IN THE SUPREME COURT OF NEW ZEALAND SC 32/2009

BETWEEN **ANDREW ROBERT POYNTER**

Appellant

AND **COMMERCE COMMISSION**

Respondent

Hearing:	17 November 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	J H Miles QC with S C Keene and A J Fincham for the Appellant D J Goddard QC with M-A M Borrowdale for the Respondent

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CIVIL APPEAL

MR MILES QC:

May it please Your Honours, I appear for the appellant together with Ms Keene and Mr Fincham.

ELIAS CJ:

Thank you Mr Miles, Ms Keene, Mr Fincham.

MR GODDARD QC:

May it please the Court, I appear with Ms Borrowdale for the Commerce Commission respondent.

ELIAS CJ:

Thank you Mr Goddard, Ms Borrowdale. Yes Mr Miles?

MR MILES QC:

Your Honours, we have prepared perhaps what's best described as a few pages of supplementary submissions really, which I will speak to here and there as it were.

ELIAS CJ:

Why are they supplementary Mr Miles? Are they, it's not a synopsis of what you've already put in?

MR MILES QC:

No it's, I think it's just making our argument a little clearer given the submissions of Mr Goddard's. So in a sense, it was answering some of the points that he made in his submissions and while of course I can do it orally it just, I would have thought, would have helped Your Honours if you had it in front of you.

ELIAS CJ:

How lengthy are they?

MR MILES QC:

A mere 17 pages Your Honour.

BLANCHARD J:

We're really trying to stop people doing that.

MR MILES QC:

Well I'm in Your Honours' hands. I can speak to them. I just thought it might be easier when you come to consider these points just to have them in front of you but it's of no matter, Your Honours, if it's not helpful we believe –

ELIAS CJ:

It's additional content.

MR MILES QC:

It arises out of, would be the most accurate description.

ELIAS CJ:

Well will it inhibit the development of your oral argument if we don't have those in front of us?

MR MILES QC:

Unlikely.

ELIAS CJ:

All right, well let's proceed without them.

MR MILES QC:

What I will do, hand up, I think, three extra authorities that we advised my friend that we'd be relying on.

ELIAS CJ:

Yes, thank you.

BLANCHARD J:

I think actually we issued a practice note about this habit of counsel some time ago.

MR MILES QC:

Yes I – it's not a –

ELIAS CJ:

Don't read the practice notes?

BLANCHARD J:

Notice I didn't call it a filthy habit.

MR MILES QC:

I don't normally do it Your Honour it was just that some of the –

BLANCHARD J:

Are you applying for name suppression?

MR MILES QC:

But some of these concepts are a bit slippery, particularly the ones advanced by my friend and I just thought it might be easier if you just had the formal –

ELIAS CJ:

It might be best if you look us in the eye and tell us why they're wrong.

MR MILES QC:

Yes, yes, but I'm very happy doing that Your Honours. Could I start perhaps with the two paragraphs in the Court of Appeal judgment which seemed to us, with the greatest of respect, to fail to comply with a number of basic rules of construction. Paragraph 46 and paragraph 51.

ELIAS CJ:

I could say, I'm sorry to be picky, but someone may read the transcript and it may help us in future cases, that the case on appeal doesn't comply with our practice direction either in that the judgments are not collected together. They're in volume 2 rather than being in the principal volume. That's all right, we found them.

MR MILES QC:

Yes, well I regret that Your Honour.

ELIAS CJ:

It just makes it much easier to transport around.

MR MILES QC:

Of course it does.

TIPPING J:

What paragraph Mr Miles?

MR MILES QC:

46 Sir.

TIPPING J:

Thank you.

MR MILES QC:

And that's where Their Honours rejected my primary submission and that's something of course they're quite entitled to do so long as they adopt standard principles of construction. But they go on to say, "We consider it would be contrary to the policy of the Act reflecting the legitimate interests of New Zealand to require that the conduct on the part of an overseas principal establishing the agency relationship occur within New Zealand. That would create a significant loophole in the Act, particularly as New Zealand is a relatively small country with a heavy dependence on imported products and technology. We don't consider either section 4 or the principles of international comity require such an outcome. In our view it's consistent with the policy and scheme of the Act for 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. It's likely to be stronger if the principal has acted personally in New Zealand." I would just say in passing that that's because section 4 permits that.

Now, Your Honours, broadly speaking, we say that this paragraph which encapsules the rationale for the Court of Appeal judgment firstly fails to

construe section 4 in accordance with standard canons of construction. Secondly, relies heavily on a policy which the Court of Appeal picked up from my friend who informed the Court what the policy was, which of course is the role of Parliament, but particularly in sensitive areas such as international relationships and trade and to suggest that you can – to pick a strand of policy dealing with legitimate interests of New Zealand without considering the contrary policies such as extrapolating the regulatory reach of a New Zealand Tribunal into other countries and other nationals, nationals who may have absolutely no connection with New Zealand whatsoever, neither resident nor doing business in New Zealand and to do so in the face of overseas interests, our trading partners, our political partners, is an issue which is quintessentially the role of Parliament and the –

ELIAS CJ:

The paragraph really doesn't amount to saying much more than it would be a good idea.

MR MILES QC:

Well it's the philosophical rationale for construing section 4 in the way they have.

ELIAS CJ:

Yes.

MR MILES QC:

Rather than taking the more traditional approach, which is to analyse precisely what it says.

McGRATH J:

It emerges from the scheme and policy of the Act not its language.

MR MILES QC:

Absolutely.

TIPPING J:

Is it a construction of section 4 or is it not a gloss, or one could use a stronger word on section 4?

MR MILES QC:

Well I would be tempted to, Your Honour, because what it effectively results in is simply driving a tank through the restrictions.

TIPPING J:

Aren't they effectively saying well, everyone accepts that it's not caught by section 4, but we'll make it caught by some other means that is justified by this policy?

MR MILES QC:

Court policy, precisely Sir, precisely. And as I say, and let me extend I suppose my reply which is, which I'll get to a little later, but we then get into the fundamental error, one of perhaps several fundamental errors, in my friend's argument which prevailed in the Court of Appeal, is that he justifies his argument that section 4 is not an exhaustive section dealing with conduct, by saying that there's no connector between the requirements for what is the extended role of the Tribunal and what the appropriate characteristics are. Whereas of course section 4 provides precisely that connector. It defines the circumstances where the Commission is entitled to extend its power and what my friend says is well, absent any obvious connector then I can say to you, well section 4 doesn't cover circumstances where conduct might be in Australia and in New Zealand. This is a loophole and policy suggests we move on. Now it's not, of course, a loophole at all Your Honour. This is the second point which I take issue with in this paragraph. It's a limitation and it is a quite legitimate conceptual difference. There are always limitations when dealing with extraterritorial powers and the limitations can be found in section 4. It is not a loophole. And then on the basis of that in the next extensive sentence they say that they can extend the Act to circumstances where the defendants are neither resident in New Zealand nor do business in New Zealand and crucially, and these are the concessions which my friend

has accepted as being part of the litigation, the conduct of the defendant has had nothing to do with New Zealand. There are no communications into New Zealand and there is no relevant conduct in New Zealand. What he says, of course, is well you can deem his conduct to be in New Zealand through the provisions of section 90. A deeming provision talking about agency and which only comes into consideration once a Court has satisfied itself it has jurisdiction in New Zealand.

BLANCHARD J:

Although I think I can see a difficulty with it, is it not a possible argument that Mr Poynter, assuming he did what he is alleged to have done, has become a party to conduct in New Zealand?

MR MILES QC:

The issue though Your Honour which you have to look at is the conduct and the conduct has to take place within New Zealand and his conduct at best has been a series of meetings, always in Australia, has been an allowance, apparently, or a permission, a tacit permission, in the case of his fellow executive but who reported to him, Greenacre, who was the man who actually was involved in these actions in New Zealand.

TIPPING J:

If there was a wink and a nod, they took place in Australia?

MR MILES QC:

Exactly Sir. Exactly and –

WILSON J:

Mr Miles, just putting aside the perhaps emotive word “loophole” what would you say to the proposition that your argument would really indicate what might be thought to be a gap in our Act in that, as I understand your argument, companies involved in a cartel in New Zealand can avoid any possibility of personal liability of the executives who established those cartels by ensuring

that any discussions take place outside New Zealand between those executives who are not New Zealand residents?

MR MILES QC:

Yes that's correct Sir. And the reason for that is there has to be a limit somewhere. The company's liable –

WILSON J:

Oh yes.

MR MILES QC:

The employer is liable, the overseas employer is liable if it's doing business in New Zealand, as in *Bray*. The New Zealand companies, of course, are liable. The New Zealand executives are liable. The overseas executives are liable if they effectively are doing business in New Zealand, if their conduct becomes New Zealand, but they draw a line. They say, there has to be a limit to the extent to which the Commission's power can extend into nationals of other countries.

WILSON J:

And you say the line is drawn by section 4?

MR MILES QC:

Exactly Sir.

ELIAS CJ:

And you say if Parliament wants to change that it needs –

MR MILES QC:

Exactly.

ELIAS CJ:

– to amend section 4?

MR MILES QC:

Which is what they did in 1990 and 1996 when they passed the amendments to section 4 very carefully limiting an extension of the power which you find in section 4(2) and section 4(3). Section 4(2) deals with trans-Tasman market power, triggered by anti-dumping concerns I think, but again a very carefully constructed extension of the power, and section 4(3) deals with buying into shares of overseas companies that might affect the New Zealand market. That, I understand, was triggered by proceedings against British American Tobacco, probably when they were buying, when overseas principals were buying – overseas companies were buying each other and they had New Zealand subsidiaries which dominated the market and the – that careful extension of the power of the Commission was discussed by Parliament and passed to deal with that specifically.

ELIAS CJ:

It may not have been a careful extension for your argument to be valid. It is simply, surely the case that your argument is having expressed two circumstances in which the effect triggers liability, effect in New Zealand as opposed to conduct, there's no occasion to extend that?

MR MILES QC:

Yes I think it's, and I mean that touches of course on the other point that my friend's argument comes very close to an effects argument –

ELIAS CJ:

Yes.

MR MILES QC:

Which he eschews and which the Court of Appeal eschewed and rightly so because it's been recognised as not part of our law. But were that to change, and the delicate relationship if you like of the extent to which we can quasi-criminalise conduct of individuals, nationals of our trading partners, is quintessentially an issue for Parliament.

TIPPING J:

If the subject of this – if it's a statutory subject matter, as this is, with no common law as it were, additional subject matter, the subject matter is captured entirely by the statute, one would have thought?

MR MILES QC:

Quite Sir.

TIPPING J:

It would seem odd if Parliament is allowed some residual "common law" whatever that means, influence if you like on the terms of section 4?

MR MILES QC:

Well it would be less alarming if it didn't have the dramatic result of virtually removing the very restrictions that Parliament have said are there because if my friend's argument is right, that by the use of section 90 and by analogies with conspiracy, common law conspiracy principles, and common law agency provisions, you can extend the reach of the Act to any deal that takes place overseas so long as there's some connection with New Zealand and in the real world that would amount to most potential cartels or actual cartels or other form of price fixing because there's not a whole lot of point in having meetings in Sydney or Mumbai. It doesn't matter where it is because the reach stretches all round the world. There's not a whole lot of point in having these meetings unless there's some effect on the New Zealand market.

TIPPING J:

Was I right in *Matthews* to say that –

MR MILES QC:

Yes.

TIPPING J:

– generally speaking, I mean, but I've not seen anything put up against that in the submissions, that generally speaking a domestic statute is construed

without territorial effect and the extraterritorial effect must be clearly spelt out, as I've always understood the law, but maybe we'll find out otherwise.

MR MILES QC:

Your Honour, it is just one of those fundamental canons of construction and we mentioned *Matthews* of course in our submissions but perhaps –

TIPPING J:

Well there's lots of authority. I mean I didn't cite anything I remember –

MR MILES QC:

You didn't need to.

TIPPING J:

– because it was so obvious.

MR MILES QC:

You didn't need to, but you got into it of course in *Magic Millions* as well.

TIPPING J:

Yes I know but that – it was particularly the presumption, if you like, against extraterritoriality which I'll need some help from Mr Goddard as to not only do you imply it but you imply it so as to overcome the presumption.

MR MILES QC:

Yes well my friend will tell you, because this is what he said in the Court of Appeal, he said that that's old hat.

TIPPING J:

Oh.

MR MILES QC:

He didn't put it quite as bluntly as that. What he said is, in today's times a more nuanced approach is appropriate and that is quintessential advocacy by

my friend. He doesn't, of course, assist Your Honour with any authority for the proposition. That's his take on the way the law ought to be going.

ELIAS CJ:

But a contextual approach to statutory interpretation might permit that if section 4 were not there. I'm not sure that really questions of presumptions against extraterritorial effect are so very significant in this case. But it's the existence of section 4 which you put at the forefront of your argument and which is the big hurdle, it seems to me, for the Commission to overcome?

MR MILES QC:

Well Your Honour is right of course but nevertheless the presumption which His Honour Justice Tipping was talking about, and which is part of the law and continues to be part of the law, and if I can just finish that point. In our supplementary list of authorities we've given you a very recent English Court of Appeal judgment where they –

BLANCHARD J:

We don't have that.

ELIAS CJ:

Yes, did you hand those in?

MR MILES QC:

No, no the authorities you allowed me.

BLANCHARD J:

Presumably it was attached to the other piece of paper?

ELIAS CJ:

Volume 5.

MR MILES QC:

I was permitted.

TIPPING J:

We did let that in Mr Miles.

MR MILES QC:

Obviously on the basis you thought that –

BLANCHARD J:

I'm sorry Mr Miles, I'm behind.

ELIAS CJ:

Which one are you taking us to?

MR MILES QC:

It's to the *Office of Fair Trading v Lloyds TSB Bank* and I'll give you the –

ELIAS CJ:

55?

MR MILES QC:

Yes and I'll just get the relevant paragraph in a moment. But just in response to Your Honour Chief Justice, again what you say is right, of course, that once there is a specific connecting section in the Act, then of course the presumption – you don't have to get into the presumptions. What you do do, I suppose, is to say given what the presumptions always have been, when there is a section dealing specifically with extraterritoriality, then you construe it on the basis of what Parliament was clearly intending to do.

TIPPING J:

My point, Mr Miles, was this, that that legislation would have been past against the background of the presumption.

MR MILES QC:

Quite Sir.

TIPPING J:

Therefore it's a reasonable inference that it was the intended extent to which the presumption was to be displaced.

MR MILES QC:

And I –

ELIAS CJ:

Statutes are always speaking.

MR MILES QC:

Yes I accept that entirely Sir and that's exactly what, that's at the heart of our concern with the Court. The relevant paragraphs, Your Honour, can be found in a judgment of Lord Justice Waller at page 843 in the *Lloyds Bank* where at the bottom of that he talks about construction, the territoriality principle and he cites *Bennion.*

ELIAS CJ:

Sorry, what is this in the context of?

MR MILES QC:

My friend's submission.

ELIAS CJ:

No, no I mean the discussion in this case. What was the –

MR MILES QC:

That it confirms that that presumption, His Honour –

ELIAS CJ:

What was the case about, sorry?

MR MILES QC:

Oh I don't know that it's –

ELIAS CJ:

All right.

MR MILES QC:

It really isn't of any great moment Your Honour.

ELIAS CJ:

Right.

MR MILES QC:

The only reason I cited it is because it's just a recent restatement of a very old principle and it's, it contradicts my friend's proposition to you that this principle is something that is now more nuanced.

TIPPING J:

More nuanced?

MR MILES QC:

Yes. Now can I just –

McGRATH J:

Are you leaving that *Lloyd's* case?

MR MILES QC:

I was Sir, yes.

McGRATH J:

Was it just paragraph 73 you were pointing us to?

MR MILES QC:

And 74.

WILSON J:

It seems to be concerned with credit card transactions conducted abroad from a quick look at it. Your area of expertise now Mr Miles, is it, credit cards?

MR MILES QC:

No wonder I move quickly on. Now if I could just touch briefly on the other paragraph because I said there were two that I just, that seemed to go to the heart of Their Honour's judgment. At 51 this is again contrary to my argument that one shouldn't actually get into common law concepts of conspiracy by analogy, or indeed anything else, when construing section 4. And they're a little diffident about this. Their Honours said, well we do find the reasoning helpful, this is the analogy between this breach of competition law and the criminal offence. It recognises the important policy considerations underlying the area of law, so we're back into their construct of what policy is relevant or not.

ELIAS CJ:

Sorry what para?

MR MILES QC:

51 Your Honour. A couple of pages on.

ELIAS CJ:

Yes, thank you.

MR MILES QC:

"In arguing that the conspiracy analogy was inept, Mr Miles submitted it wasn't available in the circumstances. We address that argument in more detail… But even if that's right we don't think it's inappropriate. As if it had said it acknowledges that legal analysis must reflect the reality of increased globalisation and this is a particularly powerful fact from a case such as the present. Moreover, whether or not conspiracy is available in the present case, the incorporation of that concept into the Act is an indication that Parliament

intended the Act to have extraterritorial applications in circumstances beyond those referred to in section 4. Otherwise the concept of conspiracy in the Act would have to be limited (by implication) in some way. That is, we would have to find 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 it doesn't specifically limit the concept."

Now I take issue with just about every line of that paragraph. Firstly, again the thoroughly selective choice of what they consider to be the appropriate public policies involved, but secondly where they said, "Legal analysis must reflect the reality of increased globalisation. That's particularly powerful." The only way I can understand that sentence is the implication that somehow one has to read section 4 differently in 2009 than one did in 1986 when it was first passed because clearly what is driving Their Honours here is some relatively recent concept, one of so called increased globalisation.

ELIAS CJ:

But that is not an uncommon approach to statutory interpretation. It's a contextual approach, Mr Miles, and it does follow from the fact that the enactment of statutes has to apply to circumstances as they arise from time to time.

MR MILES QC:

Yes but section 4 which is setting out the basis of the jurisprudential claim for extending the reach, had to have a meaning in 1986 –

ELIAS CJ:

But the meaning in 1986 doesn't govern.

MR MILES QC:

Well, it's most odd Your Honour, that a key clause dealing with extraterritorial reach should now be said to actually have a different meaning merely because of different circumstances.

ELIAS CJ:

Well, it's a hurdle to be overcome but there are plenty of cases in which, particularly in Human Rights cases but when one is construing purpose of and open textured legislation where the Courts do adopt that approach to statutory interpretation – I would have thought your better argument is simply the language and the plain meaning of section 4, rather than delving into its historic, what might have been assumed by these who enacted it in 1986?

MR MILES QC:

I'm not for a moment Your Honour suggesting this is my strongest argument –

ELIAS CJ:

No.

MR MILES QC:

– I'm just taking –

ELIAS CJ:

Yes, all right.

MR MILES QC:

– this paragraph, I'd like to think, taking it apart because it's a key paragraph –

ELIAS CJ:

Yes, yes.

TIPPING J:

It's not the construction of section 4 that they're talking about in the context of increased globalisation, it's this concept of taking some analogy from the law of conspiracy.

MR MILES QC:

I'll get into that too but as I read it Your Honour, that they're using that as a tool if you like for redefining the scope of section 4.

TIPPING J:

Well I thought it was common ground that section 4 doesn't catch this and therefore the issue is whether anything else catches it?

MR MILES QC:

Well, yes but that ultimately comes down to a question of whether section 4 is all encompassing.

TIPPING J:

Is exclusive.

MR MILES QC:

Is exclusive, yes.

TIPPING J:

Exhaustive.

MR MILES QC:

Yes.

TIPPING J:

Yes. Well, if it's exhaustive, I think it's common ground, isn't is, that –

MR MILES QC:

Yes.

TIPPING J:

– your client's not caught?

MR MILES QC:

Absolutely.

TIPPING J:

Yes. So, the real issue is, is there something beyond section 4 –

MR MILES QC:

Quite, yes.

TIPPING J:

– which catches it.

MR MILES QC:

I accept that Your Honour and this is where they get into this concept of common law conspiracy.

TIPPING J:

Yes.

MR MILES QC:

Of course the, I mean, there are a number of arguments, all of them –

TIPPING J:

But how can you have a common law overlay on a statute that covers the field?

MR MILES QC:

If we just take the criminal analogy of conspiracy which is really what my friend's argument is based on, that has the extraterritorial reach because of section 7 in the Crimes Act which specifically defines the crime of conspiracy by deeming it to be able to be actioned in New Zealand because whether any part of it is overseas or not, they become liable so long as part of it is in New Zealand. So, once again, the analogy is hopelessly flawed because the Crimes Act itself produced an appropriate connector, a different type of

connector and this again is one of the key planks of my argument that Parliament recognises that there are several methods, if you like, of anchoring an extraterritorial section in any Act. You can either do it through describing the characteristics of the conduct, as they have in the Crimes Act, or you can do it through describing the characteristics of the individual and that's what they've done in this Act, where they've said you're liable if you're resident and/or do business in.

I'll be coming to, and Your Honours might even have glanced at it perhaps, but to the legislative guidelines issued in 2001 which set out the way in which these issues are typically dealt with in legislation and this is specifically covered there, that amongst the two or three or four classic connecting factors, the description of the individual is one such characteristic, again, the inference being that when they deliberately structured section 4 in the way they did, they did so with intention that that would cover all of the relevant conduct and, of course, that was also the Australian view in *Bray*. Then we get into the next sentence or two here where they say that, "Whether it's available or not in the present case, the incorporation of that concept into the Act is an indication Parliament intended the Act to have extraterritorial..." It isn't at all, it's tacked on to the bottom of those accessorial areas of conduct at section 80, where you can become liable if you're a party to and/or indeed whatever those other forms of conduct are and tacked to the bottom of that is conspiracy –

TIPPING J:

Section 80, you're saying, is subject to section 4 not the other way around?

MR MILES QC:

Of course, exactly. As is section 90 Your Honour, the deeming, knowledge provision. Those all become involved once you are held to be party to the New Zealand jurisdiction. Then they finish by saying, "That is, we'd have to find the concept of conspiracy in the Act is more limited than the concept of conspiracy in the Crimes Act..." and once again, of course, the whole concept

of conspiracy in the Act, in the Crimes Act, is determined by section 7. So, once again, these analogies are fundamentally flawed.

Could I just take Your Honours briefly to the written submissions, if only just to emphasise the points that seem particularly relevant. The –

TIPPING J:
Have we finished with the Court of Appeal now?

MR MILES QC:
Yes, we have. The introduction really sets out, in a broad way, the reason why the judgment is flawed. You'll see at paragraph 3, we make the point that Parliament has actually approached this section at least twice since passing it in 1996 and there are indications in the Bills, particularly the 1990 amendment, that it's clearly being seen as an extension to the provisions that were already there. At paragraph 5, I touch on this extraordinary argument really that my friend is putting forward, that when he relies on agency he says, "I'm not relying on agency in the way that you and I would understand it, this is a different concept altogether, this is something called broad non-technical agency."

BLANCHARD J:
Agency without a principal.

TIPPING J:
Oh, very droll.

ELIAS CJ:
You dreamt that up, last night?

MR MILES QC:
I wish I'd thought of that. There's absolutely no authority for this proposition and indeed *Bray* which is a case that does warrant, I think, some examination, *Bray* specifically refers on a couple of occasions when agency becomes

relevant, to agency of the sort we all understand which is agency in circumstances where the agent can bind the principal but something – to make an overseas national liable for a fine of half a million dollars, liable in for a quasi-criminal offence which has seriously significant reputational issues these days, to make them liable in circumstances where they might have had a broad non-technical agency relationship in an area as sensitive as this, is an extraordinary proposition. There is no authority for it and you wouldn't expect there to be any authority for it but it goes – it indicates the lengths to which my friend has to go –

TIPPING J:

Is there any attempt to explain the metes and bounds of this sort of agency?

MR MILES QC:

There are some limits to my ability Your Honour –

TIPPING J:

No, no –

MR MILES QC:

– and you've reached –

TIPPING J:

– against, in other words, what, I'm not asking you to, I'm saying does the other side attempt to delineate it in any greater fashion than broad non-technical agency?

MR MILES QC:

Well, I didn't detect it, Your Honour. But my friend will, presumably, take you to where that can be located and how it would work in practice.

TIPPING J:

Well, they also invoke some other concept of real and substantial connection in some way.

MR MILES QC:

Yes, indeed, and that's taken from the air as well. There's absolutely no suggestion in section 4 that that's a defining characteristic. You could have made it, you could have made the extraterritorial provision use such concepts, but they chose not to. But that is yet another proposition that my friend advances without any authority that indicates that this is a factor that should be taken into account for section 4. What Justice Harrison talks about in *Bomac*, and largely he just adopts the similar process that Justice Merkel did in *Bray,* but he talks about a limited form of agency. He doesn't talk about a broad, non-technical phrase. And the limited form of agency is probably restricted to the sort of meridian exercise, if you like, where you need to sort out who in the company –

BLANCHARD J:

But that's an attribution to a principal.

MR MILES QC:

Yes, it is.

BLANCHARD J:

The principal here is the employer. We get into very strange territory if we start constructing principal and agency relationships between employees.

TIPPING J:

It's a reverse attribution.

MR MILES QC:

And I deal with that in my submissions as well, because, as Your Honour says, agency as between co-employees is a very odd concept indeed, and nowhere –

BLANCHARD J:

Perhaps we could bring back the common employer rule.

MR MILES QC:

And that, indeed, was regarded as relatively reactionary in the ‘50s. We have given Your Honours a couple of authorities from America dealing with why that’s just not, why that just can’t be.

BLANCHARD J:

Which are they?

MR MILES QC:

One of them is actually – I’ll take you to the page, it’s paragraph 89 of my submissions, Your Honour. We cite from the – I think it’s a Supreme Court decision which just sets out exactly that point. Your Honours can read that.

ELIAS CJ:

Is this case really in point?

MR MILES QC:

Well, it’s just talking about the inappropriateness of an agency relationship as between co-employees.

ELIAS CJ:

I thought it was about attributing to – oh, and officers, yes, I see, thank you.

MR MILES QC:

You could make a note, if Your Honours wanted to, it’s in our volume 4 of our bundle of authorities. It’s 41, and you’ll see it at page 286. But could I just take you to a paragraph in another American judgment. I refer to it there at *Ware v Timmons*, the Supreme Court in Alabama. But it was just a nice way that Their Honours put it in the case. It’s in the additional bundle. And it’s 56, page 4. Hopefully it might be highlighted, but it’s about a third of the way down, where you’ll see Their Honours say, “In the co-employee context, each employee manifests a consent to enter into a relationship with the employer. However, it is the employer that establishes each employee’s relationship with

the other employees. Thus, because co-employees do not individually agree to act on one another's behalf, their relation to one another is not consensual. Therefore, as a matter of law, the doctrine of respondeat superior does not hold supervisors as co-employees vicariously liable for the torts of their subordinates. Supervisor lacked the ability to willingly choose to enter into a relationship with their subordinates. Likewise, subordinates don't have an ability to choose to enter into a relationship with their supervisors". So it's an odd concept which, to the best of my knowledge, Your Honours, has never been stated here as being –

ELIAS CJ:

This is in a tortious context, it is? Vicarious liability?

MR MILES QC:

Yes, but the principle remains the same, Your Honour, that no Court –

ELIAS CJ:

Unless there's something in the statute which suggests something different.

MR MILES QC:

Quite. And the only indication in the statute is the attribution section, which, of course, has nothing to do with territoriality. So just staying, again, with these broad propositions at the start of my submissions, we say at 6 it's just inconsistent with the clear language of the Act. At 7, wrong from a policy perspective. Precision is essential in defining the jurisdictional reach of the Commerce Act. Governs an extremely broad range of commercial contact arrangements, relationships, quasi-criminal offences. Although in most sophisticated, developed countries have some form of competition, there's no uniform substantive law. I mean, this, again, is a significant factor, it seems to me, Your Honour, that, unlike, I suppose, certain norms of behaviour which most Western countries would instinctively recognise as being illegal, you know, theft, assault, and other obvious crimes of that sort, competition law is much more complex or nuanced, as my friend would probably describe it. Where one set of circumstances which might be illegal here is not necessarily

illegal in other countries, and vice versa. And, indeed, we have the situation at the moment, if the Court of Appeal's decision stands, that the Australians construing a substantially similar section, their section 5, which is, essentially, in the same terms as ours, in *Bray*, and they've construed it not to have, specifically not to have, the reach that our Act would have. So you have an immediate disconnect where New Zealand is saying it now has the power to run a quasi-criminal charge against an Australian who has no connection to New Zealand. And yet, in a section that is substantially the same, they've said that doesn't apply. They've recognised the limits.

TIPPING J:

How did the Court of Appeal distinguish, or depart from *Bray*. That would interest me, Mr Miles, if what you're saying is right, and I'm not suggesting it's wrong. If *Bray* is on a similar section, or sufficiently similar, has confined it in the Court of Appeal. Here it said it goes beyond that. Is there any passage in that Court of Appeal's judgment that –

MR MILES QC:

No, there isn't really, Sir. Let me divert for a moment into *Bray.* Paragraph 50 in *Bray* is the specific paragraph that deals with the extraterritorial. Then they get into the issue of whether the overseas principals were using the Australian subsidiaries, whether there was an agency basis, simply because they're subsidiaries, and they rejected that.

McGRATH J:

There were communications into Australia weren't there, which seemed to be an important feature.

MR MILES QC:

Two factors, Your Honour, communications, which incidentally also included meetings, as a matter of fact, when you read the –

McGRATH J:

Meetings in Australia?

MR MILES QC:

Yes, there's at least one. They cite chunks of evidence from the affidavits and you'll see that the marketing manager, or whatever, of some of the overseas companies actually had meetings in Australia as well, but Justice Merkel, at about paragraph 157 or 158, specifically said that the combination of communications into Australia and the carrying out of the cartel by the employees of the subsidiary being directed as agents of the overseas company, that that amounted to conduct in Australia by the overseas company.

McGRATH J:

So directed by the principal, do you say?

MR MILES QC:

Quite.

TIPPING J:

So on the facts, it satisfied their section 5?

MR MILES QC:

Quite.

TIPPING J:

But what – Mr Goddard seems to have a major difficulty with that proposition.

MR MILES QC:

No, no, they held that there was conduct within Australia, so it mattered not whether they were resident or doing business in Australia.

TIPPING J:

I follow, sorry, yes.

MR MILES QC:

And we say, given the concessions, because this is not even on the table, the concessions that my friend has made in a very formal way, is that not only was Mr Poynter not a resident or doing business in New Zealand, but the relevant conduct which they say infringes the Act was not carried out in New Zealand.

ELIAS CJ:

When you say "in a formal way", how was that concession made? Do we have that?

MR MILES QC:

Yes, it's in our submissions, it's in the judgment.

ELIAS CJ:

I've read it in the judgment, but you say it was made in a very formal way, how did the Commission make that concession?

MR MILES QC:

Submissions, yes.

ELIAS CJ:

Oh, in submissions, all right, thank you.

TIPPING J:

What did Justice Merkel say about the exclusivity, if you like, of their section 5?

MR MILES QC:

It was exclusive.

TIPPING J:

He did say that?

MR MILES QC:

Yes, and let me take you to it because – it's in volume 2 of our bundle, and it's 28 and I think from memory it's paragraph 50. Yes. It's 50 to 52. If Your Honours needed to have a look at their section 5, you'll see it at paragraph 46 where their part 1, subsection (1) says that the relevant part of the Act extends to engaging in conduct outside Australia by bodies incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia. Slight difference, it drops the doing business of the individual, so you're liable as an individual if you're an Australian citizen or someone ordinarily resident within Australia but essentially, it's got to be conduct outside Australia.

WILSON J:

Has there been no change to section 5 since this judgment?

MR MILES QC:

No. I understand because they have now, of course, criminalised –

WILSON J:

They've criminalised cartel conduct, haven't they?

MR MILES QC:

Yes, and my understanding is that that section remains intact.

WILSON J:

Yes, I was interested as to whether there had been any change, one, in the light of *Bray* and two, in the light of the criminalisation of the conduct.

MR MILES QC:

Well you can understand, Your Honour, why they might get given the *Bray* judgment, which treats this as being exclusive and limited in the way that we say Parliament intended to be limited. You can understand why they wouldn't need to amend by introducing, by criminalising the conduct, because you are

only liable if there is some specific connection to Australia, a citizen or ordinary resident.

TIPPING J:

Is it the last three lines of paragraph 50 that are the key?

MR MILES QC:

Yes. Well I like the whole paragraph.

TIPPING J:

Yes, I'm sure you do, but from the point of view of the exclusivity, the Judges saying that the only circumstances in which it has extraterritorial effect are those set out in section 5?

MR MILES QC:

Yes.

TIPPING J:

And how did the Court of Appeal deal with that vis-à-vis us going a different way?

MR MILES QC:

Overlooked it, ignored it.

TIPPING J:

So you say they didn't address this?

MR MILES QC:

In my recollection, it was certainly given considerable prominence by me but I think I'm right, I don't recall the judgment talking about it. But I like, too, the first few lines of that section where, of course, you don't need to rely on any canon of construction in respect of section 5 because it's so specific and it clearly applies to the Act as a whole. And then 51 and 52, these have the similar add-ons that our section has that we put in in 1990 and 1996, the view

that section 5(1) is the repository, is the nice way of putting it, of the extraterritorial operation of the Act is also supported by those subsidiary subsections, which I have already taken you to, those are section 4(2) and section 4(3) dealing with the trans-Tasman market.

ELIAS CJ:

Are they in the same terms?

MR MILES QC:

Yes they are Ma'am.

TIPPING J:

So they've gone to the trouble of being specific when they want it further extended, but nevertheless there's this sort of hovering overlay?

MR MILES QC:

Well it's not an overlay, Your Honour, it completely dominates the issue of extraterritoriality because, as I said, while I'm sure my friend will give you examples where the section would be applicable and his principals of agency and conspiracy aren't, broadly speaking, most of the examples of anti-competitive behaviour which might take place overseas, are almost certainly done on the basis that they will be carried out in New Zealand and with a New Zealander or another company dealing in New Zealand on the opposite party, so it's the bulk, if not all, of the analysis subsequent to this, if this judgment was allowed to remain on the books, would ignore section 4. It would simply deal with conduct that is partially in New Zealand, partially overseas and doesn't amount to a breach of the Act.

WILSON J:

I was just looking at the last four lines of paragraph 52 of *Bray*, do I take it that both Justice Lockhart and Justice Wilcox took the view that section 5 was exhaustive?

MR MILES QC:

And I can take you to those –

WILSON J:

No, I don't need to go to them, just to check my understanding that the two Judges, well known in this area of the law…

MR MILES QC:

Your Honour's right, exactly. And both of them say so, and they're in the bundles and we've given you the references in the submissions.

ELIAS CJ:

Is it the case that it's even more significant in that not only are subsections (2) and (3) specific but they are co-ordinated with the Australian –

MR MILES QC:

Quite, Ma'am.

ELIAS CJ:

– which suggests it's an Australasian extension.

MR MILES QC:

And I suppose is why I say these are areas that Parliament gets involved because they understand the bigger picture.

BLANCHARD J:

This is what I was going to ask about. Were those amendments made pursuant to some kind of agreement with the Australians or was it simply a matter that the Australians had put in some amendments and we copied them?

MR MILES QC:

I can say, Your Honour, that the 1990 amendment, which was subsection (2), the anti-dumping, I think, provision, the market par, there is a specific bill and

we have, I think, a reference to that and that may deal with what Your Honour says, that issues that Your Honour has raised. The 1996 amendment was part of a, what's the bill, an Omnibus Bill, and there's very little explanation as to why it was there.

McGRATH J:

An Omnibus Bill not concerned with the Commerce Act, just a statute revision type of Bill?

MR MILES QC:

Exactly. In fact, the answer to Justice Blanchard, I think, is in our bundle of authorities volume 1, tab 10, where you can see that this is all part of a CER review that was conducted a year before.

ELIAS CJ:

Well, I'm not sure that – this is a cabinet policy committee document, is there any explanatory note to the Bill?

MR MILES QC:

Yes, that's the next and I'll come to that in a moment Your Honour but –

ELIAS CJ:

Well, it's more orthodox to refer to that.

MR MILES QC:

Well, the answer to Justice Blanchard, I think can be found in this paper, this memorandum –

ELIAS CJ:

Well, what's the basis on which we look to this?

MR MILES QC:

Oh, I just assumed that it was part of the – it's a public document that assists in explaining the background –

ELIAS CJ:

It's not a legislative document.

MR MILES QC:

Well, Your Honour has slightly caught –

BLANCHARD J:

I think it's legitimate to look at a document of this kind not – because it's indicating that there has been an intergovernmental agreement of some kind.

MR MILES QC:

I didn't come armed with the answer. I was under the impression that the Courts these days were content to look at most documents that might assist them in construing –

ELIAS CJ:

I don't think it's quite as loose but is there nothing in the explanatory note to the Bill?

MR MILES QC:

Yes but if we – you will see, if I could just stay with this for a moment since I've got it, and then I'll come to Your Honour's point. If you look at page 3, with the amendments to competition law, you'll see in the rest of that page they talk about this – how that is going to be sorted out and why it is necessary to amend the Act. And you'll see the last paragraph under jurisdiction, a difficulty remains with the Act's jurisdiction. At present the jurisdiction of the Commerce Act is based on the normal rules of territorial application, extended to only a limited range outside New Zealand, and at 17 you'll see, in order for the Commerce Act to apply to the full range of trans-Tasman change it will be necessary to extend the jurisdiction.

BLANCHARD J:

Did they repeat this in the explanatory note?

MR MILES QC:

Let me find it.

ELIAS CJ:

Well the next document, is that for the same, is this the –

MR MILES QC:

No –

ELIAS CJ:

This is the miscellaneous Bill?

MR MILES QC:

This must be, yes. We don't have, we don't have an explanatory memorandum for the, for that 1990 –

ELIAS CJ:

Well do you have the Bill?

BLANCHARD J:

Because there isn't one?

MR MILES QC:

I don't know Sir.

BLANCHARD J:

I mean I would have thought you –

TIPPING J:

The explanatory note talks about aiding a new subsection (3) so that was the '96 exercise?

MR MILES QC:

Yes, yes, and I'd assumed that that's what it was but that –

TIPPING J:

There's a distance between the two –

MR MILES QC:

Yes there is.

ELIAS CJ:

There's another Bill that we don't have.

MR MILES QC:

I can look for that Your Honour. It's not before the Court at the moment.

TIPPING J:

Anyway for me the key point is that the, if we're going a different way from Australia one would want to have a very persuasive reason for doing so?

MR MILES QC:

And particularly when the indications are that this was a very carefully, well I understand it's the amendment we're talking about –

TIPPING J:

No, no, I'm talking about the –

MR MILES QC:

About section 4 in general?

TIPPING J:

Yes.

MR MILES QC:

Yes, quite.

BLANCHARD J:

Well I would have thought they would have sat down with the Australians and worked out the extent to which they were going to bend the normal rules on extraterritoriality so that they moved in step with one another.

MR MILES QC:

Quite. As you would expect with trading partners and such important trading partners.

TIPPING J:

I think one could reasonably infer that they had in the fact that they are virtually coincident in their terms would strongly support that.

ELIAS CJ:

Was there any indication of when the amendment was made to the Australian legislation?

MR MILES QC:

I can probably –

ELIAS CJ:

It doesn't matter. We can look at this –

MR MILES QC:

I think I can probably work my way through that Your Honour.

ELIAS CJ:

Yes.

MR MILES QC:

Then just reverting I suppose to those broad principles that I'm talking about Your Honours. We say at 8 that New Zealand's reputation as a place to do business would inevitably suffer if they had to put up with what we describe as

these amorphous ill-defined concepts such as broad non-technical agency or unprincipled as one would now like to call them. Then the, this issue of no formal agency relationship between appellant and co-employee which I've already discussed with Your Honours at 10. My friend relies on the term "conspiracy" incorporating a much wider test for extraterritoriality and we've already discussed the basis of why that's an inappropriate analogy. Obviously I say at 13 that this appeal has a significant precedent effect. It's only, this is only a minor point Your Honours, but it only surfaced a week before the hearing in the High Court when an amended statement of claim was filed alleging conspiracy and other such matters and this argument was put forward for the first time. Now there's no reason why that in itself is significant but I can find no previous attempt by the Commission to run an argument as wide as this. It doesn't necessarily make it wrong but it did appear to have its genesis in the amended statement of claim filed a week before the High Court. There's no question about the precedent effect of this. If this is right it will have a very significant impact on the way business is seen to be done in New Zealand. And at 14 we just say the jurisdictional reach of a statute has to be drawn at some time, that's a deliberate policy choice by Parliament. At 15 it'll bring it back in line with the Australian counterpart and that sums up, I suppose, in a broad way the basis of why we say this appeal should be successful.

ELIAS CJ:

Mr Miles, where are you intending to take us now with your submissions?

MR MILES QC:

Yes. I would like to take you to the undertaking, the concessions, which you'll find at paragraph 29.

ELIAS CJ:

Yes.

MR MILES QC:

You'll see there that "… the Commission does not argue that the extended section 4(1) jurisdiction applies in this case, as it accepts that none of the protesting defendants was resident in New Zealand, or carried on business in New Zealand…" "None of the conduct by Poynter relied upon his participating in the alleged understandings took place in New Zealand or involved communications directed by him personally to New Zealand." So it's a very substantial concession. It takes out any conduct of Mr Poynter's in New Zealand. So the only way he can be liable is on these extended definitions which my friend is relying on through agency or –

TIPPING J:

Is it section 80 that really is the – if there is any statutory genesis of this further extraterritorial reach, does it derive from section 80 or is it really completely unrelated to the statute?

MR MILES QC:

Well my friend will probably tell you that it's related in part to section 80 and in part to section 90 where he says, well, there is a reference to the tort if you like, to the conduct tacked in at the end of section 80. But all that – but section 80 is a procedural section essentially defining the conduct which will link you to the illegal conduct.

TIPPING J:

So then we're back to the proposition that 80 and 90 must, in any event, be subject to 4?

MR MILES QC:

Of course. Exactly Sir. And section 90, which is entirely a sort of conventional section I suppose, dealing with attribution to the principal of the state of mind of an agent or the conduct of an agent, but it's always on behalf of – the crucial phrase is the state of mind of the agent and whether it's an agent of the company or an individual but it's always, it's always on behalf of a principal and the problem, the fundamental, well two fundamental problems.

That attribution section, it has nothing to do with the definition of what conduct the Act requires a defendant to, if you like, have carried out before jurisdiction kicks in. That's a straightforward issue under section 4. Has there been any conduct by the company or by the individual resident in New Zealand that suggests he's, the conduct takes place in New Zealand and you don't need attribution arguments. You don't need deeming provisions. You don't need a reference in section 80 to even get involved with this analysis. All of those factors come into play once the defendant is subject to New Zealand jurisdiction and then you look at the illegal conduct and whether the defendant is a party to it or is a primary, has been guilty in a primary way.

Now Your Honours the next few pages are relatively straightforward because they deal with the, that presumption that I talked about right at the outset referring to *Matthews* and to that, Justice Tipping, referring to that classic statement by Lord Justice Donaldson that the Act shall not have extraterritorial effect save to the extent it so expressly provides. I mean that's relatively straightforward. Now let me touch on at 39 we get onto the Legislative Advisory guidelines and I'd just like to take Your Honours to that because I think it's a matter of real assistance to Your Honours. You'll find it in volume 1 I think of our bundle. Yes, tab 8. Now these are the Legislation Advisory Committee guidelines and I suppose Your Honours that if indeed the Courts do what they say they are to do, which is to express the intent of Parliament in construing statutes, a useful starting point is to see the methods used by the drafters when drafting the Bills. We could start with page 328.

ELIAS CJ:

Sorry which one are you –

MR MILES QC:

This is tab 8, Your Honour, volume 1.

ELIAS CJ:

I'm just really wondering whether it's necessary for you to get into this detail. What's the point that you're wanting to make to us Mr Miles?

MR MILES QC:

It explains why, it explains the process, I think, that was adopted when section 4 used the wording that it did. That section 4 used a specific form of connector to the territory if you like.

ELIAS CJ:

Conduct?

MR MILES QC:

Yes, well, ah, well, conduct, yes, but also defendants who are either resident or doing business and so this is part of my argument that when Parliament set out to define the extraterritorial reach of the Act, it did so using established techniques and that that is a very powerful pointer towards the proposition that this is the whole area, this section deals with the whole issue of extraterritoriality.

McGRATH J:

The legislative policy guidelines, they're really Legislation Advisory Committee guidelines, are they really any different than an expression of policies of public international law that are so applied in New Zealand?

MR MILES QC:

They reflect it Your Honour. I just thought they were a –

McGRATH J:

I see that as a more legitimate source for us to go to.

MR MILES QC:

Yes.

McGRATH J:

To interpret a statute.

MR MILES QC:

It seemed useful to me because largely I suppose because of my friend's reliance on the conspiracy analogy and the criminal law provisions and the fact that section 7 of the Crimes Act which is the section, the equivalent of section 4 in the Commerce Act, in the sense that that defines the extraterritorial reach, but it defines it by describing characteristics of conduct rather than – which is one way in which you can define the territorial reach, if conduct happens overseas and partially in New Zealand, partially over there, then we can reach that far, which is pretty much what my friend is arguing. Whereas the Commerce Act, under section 4, uses a quite different set of criteria.

McGRATH J:

I understand that. I suppose what I'm really getting at, I think Mr Miles, is these guidelines explain policy consideration that the particular committee urges on departments and it seems to me that, as a means of interpreting particular legislation, that's a bit doubtful but those policies usually emanate from other principles and I think that the principles concerned are really public international law principles. The comity between –

MR MILES QC:

Yes they are.

McGRATH J:

– nations and if we can – sorry, just wondering whether that's not a better and more legitimate source if we're interpreting a particular statute. I'm actually one who, like Justice Blanchard has some doubts about looking at memoranda to cabinet committees and things of that kind and I just would have – so I suppose I'm not quite so confident that all of these parts you've highlighted in yellow throughout this report are necessarily appropriate things for us to interpret in relation to this particular statute.

MR MILES QC:

Well it's – maybe I've –

BLANCHARD J:

Isn't there a more immediate difficulty that this document is dated some 15 years after the statute and section 4 went in, at least to the extent of subsection (1), in the statute in 1986, didn't it?

MR MILES QC:

Yes I was using it, Your Honour, it's page 343 really which –

BLANCHARD J:

I mean if you were citing us the LAC guidelines as they stood in 1986 perhaps that would be more helpful but I, like the Chief Justice, I'm not sure that this actually is a necessary argument.

MR MILES QC:

Well you can – what it does, it short circuits really something I could get to in exactly the same way just from analysing section 7 of the Crimes Act and section 4 of the Commerce Act because they both use different characteristics. The only – defining the extraterritorial reach. The only reason this seemed helpful is that it sums up the way in which the draftsman has approached this tricky area of extraterritoriality.

ELIAS CJ:

But I don't know that we can, in fact, draw that inference anyway. Both for reasons that Justice Blanchard has pointed out but also because how do we know that the draftsmen actually did pick up these guidelines? So it all seems a little contingent and unnecessary.

MR MILES QC:

I, look I won't take it any further Your Honours.

McGRATH J:

I can see that it's, if you like, an expression of the international law of principles which you rely on but I don't think it gets anything through being in this particular document.

MR MILES QC:

No. I'm happy to leave it at that. We deal with the evolution of section 4 at page 11 onwards and I've already discussed those with Your Honours. Refer to His Honour Justice Tipping's judgment in the *Magic Millions* and with respect I would adopt what Your Honour said. You'll see in the last sentence, this is at paragraph 57, "Overseas conduct by non-New Zealand organisations should not be regarded as providing effective competition in New Zealand market unless the goods or services are supplied within New Zealand", essentially, and at the start, of course, of that paragraph, "This seems to be the limit of the extraterritorial effect of the Act, and where that limit is clearly set out, difficult to imply extraterritorial effect", and again, I would, with respect, adopt those comments.

We give you *Bray* and we give you the judgments of Justice Wilcox and Justice Lockhart which I have already briefly discussed with Your Honours, and really pages 15 and 16, we deal with the, again, I suppose the counter policy arguments all really emphasising the complexity of competition law, the fact that it is often different in different countries and the significant care one would take in extending any one country's jurisdiction to another country. At 70 we refer to the attempts that America has made in the past to do just that. Your Honours will be well aware of those sorts of issues and the reaction that they tend to get from the countries which then have to deal with that form of overreach.

We deal with this agency issue at pages 18, 19 onwards, and again Your Honours, we have discussed already, I suppose, those basic concepts of the impossibility of construing an Act like this on the base of broad, non-technical agency, inconsistent with the language at section 4, inconsistent with the relationship of agency between Greenacre and Poynter. So it's all very well to

talk about situations involving vicarious liability of employees for their principals, their companies, those who employ them. One has no difficulty in seeing how liability can be passed on from the employee to the employer, but the relationship when dealing with individuals is much more complex and generally speaking, when executives are making decisions, whether in Australia, New Zealand or anywhere else, they are making them not on their own behalf at all, but on behalf of their employer, and hence they make their employer liable but the issue of whether the executive becomes liable is a much more contentious issue and that's of course what I –

ELIAS CJ:

Well we've dealt, really, with that.

MR MILES QC:

We've dealt, we have indeed.

ELIAS CJ:

I'm just looking ahead and by all means, emphasise anything that you wish to, but it does seem to me that really you've covered the argument.

MR MILES QC:

When dealing with *Bray* and *Bomac, Bray* in particular, because *Bray* is perhaps the more principled analysis of the issues here, I have already taken Your Honours to that paragraph where Justice Merkel says it's the combination that's significant. Now, we've given you the reference to the Court of Appeal judgment in the same case, where His Honour Justice Carr, in the Court of Appeal, said it's clear that the combination of those two factors were crucial, and I've given you the reference here. Now, the Court of Appeal rejected that notion. They said, a little misleadingly, with respect, they said the issue of the combination of the two, or particularly the, yes, the combination of the two, seemed to be regarded as important by Justice Merkel, but we disagree.

WILSON J:

Didn't Justice Merkel find that section 5 was exhaustive?

MR MILES QC:

Yes.

WILSON J:

Isn't that of mainly relevance for the present purposes?

MR MILES QC:

Yes, that's the end, yes, quite. Exactly, Your Honour. But you do then because he needed to for that case, you then need to see whether it was conduct and he held that the combination of the directions into Australia plus the carrying out amounted to conduct by the overseas principal.

TIPPING J:

Well you look to see whether section 4, here, is met. That's obvious. But it's only section 4.

MR MILES QC:

Exactly, exactly.

TIPPING J:

Is the point.

MR MILES QC:

Yes, exactly.

McGRATH J:

Can you just help me with where the passage of Justice Carr – I'm sorry, I've seen it, it's paragraph 98. Paragraph 98 of your submissions is the reference you've given to Justice Carr in the Court of Appeal is it?

MR MILES QC:

Yes, yes.

McGRATH J:

Is that the passage you're relying on?

MR MILES QC:

And it's in our bundle of authorities, Your Honour. The appeal is actually –

McGRATH J:

That's all right, you've got a passage there, that's fine.

MR MILES QC:

And the other Judges don't touch on it, the appeal deals with a host of other issues, which have little relevance to this case. It was really just that paragraph that's of any significance.

Again, I may not need to discuss in any detail, Your Honour, the last 10 or 15 pages dealing with the analogy arguments. We've set out the principles, the classic principles which have been enunciated time and time again, indicating the dangers of arguing by analogy from the provisions of one Act to the provisions of another. I've given you the references there to Professor Farrar's article on how the Courts have traditionally dealt with this, and broadly speaking, it's something to be avoided, generally speaking. And of course the reason is that so often, the key sections in the Acts which are being used as having some form of analogy are different, and the Crimes Act is that very point, that section 7 is the section that gives conspiracy the extraterritorial reach, and it's just utterly unhelpful to suggest that that's an analogy of any usefulness whatsoever to the Commerce Act, because it's a different form of connecting.

McGRATH J:

It's a different subject matter, I suppose, in a way, isn't it?

MR MILES QC:

Well to me Your Honour, it's more the way the extraterritorial reach has been defined and they've chosen to define it by concentrating on conduct, whereas here they define it by the characteristics of the defendant, both equally valid, they just use different criteria.

McGRATH J:

This article you're referring to by Professor Farrar, is that, that's what you refer to at paragraph 21 of your submissions isn't it?

MR MILES QC:

Yes.

McGRATH J:

Because Farrar does acknowledge that sort of in pari materia concept, that you can use one statute to – but as long as it's the same subject matter.

MR MILES QC:

Yes, quite.

McGRATH J:

And you're saying the subject matter is different because the definition focuses on different aspects in particular, conduct as opposed to individuals.

MR MILES QC:

Yes Sir, but I suppose at a higher level than I would take up what Your Honour was saying, it is indeed a different subject matter because one deals with crimes in the classical sense with all the elements that are important for crime which aren't part of the Commerce Act, mens rea, you know, being a particular example. And again, I give Your Honours the sort of analysis that we got into at that level.

It may be, Your Honours, that that's all that you would like to hear from me at this stage. If there is anything further on the issues of attribution that you would like to hear from me at this stage, I'm happy to discuss that.

ELIAS CJ:

I think Mr Miles you can respond of course by way of reply if anything new emerges, but we have read your submissions and I think you touched on all the essential points in your oral argument.

MR MILES QC:

I'm obliged Your Honour.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.47 AM

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

I have what is a three page road map of how I intend to go through my written submissions if I may provide that.

ELIAS CJ:

Three pages are fine, thank you.

MR GODDARD QC:

And also a better copy of one case in my casebook, *R v Doot*, which is under tab 13 of volume 1 where are some pages were omitted and the quality of the copy was also abysmal. This remedies both those defects and I'm sorry about that.

My friend's argument really illustrates the importance of asking the right question lest by asking the wrong one, one be led to strange places. This, as

I say in paragraph 1 of my note, is not properly understood, a case about the extraterritorial application of the Commerce Act. What it is about is the extent to which Poynter is liable under the Act because he is responsible for the extensive conduct that did take place in New Zealand, that was engaged in here by his subordinate, Mr Greenacre and others, at his direction and with his consent and agreement, and we say that he is responsible for conduct that took place in New Zealand and that because some of the conduct which is attributable to him took place here, the whole of his conduct is subject to the Commerce Act, and that is the argument that was accepted in the Court of Appeal.

TIPPING J:

So it's not his conduct, it's the conduct of others –

MR GODDARD QC:

Which is attributable to him.

TIPPING J:

Which you say he is responsible for?

MR GODDARD QC:

Yes.

TIPPING J:

And liable criminally for or quasi-criminally for under our Act?

MR GODDARD QC:

Yes. In just the same way, suppose that he and Mr Greenacre had agreed that they would defraud one of the company's clients in New Zealand. That they would add an item to the invoices which said industry levies, some fictitious levy that didn't exist, and they'd add 10 percent to the bills in order to improve returns. If they had discussed in Sydney creating fictitious invoices of that kind, and Mr Greenacre had come to New Zealand and prepared the invoices and caused them to be delivered to customers here bearing this

fictitious entry, industry research levy 10 percent, and had collected the additional money, then Mr Poynter would have committed an offence under New Zealand law. The reason for that is that under section 66(1)(a) he would be a person who actually committed the offence because he had –

TIPPING J:

Are you referring to the Crimes Act?

MR GODDARD QC:

Yes. And the various categories, so this wouldn't even be a matter of access or liability, he would actually have defrauded the customers through his agent Mr Greenacre in New Zealand. There's no doubt but that the New Zealand Crimes Act would extend to that conduct by –

BLANCHARD J:

What if the New Zealand Crimes Act didn't have its extraterritoriality provision?

MR GODDARD QC:

If the Crimes Act was silent on – well, there are two provisions which work together, of course, in the Crimes Act. Sections 6 and 7 and it's perhaps helpful to turn those up. They're in my friend's volume of authorities under tab 2 I think and they both appear a few pages into the extract from the Crimes Act on page 375.

ELIAS CJ:

Sorry what volume?

MR GODDARD QC:

Sorry volume 1 of my friend's authorities, tab 2 Your Honour. Section 6, "Persons not to be tried in respect of" and he's done outside New Zealand and 7 which deals with where things are to be done.

ELIAS CJ:

Sorry mine are upside down. It's just taking me a little while to find section 7. Yes.

MR GODDARD QC:

That's indicative of much of my friend's argument Your Honour as I'll explain. When one turns it up the right way it all makes much more sense. In a sense I'm slightly flippant but it is all about asking questions in the right order. It's about working out what conduct we're talking about and then asking whether that took place within New Zealand. Which was the approach, I should say in passing, of the Court in *Bray* and also –

TIPPING J:

What is the conduct of Mr Poynter which is said to make him liable?

MR GODDARD QC:

Mr Poynter engaged in a range of conduct which broadly speaking, as I say, can be described as facilitating and encouraging the conduct of Mr Greenacre and others in New Zealand and elsewhere.

TIPPING J:

But he did that facilitation and encouragement in Australia?

MR GODDARD QC:

He did the facilitation and encouragement in Australia and, for example, one of the allegations against Mr Poynter is that he attended meetings with a senior executive of the competitive coppers, again in Australia, and made complaints to them about the aggressive competitive conduct of their New Zealand managing director with a view to having those, we allege, passed back to New Zealand.

TIPPING J:

Well I call that facetiously the wink and the nod but if you'll forgive me for adopting that terminology.

MR GODDARD QC:

Yes.

TIPPING J:

The wink and the nod occurred in Australia?

MR GODDARD QC:

The wink and the nod occurred in Australia. In terms of things –

TIPPING J:

And how does that fit section 4, or do you say it doesn't have to?

MR GODDARD QC:

Exactly. We say this is not a section 4 case and that's the same conclusion that the Court reached in *Bray* in Australia.

ELIAS CJ:

Aren't all cases section 4 cases?

MR GODDARD QC:

No.

ELIAS CJ:

Because that's the jurisdictional provision?

MR GODDARD QC:

No because section 4 is not a comprehensive statement of the circumstances in which the Act applies. The structure of the Commerce Act is different from the Crimes Act. Here in the Crimes Act we have a statement of what the Act does apply to and what it doesn't apply to. Section 4 is a much more typical

provision in the New Zealand statute book in which it assumes a certain scope of conduct. There's nothing that says this Act applies to conduct in New Zealand. There's nothing in the Commerce Act that says that. It's taken for granted and the Court is left to determine what it means to say this Act applies to conduct in New Zealand. What section 4 then goes on to say, and my friend's submission is right on this, is that the application of the Act is extended, stretched out to some additional circumstances described in section 4. And the classic issue to which section 4(1) is addressed was touched on by His Honour Justice Wilson's question. Suppose you've got two New Zealand chief executives of New Zealand companies who decide they won't make the mistake of doing their price fixing here in New Zealand and they pop across to Sydney. Have dinner at an expensive restaurant there and agree to raise prices back in New Zealand. The only way that agreement is captured by the New Zealand Commerce Act is by virtue of section 4(1). When they make that agreement the reason that section 27(1) applies and by virtue of section 30, the reason that the breach involved in entry into the agreement is captured, is that section 4(1) extends the Act to this conduct, the making of the agreement which otherwise took place outside of New Zealand. Now the given effect will happen within New Zealand anyway –

TIPPING J:

Mr Goddard forgive me but the section says that if it's conduct overseas, it only counts if the person is resident or carries on business in New Zealand. Now this wink and the nod is conduct overseas.

MR GODDARD QC:

That's –

TIPPING J:

Now why is that not the long and the short of it?

MR GODDARD QC:

Because Sir that's not what the section says. Again I think it's helpful to turn up, can I begin by just looking at those provisions in the Crimes Act because

they do say that. The provisions in the Crimes Act, sections 6 and 7 say, first of all in section 6, subject to 7, "No act done or omitted outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment." Then 7 goes on to say, "For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand4, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event." And that's why if one sends poison in the post to someone here or if Mr Poynter were to give poison to Mr Greenacre to administer to a competitor, Mr –

TIPPING J:

Mr Poynter would have to be within the jurisdiction of the New Zealand Court in order to stand trial. He'd have to actually be physically or capable of extradition.

MR GODDARD QC:

Those are separate issues and it's extremely important –

TIPPING J:

I'm not sure how separate they are.

MR GODDARD QC:

They are Sir and I'll take Your Honour to a number of cases which make that point.

TIPPING J:

All right.

MR GODDARD QC:

But the importance between jurisdiction to adjudicate which in the case of the criminal law means effectively having the person physically present within the jurisdiction and territorial scope, jurisdiction to prescribe, is an important one

and there are many respects in which New Zealand law prohibits conduct by people who will at the time of that conduct be outside New Zealand and trial will be possible only if they voluntarily return to New Zealand for some reason and can be proceeded against criminally or if they're extradited as Your Honour said to New Zealand which is also possible in some cases.

McGRATH J:

Isn't the heading to section 4 against your line of argument as to its structure and purpose?

MR GODDARD QC:

No Sir. In fact it supports it. The point it's making is, it's saying to what extent does the act apply to conduct outside New Zealand. So it assumes that the act applies to conduct inside New Zealand. What one then has to ask is, this conduct in New Zealand, who has engaged in it? And –

McGRATH J:

But wouldn't one expect to draw the inference following, having read the heading, that you will have a series of sections that deal with the extent to which the act does apply to conduct outside New Zealand. Isn't that the suggestion that the heading carries?

MR GODDARD QC:

Yes and that's why it's necessary once one has concluded that the section doesn't apply to go on and ask whether there has been conduct inside New Zealand for which the person is responsible. In *Bray* the overseas defendants were held to be subject to jurisdiction. The Court in *Bray*, I'll go to this case later, but it's important to be clear about the result in that case. The Court held that section 5 of the Australian Act was an exhaustive statement of the circumstances in which the Act applied to conduct outside Australia and the criteria were not met so far as the overseas parents were concerned. The Court rejected an argument that the overseas parents carried on business in Australia through their subsidiaries, rightfully so on the facts, no lifting of the veil.

What the Court then went on to analyse was whether there was conduct in Australia by the overseas parent companies for which they would be liable quite apart from the provisions of section 5 of the Australian Act, and the Court said yes. The Court said yes because of two things. Firstly, because the overseas parents had, or an inference could be drawn that they had directed communications into Australia and that was held to be sufficient conduct in Australia for the Act to bide, and I'll develop that point later, and secondly, because the Court considered that the actions of the local subsidiaries and their employees could be attributed to the overseas parents with the result that the overseas parents arguably, because it was just a protest to jurisdiction hearing, arguably had acted in Australia with the result that the Australian Act applied, even though section 5 did not. My argument in this case is exactly on all fours with that, and that's what the Court of Appeal accepted.

So the Court of Appeal, Your Honour Justice Tipping asked, "How did the Court of Appeal explain that they were departing from *Bray*?" and the short answer is that they weren't. They were engaging in precisely the same analysis as the Court in *Bray* and they reached the same conclusion, following the same path. That's why I say it's important to ask the right question, not to be distracted, as in my submission, my friend's argument seeks to do.

ELIAS CJ:

Well, isn't, then, the right question on your argument, the question that was put to you by Justice Tipping which is what is the conduct? And I had understood that you had agreed with him that the conduct was what had happened in Australia.

MR GODDARD QC:

No.

ELIAS CJ:

No? So you have to argue that the conduct is that of the subordinates in New Zealand.

MR GODDARD QC:

We argue that, yes, it's a course of conduct, some of which is engaged in personally and some of which is engaged in by subordinates in New Zealand but attributable to him.

TIPPING J:

I thought you had agreed with me that it was the conduct in Australia.

ELIAS CJ:

Yes, that's why I've gone back to it.

MR GODDARD QC:

No, I'm sorry. Your Honour asked me where the things he personally did had happened and I agreed that that was in Australia.

TIPPING J:

But I asked you what was the relevant conduct and you said it was the facilitation and encouragement. Anyway, it doesn't matter, it's been clarified now.

MR GODDARD QC:

I'm sorry Sir, in that case, I didn't answer that as clearly as I should have. But let me be – this is very important.

TIPPING J:

The relevant conduct is what?

MR GODDARD QC:

The relevant conduct is described in paragraph 1 of my short note. It is the whole course of conduct including the extensive conduct engaged in by

Greenacre and others in New Zealand, which we say is attributable to Poynter and the steps Poynter took to facilitate and encourage that conduct in New Zealand. Now, the steps he took personally, he took overseas, but the conduct which is properly attributable to him, under section 90 of the Act and orthodox common law principles of the kind applied in *Bray* and by the High Court in New Zealand in *Bomac*, includes the conduct of the subordinates. That conduct took place in New Zealand.

TIPPING J:

Under what doctrine is the conduct attributable to him?

MR GODDARD QC:

The conduct is attributable to him –

BLANCHARD J:

You said that section 90 applies, can you explain how that can be?

TIPPING J:

That was essentially the same point, so we're on – it has to be a statutory attribution doesn't it?

BLANCHARD J:

Well perhaps Mr Goddard could take us to the exact words that he says brings this within section 90.

ELIAS CJ:

The exact words in section 90 that he relies on, yes. I didn't want to go back to conduct.

MR GODDARD QC:

Section 90(4), it's in various places so the Court has a copy, it's under tab 2 of my authorities volume 1, it's also in my friend's bundle. Subsection (2) deals with attribution of conduct engaged in on behalf of a body corporate, Mr Poynter obviously not a body corporate, not within the words of that.

Subsection (4) deals with attribution to a person other than a body corporate and it provides that conduct engaged in on behalf of a person other than a body corporate, first of all by a servant or agent of the person, now that's not relevant here, Mr Greenacre not a servant or agent in the contract law sense of Mr Poynter, and my friend cites authorities to that effect, but that's obvious that's not an issue.

TIPPING J:

So it's not (4)(a)?

MR GODDARD QC:

It's not (4)(a). It's (4)(b), but with a gloss that I need to deal with. (4)(b) says, "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 that servant or agent's actual or apparent authority. Now, that's slightly clumsily expressed, and it doesn't adequately capture, or it needs to be read to capture in a purposive way, other persons acting at the direction or with the consent of the first mentioned person, without it being transmitted through a servant or agent.

BLANCHARD J:

But the first mentioned person is the employer.

MR GODDARD QC:

Well it's the person.

BLANCHARD J:

That's clear from paragraph B. It's a servant or agent of the first mentioned person.

MR GODDARD QC:

The Act is not confined to attribution of agents – sorry, it's not confined to attribution to employers.

BLANCHARD J:

Yes, but you've got three people being referred to here.

MR GODDARD QC:

Yes, and that's –

BLANCHARD J:

And the attribution is to the third person, not to the second person.

MR GODDARD QC:

It's to the first person.

ELIAS CJ:

The first person from the third person.

BLANCHARD J:

Well it depends on where you start counting.

ELIAS CJ:

But there's an interposed agency.

MR GODDARD QC:

But that cannot be essential. Let me give you the example of two sole traders, two barristers, say, who each ask a friend to broach the possibility of a price fixing understanding between them. Now, it's quite clear that if each barrister asked their secretary, whom they employ, to encourage the third party to make that approach, then the conduct of that friend would be attributable to the barrister. It makes no sense to suggest that if the barrister asks the friend direct to have that conversation, that would not be attributable to them.

ELIAS CJ:

Well it may not, but don't you have to show us why this statutory scheme or the language used in subsection (4) allows us to plug that apparent gap?

BLANCHARD J:

As well as plugging a gap in section 90.

ELIAS CJ:

Yes. Sorry, that's what I'm talking about, the gap in section 90.

MR GODDARD QC:

I mean, section 90 I think can be read purposively to exclude the need for the natural person, principal to pass their request –

TIPPING J:

Could you personify the people involved with reference to this particular case in subsection (4)? Can you just identify who's the person referred to in the, "Any conduct engaged in on behalf of a person, other than the body corporate", now in this case, who's that person?

MR GODDARD QC:

That person is the defendant, Mr Poynter.

BLANCHARD J:

So "any other person", that's Mr Greenacre, "at the direction of a servant or agent of the first mentioned person."

MR GODDARD QC:

Well let's take Mr Greenacre's subordinates –

TIPPING J:

It doesn't work.

BLANCHARD J:

It just doesn't work Mr Goddard.

MR GODDARD QC:

I agree that that language doesn't take you there directly, but consider Mr Greenacre's subordinates Your Honour.

BLANCHARD J:

What you're asking us to do is to read in something that isn't here and then to go on and read something into section 4. This is getting a bit silly.

MR GODDARD QC:

Well, I think Sir, first of all, that this is something which needs to be read into section 90(4) to make it work even in the purely domestic context.

BLANCHARD J:

Well the Commerce Commission might wish it to work, but the solution to that is legislative.

MR GODDARD QC:

But second, there are a number of authorities which are to the effect that section 90 is not an exhaustive statement of the rules of attribution in the Commerce Act context, and that it is intended to extend and not to displace the common law principles of attribution, and that is the alternative argument that we make to say that this conduct can be attributed to Mr Poynter.

BLANCHARD J:

Well what you're really saying is we don't need section 90. We can have our own attribution rules which we make up.

MR GODDARD QC:

Not that we make up, we apply the attribution rules that are being developed by the cases in comparable circumstances.

BLANCHARD J:

But you don't need section 90 if you've got that.

MR GODDARD QC:

Well in some circumstances, section 90 is broader than those rules, and there you do need it, but yes, otherwise you don't, Your Honour's quite right.

TIPPING J:

Is section 90(4) the foundation for your argument that Mr Poynter is caught? Does it go beyond? I just want to see the whole sweep of your argument. Is it 4 plus 90(4)? Well it's not 4 at all actually.

MR GODDARD QC:

It's not 4 at all. I say it's not a section 4 case.

TIPPING J:

No, it's 90(4) is it?

MR GODDARD QC:

And common law principles of attribution.

TIPPING J:

Plus common law?

MR GODDARD QC:

Yes. So that's my paragraph 2 of my short note.

BLANCHARD J:

So essentially then, both section 4 and 90 are a distraction? If they didn't appear in the Act, we could get there anyway?

MR GODDARD QC:

Section 90 is not a distraction, it provides a helpful guide to the breadth of attribution principle, contemplated by the Act and in particular, it confirms that as the common law does in the context of conspiracy, it's appropriate to attribute to any party to an agreement the conduct of any other party to that agreement, for the purposes of this Act. So in the same way, that in a case

like *Doot* the importation of the campervans full of drugs into England was treated as an Act by some conspirators on the part of all the conspirators –

TIPPING J:

I just would like you to expressly address the facts of this case into subsection (4)(b), because I'm not at all clear that it works. It doesn't work to the extent that no common law gloss is going to make it work.

MR GODDARD QC:

Let us take first of all one circumstance which falls squarely within that language, and that is the situation where Mr Poynter encourages Mr Greenacre to engage in various forms of price fixing conduct and Mr Greenacre goes to New Zealand and instructs the relevant people in New Zealand to exchange price lists or share information or co-operate with the competitor. Now, let's go through that. We have the first person, Mr Poynter, conduct engaged in on behalf of him by another person, that's the New Zealand subordinates, because Mr Greenacre was also based in Australia but came to New Zealand frequently, so you have by other persons acting at the direction or with the consent or agreement of an agent of Mr Poynter. Now, Your Honour is going to say to me, "But he wasn't an agent of Mr Poynter, he was an agent of his employer."

McGRATH J:

90(2) applies then, doesn't it?

MR GODDARD QC:

90(2) clearly applies. Perhaps, and what that really illustrates is that it's not easily dragged within the paragraph B of subsection (4) and I am more heavily reliant on the common law attribution principles than section 90.

ELIAS CJ:

Well is it, then, irrelevant? Is section 90 irrelevant? Or is it, in fact, adverse to you because it's part of the legislative background that you're asking us to engraft some common law, and it just doesn't help you? Expressio unius.

MR GODDARD QC:

Well the question is, is that the right inference to be drawn here, and as I mentioned, a number of cases including, I think, *Bomac*, I'll come back to that, a decision of Justice Harrison in New Zealand, have said section 90 is not an exhaustive statement of the rules of attribution. And I think, though I need to check this, the same approach was adopted to the equivalent Australian provision in *Bray* that the Court in Australia in *Bray* also said our equivalent of this, which I think is section 86 of the Australian Act in a very similar form –

ELIAS CJ:

Can I ask you, if you're arguing, as you do, that agency is a sort of a broad church, why did you make the concession? Are we being encouraged to go into contortions over the legislation because of the concession on the facts here?

MR GODDARD QC:

No, I think it's important to clarify what that concession was, which was that the conduct of Mr Poynter personally all took place outside New Zealand.

ELIAS CJ:

Personally, that's right, yes.

MR GODDARD QC:

But there was never an intention to concede anything beyond that.

ELIAS CJ:

Yes, I'm sorry, yes you had made that point, yes.

MR GODDARD QC:

That, I concede, his conduct personally was entirely outside New Zealand, the nods, the winks, even more positive encouragement, all happened outside

New Zealand, but we say that that produced conduct in New Zealand for which he is responsible, in the same way that a co-conspirator in the criminal context would be responsible for that conduct in New Zealand.

TIPPING J:

Mr Goddard, if it's not 4(4) and it's not 90(4), what is it?

MR GODDARD QC:

It is attribution to him in accordance with common law principle of the conduct of Mr Greenacre and others which took place at his direction or with his consent or agreement.

TIPPING J:

So it's common law attribution?

MR GODDARD QC:

Yes, I think it's cleaner to put it that way.

TIPPING J:

Well, it's not any better but it's the only way of putting it, isn't it?

MR GODDARD QC:

Yes, that's probably right, because really, as I considered Your Honours' questions, it struck me that my statutory interpretation argument was just another formulation of the common law argument, and it's a more complicated way of saying the same thing.

McGRATH J:

If it's a common law argument, does *Bray* still help you?

MR GODDARD QC:

Yes. Because that's exactly the line of argument that was followed in *Bray*.

BLANCHARD J:

You will take us there at some stage?

MR GODDARD QC:

I will, I've been trying to set up the sort of basic foundations of my argument first, so the conduct described in paragraph 1 of my note, and I expanded on that in response to a question from His Honour Justice Tipping, and paragraph 2, the central argument here is that the conduct of a person in New Zealand can be attributed to another person outside New Zealand in accordance with section 90 and/or relevant common law attribution principles.

BLANCHARD J:

Well we can cross out in accordance with 90, can we?

MR GODDARD QC:

I think it's important to bear in mind the corporate principle as well, and then work out how that fits together, and I'll go through some examples and it's very relevant there. And where the person in New Zealand acts at the direction or with the consent or agreement of the person outside New Zealand, and we say –

TIPPING J:

Would you allow me to add to your second line of 1, rather it concerns Poynter's responsibility by common law attribution?

MR GODDARD QC:

Perhaps I'd add, for the extensive conduct engaged in by his subordinate Greenacre and others in New Zealand (attributable to him at common law).

TIPPING J:

Right.

MR GODDARD QC:

And again, just finishing my 2, we say that in the circumstance I have described, the person to whom the conduct is attributed has engaged in conduct in New Zealand and section 4 of the Commerce Act is not relevant. It need not be relied on because it's not a case about conduct that takes place outside New Zealand. And that is consistent with a series of cases in the criminal law context, some concerned with conspiracy, but not all, which explore the extent to which statues expressed in apparently general terms, should be read down by reference to what might loosely be called principles of territoriality. And I will go to some of those, perhaps after *Bray*, but in short, what those cases say, and in this, the House of Lords, the Privy Council, the Supreme Court of Canada and the High Court of Australia are all at one, is that it is too simple to say legislation is presumed only to apply to conduct of the defendant in the jurisdiction.

BLANCHARD J:

In any of those cases, was there an equivalent of section 4, which did deal with, you would say in part, with extraterritorial conduct?

MR GODDARD QC:

Treacy, the very first of those, was a case in point. The Theft Act included some provisions extending some aspects of the act to certain overseas circumstances and Lord Diplock said, in short, well that tells us that there is some limit that goes without saying because the legislature saw an extension in those circumstances necessary but there is no statement anywhere of what that limit was, we must work it out. We will work it out by look – by assuming that Parliament intended to act consistently with its public international law responsibilities.

BLANCHARD J:

Are you going to take us to *Treacy*?

MR GODDARD QC:

I am.

ELIAS CJ:

So does this mean though that critical to your argument is the use of the word "extend?"

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

That section 4 does not limit the scope of the Act. That – you have to first ask what would the scope of the Act be absent section 4, and then section 4 was intended to extend that not to limit it.

ELIAS CJ:

It's, yes extend doesn't always mean extension.

MR GODDARD QC:

No but in this case that is precisely what it was intended to do. It was effectively an anti-avoidance provision intended to capture the sort of popping across to Australia by two chief executives that I described. Otherwise the ability to avoid the Act would have just been too simple. You only had to go and have your conversation outside New Zealand and the Act wouldn't apply to that conversation. Section 4 was intended to say, in addition to all the cases to which the Act would otherwise apply, it extends to conduct outside New Zealand by these designated classes of person.

BLANCHARD J:

Do we really need to have section 4(1) in the Act?

MR GODDARD QC:

Yes, because otherwise it wouldn't apply to that agreement by the two New Zealand chief executives. Suppose that you have two New Zealand companies, they're competitors with each other, the two chief executives pop across to Sydney and have a conversation and they agree that they will put prices up or they agree that one will refrain from bidding on one tender, the other will refrain from bidding on another, section 27(1) provides that entering into that agreement is a breach of the Commerce Act but the whole conduct involved in entering into the agreement took place outside New Zealand.

McGRATH J:

I think possibly the better hypothetical is the two Australasian chief executives meet in Sydney and Melbourne.

MR GODDARD QC:

My, yes, that's another – well. The two Australian chief executives who meet in Sydney or Melbourne, if the companies carry on business in New Zealand, but the individual chief executives do not reside here, then their conversations still will – the companies will breach the Act but the chief executives won't. If one of them was a New Zealand resident who had popped over to Melbourne for the conversation, that individual would breach the Act –

ELIAS CJ:

Why do you need subsections (2) and (3) on your argument?

MR GODDARD QC:

Subsection (2), I deal with this in my written submissions at paragraph 10.34 and 10.36. Subsection (2) I can assist with the history of that. There was a review of the CER arrangements in 1989 and the two governments agreed, and my friend is right in this, that rather than applying anti-dumping regimes, as between Australia and New Zealand, that should be replaced with competition rules. Effectively prohibitions on predatory pricing within the Australian area. So we continue to have anti-dumping legislation vis-à-vis the rest of the world but, and this is uniquely pretty much as between Australia

and New Zealand, we do not apply anti-dumping rules anymore. Instead we rely on the competition rules and what happened was that a protocol to the CER agreement was executed by the two governments which provided for a number of different steps to be taken and one of the steps that was provided for in the protocol was that when free trade in goods had been complete – fully insured, which was due in I think July 1990, and when both governments had extended, both countries had extended I should say, their competition prohibitions to trans-Tasman unilateral misuse of market power, then it was agreed that the two countries would stop applying their anti-dumping rules as between each other. So both countries adopted, pursuant to that, very similar provisions and what subsection (2) does is, as I explain in 10.35, provide a substitute for anti-dumping action in the trans-Tasman context . Consider my company A Ltd, an Australia company manufacturing widgets, because they always do in these examples, engages in predatory pricing of widgets when selling to purchasers in Australia, including exporters of widgets to New Zealand for the purpose of deterring competitive entry in the widget market in both countries. All sales take place in Australia. The company does nothing in New Zealand. The third party purchasers obviously aren't acting on behalf of A Ltd when they sell into New Zealand and neither section 90 nor common law attribution principles, however framed, could lead to that result. No unlawful agreement or conspiracy, simply a unilateral exercise of market power. That's the situation to which section 4(2) is addressed. Because there's no conduct by that person with market power in Australia and indeed in Australasia, in New Zealand at all. And this is exactly the situation of predatory pricing example that this was intended to capture.

Subsection (3) is not by any means the same as the Australian provisions on extraterritorial acquisitions. It is, in fact, a – and in this respect New Zealand's Act has a much broader territorial scope than the Australian Act. Section 4(3), and I discuss this at my 10.36, provides that section 47 of the Act, which prohibits acquisitions which have the effect of substantially lessening competition in a market, extends to acquisitions outside New Zealand by a person, whether or not resident or carrying on business in New Zealand, of the assets of a business or shares to the extent that the acquisition effects a

market in New Zealand. So the effect of this, and it's a very sweeping provision, is that if two British companies have subsidiaries in Australia, that have subsidiaries in New Zealand, and the two subsidiaries in New Zealand are competitors here, if one British company acquires the other, and that has the effect of eliminating competition between their subsidiaries in New Zealand, then that is a breach of the New Zealand Commerce Act. Now my friend was wrong to suggest this was in response to the *British American Tobacco* litigation. In fact that litigation took place after this provision and construes it and finds that it does have that effect. I won't take the Court to the case but it's under tab 20 of volume 2 of my casebook and it was – and the conclusion that was reached was that indeed the New Zealand Commerce Act did apply to the acquisition by one British company of another, although there might well be difficulties in practically enforcing the Act against the acquirer. So, and the Australian Act operates rather differently. It does not attempt to extend the prohibitions in the Act to the overseas acquisition in circumstances where the acquirer has no connection with Australia. Rather it prescribes certain consequences in terms of disposition of assets within Australia if that event occurs.

WILSON J:

Didn't this issue arise over New Zealand Steel that gave rise to Justice Lockhart's judgment that was referred to?

MR GODDARD QC:

Yes it did, it did Your Honour. Your Honour is exactly right. There were some issues about the acquisition as well. That involved, I think, the acquisition of Australian company shares – no it was an Australian acquirer.

WILSON J:

Australian acquirer of New Zealand Steel?

MR GODDARD QC:

Australian acquirer acquiring New Zealand Steel.

WILSON J:

Yes. Acquiring in Australia?

MR GODDARD QC:

Yes, yes. So there wasn't that same issue.

WILSON J:

Mr Goddard, just before you go on, can I just come back to ask you about this basis of attribution and suggest to you that in order to establish a foundation for attribution, be it statutory or at common law, it's necessary to rely on conduct outside New Zealand?

MR GODDARD QC:

Yes, I accept that, and I don't think there's a problem with it. In terms of –

WILSON J:

Well, isn't that idea relevant then, in determining an issue of the extraterritorial application of the Act, given it occurs outside New Zealand?

MR GODDARD QC:

Let me – well, perhaps Your Honour could have a look on my note at the first two scenarios and, if I just work through those very quickly, I think the second one captures that, but we need to do the first one quickly first. So we've got an Australian company, Wallaby Limited, sole manufacturer and supplier of widgets in Australia, Kea Limited, the sole manufacturer and supplier of widgets in New Zealand. First of all, assume the two chief executives meet in Sydney and they agree that Wallaby will not enter the New Zealand market and Kea will not enter the Australian market –

ELIAS CJ:

Sorry, what paragraph are you in ?

MR GODDARD QC:

I'm, under my heading, "Some scenarios for consideration," in paragraph A, very foot of the first page in my note.

ELIAS CJ:

Oh, yes, thank you.

MR GODDARD QC:

And I think that this is the only example where my conclusions will be common ground and, first, I say that both Keith and Kea Limited breach section 27, and they breach that by virtue of section 4 subsection (1). By entering into the agreement, the conduct of entry into the agreement takes place in Australia, why does the Act apply to Keith and to Kea Limited? It applies to both of them by virtue of section 4 subsection (1). What about Wallaby Limited and it's chief executive, Wilma? Well, they don't breach the Act, because all their conduct was outside New Zealand, section 4(1) doesn't apply and no-one has done anything on their behalf in New Zealand. So I think that's common ground.

But now we turn over and assume that the meeting takes place in Auckland. Now, obviously, the New Zealand company and the New Zealand chief executive breach the Commerce Act but also, in my submission, Wallaby Limited and Wilma do. Why does Wilma breach the Act? She breaches the Act because she engaged in conduct prohibited by the Act while she was in New Zealand. So, no question of section 4 arises, she's simply engaged in conduct here in New Zealand. Now, let's look at the position of Wallaby Limited, because this is a direct response to Your Honour's questions. Wallaby Limited, it seems to me, must also be responsible for Wilma's conduct in New Zealand and breaches the Act, and that's because it's conduct engaged in by a servant of Wallaby in New Zealand. So section 90 subsection (2) squarely applies.

But notice at once, Your Honour, that everything that Wallaby has done to create that agency arrangement happened in Australia. So Wallaby has not done anything independent of the conduct of Wilma in New Zealand, but is

accountable for that conduct. The relationship of agency, the relationship, employment relationship, arose solely as a result of acts in Australia, but it's never been suggested and, in my submission, could not be suggested, that that means that Wallaby can say, "Oh, well, you're looking to the fact that we employed her, that was in Australia, you're looking to the fact that we gave her general responsible as chief executive to manage the business, that was in Australia, so you can't attribute her conduct to us for the purposes of the Commerce Act. So, in my submission, it's not part of the scheme of the Commerce Act and would be inconsistent with common sense principles of attribution and legal responsibility to suggest that there needs to be some conduct by the principal in New Zealand, apart from the proscribed conduct by the breacher, the individual breacher here.

ELIAS CJ:

But isn't that simply because section 92 applies?

MR GODDARD QC:

Yes, but in accepting that Your Honour has immediately rejected my friend's submission that you apply section 4 first and then section 90.

ELIAS CJ:

Well, I'm going along with you at the moment, but…

MR GODDARD QC:

Yes, yes, no, that's right, what I – my submission is that first of all you work out what conduct is attributable to the defendant in question, and then you ask where that conduct happened.

ELIAS CJ:

Yes.

MR GODDARD QC:

And, in my submission, that is the only sensible way of approaching that process, and what that means is that before you reach the question which section 4 is addressed to, "Was their conduct within New Zealand or outside New Zealand?" you've worked out what conduct the defendant is accountable for, and then you ask whether that conduct is in or outside New Zealand. So that, I think, must be the right approach to the relationship between attribution of conduct and application of section 4, but the question that the Court has been pressing me on is, "Well, that's all very well, but how do you attribute the conduct of New Zealand to Mr Poynter?"

WILSON J:

Just before you go there, can I just check my understanding that you accept that you seek to attribute responsibility to Mr Poynter because of the conduct of Mr Poynter in Australia?

MR GODDARD QC:

Yes.

TIPPING J:

Had he done nothing, you couldn't attribute. Whatever he did was in Australia?

MR GODDARD QC:

Yes. Personally, whatever he did personally.

WILSON J:

Yes, oh, yes.

TIPPING J:

Yes, yes.

MR GODDARD QC:

Now, the same of course is true of Wallaby in my example. Whatever Wallaby did in scenario B –

TIPPING J:

But are you attributing as a matter of law or are you attributing because of the counselling and procuring dimension?

MR GODDARD QC:

Well, attribution always involves two stages. It involves identification of the legal test for attribution and then an enquiry as to whether the factual prerequisites for that attribution are met. But in the case of Wallaby, the factual prerequisites for attributing Wilma's conduct all took place in Australia, the employment of her.

TIPPING J:

Well, never mind Wilma and Wallaby, I find all these examples extraordinarily confusing.

ELIAS CJ:

How did you alight on "Wilma"? Was that a New Zealand sort of name, like Wallaby?

MR GODDARD QC :

No, no, it started with W, like Wallaby, it was meant to –

ELIAS CJ:

Oh, I see, a widget, yes.

TIPPING J:

And Keith and Kea, you see, it has the same sophisticated linkage.

MR GODDARD QC:

Yes, and Keith and Kea. I –

ELIAS CJ:

Sorry, I couldn't resist asking that, because it was irritating.

MR GODDARD QC:

That, that is – I was driven by nothing more sophisticated than alliteration.

TIPPING J:

Yes. Well, what I find difficult is you're really saying that Mr Poynter is a party to the conduct in New Zealand, using other language.

MR GODDARD QC:

Yes, “party” in the sense in which that's used, for example, in section 66 of the Crimes Act, to include the person who actually commits it through an agent –

TIPPING J:

But the conduct which makes him a party is conduct out New Zealand.

MR GODDARD QC:

Yes.

TIPPING J:

That's the long and the short of it.

MR GODDARD QC:

Yes.

TIPPING J:

The issue is, does that make him a party, so as to make him liable under our Act?

MR GODDARD QC:

That's exactly right and, in the criminal context, it would.

TIPPING J:

Oh, yes, but that's because of the definition in section 7.

MR GODDARD QC:

Well, I don't know that that's right, is it, Sir?

TIPPING J:

At common law you couldn't charge someone who was a party if they were outside the jurisdiction, they had to be inside the jurisdiction.

MR GODDARD QC:

No, and that's what those cases are addressed to that I need to go to, *Treacy* and the others.

TIPPING J:

Well, you'd better get there smartly, I would say.

MR GODDARD QC:

Yes.

ELIAS CJ:

Just before you get there, and I imagine you will come back to section 94, but that is "Any conduct engaged on behalf of a person is deemed to have been engaged and also by the first-mentioned person." So, leaving aside the problems you have with whether you're within A or B, paragraphs A or B, how is conduct in encouraging or agreeing to, conduct on behalf of a person?

MR GODDARD QC:

In the same sense in which the conduct of one co-conspirator is engaged in on behalf of the other co-conspirators. That's why statements that they make are attributable to the other co-conspirators, that's why acts done –

ELIAS CJ:

Well, it has to be conspiracy, doesn't it, really? What's the legal handle?

MR GODDARD QC :

Yes, it is, it is the concept of, you know, qui facit per alium facit per se, to lapse into Latin, that if you do something through someone else then you are treated as doing it yourself. That's an explanation that's frequently given – you'll see it in some of these cases – for the reasons why one co-conspirator is responsible for the actions of another within the common purpose, and the Commission's submission –

ELIAS CJ:

So, "on behalf of" doesn't mean a hierarchical direction?

MR GODDARD QC:

No, it doesn't.

ELIAS CJ:

It can be acting in concert.

MR GODDARD QC:

It means acting in concert, acting in accordance with the common purpose. So, where you have a group of people who make an unlawful agreement, whether it's a conspiracy to defraud or whether it's conspiracy to price fix, each person acting within the scope of that conspiracy acts on behalf of the other conspirators.

TIPPING J:

That's not your problem about subsection (4), with respect. I thought we'd already – you're not actually relying on subsection (4) are you?

MR GODDARD QC:

No but I rely on that argument for my common law attribution.

TIPPING J:

Yes, I understand that.

MR GODDARD QC:

Yes.

ELIAS CJ:

Sorry, go back to the question that you were addressing with Justice Tipping. You were going to go to the cases.

MR GODDARD QC:

Yes, I thought I might begin with *Bray* in fact, which is in volume 2 of my friend's authorities under tab 28. It's an application to set aside leave to serve out of the jurisdiction, on the European parents of these vitamin-selling groups that had been involved in the famous vitamin cartel in Europe and worldwide. The defendants in this proceeding, which was brought by a purchaser of vitamins, the ACCC's proceedings had been resolved, served the Australian subsidiaries and the European parents. The issue was whether there was jurisdiction to proceed in Australia against the European parents and one of the issues raised, of course, in the context of jurisdiction in personam, is whether there is a good arguable case or a serious issue to be tried against the defendant, and that in turn raised the question, well, is there a good arguable case that the European companies breached the Australian Trade Practices Act, or are they simply outside its territorial scope? That was a key issue here.

So if we look at, first of all, paragraph 25 on page 7, section 45 and 75(b) claims against the foreign respondents relate to conduct allegedly engaged in within and outside of Australia within certain dates.

TIPPING J:

Sorry, you're going a bit fast for me Mr Goddard.

MR GODDARD QC:

I am sorry, Sir.

TIPPING J:

I'm sorry, I'm finding it extremely intricate so if you wouldn't mind just slowing down a wee bit.

MR GODDARD QC:

It is intricate.

TIPPING J:

Where were you?

MR GODDARD QC:

Paragraph 25, describes the claims against the foreign respondents, it relates to conduct engaged in within and outside Australia between certain dates. Insofar as the claims are based upon conduct by the foreign respondents within Australia, issue of extraterritorial operation under 5(1) does not arise, 5(1), so far as the claims are based on conduct outside Australia an issue arises as the operation of 5(1), and in particular whether the foreign respondents carried on business in Australia, so were caught. One of the arguments that one often sees in these cases of course is that the local subsidiary carries on the parents' business, that was raised and rejected here.

So the Court describes the requirements of the Australian Federal Rules in relation to leave to serve out of New Zealand, notes at paragraph 44 on page 11 that there's a prima facie case of contravention of section 45, and of course the same is true here, but the question is whether the case has been made out against any of the foreign respondents, so it's exactly the circumstances of this case, clear breaches within the jurisdiction what of the overseas defendants. Most, if not all, of the foreign respondents were involved in the making of or giving effect to the cartel arrangement. It resulted prima facie in contraventions by the Australian subsidiaries. The issues, the same issues here, are whether the conduct constituting that involvement was engaged in outside of Australia, in which event the extraterritorial operation

arises for consideration, or within Australia, in which event section 45, the equivalent of our 27 can apply without resort to section 5(1).

WILSON J:

So neither was really an attribution issue there was it?

MR GODDARD QC:

Yes, the second of those was an attribution issue and I'll take Your Honour to that.

TIPPING J:

That includes attribution?

MR GODDARD QC:

Yes.

WILSON J:

Sorry, that's only in the context of within Australia, in terms of actions outside Australia, it appears to be seen as a section 5 rather than an attribution issue, doesn't it?

MR GODDARD QC:

Yes, but in order to identify what conduct constituting that involvement occurred within Australia, the Court enquired what conduct by the subsidiaries could be attributed to the parents, so that's how that comes in.

So we then get to a discussion of section 5, and that's set out over the page. There's a reference to the general canon of construction, that an enactment's not construed as applying to foreigners in respect of Acts done by them outside the dominions of the power and I'll deal with the contemporary formulation of that a little later. In my submission, it's best captured by the Supreme Court of Canada decision that the contemporary formulation is, there's a canon of construction that an enactment will not be construed as applying in circumstances where there is no real and substantial connection

with the jurisdiction, and that's the Canadian approach which, in my submission, is the appropriate one. But His Honour goes on to note some dispute over the extent to which the canon applies to acts which occur outside the jurisdiction which have adverse effects on the country concerned. He notes that in an era of e-commerce and so forth, much to be said for the view that absent a contrary statutory intention, the time might have come to move to the effects doctrine developed in the United States.

Paragraph 50, whether a statutory provision has extraterritorial operation is a question of construction of the Act as a whole, and of course that's construction which takes place having a granted purpose and in context and against the backdrop that Acts are always speaking the point that Your Honour the Chief Justice made in relation to section 6 of the Interpretation Act. Within the Trade Practices Act, not necessary to rely on a canon of construction in respect of section 5, because 5(1) provides a brief for territorial application. It goes on to find that section 5(1) is the repository of the extraterritorial application of the Act but importantly goes on later, and I'll come to these passages, to find that that doesn't exclude the attribution to a person outside Australia of acts done by persons within, and that that's not a section 5 issue.

At paragraph 57, His Honour notes that, "Insofar as the claims against the foreign respondents in reliance on section 45 are based on conduct outside Australia, they are only maintainable if those respondents were carrying on business within Australia." His Honour turns to consider that question and concludes, as is usual in these cases, when one looks at the facts, that the subsidiaries were carrying on their own business in Australia, not the business of the parents, the parents were not carrying on business in Australia. That conclusion is set out at paragraphs 80 to 82 on page 20 of the judgment. "Something more than indirect capacity to control required to find that the subsidiary carried on business as agent for the parent, not satisfied the evidence establishes that", 81.

82, “Accordingly, if the applicant is to uphold its service on the foreign respondents out of the jurisdiction, it must be on the basis of conduct by those respondents within Australia.” So the question discussed in the rest of the judgment is, did the European parents engage in conduct within Australia?

83 sets out the alternative case of the applicant, “That the foreign respondents, by their own conduct and acting by their Australian subsidiaries, gave effect to, or were persons involved in the cartel arrangement in Australia.” That exactly parallels the Commission’s argument in this case.

The evidence relied on is set out and is described in considerable detail, complete with extracts from affidavits and investigation reports of the New Zealand Commerce Commission and key agreements from United States and I think it can be picked up again at page 39, paragraph 142. His Honour said, “I infer from the facts established by the evidence that the implementation of the cartel arrangement in Australia was controlled and directed, directly or indirectly, in all relevant aspects by European and regional parent companies in each of the three groups.” He goes on to note how the instructions on pricing were determined at a higher European level. 143, “The inherent nature of the cartel arrangement required its implementation at the national level be substantial as Johnson described it. Importantly, for present purposes, I infer the ongoing implementation including supervision and monitoring of the cartel arrangement in Australia required offices of the regional parent or, in its absence, of the European parent responsible for making or implementing the arrangement to regularly direct, instruct and advise senior executive officers of the Australian subsidiary as to prices and volumes in respect of the purchase of the Klaus vitamins, and prices, volumes and customers in respect of their sale.”

ELIAS CJ:

Isn’t this, though, isn’t this really the situation in section 90(2) that’s being described here?

MR GODDARD QC:

Yes.

ELIAS CJ:

Attribution to the company?

MR GODDARD QC:

Attribution to the parent company of acts done by the subsidiary and the staff of the subsidiary.

ELIAS CJ:

Yes.

MR GODDARD QC:

So that attribution enquiry is being conducted as part of an enquiry into whether the parent engaged in conduct in Australia.

ELIAS CJ:

What's the equivalent of section 90(2) in the Australian legislation, is that set out in this?

MR GODDARD QC:

Section 86.

ELIAS CJ:

This is presumably what this discussion is being conducted against, is it?

MR GODDARD QC:

In fact, there is no reference to that provision, it's simply analysed as a matter of general attribution.

BLANCHARD J:

But there is such a section?

MR GODDARD QC:

There is such a section.

BLANCHARD J:

So can we assume that Justice Merkel was looking at the matter as a matter of common law and not under the statute?

MR GODDARD QC:

No, you can't make an assumption one way or another.

BLANCHARD J:

You'd given me the impression somewhat earlier in your argument that this was simply an example of common law attribution.

MR GODDARD QC:

And when one looks at – I think I was too quick to answer that because when one looks at the analysis undertaken and the language used, I think that's the better inference of what His Honour is doing and it's explicit in the New Zealand judgment that follows at *Bomac*, which I am going to go to.

WILSON J:

Mr Goddard, isn't the crucial point here though, that at paragraph 147, the Judge expressly found, in effect, that there was conduct within Australia?

MR GODDARD QC:

There are two findings about conduct in Australia. The first is in 147, that's the communications into Australia.

WILSON J:

Well first of all, perhaps 144 line 3, there's reference to meetings both inside and outside Australia.

MR GODDARD QC:

I was going to note that there were meetings inside and outside Australia and communications by officers of the European or regional parent to officers in Australia, except that in some cases, meetings and communications occurred at the overseas headquarters of the European or regional parent.

WILSON J:

But isn't it quite clear in 147 that at least most of these communications, even if initiated outside Australia were directed to and were received in Australia, so aren't we talking about conduct in Australia that immediately distinguishes this case from our present one?

MR GODDARD QC:

In my submission, given that some of these communications were indirect, it's not a relevant distinction. One of the things –

BLANCHARD J:

Why did Justice Merkel say in paragraph 144, "I accept that in some instances, meetings and communications occurred at the overseas headquarters of the European or regional parent"? Isn't that an indication that he is thinking that if that had been all that had happened, it wouldn't have been possible to make this attribution?

MR GODDARD QC:

No, I think rather what His Honour is saying is that that's not fatal, because those meetings and communications produced action pursuant to them.

BLANCHARD J:

Exactly, that's my point.

MR GODDARD QC:

But here too, Your Honour, the communications between Poynter and Greenacre in Australia produced actions in New Zealand, so our case is on all fours.

TIPPING J:

"But however…" introduces the second half of para 144. It seems to me, at least at first blush, to be making the very distinction that's been put to you.

ELIAS CJ:

And it is officers of the relevant overseas parent.

MR GODDARD QC:

So that's where 147 comes in. 147 and 148 spell out in more detail those two limbs. First of all, the communications, two officers of the Australian subsidiaries, although likely for the most part to have been initiated outside Australia were directed to and were expected to be and were received in Australia, such conduct can, for the purposes of section 45, be regarded as taking place in Australia. So that's the communications. And then 148 –

TIPPING J:

For the purposes of section 45, because the whole of this section of the judgment is headed, I've lost it, but it's headed with two sections, one of which was 45, yes. On page 20, 45 and 75(b).

MR GODDARD QC:

So 45 is the prohibition equivalent to our section 27, so that's just saying for the purpose of the prohibition.

TIPPING J:

But, for the purposes of that section, it can be regarded as conduct taking place in Australia. There's nothing comparable here.

MR GODDARD QC:

Yes, we say that for the purposes of section 27, communications into New Zealand, and indeed for the purposes of part 2 of the Act as a whole, communications into New Zealand are conduct within New Zealand.

BLANCHARD J:

Were the communications into New Zealand by Poynter?

MR GODDARD QC:

Through Mr Greenacre.

TIPPING J:

Well that of course introduces the essential difficult step.

MR GODDARD QC:

Mr Poynter tells Mr Greenacre what he wants done, Mr Greenacre trundles off to New Zealand and communicates with the other side, with the competitors and with other people, effectively – it cannot make a difference, this is an important part of the question, it cannot make a difference whether Mr Poynter picks up the telephone and calls Mr Boyle in New Zealand or whether he says to Mr Greenacre, "Go and have a chat to Mr Boyle and fix prices." Either way he is directing communications into New Zealand.

TIPPING J:

I think the essential point that you're making, which has to succeed to get you home, is in 6.5 of your primary written submissions on page 12. And then they're followed by some more widgets.

MR GODDARD QC:

Yes, that's an essential point.

TIPPING J:

Well, it's the essential point, isn't it?

MR GODDARD QC:

Yes it is.

TIPPING J:

6.5, unless you are right on 6.5, you won't succeed.

MR GODDARD QC:

Yes, I need to be able to treat Mr Greenacre's conduct as attributable to Mr Poynter, or, and this is perhaps a slightly different – yes, to treat Mr Greenacre as the instrument, the medium, through which Mr Poynter was communicating with the competition in New Zealand.

TIPPING J:

In other words, just as a conduit, in effect, and it's his conduct that's taking place in New Zealand?

MR GODDARD QC:

Yes.

TIPPING J:

Via Greenacre?

MR GODDARD QC:

That's right, Sir.

TIPPING J:

It seems to me that that is the point on which we should all be focusing.

MR GODDARD QC:

And that's why I say this is an attribution case really.

TIPPING J:

Yes, and it has to be common law attribution, because it's not statutory.

MR GODDARD QC:

Exactly, because either we can attribute that conduct and then no issue of section 4 arises, that's conduct within New Zealand if the Act applies, or we can't, in which case there's no basis for applying the New Zealand Act.

TIPPING J:

If Greenacre's conduct is his conduct, then it's in New Zealand. If it's not, there's nothing that's happened that would make him liable.

MR GODDARD QC:

Yes.

ELIAS CJ:

And you'll have to explain, when we come back, why then it was necessary to enact section 90.

MR GODDARD QC:

Yes, and deal with the question of whether it's exhaustive or not in relation to attribution.

ELIAS CJ:

Yes.

McGRATH J:

You are saying that in terms of *Bray*, the discussions Poynter had with Greenacre in Australia are the same, following which Greenacre comes to New Zealand and does what he does, you're saying that's the same as if there was a communication into New Zealand in the form of an email, a phone conversation, or something of that kind.

MR GODDARD QC:

Yes, that it makes no difference whether you pick up the phone to the person in New Zealand, clearly enough, or whether you ask your PA, sitting outside to send them an email or a fax, or whether you take your next person down in the reporting line and you say, "Just pop over to New Zealand and just fix those prices, would you?" You're still directing a communication from yourself to the person in New Zealand through that instrument, and it doesn't matter whether that instrument is a telephone line, your computer and your email, your PA or your 2IC.

McGRATH J:

Is it fair to say that that's not the way Justice Merkel was thinking? Justice Merkel clearly distinguished out and found significant the fact that the communications were into New Zealand from – into Australia from overseas.

MR GODDARD QC:

Justice Merkel also does combine the two and that really emerges from the following paragraphs.

BLANCHARD J:

Are we coming back to *Bray* then?

MR GODDARD QC:

Yes, I haven't finished with *Bray* yet.

ELIAS CJ:

And you'll take us to the Australian statutory provision which may be what Justice Merkel was implementing in terms of the attribution to the parent company.

MR GODDARD QC:

Yes, it's virtually identical to the New Zealand one, I can say that. The New Zealand section 90 is more or less a copy of the Australian provision.

ELIAS CJ:

Then you have a gap.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.15 PM

MR GODDARD QC :

Your Honours should have two pieces of paper that Madam Registrar has made available, from me. One is an extract from *Miller*, the Australian

commentary on the Trade Practices Act, and the other is a extract from *Gault on Commercial Law*. I apologise for the horrible computer printout, it's all I was able to organise over lunch. The *Miller* extract sets out the relevant Australian provision, it's section 84. I was out by two, which, given the length of the Trade Practices Act was not terrible going, but I do usually try to be more precise. And the Court will see that it's identical to our provision, ours was modelled on it. So that's the Australian provision.

If I could continue through the commentary to page 839 of the *Miller* commentary, there's a heading on 838, "Concept Conduct of Servants," and then about 10 lines down the commentary discusses the Australian understanding of whether section 84 is exhaustive and sets out a couple of the authorities, which note that the cases have proceeded on the assumption that it's not.

So, first of all we have *TPC v Queensland Aggregates,* Morling J, section 84(2), "Not expressed to take effect of the exclusion of the common law, scope's been considered but not determined in a number of cases, seems to have been assumed in most of the cases that ordinary common law principles apply in determining whether conduct engaged in by a corporation, servant or agent is binding on the corporations so as to makes it viable for a breach of the Act." Then, coming down three lines, "Moreover," yes, I think we're back to, "the language of section 84(2) appears to disclose a legislative intention to extend rather than limit the liability of corporations for the actions of others."

And then, Justice Toohey in *TPC v Tubemakers,* "In my view," section 84(2), "not intended to be an exhaustive statement of corporate responsibility under the Trade Practices Act." And that assumption pervades a number of the Australian decisions and, in my submission, explains why there's no reference to section 84 at all in *Bray*, and I'll come back to *Bray* in a moment.

But, just while we're on the non-exhaustive nature of section 84, can I note that the same point has been made about section 90 of the New Zealand Act. I have provided this extract from Gault after setting out section 90, there are a

couple of points that it's worth noting in passing. The first, on the second page of the extract, the heading, CA90.04A section 92, concerned with vicarious liability, there's reference to the decision of the Court of Appeal in *Giltrap City v Commerce Commission,* and the importance of that decision is that the Court of Appeal there held that the individual who participated in the meeting was liable as a principal for breaching the Commerce Act as well as the company represented by M, the relevant defendant, and that's noted at paragraph 56 of the quote, both have principal liability, and that's important when we come to considering attribution, and I'll come back to that.

Over the page there's a reference to the first instance decision of Justice Glazebrook in *Giltrap,* and in that decision Her Honour expressly considered the question of whether section 90 subsection (2) was exhaustive and held that it wasn't, and that the attribution principles that were adopted by the English Courts in *Ready Mixed Concrete* were still applicable under the Commerce Act. That was important, because otherwise an employee who had been forbidden to participate in price fixing activities would not have their conduct attributed to the company under section 90 subsection (2) and it was held, no, it wasn't enough for a company to be able disclaim responsibility for an employee, especially a senior employee, acting in the course of their employment, that wasn't enough to say, "Well, they have been told not to engage in breaches of the Commerce Act and therefore section 92 is not satisfied because the employee is not acting within the scope of their authority.

ELIAS CJ:

Well, have you got any authority, though, that goes further? This is about attribution to –

MR GODDARD QC :

Yes.

ELIAS CJ:

– companies, you're seeking to attribute to an individual.

MR GODDARD QC:

And, so my starting point is to say, well, if subsection (2) is not exhaustive, and there's no more reason to consider that subsection (4) was meant to be exhaustive, the common law principles can operate in parallel, what are those?

And in relation to attribution to an individual, I want to come back to the finding in *Giltrap* in the Court of Appeal that the managing director, who attended the meeting, breached the Commerce Act, as well as the car dealer company that they were at the meeting to represent. And I wanted to ask the Court, despite the comments about hypothetical examples earlier this morning, to consider – so the situation where M attends a meeting and reaches an agreement with other car dealers to fix prices, M breaches the Commerce Act. What if M had sent along his 2IC to that meeting and said, "There's going to be a meeting with the chief executives, there's going to be a discussion about fixing prices, and this is a good thing for us, we're having a hard time making money at the moment, so pop along and agree on our behalf." So, the sales manager, say, trundles along to the meeting and agrees to a price fixing arrangement with the other car dealers in the area.

Now, the stark question in this purely domestic case is, "Does the chief executive breach the Commerce Act?" Can they avoid breaching the Act simply by not turning up at the meeting themselves but sending along someone else to follow the cause of action that they have directed them to adopt? In my submission, they can't avoid liability, that would be fundamentally at odds with the policy of the Act, there's no indication in section 90 that people were intended to be able to escape liability by adopting the simple artifice of sending along a delegate to a meeting or, rather than faxing back themselves a "yes" to a proposal to price fix, asking their PA to do it or someone else on their staff to sending it. If that's right, then section 90 can't be exhaustive of the circumstances in which the chief executive is responsible for someone else's conduct because, as the Court pointed out to me very forcefully, and as I think I eventually accepted, there's nothing in

subsection (4) that would enable the sales manager's conduct to be attributed to the chief executive in that situation. So –

TIPPING J:

It certainly looks like an attempt to be comprehensive, but you say it's misfired as such?

MR GODDARD QC :

Yes, and so if this Court were to say it was comprehensive there would be some obvious cases where the policy of the Act ought to apply and where at common law there would be liability, following the *Ready Mixed Concrete* principle, but where this Court would be saying that accidentally Parliament had knocked out a responsibility that would otherwise exist. It would mean that there was a different legal result if one dealer called Giltrap and said, "Shall we put prices up by 10 percent?" If the chief executive picks up the phone and rings back and says, "Yep, good idea, let's do it," they are a principal breacher of the Act, but if they say to their PA, "Could you ring them back and tell them, 'Yes, and don't send me any more incriminating emails'," which I imagine would be the two things that a smart chief executive, you know, might include in that communication, the chief executive doesn't breach the Act. Now, that makes no sense at all and –

TIPPING J:

Well, this is the same point as you're making in 6.5 of your main submissions, isn't it?

MR GODDARD QC :

Yes, it's exactly the same point, and just putting completely to one side the extraterritorial issues, which are an additional layer of complexity, the line of questioning that the Court was putting to me before lunch would result in a very significant gap in responsibility under the Commerce Act of senior executives who communicate through staff members their acquiescence in a price fixing arrangement and, in my submission, a finding that section 90 is exhaustive of the circumstances in which conduct can be

attributed would produce that result. That's an astonishing result, it's not one which needs to be reached, because the shared assumption, analysis of both the Australian and the New Zealand Courts, has been that section 90 is provided to simply the process of attribution in some cases, but does not exhaust the avenues of attribution.

TIPPING J:

The paragraph in the Court of Appeal's decision that you went to first, understandably, 46, seems to have understood your argument as though attribution was the same effect as creating an agency. Now, it was the same argument you were addressing to the Court of Appeal, was it?

MR GODDARD QC :

It would be fair to say that my argument in the Court of Appeal was not put as clearly, I think, as the argument on attribution has been today and that, in particular, because all those attribution issues were also loosely described as "agency creating" in the High Court decision in *Bomac,* I slid into the same linguistic usage. But that's, I accept readily, actually potentially quite a confusing usage. It's much better to be clear that what we're talking about is attribution, that attribution goes beyond agency – that's obvious from the form of section 90, which extends out beyond directors, servants and agents to certain other people acting with the consent or agreement of the principal. So, it's obvious, once one looks at section 90, that –

TIPPING J:

There's a difference too, between attribution and vicarious liability –

MR GODDARD QC :

There is.

TIPPING J:

– and I don't know that we necessarily want to revisit that controversy here, but it's very important to get the language accurate, isn't it, because otherwise you get led into the wrong sort of mindset.

MR GODDARD QC :

Yes, I think my learned friend found plenty in what I said before and, as a result, the Court of Appeal said, to beat me with, the broad non-technical agency concept, and I should have stayed right away from that because that's actually confusing.

ELIAS CJ:

Is attribution not accurate in relation to companies but agency the appropriate relationship in respect of others, and in your PA example why is that not caught under section 90(4)(b)?

MR GODDARD QC :

Because the PA is not the employee of the managing director. So, for the same reason the Court –

TIPPING J:

That's the problem with –

ELIAS CJ:

But the PA is the agent of the person who sends her to, say, to and tell them to enter into this agreement.

MR GODDARD QC :

My friend would say, "Not in the contractual sense, she's employed by the company, she's an agent of the company, she's not, as a matter of the law of agency, capable of creating contractual relations between her boss, who's just another employee, and anyone in the outside world," and my friend is right to say that. So, Your Honour, it all depends – sorry.

BLANCHARD J:

In any event, there isn't the big gap in the Act that you're suggesting, because a pecuniary penalty could still be imposed upon the cunning chief executive

who used their PA, because they would have aided, abetted, counselled or procured someone to contravene a section of the Act.

MR GODDARD QC :

That would of course require proof of the additional elements that go to accessory liability, including mental state.

BLANCHARD J:

Well, you'd have to prove that anyway.

TIPPING J:

Well, that wouldn't be difficult in your example.

MR GODDARD QC :

In my example, it wouldn't, that would not be difficult. But, it seems to me that it's a somewhat perverse result to say that they're not a principal –

BLANCHARD J:

Why is it perverse? Presumably the same penalty could be imposed?

MR GODDARD QC :

A breach of the same penalty could be imposed.

BLANCHARD J:

Yes, so it's not really a gap at all.

MR GODDARD QC :

It becomes important potentially in two ways. First, if one simply says to the PA, "Call them and say, 'Yes'," I don't think the PA who didn't know what they were responding to would breach the Act, so –

BLANCHARD J:

Well, the company would be breaching the Act, and you'd certainly have abetted or aided the company to do that.

MR GODDARD QC :

The company, entering into it. But you would in the process have, through a technicality, lost the principal liability and the strict liability.

BLANCHARD J:

Well, would it matter?

MR GODDARD QC :

It would matter in terms of what one needed to prove, what one needed to plead and prove. But the result in my example would be the same.

BLANCHARD J:

But you'd be having to prove the conversation in each case.

MR GODDARD QC :

The gap identified by Justice Glazebrook is a more serious one, because that would result in the company escaping liability.

TIPPING J:

But if the –

BLANCHARD J:

Why would the company escape liability?

TIPPING J:

Mmm, I don't know, I don't follow that. If the man in your example instructs the PA to say, "Yes," the PA, being innocent, wouldn't be liable, but the man involved would be, and would bind the company. I can't see any problem about that.

MR GODDARD QC :

I was referring to another example, but I don't know that that works as clearly either. The second reason this matters, the second context in which this matters, comes back to the territorial scope issue.

BLANCHARD J:

Yes, that's where it is important.

MR GODDARD QC :

So that's the other point at which it really matters, is this conduct attributable to the chief executive who says to the PA, "Ring them back and say, 'Yes'." So, we're in a situation where the chief executive in Australia picks up the phone, rings their counterpart in New Zealand, says, "Yes, that's fine," conduct in New Zealand, breach of the New Zealand Act. They say to their PA, "Ring them up, say, 'Yes, that's fine'," in my submission, that is a classic example of acting in the jurisdiction through a person whose conduct's attributed to, through in the sense in which it's used in the criminal law, an innocent agent. And there are many cases, some, for example *Paterson* and *Police v B* are included in the case book, where the Courts have held that where someone procures an innocent agent to commit an offence, for example, to go to an apartment and take away a television, *Paterson,* they actually commit the offence of burglary, through the innocent agent. And I say that here too Mr Poynter has actually committed conduct in New Zealand, through his not-so-innocent agent, Mr Greenacre.

Now, that, I think, is a logical point at which to finish, very quickly looking at *Bray,* and then go on to the cases which show that that sort of agency has been applied in cross-border contexts, as an appropriate form of linkage to the jurisdiction, that there's nothing antithetical to public international principles or common law principles in that. So, I was in *Bray*, which was in Volume 2 of my friend's casebook under tab 28, and I was on page 40, I'd got as far as paragraph 147, which related to the communications directed to Australia, and then I was moving on to 148, "Conduct of a European or regional parent company may also be said to be conduct that has taken place in Australia

where the particular conduct is engaged in by the subsidiary or by its officers on behalf of the parent." In substance, the evidence indicates the cartel arrangement made between the European parents, who were obliged to implement it – "Primarily, the European parents implemented the arrangement through the regional parent, which in turn implemented the arrangement through national subsidiaries." And the bottom of the page, "Probably more accurate to state it was made at the European level and then implemented respectively at the regional and national levels, rather than view the Australian subsidiaries as making the cartel arrangement, which at the micro-level they plainly admitted to doing, may be more accurate to describe their conduct as, 'Implementing the cartel arrangement of the European parent,' as directed by the European and regional parent.

In so doing, the subsidiary or, more accurately, its officers, was performing the obligations undertaken under the cartel agreement made by the European or regional parent, Australian subsidiaries had little or no discretion. Put another way, when the subsidiaries determining volume, price and customers for the class vitamins for the purposes of its purchase and sale of those vitamins, it's doing so in performance of the European parent's obligations under the cartel arrangement. The parent, in turn, agreed to and could only carry out its obligations by its servants and agents. The 'agents' for that purpose are its officers and the relevant officers of the regional parent or of its subsidiaries at the national level."

And just pausing there, "agent" not being used in the legal sense there, because the employees of subsidiaries are not agents of the parent, to create contractual relationships. And there's a discussion of how the evidence supports that, and paragraph 149 concludes, "I regard it as probable that the European parents, acting through officers of the regional parent and the national subsidiary, were actively involved in implementing the cartel agreement in Australia." So that conduct is being attributed to the European parents and its conduct in Australia, so there's no extraterritorial issue, the Australian Act applies.

There's some more discussion of the facts and then over on page 43, second line down, "Put another way, the relevant officers, when implementing the cartel arrangement, were authorised to do so and did so for and on behalf of the parent whose obligation they are performing, thus the implementation by the agent was implementation by the parent which, subject to the illegality, was bound by the agent's implementation," a reference to *Adams v Cape.* And then 158, "The combination of the conduct constituting communications by the relevant parent to officers of the subsidiaries in Australia and internal implementation of the cartel arrangement by officers of the subsidiaries in Australia on a regular and ongoing basis over a significant period constitutes, in my view, conduct by way of implementation of the cartel arrangement in Australia, that for the purposes of section 45(2)(b)," the prohibition, like our 27, "can be inferred to be conduct of the foreign parent in Australia."

So that's both aspects of the conduct, not just the communications in, but also the things done at the direction, with the consent and agreement of the European companies. That was upheld on appeal to the full Court of a federal Court, I don't need to go to that. My friend is right that one of the Judges in that Court said that both aspects of that conduct appeared to be important, but if one looks at the analysis I have just taken the Court through, one can see that there's a stand-alone analysis of how the implementing conduct by the Australian subsidiaries and their officers in Australia was conduct in Australia attributable to the parent. The same conclusion was reached by the New Zealand High Court in *Bomac* the New Zealand litigation about exactly the same cartel, that's in Volume 3 of my friend's authorities, under tab 30, decision of Justice Harrison, on a protest to jurisdiction by the same mix of local and foreign parent companies, and again there were arguments that the international parents carried on business in New Zealand through the local subsidiaries, that was rejected by the Judge, and I think we can jump straight to the discussion then of the agency issues, that's on page 103, 643 of the report, the numbers at the top right.

So, Your Honours will see at 74, "Rejection by Harrison J that the international defendants carried on business through the local subsidiaries." Then His

Honour moved on to the agency issue, “However, while it cannot be said the New Zealand subsidiaries were the agents of the international defendants for the purpose of carrying on business in New Zealand, that does not exclude the existence of a parallel agency relationship where the international defendants used the New Zealand companies as instruments to give effect to arrangements settled overseas, but which were designed to affect the local market. In this sense, a relationship of principal and agent exists,” reference to, down, fives lines from the bottom, “Arguably this principle falls within wider rules of corporate attribution.”

Para 76, “Mr Lange acknowledged that this proposition and expression of the ancient maxim, qui facit per alium facit per se, conceptualise that that root of the law of agency,” reference to *Police v B,* which is in the casebook, “In this respect,” 77, “Mr Stevens placed considerable reliance on section 90 subsection (2). Mr Lange acknowledged that it is, in effect, a statutory expression of the common law maximum,” perceptions set out and, at 79, “Starting point to determine whether the subject conducts and engage in on behalf of the international defendants. The Australian authorities have interpreted a matching provision in the Trade Practices Act is intended to extend rather than simply reflect the common law, purpose to attribute to a corporation the conduct of others for which it would not necessarily be otherwise responsible,” paragraph 80, His Honour’s opinion, section 92, “Has the same purpose, a phrase, ‘on behalf of’ connotes something done for a company in the course of its activities, use of the phrase ‘by any other person’ suggests the provision is designed to extend to those associated with but not necessarily employed by, or the legally engaged agent of a body corporate, very arguably the phrase would extend to officers or employees of local subsidiaries who are associated with or connected to the international defendants but not employed by them, availability of this argument reinforced by the reference to conduct at the direction of an agent or director of the body corporate, an argument that applying it would undermine the territorial restriction in section 41,” and then paragraph 82, His Honour, “I disagree. Section 41 applies in a discrete situation to the conduct out of this jurisdiction by a company resident or carrying on carrying on businesses in it. But I am

examining the reverse situation, namely whether a foreign corporation has engaged in proscribed conduct within New Zealand, section 41 is irrelevant to that enquiry," that's, again, this case. 83, "In my opinion *Bomac* is a good or strongly arguable legal case to support this limited type of agency, subject to some pleading amendments, a serious issue for trial," and then over the page, paragraph 89, "The key to my conclusion that *Bomac* has a good, arguable case on both causes of action under section 27(2), lies in my acceptance that, first, the issue of whether or not a foreign corporation can give effect to an arrangement through the instrumentality of a local subsidiary, whether by the doctrines of pure agency, section 92 Commerce Act, or attribution, is in the circumstances of this case a serious or substantial question to be tried." So, those all operating in parallel there, reference to *Bray* and the judgement of Justice Merkel –

ELIAS CJ:

Well, here there's admittedly no pure agency, section 92 of the Commerce Act doesn't apply, there's only attribution, and the only basis that you're putting forward for attribution is an acting in concert.

MR GODDARD QC :

Yes.

ELIAS CJ:

What authority do you have on that?

MR GODDARD QC :

At the direction or in the concert. And I say that that is where, and again I think that's where, that is where one looks to the law of conspiracy to understand what it means to act on behalf of someone for the purposes of a statute that is designed to impose penal consequences on unlawful conduct. And that's perhaps a good point at which to look at some of the cases referred to in my note on that point in the extraterritorial context, and I've picked up –

ELIAS CJ:

Is there any authority you can take us to which considers attribution in the context of conspiracy that might help?

MR GODDARD QC:

Attribution in the context of –

ELIAS CJ:

Yes, conspiracy.

MR GODDARD QC:

– conspiracy. Yes –

ELIAS CJ:

I suppose it's a, it's really of the nature of conspiracy to attribute to co-conspirators.

MR GODDARD QC :

It is. There's a helpful reference to the concept in a recent decision of the New Zealand Court of Appeal, *R v Messenger,* under tab 10 of Volume 1 of my authorities, and it's a case about the co-conspirators' exception to the hearsay rule, and that is discussed – the allegation was of a joint criminal enterprise to supply ecstasy and methamphetamine, the Crown relied on the co-conspirators' exception to the hearsay rule, and the relevant discussion begins at paragraph 8, "Notes that where the co-conspirators exception applies, statements made or acts done, either of those statements or acts done by one or more alleged offenders are admissible against the accused and in the case of statements as evidence of their truth."

Paragraph 10, "The rationale for the admission of evidence of the acts or words of one member of a criminal conspiracy or joint enterprise against another member is that the joint enterprise to commit a crime is considered as implying an authority to each of the members of that enterprise to act or speak

in furtherance of the common purpose on behalf of the others." There's a reference to some cases, discussion of the threshold issues.

The only other paragraph that's really helpful for today's purposes is right at the end, paragraph 38, third to last page. "Making some comments on submissions made, a submission of statements, persons who are not members of the conspiracy cannot be used against him. While this is correct, it must be remembered that it is not merely the statements of co-conspirators that can be admitted under the exception, it is also the acts. Therefore, if, for example, one of the co-conspirators is arranging with a courier for the transport of drugs, this may be admissible as evidence of an action of a co-conspirator in furtherance of the conspiracy."

Now, the next case I'd like to go to which makes the same point and also deals with extraterritoriality is the *Doot* case, *DPP* v *Doot*, I handed it up loose this morning to replace the defective copy in my bundle. And just before we deal with the territoriality issue, it might be helpful to jump straight to a passage on page 827 which is directly responsive to Your Honour's question. Lord Pearson, the case concerned an arrangement between some American citizens to import cannabis into the United States by way of England, in the best traditions of the 1970s, they all owned VW Kombi vans and they hid cannabis in the upholstery of the vans and were driving them to England and then by ship to the United States.

Page 827, just below letter E, His Lordship said, "On principle, apart from authority, I think, and it would seem the Court of Appeal also thought, that a conspiracy to commit in England an offence against English law ought to be triable in England if it has been wholly or partly performed in England. In such a case, the conspiracy has been carried on in England with the consent and authority of all the conspirators. It is not necessary that they should all be present in England. One of them, acting on his own behalf and as agent for the others, has been performing their agreement with their consent and authority in England. In such a case, the conspiracy has been committed by all of them in England. Be it granted that all crime is local, jurisdiction. The

crime of conspiracy in the present case was committed in England personally or through an agent or agents by all the conspirators. The balance of authority is in favour of the view that the English Courts have jurisdiction in a case such as this."

So I think that answers Your Honour's question about authority, and deals with it in the territoriality context and makes it clear that that sort of attribution is legitimate for the purpose of establishing territorial scope of an offence.

Let's go back to the beginning of the speeches of Their Lordships. Lord Wilberforce at 816 identifies the question that was certified, whether an agreement made outside the jurisdiction in English Courts to import a dangerous drug into England and carried out by importing it into England is a conspiracy which can be tried in England.

Over the page, just under A, His Lordship says that he has "had the benefit of reading in advance the opinion of my noble and learned friend, Lord Pearson", and agrees with it, so the proposition that I just took Your Honours to has the authority, the high authority of Lord Wilberforce as well as Lord Pearson.

The basis of the Court of Appeal's judgment, the Court of Appeal had acquitted the accused, the proposition that all crime is territorial. Following common law jurisdiction has been consistent, applied both as a principle for construction of statutes, and *McLeod v Attorney-General* is a very famous example. Then there's some discussion of the international law principles and the objective territorial principle, which says that it's appropriate for a state to exercise jurisdiction where any part of the conduct has occurred within the territory of the state. I have included the passage from Brownlie, *Principles of Public International Law*, which explains those different principles in the same language as the Harvard research, and they are touched on in simplified terms in that chapter of the *LAC Guidelines,* which I have to confess, I am the author of, I therefore think that it is nothing more than academic commentary, but hopefully it's a helpful exposition of the principles, and more than that, I think, could not be made of it as the Court quite rightly suggested to my friend.

So coming down to just above G – just below E, in search of a principle, the crime of territoriality does not, in itself, provide an answer. To many simple situations where all relevant events occur in this country or conversely occur abroad, it may do so, but there are many crimes, I use the word without prejudice at this stage, the elements of which cannot be so simply located, they may originate in one country, be continued in another, produce effects in a third. Some constituent fact, post or receipt of a letter, hiring of a shop, falsification of a document, may take place in one country, the other necessary elements in another. There is no mechanical answer, either through the Latin maxim or by quotation of Lord Halsbury's words in *McLeod* or otherwise which can solve these, the present is such a case.

So that's the foundation for my submission, a somewhat more nuanced and sophisticated approach is required. I didn't make that up, as I think my friend slightly unkindly suggested, there is House of Lords authority for the proposition.

His Lordship goes on to say the key to a decision can be found in answer to the question why the common law treats certain actions as crimes, discusses that.

Under letter D over the page, 818, after setting out – actually it's worth perhaps starting at C, a legal principle which would enable concerting law breakers to escape a conspiracy charge by crossing the channel before making their agreement or to bring forward arguments which we know can be subtle enough as to the location of agreements, or conversely which would encourage the prosecution into allegation or fiction of a renewed agreement in this country, all this with no compensating merit is not one which I could endorse.

In addition to these considerations, there is substantial authority, both English and American, that jurisdiction exists to try in our Courts conspiracies entered into abroad but implemented here. Lord Pearson's quoted, "The English and

some of the United States cases, there are others which could be cited, I adopt and do not repeat his analysis. Established in my opinion that under existing principles of common law supported by authority, the offence charged was triable in England. He adds that the further question of whether a conspiracy formed abroad to do an illegal act in England but not actually implemented here, could be tried in this country not before Their Lordships.

Then I've taken the Court to Lord Pearson at 827, the other reference that's helpful is Lord Salmon. Lord Salmon's speech begins at 830, but the relevant passage – and after setting out the facts, His Lordship notes on 831, letter C, "The doctrine of qui facit per alium facit per se applies no less in criminal than in civil cases. I would say also in competition cases, penalty cases under the Act. And then over at 833, letter D, if a conspiracy is entered into abroad to commit a crime in England, exactly the same public mischief is produced by it as if it had been entered into here. It's unnecessary for me to consider what the position might be if the conspirators came to England for an entirely innocent purpose unconnected with the conspiracy. If, however, the conspirators come here and do acts in furtherance of the conspiracy, for example by preparing to commit the planned crime, it cannot, in my view, be considered contrary to the rules of international comity for the forces of law and order in England to protect the Queen's peace by arresting them and putting them on trial for conspiracy, whether they are British subjects or foreigners and whether or not conspiracy is a crime under the law of the country in which the conspiracy was born."

His Lordship, over the page, 834 just under letter A, notes that "No civilised country could have any reasonable objection to action in those circumstances", and above letter C, "Not impressed by the argument that certain statutory enactments would have been unnecessary if the view which I have propounded is correct", echoes of my friend's arguments about section 4(1), and then after noting the purpose of those statutes, just above letter D, "In any event, the rules of international comity are not static. I do not believe that in the modern world, nations are nearly as sensitive about exclusive jurisdiction over crime as they may have been formerly", and the same is true

in this area, the jurisdiction that I am suggesting is narrower than that asserted by the United States and consistent with the approach of many other countries, including, in my submission, Australia, as *Bray* illustrates, it's enough if you act in the country through an agent, through someone whose conduct can be attributed to the overseas principal and a number of European jurisdictions.

Rewinding slightly to *Treacy*, because it's an enormously important case in this area, that's in volume 2 of my friend's authorities under tab 24, *Treacy v Director of Public Prosecutions*. The question here was whether the offence of blackmail had been committed by someone, who, within the jurisdiction, sent a letter demanding money with menaces to a lady in Germany. Their Lordships divided 3-2 held that the offence had been committed. Can I just note that –

TIPPING J:

Was the question where the demand was made?

MR GODDARD QC:

Yes. Well, four of Their Lordships approached it in that way and so did Lord Diplock, but His Lordship took another approach and said that we shouldn't get too hung up on that question, rather we should ask whether it's consistent with the objectives of the statute to apply it in circumstances where a letter is posted here to someone abroad, and that the whole exercise of trying to attribute a single situs to an offence is actually a very artificial and unhelpful one. And it's for that proposition which has been accepted in Australia and in Canada that this case is most often referred to. I don't quite understand why, but there are two New Zealand decisions which refer to Lord Diplock's speech as a dissenting speech. That's wrong, His Lordship was part of the majority in this case. I just note that. I wonder if what was meant to be said was that His Lordship gave somewhat different reasons for the conclusion of each point.

TIPPING J:

Was the dissent on the basis that the demand was made in Germany and that was the essence of the crime? Was that –

MR GODDARD QC:

No, His Lordship didn't disagree with that either, so –

TIPPING J:

No, no, but I mean, the Court was divided here?

MR GODDARD QC:

Yes, yes, that a demand is made where it's received, following some old cases to that effect.

ELIAS CJ:

So Lord Diplock was in the majority?

TIPPING J:

Yes, he was in the majority.

MR GODDARD QC:

Lord Diplock was in the majority, two of Their Lordships in the majority said the demand was made where it was sent, and Lord Diplock said "Wrong question", and although you could say that –

TIPPING J:

Well two of them held, as I recall, that the demand was made when it was posted, and it was posted in England. There's sort of a bit of Adams and Linsell stuff coming in?

MR GODDARD QC:

Yes, which as a way of dealing with this sort of issue, in my submission, is enormously artificial and it's really the criticism of that to which Lord Diplock's speech is addressed. His Lordship begins at 558 of this microscopic reduction of the text and it's helpful to begin at 559, letter B. "In view of the

way in which the question is framed and the wide-ranging argument about jurisdiction before Your Lordships helps. I'm prompted to state at the outset that the question in this appeal is not whether the central criminal Court had jurisdiction to try the defendant on that charge but whether the facts alleged and proved against him amount to a criminal offence under the English Act of Parliament." So that's the difference between territorial scope, scope of application and personal jurisdiction which I drew earlier.

Different question from the old case about venue, His Lordship notes halfway between F and G that the fact the appellant was arrested in greater London and committed for trial, the question he gave to that Court jurisdiction to determine whether he was guilty or not but at H, the only question for Your Lordship's House, is what did Parliament mean when it enacted in 1968 in the Theft Act, persons guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces. The words are quite general. On a literal instruction, as satisfied wherever the unwarranted demand is made. No mere application of rules of syntax or semantics could cut them down to if he makes any unwarranted demand with menaces in England and Wales.

If the meaning of the subsection is to be qualified by implying some geographical limitation as to the place where the unwarranted demand is made, the limitation is to be derived not as a matter of linguistics from the actual words used, but from broader considerations of the purpose of the code in which the words appear. So it's a matter of construction, and it's actually my friend who is trying to read a geographical limitation into section 80. And it is that which requires justification, and that's the issue to which His Lordship then turns his mind.

The Code of Criminal Law, which defines offences, talks about some of the writing on result crimes. Over at 561, just above letter B, "The assumptions which underlie the proposition that English criminal law calls for a choice to be made between these rival theories of jurisdiction, initiatory or terminatory, is the offence committed when you start the process or it ends. First, the

definition of the crime includes a requirement the physical act should be followed by specified consequences. Second, that the existence of jurisdiction of the Courts of one state to try the accused for a particular crime, however defined, necessarily excludes the jurisdiction of the Courts of any other state. My Lords, whether or not the definition of the crime of blackmail in section 21 of the Theft Act is one which includes a requirement of the physical acts of the accused himself should be followed by any consequences is a problem of linguistics, on which Your Lordships are divided. In due course, I shall express my own opinion on this aspect against an appeal. But it does not matter which view is correct, unless the second underlying assumption of Professor Williams is justified. This raises a more basic question in our criminal law than a mere problem of linguistics. This I will now proceed to examine.

His Lordship notes that Parliament can, if it wants, authorise a Court to punish acts, persons and its territories for having done physical acts, wherever the acts were done, and wherever their consequences took effect. When Parliament, as in the Theft Act, defines new crimes in words which is a matter of language, do not contain any geographical limitation as to where a person's punishable conduct took place, or when the definition requires conduct should be followed by specified consequences as to where those consequences took effect. What reason have we to suppose that Parliament intended any geographical limitation to be understood. The only relevant reason, now that the technicalities of venue have long since been abolished, is to be found in the international rules of comity, which, in the absence of express provision to the contrary, it is presumed that Parliament did not intend to break. It would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no harmful consequences there. But I see no reason in comity for requiring any wider limitation than that upon the exercise by Parliament of its legislative power in the field of criminal law."

So that would be a response to Your Honours' earlier question to my friend about what's happened to the presumption that Parliament only intends to legislate about things done in New Zealand. In my submission, that is not good law any more, rather, the presumption is that Parliament did not intend to legislate in a manner that is inconsistent with New Zealand's international law responsibilities, and those international law responsibilities are more nuanced, more sophisticated, than a crude territorial location principle suggests. That's what this judgment is about, and as I say, it's what the Supreme Court of Canada and the High Court of Australia have accepted in the cases I refer to.

So there's a discussion about, on the page over on 562, three lines down, "Nor can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done, outside the United Kingdom, physical acts which may have harmful consequences upon victims in England." There's discussion about the double jeopardy issues, and how that's managed.

Then over at 563, just above letter F, conspiracy of crime in common law, ascertained by analysis of the cited cases. Blackmail, which is what they're concerned with here, is a statutory offence. Its characteristics are to be ascertained by determining what Parliament meant by the definition of blackmail in section 21(1) of the Theft Act. So it's the same task as before this Court in relation to breaches of the Commerce Act. "I have already pointed out that the actual words in the definition are quite general, so far as concerns the place where the unwarranted demands are made. Absence of any geographical limitation upon where that described conduct of the offender takes place, where its consequences take effect, is common to all the other definitions of offences contained in the Act. If any such limitation does exist, its source is to be discovered, and its extent determined by applying some presumption as to Parliament's intention, extraneous to the words in which the definitions of offences are couched." So, too, my friend's argument here. "Recognition that there is some limitation which goes without saying is to be found in section 24 of the Theft Act. This section by subsections (1) and (4)

extends the scope of the new offence of handling stolen goods created by section 22 to goods which have been stolen or obtained by blackmail or by deception elsewhere than in England and Wales. In doing so, it treats the descriptions of conduct, including where appropriate its consequences, which appear in the statutory definitions of steal, blackmail, and obtaining by deception, as wide enough to include that conduct, even though it takes place outside England and Wales.

But it also recognises that there may be circumstances in which that conduct is not an offence under the Act. Where those circumstances exist, the goods obtained as a result of the conduct are not to be treated as stolen goods, unless the conduct by which they are obtained amounted to criminal offence under the law of the place where it occurred. It is thus evident that the circumstances which it is assumed may prevent conduct from being an offence under the Act, notwithstanding that it falls within the description of the offence, relate to the place where the conduct and/or its consequences occurred." So it's exactly the same as section 4. The same sort of assumption, that there's some limitations, that it's something to do with where the conduct occurred. "The limitation acknowledged by these subsections is thus territorial in character, but neither they, nor any other provisions of the Act, throw further light on its extent." Just like the Commerce Act.

And then we get into the answer to this. "The source of any presumption that Parliament intended the right created by the Act to punish conduct should be subject to some territorial limitation upon where the conduct takes place or its consequences take effect, can, in my view, only be the rules of international comity. And the extent of the limitation where none has been expressed in words can only be determined by considering what compliance with those rules requires. Leave aside matters within the United Kingdom. For reasons which I stated earlier, the laws of international comity, in my view, do not call for more than that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state, where that conduct has had no harmful consequences within the territory of the state which imposes the punishment. I see no reason for presuming that

Parliament in enacting the Theft Act 1968 intended to make the offences which it thereby created subject to any wider exclusion than this. My view, where the definition of any such offence contains a requirement, the described conduct of the accused should be followed by described consequences. The implied exclusion is limited to cases where neither the conduct, nor its harmful consequences, took place in England or Wales." So that, in my submission, is the appropriate method of interpretation to be adopted in respect of a statutory penalty provision that is silent as to its territorial application. One says we have general words. What licence do we have for reading in geographical limitation? It can only be the presumption that Parliament did not intend to legislate beyond the proper scope of its jurisdiction. What is that proper scope? It is not limited to things that happen wholly within the jurisdiction, and as *Doot* illustrates, it does not exclude agreements entered into outside the jurisdiction that are implemented by someone within it. The next case –

TIPPING J:

Does that mean, Mr Goddard, that strictly speaking, the addition of subsections (2) and (3) to section 4 was not necessary?

MR GODDARD QC:

No. Because each applies in circumstances where there is no relevant conduct in New Zealand at all. Subsection (2), I gave the example of the predatory pricing by a firm with dominance in an Australian market, which includes selling to the persons in Australia who import into New Zealand. That produces effects in New Zealand, but no relevant conduct in New Zealand. So that extends the Act to that situation. Section 4 subsection (3) is the broadest extension of all, because that would cover an acquisition by one English company of the shares of another English company, even though nothing at all was done in New Zealand in connection with the acquisition.

ELIAS CJ:

Mr Goddard, can you remind me where the pleading of conspiracy is?

MR GODDARD QC:

Yes, Your Honour. The amended statement of claim is in volume 1 of the case on appeal under tab 5.

ELIAS CJ:

Just tell me the paragraph number. You don't need to take us to it.

MR GODDARD QC:

It's page 52 of the pleading, page 171 of the bundle. And I will very quickly, if I may, just go to it, because I want to emphasise what the allegation is. So it's the 48th cause of action, and the only relevant –

ELIAS CJ:

Are there always so many causes of action?

TIPPING J:

There are a lot of defendants. I suppose that's why.

MR GODDARD QC:

There were a lot of defendants, some 17, oh, 15. And lots of conduct over a lengthy period. So repeat the previous 186 paragraphs. And then the alleged, at 190, that Mr Poynter contravened, so that's principal liability, or attempted to contravene, or was directly or indirectly knowingly concerned with one or more of the breaches, or conspired with another defendant or defendants to breach the Act, as pleaded in those causes of action.

WILSON J:

Where is it a pleading of attribution, do you say?

MR GODDARD QC:

It's intended to be encompassed within that. So the allegation that he contravened, and then what we have in the particulars is the breaches by the Fernz Group defendants relevant to each defendant. So at A(2), there are some causes of action which include conduct by other people that are pleaded as relevant to the allegation against him.

WILSON J:

I must say, reading this, the allegation of attribution didn't leap out at me.

MR GODDARD QC:

It would be – clearly, it could be pleaded in a lot more detail, and I imagine that by the time this comes to trial, it will be helpful to particularise that better. In my submission, the issue is one of particularity, rather than the presence of the allegation. The allegation that he contravened is the allegation that arises from the attribution, in the same way that where someone commits a crime by an innocent agent, the charge is that they actually committed it, under section 66(1)(a) of the Crimes Act. So it's intended – and section 80 of the Commerce Act is structured in the same way. It imposes a penalty on someone who contravenes the provision, or attempts to contravene it. So section 80 mirrors the structure of section 66. This pleading was meant to be a brief reference to that, without setting out, again, all the material in the preceding 47 causes of action. But now that the focus is just on Mr Poynter and Mr Harris, it will be helpful, I think, to plead this in more detail.

So I have dealt with *Treacy* and *Doot*. *Libman* is another important decision but I am conscious that time is reasonably short. Perhaps if I could just talk briefly to it. It's in my first volume of cases under tab 15. It was a trial on seven counts of fraud and a count of conspiracy to commit fraud arising out of a telephone sales solicitation room. Some people in Canada preying on gullible Americans, ringing them, and causing them to send substantial sums of money to Panama where periodically the Canadian principal would repair to pick up the proceeds. The case discusses a whole series of similar cases. This seems to be quite a considerable Canadian industry but a judgment of the Court, unanimous Court, delivered by Justice La Forest and again extensive arguments about where these offences had been committed. The circumstances where the telephone calls were made from Canada to people in the United States and the money was sent to Panama. On page 183 heading, "General Considerations. Transnational offences of the kind in question here have been dealt with in a rather confusing fashion, probably

because they are not of a type individual courts are called upon to deal with frequently. Accordingly, it will be useful to examine the legal background on a broad basis as the argument of the Crown rather invites us to do. The primary basis of criminal jurisdiction is territorial." It goes on to explain that.

Then over the page on 184, three lines down, "It is, however, permissible under international law to exercise jurisdiction on other bases." That is apart from – on the basis that events take place wholly within the boundaries of the country. "For example, states have long exercised jurisdiction over ships that fly their flags and over their nationals abroad. As well, along with other types of protective measures, states increasingly exercise jurisdiction over criminal behaviour in other states that has harmful consequences within their own territory or jurisdiction." And there's a reference to *The Lotus*, a decision of the Permanent Court of International Justice on a matter referred to it by France and Turkey which is discussed in the Brownlie extract that I've included in the casebook. Discussion of the English legal background and the suggestion, about two thirds of the way down that, "Great Britain probably followed the territorial principle more stringently than other states."

Over on 185, about halfway down, His Honour notes, "…that Parliament seldom adverted to territorial considerations in defining criminal offences. It was rather the courts that confined criminal offences within the realm, sometimes by reference to international comity." Over on 186, second paragraph, "Though counsel for Mr Libman argued that exclusive jurisdiction belongs to the country where the gravamen of the offence took place or where it was completed, a review of the English authorities does not really support that position. What it shows is that the courts have taken different stances at different times and the general result, as several writers have stated, is one of doctrinal confusion, a confusion compounded by the fact that the discussion often focuses on the specific offence charged, a discussion made more complicated by the further fact that some offences are aimed at the act committed and others at the result of that act."

It is then what has since been described as, by the Privy Council, as a very helpful review of the English cases and the Canadian cases and, including *Treacy* and *Doot*. And on page 198 His Honour says, at the very foot of 198, last paragraph, "It cannot at this juncture be stated that the broad approach of Lords Diplock…" in *Treacy* "…and Salmon…" in *Doot*, "…has been definitively adopted in England. But the simple fact is that since the English cases relied upon by the appellant were decided, the English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single situs of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country. Indeed, while the English courts in the past gave a variety of differing reasons, sometimes inconsistent, it can fairly be said that, with some muddling through, this is substantially what, with the exception of a relatively few cases, they have done over the last century."

TIPPING J:

Patronising stuff.

MR GODDARD QC:

Yes. At the same time, not without justification. Your Honour will find similar criticisms in Justice Kirby's judgment and also I think Chief Justice Gleeson's judgment in *R v Winfield and Lipohar* so the Judge is not alone. And in Brownlie on their public international materials.

Over to 206, last paragraph, His Honour sums up the Canadian experience at little i, "The Canadian courts were prepared to move beyond the gist of the offence test when the impact of a crime was felt in Canada. And like the English courts, too, they in time adopted techniques to avoid the strait-jacket in which

the rigorous application of that test…" the territoriality test, "… put them, notably the technique of continuing offences."

And then His Honour moves on to set out his own rationale in conclusion, or the Court's rationale in conclusion. It says at the foot of 207, "I find it unnecessary to enter these niceties…" about where things were committed, "... because my difficulties with the gist of the offence and the completion of the offence tests arise on a much broader plane. To begin with, these tests seem to me to involve a large measure of unreality. It requires, for example, that one hold that what happens to money obtained abroad when it is in fact brought to Canada in accordance with a carefully concocted fraudulent scheme originating here, is, in the words of the court in the *Rush* case, neither here nor there. This kind of thinking has, perhaps not altogether fairly, given rise to the reproach that a lawyer is a person who can look at a thing connected with another as not being so connected." That's what my friend is inviting this Court to do. To look at Mr Poynter as quite disconnected from New Zealand even though he had his agents, on the Commission's case, zipping over here to do his will. His Honour went on, "For everyone knows that the transaction in the present case is both here and there."

Discussion of *Harden* and the next paragraph, "As noted earlier, the territorial principle in criminal law was developed by the courts to respond to two practical considerations, first, that a country ahs generally little direct concern for the actions of malefactors abroad; and secondly, that other states may legitimately take umbrage if a country attempts to regulate matters taking place wholly or substantially within their territories. For these reasons the courts adopted a presumption against he application of laws beyond the realm, a presumption later codified in this country in s. 5(2) of the *Criminal Code.*" Similar to our section 6. "While, we saw, there were occasional strong expressions of the territorial doctrine, particularly in earlier times, the fact is that the courts never applied the doctrine rigidly." And a helpful explanation of the unsatisfactory consequences that that would lead to and how the courts have, in His Honour's phrase, "muddled through."

Middle paragraph on 209, "This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here – "

ELIAS CJ:

Is this really, I'm just wondering, particularly given the time, it doesn't really appear to be essential.

MR GODDARD QC:

Let me jump straight to one paragraph and then finish.

ELIAS CJ:

Yes.

MR GODDARD QC:

So page 212, last two lines, His Honour summarising his approach to the limits of territoriality in this way. "All that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law." And of course now present in rule 6.28 of our High Court Rules as the test for connection between a civil action and New Zealand.

It doesn't require legislation to adopt this test. "It was the courts after all that defined the manner in which the doctrine of territoriality applied, and the test proposed simply amounts to a revival of the earlier way of formulating the principle. It is in fact the test that best reconciles all the cases."

ELIAS CJ:

Because your argument is that there are acts, the acts which occurred in New Zealand which are attributable to Mr Poynter so I'm not quite sure why –

MR GODDARD QC:

My friend argues that –

ELIAS CJ:

I –

MR GODDARD QC:

– the source of the attribution has to be conduct within New Zealand.

ELIAS CJ:

Yes.

MR GODDARD QC:

And I say not so because otherwise that would produce the absurd and technical consequences of the kind that the Courts have shunned in the trilogy of cases I've just taken the Court too.

ELIAS CJ:

Yes.

MR GODDARD QC:

That one actually needs to look at the substance of the matter. That there's no reason to read down the language of the Commerce Act, the general prohibitions, to exclude the type of attributed conduct which the Commission alleges in this case where the conduct has occurred in New Zealand but the circumstances giving rise to the attribution have occurred elsewhere. That's just like the conspiracy in *Doot* entered into in Morocco and elsewhere and then two of the conspirators come to England with their vans and the conduct of those conspirators in England is attributed to all of them because of the antecedent agreement.

ELIAS CJ:

Yes, the conspiracy which gives rise to the attribution on your argument it's immaterial where it takes place?

MR GODDARD QC:

Yes.

ELIAS CJ:

As long as the, as long as there is –

MR GODDARD QC:

Some conduct pursuant to it –

ELIAS CJ:

The conduct.

MR GODDARD QC:

– that takes place in New Zealand.

ELIAS CJ:

In New Zealand, yes.

MR GODDARD QC:

Because that conduct is then attributable to all the conspirators that is conduct by all of them here and one simply doesn't reach the need for the extension identified in section 4(1). That's my argument. And that's the argument that the Court of Appeal accepted but perhaps in slightly different terms which is probably my fault.

TIPPING J:

Well it's not immediately recognised.

MR GODDARD QC:

That is the argument I made but as ever with appeals one refines and clarifies what it is that one is saying. That, and that was, the same cases were referred to but the agent word I think got in the way of it. And that is, again I won't take the Court to it given the time, but *Liangsiriprasert* is a Privy Council

decision on appeal from Hong Kong which endorses and adopts the concept of conspirators acting on behalf of each other wherever they act and suggesting that, in fact, the – in that case the Privy Council decided that the accused, who was held in Hong Kong pending extradition to the United States, could be extradited on the grounds that it was an extradition offence that was committed within the United States because of two alternative arguments. One was that the drugs were taken, were purchased by a DEA agent. It was a sting. And they were being sent by diplomatic pouch from Thailand to the United States and Their Lordships held that that was an overt act in the United States pursuant to the conspiracy because it gave effect to the conspirators intention. So that extended it still further and said that an innocent agent's acts in the jurisdiction are a sufficient connection. That also is an act done in the jurisdiction pursuant to the agreement between the conspirators and attributable to them. S o that goes even further than I'm contending for in this case because I'm confining myself to actions in New Zealand by participants. Now I suppose and –

BLANCHARD J:

But your alternative argument is that Mr Poynter was one of the conspirators, so was Mr Greenacre –

MR GODDARD QC:

And he did things in New Zealand.

BLANCHARD J:

– and each was the agent of the other for the purpose of furthering the conspiracy?

MR GODDARD QC:

Yes. That's my primary argument. And then *Liangsiriprasert* actually goes further and suggests that it may not even be necessary to have an overt act in the jurisdiction for the purpose of common law conspiracy. *Winfield and Lipohar* is a conspiracy to defraud case from the United States – from Australia and the Court followed the approach in *Doot* finding that it was

sufficient that there be an overt act within the – within South Australia, for the law of South Australia to apply. And two of the Judges, Chief Justice Gleeson and Justice Callanan considered that in fact Australia should go further and follow *Liangsiriprasert*.

So the Commission alleges that there was an agreement to which Poynter and Greenacre were parties to engage in conduct of a kind proscribed by the Commerce Act. The Commission says that Mr Greenacre came to New Zealand and on his own behalf, and on behalf of Mr Poynter, and on behalf of the companies that they represented, engaged in that conduct in New Zealand. There is nothing in the language of the Commerce Act that requires it to be read as not applying to that conduct and there is nothing in public international law principle or common law principle that justifies the geographical reading down for which Mr Poynter contends. It is Mr Poynter who is arguing for the insertion into the statute of words that are not there. Insertion into section 27 of no one shall give effect to an agreement in New Zealand which has the purpose or effect or likely effect is substantially less in competition. It doesn't say that. Why then would one read in a territorial limitation? There could only be two reasons. One would be that it would be inconsistent with international comity, public international law principles for the Act to apply in such circumstances. But as the cases I have gone to show, that is not correct. That argument is misconceived. There is nothing inconsistent with international comity with public international law principle in applying the objective territorial approach here and attributing that conduct to Mr Poynter for the purposes of punishment. The only other possible argument is that it's implicit in section 4 but as I have endeavoured to explain, section 4 is not a comprehensive statement of the circumstances in which the Commerce Act applies. It doesn't say, subject to the other provisions, nothing in this Act applies to anything done or omitted –

TIPPING J:

But the key answer do you make, I would have thought is, that this has not got anything to do with conduct outside New Zealand.

MR GODDARD QC:

Yes. Yes that's right.

TIPPING J:

This is conduct inside New Zealand to which Mr Poynter is a co-conspirator and therefore he's deemed to have committed it in New Zealand.

MR GODDARD QC:

Yes. That's where I was headed.

TIPPING J:

Is it anymore complicated, your argument, than that?

MR GODDARD QC:

No.

ELIAS CJ:

Well, except that the conduct on which you rely upon for attribution is conduct outside New Zealand. But that is not the conduct which has to be within New Zealand for the purposes of section 4.

MR GODDARD QC :

That's right.

TIPPING J:

You can make the conspiracy abroad, but if the conspiracy is to be performed in New Zealand and is performed in New Zealand, then the performance is deemed to be that of all the conspirators.

MR GODDARD QC :

And because it takes place in New Zealand section 4 is irrelevant.

TIPPING J:

Yes.

MR GODDARD QC :

That's my argument. I don't think there's anything to be gained from trawling through *Winfield and Lipohar* in the same detail as I have the other cases, I've summarised its effect, it's in my friend's bundle of authorities in Volume 4 under tab 46, and it is well worth reading because it shows just how consistently the final Courts of Australia, Canada, England, Hong Kong, have adopted this purposive and more nuanced and more sophisticated approach to territorial scope.

TIPPING J:

Is the agency concept relevant only as the link between one conspirator and another?

MR GODDARD QC :

Yes, and that's why I have used the phrase "broad non-technical agency", which I now regret, because it's only used in the same sense in which the cases talk about one co-conspirator as the agent of all the other –

TIPPING J:

Yes, yes.

MR GODDARD QC :

– which is not a Bowstead on agency sense of the word.

TIPPING J:

It was an unfortunate – I think it would have been much easier if it had been focused directly on the conspirator principle.

MR GODDARD QC :

Yes.

BLANCHARD J:

So, section 90, on that argument, is really concerned with people who you can strictly call agents.

MR GODDARD QC :

Yes.

BLANCHARD J:

When one looks at conspiracy, one is dealing with a different sort of agency, and section 90's got nothing to do with that.

MR GODDARD QC :

Yes.

BLANCHARD J:

Thank you.

MR GODDARD QC :

And that's why I say it's not exhaustive of the circumstances in which conduct of one person is attributed to another. Unless there are any specific aspects of that argument –

ELIAS CJ:

No, thank you.

MR GODDARD QC :

I could assist the Court with the rest of my argument, it's set out in detail with unhelpful language in my written submissions.

ELIAS CJ:

Thank you, Mr Goddard. Now, Mr Miles, would you prefer us to take a short adjournment? I don't wish to rush you in your reply, it's 25 to 4.

MR MILES QC:

I'm quite happy to continue now, Ma'am.

ELIAS CJ:

Yes, thank you.

MR MILES QC:

I will assume that there'll be no hesitation in stopping me if anything I'm saying is unnecessary, maybe because you already don't need any further comments by me, or perhaps the proposition is so inherently improbable that you'd rather not hear any more on it, but –

BLANCHARD J:

Are we to distinguish between them?

ELIAS CJ:

I would have thought it was our duty to hear the second.

MR MILES QC:

Well, on a non-controversial basis to start with, Ma'am, we have dug up an explanatory note on the Commerce Law Reform Bill that came in in, this is 1990 or 1989. We have also dug up an explanatory memorandum for the Australian equivalent, which was passed at the same time, and which quite specifically talks about the amendment being consequential on Australia's obligation under Article 4 of the protocol, the CER, and noting at paragraph 2 that similar amendments to the New Zealand legislation will implement New Zealand's obligation under the protocol. So, as expected, Your Honour, it was an understanding between both countries that they would expand the reach of the respective regulators, but in consultation and through the aegis of the legislature, which is precisely where you'd expect such amendments to be found. The only reference in the explanatory memorandum to the New Zealand Bill, Your Honours, is at the bottom of the first page, clause 5, you'll see, extends the application of new section 36A, "The principal act, conduct in Australia, it affects the market in New Zealand, these amendments

in the new section 36A should be considered together with the amendments made by part 3 of the Bill to dumping, et cetera, and et cetera." So, you can see that it's a quite specific and deliberate extension of the extraterritorial functions of the Act.

Can I turn to this vexed question of section 90, it's relevance to this proceeding and the whole issue of attribution. Section 90, as we know, is essentially a deeming provision. We say, Your Honours, that it doesn't come into play until the issue of jurisdiction has been determined, because section 4 doesn't require that form of analysis. Section 90 only comes into play once, New Zealand has the right to try the defendant and then and only then do you get into issues of the state of mind of the principal and how that state of mind, or how the conduct of the principal might be affected by the state of mind or conduct of an agent. Now, one can understand entirely why in *Bray* they discuss the issue of attribution in the terms they did, because when you're dealing with a company as the principal, then it is inevitable that you have to deal with attribution issues, because you need to focus, as Lord Hoffman in *Meridian* has reminded us, you need to focus on the specific acts of the specific servants or agents of the company, which the company intended to bind it, and hence *Bray*, inevitably when discussing what conduct was relevant in terms of an overseas company, had to get into issue of attribution because they had to determine which, if any, of the servants of the overseas company were involved in the activities in Australia.

BLANCHARD J:

Does that mean that the sequencing or technique is different, depending upon whether you're looking at a company or an individual?

MR MILES QC:

I think it indicates why I think, Sir, that this debate, at the initial stage, doesn't include section 90. Because when you look at the problems of attribution for an individual it doesn't work. What is required under section 4 for an individual is specific conduct by an individual, you don't need to get into agencies or states of mind of agents at that stage, you simply have to look at

what the individual did and what his or her conduct was. You have to see whether he or she were resident in New Zealand or whether they carried on business in New Zealand. It's a series of personal characteristics, which are inimicable on issues of attribution.

ELIAS CJ:

I wonder though, and listening to Mr Goddard, it hadn't really hit me with as much force until then, the reason for attribution in the case of companies is because companies have to act through human agents. But it occurs to me that there is exactly the same need when you are talking about a conspiracy to have attribution to the conspiracy, otherwise you can't get hold of it.

MR MILES QC:

Well, in terms of an individual it shouldn't be difficult.

BLANCHARD J:

Does that mean you just apply the usual rules?

MR MILES QC:

Yes. And that –

BLANCHARD J:

Doesn't that present a problem for you?

MR MILES QC:

Not, I think, in terms of a conspiracy, because the fundamental problem, I think, with conspiracy for my friend, is a conspiracy could – the reason why conspiracy has that particular extraterritorial quality it does is because it's anchored on those sections in the Crimes Act, which specifically give it that element of territoriality, and they don't exist in section 4. And the problem he has, and I think my friend understands this, because he took you at some length to cases like *Doot, Treacy* and others, in an attempt, I think, to persuade Your Honours that in terms of common law offences – then, of course, Courts are free to try and determine these particular issues, based as

best they can on a text or investigation of the act, and perhaps some sense of public policy or what is best in the interests of the country. But where a Crimes Act specifically defines the offence, as they do in New Zealand, where all crimes are statue-based, then a different proposition arises altogether. And the key reason – and Justice Blanchard earlier on today asked, with respect, the very relevant question when my friend first raised the issue of discussing these cases with you, and Your Honour said something to the effect, "Well, do any of those cases have one of those anchoring territorial provisions, such as the Crimes Act or the Commerce Act?" and my friend said, "Yes," and specifically, I think, nominated *Treacy* for that. Now, when you go to the key paragraphs of Lord Diplock's judgement, and I think they are at page 561 and 563, he specifically says, "In the absence of some geographical delineation in the statute, then we're free to make the sorts of decision that we're about to make." The key issue is the recognition that they're always bound, of course by the statute dealing with whatever it is they're dealing with. And at 561, Lord Diplock said, and this is at E, "When Parliament, as in Theft Act 1968, defines new crimes in words which is as a matter of language do not contain any geographical limitation either as to where a person's punishable conduct or place, when the definition requires that the conduct shall be followed by specific consequences, as to where they took effect. What reason have we to suppose that Parliament intended any geographical limitation to be understood?" and he repeated that at page 563. So, in that sense, there is nothing remotely controversial about what Lord Diplock said. By the way, while Lord Reid was in the minority, he was not in the minority in the sense of his assessment of the way the Courts look at these territorial issues. The note that we had on this issue, which I just share with Your Honours, is that Lord Reid and Lord Morris both relied on this extraterritorial presumption that we relied on and, incidentally, that dicta has been picked up by His Honour, Gleeson CJ, in *Lipohar*, one of the cases my friend cited, you see it at paragraph 15. Lord Hodgson and Lord Guest concurring, decided the case on other ground, but the indications are that they actually agreed with Lord Reid on the presumption, and the notice paragraph 557F, 558E, so –

ELIAS CJ:

That's a fallback position though, isn't it, because your first position is –

MR MILES QC:

Yes, quite.

ELIAS CJ:

– is that you've got a specific –

MR MILES QC:

Exactly, Ma'am.

ELIAS CJ:

– territorial acknowledgement not present in the other cases.

MR MILES QC:

Absolutely.

ELIAS CJ:

And then the fallback being that there's a presumption against extraterritoriality.

MR MILES QC:

Precisely, the prime position is the one that we've argued from day one. And the problem my friend has is this is exactly the reason why it's so dangerous to run arguments based on analogies, because you pick up these common law concepts of conspiracy and then try and shoehorn them into a statutory regime, like the Commerce Act, with, we would say, dramatic results. If the actions of Mr Poynter amount to a conspiracy, then I think one can confidently say that almost any activity which appears to run the risk of being regarded as being anti-competitive and which involved some action or decision overseas as well as in New Zealand, immediately becomes vulnerable to conspiracy charges. And the entire protection of section 4 simply disappears. And it seems almost inconceivable for the reasons I

discussed with Your Honour this morning that Parliament would ever have had that in mind, because it simply opens up the whole Pandora Box, not only of an infinitely wider series of problems that overseas executives have, but a fundamental uncertainty as to when they might ever become subject to the rigors of the New Zealand Commerce Commission.

TIPPING J:

Mr Miles, if they conduct themselves in a way that – forget territoriality for a moment, if they conduct themselves in a manner which amounts to conspiring with others to contravene any provision of the New Zealand Act, that in itself gives the link, if you like, with New Zealand, is the argument against you. I think, I'm putting it different from Mr Goddard. So you are – in different language but I hope to broadly the same effect, so there is some element of control, because the target of the conspiracy is focused on contravening the New Zealand law.

MR MILES QC:

The difficulty I think, Your Honour, is to see any indication in the Commerce Act that they had that intention by tacking on the conspiracy behaviour, if you like, at section 80, to what has always been regarded as essentially, well, *Bray* actually talks about an identical provision there as essentially a procedural section which merely describes the sort of conduct or behaviour, if you like, which might amount to having you become a party to some illegal act. There's no suggestion there that that provision, or indeed any of the preceding five or six, the aiding and abetting and all those other indications at section 80, amounts to expanding the jurisdictional base for the Act.

If you keep in mind, Your Honours, the dramatic effect that these proceedings have on individuals and companies, but particularly individuals today, and bear in mind we're now talking about foreign nationals, my friend naturally keeps –

ELIAS CJ:

Why should we be concerned about that?

MR MILES QC:

Because that's an issue for Parliament, Your Honour. When you start introducing quasi-criminal –

ELIAS CJ:

I understand that argument that the matter should be left to Parliament, but it's more the violins Mr Miles, I'm not sure that they really add very much.

MR MILES QC:

Well I think the violins, as Your Honour rather dismissively puts it, are not, I didn't see them quite as violins so much as indicating the possible impact if this argument was correct, and I must surely be – and it would be remiss of me not to say that the impact of these proceedings, of any proceedings these days based on anti-competitive conduct, coupled with half million dollar fines, is very significant, and it's particularly difficult when overseas defendants, who by definition now, under my friend's argument, have no natural connection with New Zealand, they're not resident here, they don't do business here, and none of the conduct has been in New Zealand and yet they –

BLANCHARD J:

But we're positing a situation in which the overseas resident joins in an agreement to offend against New Zealand law.

MR MILES QC:

But in those circumstances, well, yes –

BLANCHARD J:

So such a person, having done that, could hardly be surprised if New Zealand law reached out and grabbed them.

MR MILES QC:

Well let's take Mr Poynter, who –

BLANCHARD J:

Well we perhaps shouldn't take him because we're making assumptions about his behaviour.

MR MILES QC:

All right, well let's take someone else, let's take someone in Washington, who it is said turns a blind eye to the activity of someone else who's in Washington but who's in charge of affairs in New Zealand, who goes to some lunches in Washington, and it is said criticises the behaviour of one of the employees of another company and it is said, takes an interest, again from there, into a particular tender that took place in New Zealand. Now, this is the conduct we're talking about. To most overseas executives, I would be inclined to say would be surprised or shocked to be told that this amounts to some form of conspiracy.

McGRATH J:

It might well amount to a conspiracy in Washington.

MR MILES QC:

And hence one comes back then to the need to anchor such a serious allegation.

ELIAS CJ:

But all this would be for proof.

MR MILES QC:

All of this is for jurisdiction.

ELIAS CJ:

Well yes but the adverse consequences would depend on proof.

BLANCHARD J:

If there wasn't proof of joining in a conspiracy, then it all falls away, there's no participation in a conspiracy.

MR MILES QC:

But the reputational effect, Your Honour, starts from day one. We're still on the issue – it's not possible to remove one's self entirely from Mr Poynter, because here he is some years down the track and we're still of course involved on issues of –

BLANCHARD J:

Well we're having to look at this more in the abstract, particularly since the allegations against Mr Poynter are merely allegations at this stage.

MR MILES QC:

Yes Sir. But coming back then to this conspiracy argument, each of those cases that my friend talks about does require an act that allows a Court to be able to say, Parliament had this in mind, Parliament intended, one way or another, to permit the Act to be expanded in this way. I don't see one of those cases that he cites as cases that have the sort of territorial anchoring on extraterritorial conduct as the Commerce Act has.

TIPPING J:

Is one way of putting your point, Mr Miles, that unless it can clearly be shown otherwise, the "has conspired with any other person" is read as "has conspired in New Zealand with any other person"?

MR MILES QC:

Quite Sir.

TIPPING J:

That's really the nub of what you're saying, isn't it?

MR MILES QC:

Precisely.

TIPPING J:

Because there's the presumption to that effect and there's nothing to displace it.

MR MILES QC:

And it's within a section that one wouldn't normally expect to be relevant in terms of –

TIPPING J:

Well it would be a little odd if conspiracy was a unique manifestation, extraterritoriality, where all the others weren't.

MR MILES QC:

Exactly, Your Honour. Exactly.

TIPPING J:

I don't think Mr Goddard went as far as saying that the attempt section for example, subparagraph, somehow or other has this extraterritorial…

MR MILES QC:

Quite, and again, it does seem to have some significance that in *Bray*, the argument I think was, and admittedly I've swung back to attribution just for a moment, but the argument there did centre on Meridian-type concepts, rather than on their equivalent of section 90. Probably, I would say, because they recognised that section 90 was irrelevant in terms of assessing what the basic jurisdiction is, and similarly, if you read the case carefully, there is, one of the causes of action, in fact, is conspiracy, but there was no suggestion there that conspiracy would have these extraordinary effects that it is suggested by my friend.

ELIAS CJ:

Does that mean that one would have to make a distinction between all Acts undertaken in New Zealand and any in furtherance of the same end taken offshore, that you'd have to do some sort of dismemberment?

MR MILES QC:

No, I think you'd simply say Ma'am that you look, as *Bray* did, at whatever conduct is being alleged and if the conduct was not conduct in New Zealand and if the Crimes Act, for instance, if the territorial issue that was significant under the Crimes Act wasn't present, then it's exactly the same exercise as it would be if you were just looking at it as a breach of section 27. And after all, the particulars, and again I think this perhaps points out that they aren't something significantly different, conspiracy is just an added cause of action, an added description of conduct, as I say, at the end of section 80, when we note that the same particulars for conspiracy are those also for section 27.

TIPPING J:

There is a degree of overlap between some of the paragraphs of section 80(1) which in other words, "being concerned directly or indirectly in a contravention" could well be seen as overlapping with conspiring to commit a contravention. I'm just a little concerned that the idea that some of these paragraphs necessarily have this extraterritorial dimension whereas, on the face of it, others presumably don't. It's a bit elusive.

MR MILES QC:

Yes it is Sir, but if you keep in mind that it's exactly the same particulars that are relied on for conspiracy as it is for breach of section 27, so the conduct is identical.

TIPPING J:

They are asking to infer the agreement that is behind the conspiracy from overt acts, as it is sometimes put, and those overt acts are particularised as the –

MR MILES QC:

As the agreement.

TIPPING J:

So it's almost the rabbit chasing its tail.

MR MILES QC:

Well actually we argued this as a matter of fact, earlier on, and the key cases allied –

TIPPING J:

Well I don't want you to go down that now.

MR MILES QC:

No, no. But it's tab 43 for what it's worth, Your Honour. But it is significant that we're not talking about a different set of particulars here, we're talking about standard sort of – and I might say, in terms of your typical cartel, you'd have to say that Mr Poynter's involvement is relatively peripheral, but I understand that's not really the issue today. What is clear is it's a sort of belt and braces, if you like, amongst the 50 or 60 causes of action or whatever's there, tucked away in there is conspiracy as well. The sort of cause of action you'd expect when you've got those six or seven descriptions of penalty conduct of section 80. But I think that the most damaging argument, if my friend's argument is right, is that section 4 simply disappears. It's difficult to think of any normal set of anti-competitive conduct or behaviour in which there was an element of it overseas and which inevitably would be aimed at affecting a New Zealand market in some way which would not be caught by the conspiracy argument, with all of the problems of difficulties for all the parties, for all the defendants, to be able to get some idea as to the metes and bounds of this cause of action.

TIPPING J:

You mean that in any such case there will almost inevitably be a conspiracy in the terms that is being alleged here?

MR MILES QC:

On what is alleged.

TIPPING J:

Because they're not going to arise spontaneously on some sort of unilateral basis. Is that the –

MR MILES QC:

Well it's an – there must be an agreement of some sort.

WILSON J:

Section 27 obviously requires more than one party.

MR MILES QC:

An agreement, understanding, arrangement and if there is such an agreement then almost certainly it's intended that it will be carried out or affected somewhere in New Zealand by someone here in which case instantly one gets into the conspiracy argument.

There are also real difficulties, it seems to me, in terms of this type of action under the Act which causes neither civil nor criminal. It's that uncomfortable creature that we call quasi-criminal. But it has – that does have implications for defendants if they're having to defend a conspiracy charge under the Act. Presumably the standard of proof is civil rather than criminal. The normal requirements of, Your Honours clearly are –

ELIAS CJ:

No, sorry, the standard of proof is something we're divided on.

MR MILES QC:

Ah, well, that's not going to help the advisor.

BLANCHARD J:

Well it was a majority.

MR MILES QC:

I don't need to advise – I don't need to remind this Court of the complexity, typically, of cartel arrangements, one only has to mention Cards, I think give an idea of how complex that would be, how complex they typically are. If you tossed in a conspiracy cause of action, the Cards litigation, and I see no reason conceptually on my friend's arguments why you couldn't, it would just be a whole new layer of complexity. But you have these issues, standard of proof, whatever the standard of proof might be. You have issues of mens rea which presumably would have been an integral part of any conspiracy cause of action but isn't necessarily part of certain activity under the Commerce Act. So given that it's exactly the same particulars, given that they're all essentially proceedings brought, having the characteristics of a cartel of one sort of another, or anti-competitive behaviour, it is going to raise serious issues if you overlay that with criminal concepts typically involved with conspiracy. And it –

McGRATH J:

Well conspiracy is really introduced to the Act, isn't it, clearly under section 80 and it is a civil liability. I mean the statute – your, these submissions really don't go to the fact that the conduct's taking place outside of New Zealand. It is really critical of the central provisions of the Act?

MR MILES QC:

Yes that's true Your Honour.

McGRATH J:

There might be another place you need go to.

MR MILES QC:

I, maybe I'll just say this for –

TIPPING J:

I think it's a bit of a cri de coeur. The better point is that there's an implication that the conspiracy has to, or the conspirator has to be in New Zealand and that's really the hard line argument isn't it?

MR MILES QC:

And that, Your Honour has just, I was going to say, I'll say this for the last time, that I was coming back to that precise point. That ultimately it's pretty clear that from the way Parliament has treated section 4 from the day it's been there, that they saw it as being the section dealing with extraterritorial reach by a regulator and hence any cause of action always comes back to be measured against those requirements and if that means that conspiracy is restricted to the same limitations as any other action brought under the Commerce Act, then that's exactly how it should be.

Well Your Honours, if there's – oh I suppose the last point, again this was under the issue of attribution/agency and that is the relationship between Mr Poynter as the so called principal if you like with Mr Greenacre as his agent. I probably don't need to spend any time on that other than simply pointing out that, and picking up I suppose on those American cases, but the reason why, or one of the primary reasons why it's wrong for any executive to be responsible for the actions of a subordinate, is because the executive didn't make the choice to have him or her as the subordinate. Neither, both are reporting to the company. Both are joint employees and agents of the company. No one has, not even my friend seriously I think, suggest that in some way –

ELIAS CJ:

But it wasn't being suggested that there be anything like vicarious liability. There would have to be adherence by the superior to the conspiracy to ground liability.

MR MILES QC:

Well, ah, given the –

ELIAS CJ:

It's not like, it's not really like attribution in respect of companies?

MR MILES QC:

No I accept that. I accept that Your Honour. This was a, I suppose a throw away line based on a couple of earlier points that I was planning to make, and which had nothing to do with the conspiracy, and everything to do with the attribution argument, but I appreciate that it's the conspiracy argument that we've really been focusing on. But unless there is anything further that Your Honours wish to discuss then that is it for me.

ELIAS CJ:

Thank you. Sorry Mr Goddard?

MR GODDARD QC:

His Honour Justice Tipping asked my friend a question about what the Commission alleged in respect of the other limbs of section 80.

BLANCHARD J:

I'm having difficulty hearing, could you speak into the microphone?

MR GODDARD QC:

Sorry Sir. His Honour Justice Tipping asked my friend a question about what the Commission alleged in respect of the limbs of section 80, other than the conspiracy limb and I wondered if it would be helpful for me just to make that explicit because my friend gave an answer which didn't quite reflect what in fact the Commission says about those and the interaction between a conspiracy and how those limbs apply, the attempt question.

TIPPING J:

I think that's quite important and Mr Miles should have an opportunity to respond.

MR GODDARD QC:

I wouldn't normally pop up but I did think this might be important.

TIPPING J:

Well A for example has contravened.

MR GODDARD QC:

Yes and the Commission's case on that, because there is an allegation that Mr Poynter has contravened, and the allegation is that he has contravened in New Zealand because conduct by a Mr Greenacre, and others, is attributable to him pursuant to the agreement. So we say that the agreement between him and Greenacre and others is sufficient for any conduct by Greenacre, or others who are parties to that conspiracy, to be attributed to Mr Poynter for the purposes of any of the limbs of section 80.

TIPPING J:

That's helpful, thank you.

MR GODDARD QC:

For example –

TIPPING J:

I just wanted to know what was asserted, not the reasoning behind it.

MR GODDARD QC:

Yes, that's right. So for example it's asserted –

TIPPING J:

No, no, I just wanted to know what was asserted Mr Goddard.

MR GODDARD QC:

That's what's asserted Sir.

ELIAS CJ:

Thank you Mr Goddard. Was there anything arising out of that Mr Miles?

MR MILES QC:

No Ma'am.

ELIAS CJ:

Thank you counsel. It has been a very interesting argument and quite a difficult point. We'll reserve our decision.

COURT ADJOURNS: 4.10 PM