circumstances in which an Act is to have extraterritorial effect, it would be most unusual if the Act was meant to provide for additional circumstances in which that was so, but this was left to a process of implication. It is common ground that the circumstances of the present case do not

fall within s 4 of the Commerce Act, that being the section which expressly provides for the Act's extraterritorial reach. Mr Poynter cannot properly be regarded as having himself engaged in conduct in New Zealand either pursuant to s 90 of the Act or pursuant to s 80(1)(f), they being, respectively, the sections dealing with attribution of conduct by means of the relationships of employer and employee and principal and agent; and liability as a result of conspiring to contravene the Act. Nor can Mr Poynter properly be regarded as having himself engaged in conduct in New Zealand by reason of some expanded concept of agency or through the common law principles that apply to extraterritorial conspiracies.

[79] Under the guise of applying the scheme and policy of the Act, the Court of Appeal construed it as justifying the attribution to Mr Poynter of the conduct of others within New Zealand when that construction did not represent a necessary implication from the terms of the Act. The Act is not expressed in such a way as to justify the conclusion that, on the alleged facts, bearing in mind as well the agreed proposition that Mr Poynter had not personally done anything in New Zealand, he is nevertheless amenable to the jurisdiction of the New Zealand courts. If, and to the extent that Parliament considers it proper, when all competing issues are addressed, that the Commerce Act should have greater territorial effect than that provided for in s 4, Parliament can always amend the Act so as to achieve that objective with the necessary clarity and precision.

Disposition

[80] In the result, for reasons which draw substantially on Mr Miles' supporting submissions, we conclude that his primary submission that s 4 of the Act is an exhaustive statement of its extraterritorial effect is sound. The appeal must accordingly be allowed. The orders made by the Courts below must be set aside. In their place an order should be made dismissing the Commission's application to set aside Mr Poynter's protest to the jurisdiction. That protest succeeds and Mr Poynter should be dismissed from the proceeding. The Commission must pay him for his costs in this Court the sum of $15,000 plus disbursements, to be fixed if necessary by the Registrar. Mr Poynter should also have his costs in the Court of Appeal and the

High Court, either as agreed or as fixed by those Courts in the light of the outcome in this Court.

Solicitors:
Russell McVeagh, Auckland for Appellant
Commerce Commission, Wellington for Respondent