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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-2080

UNDER	the Commerce Act 1986, ss 27, 30 and 80
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	KOPPERS ARCH WOOD PROTECTION (NZ) LTD (DISCONTINUED AS SETTLED) 1st Defendant
AND	KOPPERS ARCH INVESTMENTS PTY LTD (DISCONTINUED AS SETTLED) 2nd Defendant
AND	KOPPERS AUSTRALIA PTY LTD (DISCONTINUED) 3rd Defendant
AND	TERENCE GEORGE MULLEN (SETTLED) 4th Defendant
AND	COLIN ROBERT NEWELL (SETTLED) 5th Defendant
AND	ERNEST STANLEY BYRON (DISCONTINUED) 6th Defendant
AND	T P L LTD (SETTLED) 7th Defendant
AND	NUFARM LTD (SETTLED) 8th Defendant
AND	FCHEM (AUST) LTD (SETTLED) 9th Defendant

	AND	MARK EDWARD GREENACRE (SETTLED) 10th Defendant
	AND	A R P (PROTESTING JURISDICTION) 11th Defendant
	AND	E A (PROTESTING JURISDICTION) 12th Defendant
	AND	OSMOSE NEW ZEALAND PTY LTD (SETTLED) 13th Defendant
	AND	OSMOSE AUSTRALIA PTY LTD (SETTLED) 14th Defendant
	AND	N H (PROTESTING JURISDICTION) 15th Defendant

Hearing: 23 November 2007

Counsel: David Goddard QC and Mary-Anne Borrowdale for Plaintiff
A W Johnson for the Fourth Defendant
Paul Davison QC and Simon Stokes for
Seventh, Eighth and Ninth Defendants

Judgment: 8 February 2008 at 5:00pm

RESERVED JUDGMENT OF WILLIAMS J
[Re: Penalties and costs]

This judgment was delivered by
Hon. Justice Williams
on

8 February 2008 at 5:00pm

pursuant to R 540(4) of the High Court Rules

……..
Registrar/Deputy Registrar
Date: ……...

A. The recommended pecuniary penalties are approved and the Court orders payment to the Commerce Commission of the following sums:

a) By the fourth defendant, Mr Mullen, $35,000 for price-fixing conduct plus costs of $5,000.

b) By the seventh, eighth and ninth defendants jointly and severally the sum of $1.9m for price-fixing conduct and costs of $75,000.

c) Leave is reserved to the Commission to discontinue the appropriate courses of action against the fourth, seventh, eighth and ninth defendants.

B. Publication or broadcast of any part of this judgment or its contents by all media is prohibited for 48 hours after delivery.

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Introduction

[1] In this case the plaintiff, the Commerce Commission, alleges offending against the Commerce Act 1986 by all defendants in varying ways.

[2] It has now settled with all defendants other than the eleventh, twelfth and fifteenth (whose protests to jurisdiction were set aside in a reserved judgment

delivered on 16 March 2007 in respect of which leave to appeal was granted by consent on 7 May 2007).

[3] Previous settlements have been dealt with, as set out in this Court's judgment of 4 October 2006 (the "second judgment") as follows:

> [1] This Court's reserved judgment delivered on 6 April 2006 [the "first judgment"] dealt with an application by the plaintiff Commission, supported by the first three defendants ("Koppers"), for the Court to approve, as it did, agreed penalties of $2.85m for price-fixing conduct and $750,000 for exclusionary conduct, plus costs of $100,000 against Koppers Arch Wood Protection (NZ) Ltd and Koppers Arch Investments Pty Ltd. Leave was granted to the Commission to discontinue causes of action 17-25 against those defendants and to discontinue the proceeding as a whole against Koppers Australia Pty Ltd.
>
> [2] The Commission has now settled with Mr Newell, the fifth defendant, Mr Greenacre, the tenth defendant, and Osmose New Zealand Limited and Osmose Australia Pty Limited, the 13th and 14th defendants. All those parties recommend the imposition of penalties as follows:
>
> (a) On Mr Newell, $20,000 plus costs of $5000;
>
> (b) On Mr Greenacre, $65,000 for price-fixing conduct, $35,000 for exclusionary conduct, and costs of $5000, all payable by instalments;
>
> (c) On the Osmose companies, joint and several penalties of $1.075m for price-fixing conduct, $725,000 for exclusionary conduct, and costs of $100,000.

[4] The second judgment approved the recommended penalties listed in its para [2].

[5] The Commission has now settled with Mr Mullen, the fourth defendant, and the seventh, eighth and ninth defendants, TPL Ltd (formerly Fernz), Nufarm Ltd and Fchem (Aust) Ltd (collectively the "Fernz defendants"). Those parties recommend the imposition of penalties as follows:

a) On Mr Mullen, $35,000 plus costs of $5000.

b) On the Fernz defendants a joint a several penalty of $1.9m plus costs of $75,000.

[6] This judgment deals with those applications.

Background

[7] The two previous penalty judgments commented on the difficulties for the parties and the Court in, first, agreeing the appropriate penalty for the particular breaches admitted, and, secondly, for the Court in assessing the appropriateness of the recommended penalties having regard to the wide range of circumstances giving rise to claims such as this, the relative lack of precedent - particularly in New Zealand and the additional problem of retaining comparability, not just with other cases but within the same case resulting from serial, spaced settlements.

[8] In order to reduce that problem to a degree and increase the sense of dealing with all defendants who have settled comparably (and by, as it happens, the same Judge), it is appropriate to cite relevant portions of the previous penalty judgments.

[9] From the second judgment:

> **Facts**
>
> *(1) General*
>
> [12] In each of the settlements with which this judgment is concerned, counsel filed agreed statements of fact. For obvious reasons, they contained a large measure of common material, much of which was, naturally, common to the statement of facts on which the 6 April judgment was based.
>
> [13] The Commission's claim relates to contraventions of the Commerce Act 1986 between mid 1998-mid 2002 in the market for the supply of wood preservative chemicals. Those chemicals, particularly copper chrome arsenate (CCA), are used by millers, timber treatment operators and in wood product businesses. In the period in question, the New Zealand market was for between 4600-5400 tonnes p.a. with a market value of $14m-$25m p.a.
>
> [14] The two major suppliers of wood preservative chemicals in the relevant period were the Koppers' companies, formerly the 1st-3rd defendants, and the Fernz and Osmose Groups. Up to 31 January 2001, the latter's business was carried on by the Fernz Group but on that date the Osmose Group acquired Fernz Group's Australasian wood preservative business and operated it for the balance of the relevant period.
>
> [15] From April 1999-August 2000, Mr Newell was managing director of Koppers wood preservative chemical business in Australasia and other countries.

> [16] Until January 2001, Mr Greenacre was the Fernz Group's general manager for a number of countries, including Australasia, and from that date until April 2004, he was similarly employed by Osmose Group.
>
> [17] During the relevant period, the Koppers and Osmose Groups, together with senior executives of each, were parties to what has been called in this case the "overarching understanding" that they would maintain market share, avoid unrestrained competition, and keep prices above their true competitive level. Broadly, either as principals or parties, they also engaged in understandings concerning simultaneous price rises of similar amounts, customer-specific understandings, and attempts to exclude TimTech from the market. …
>
> [18] More specifically, though the parties did not invariably adhere to the overarching understanding during the period, for the most part, and on a number of occasions, the companies shared price information. That resulted, … in uniform and simultaneous price rises, agreements to avoid direct price competition in bids for, or sales to, specific customers or agreeing to non-competitive bids for supply to try to ensure buyers remained purchasers from existing suppliers.
>
> [19] At times during the period, other suppliers, including TimTech in mid-2001, attempted entry to the New Zealand wood preservative chemical market.
>
> [20] Following TimTech's attempted entry into the market, Osmose and Koppers' executives agreed to restrict the supply of chemicals and blending services to it and implemented that understanding including by exerting commercial pressure on suppliers not to meet TimTech orders.

[10] The second judgment then referred to views expressed in the first judgment as to the need for deterrence in the setting of penalties for breaches of the Act. The first judgment said :

> [18] The Commission's approach to those recommended penalties has been to assess the penalties which it considered would be likely to have been imposed had the proceedings against Koppers been successful at trial and then to deduct an appropriate sum to reflect the relatively early admission of liability and those defendants' co-operation. It took account that, in assessing penalty levels, Courts consider all the circumstances of the particular case including the nature and extent of defendants' actions, the gravity of breaches, the extent of any loss or damage suffered, whether the defendant has previously breached the Act, any gain achieved (s 80 (2A)(b)) and, in particular, the need for deterrence (*Carter Holt Harvey Building Products Ltd v Commerce Commission* (2001) 10 TCLR 247, 259 para [46], 267 para [94]; *Commerce Commission v Ophthalmalogical Society of NZ Inc* [2004] 3 NZLR 689,694 para [18] and *Commerce Commission v Ellingham* (Civ.2002-485-720 HC Wellington 27 October 2005 para [7] Gendall J).

and the second judgment continued:

[31] There can be no doubt, as the decision of 6 April confirmed, that the principal purpose of the imposition of pecuniary penalties under the Commerce Act 1986 is personal punishment to be exacted on individuals and companies for their statutory infractions and deterrence of others who might be minded to consider acting similarly. Difficulties in detecting and proving infringing conduct reinforce the need for deterrence.

[32] Underpinning all conduct such as that with which this judgment is concerned, is that it is buyers and consumers, the unwitting recipients of the anti-competitive conduct, suffer through being unable to enjoy the advantages of a free, open and fully competitive market, one without the restrictive trade practices the Act penalises.

…

[34] That said, however, the penalties to be imposed must recognise Parliament's evident intention, deducible from the differing maxima, that pecuniary penalties should be imposed on individuals at only a fraction of the penalties imposed on companies.

[35] Within those confines, however, pecuniary penalties to be imposed on individuals are properly conditioned by factors similar to those taken into account in the criminal courts in fixing penalties. Accordingly, admissions of liability - particularly at an early stage of proceedings – commitments to future co-operation, eschewing of technical defences and personal and financial circumstances are all appropriately taken into account by counsel in their negotiations and then by the Court in fixing the appropriate penalty.

[36] While it is appropriate for counsel, particularly counsel for the Commission, to use as a criterion their estimate of the penalty likely to have been imposed following full trial and a finding against the defendant, a cautionary approach is appropriate, largely because New Zealand has so few cases, particularly recent cases, on which to base such an estimate. Even such cases as there are rapidly become no more than very general comparators given the passage of time, the change in penalty maxima and erosion in the value of money, to say nothing of individual circumstances.

[37] And such estimates can only ever be based on postulations as to the evidence which might emerge at trial, not the Court's evaluation of its credibility and weight.

[38] Counsel made the point that in *Australian Competition and Consumer Commission v ABB Power Transmission Pty Ltd* (2004) ATPR 48,848 (at 48,855-48,856 paras 51, 52) the Federal Court of Australia said a court considering recommended penalties should not reject a figure agreed between the parties if it was within what the Court regarded as a permissible range. Whilst there is, with respect, force in the observation, as earlier mentioned the lack of similar New Zealand cases which have gone to trial and thus where penalties have been imposed having regard to all the circumstances mean that recent New Zealand precedents are rare and counsel, however experienced, are likely to reach recommendations by basing assumptions on assumptions.

[39] Even though Australian law and cases are of assistance – the statutory proscriptions having certain similarities - exchange rate differences, statutory

differences and, of course, factual differences mean Australian precedent can also be no more than a general guide.

[40] A further complicating factor is that, as the Commission accepts, the actual market impact of actions such as those under scrutiny in this case is very difficult to assess. By how much a truly competitive market was skewed by the offending actions of companies and their officers is extremely difficult to calculate. And is the extent and nature of the market in question a factor of significance? Is anti-competitive conduct in ubiquitous markets, say food or clothing, to be more severely punished than a niche market such as wood preservative chemicals which, though important to its participants, is only a tiny fraction of the economy? How can penalties in markets of different types and offending conduct of differing extent ever be truly comparable?

[41] All of the above makes assessment of appropriate pecuniary penalties a highly imprecise exercise and one without many significant signposts either for counsel or the court.

[11] Other aspects of the assessment process were discussed in the first judgment:

[33]… whilst buyers of timber preservative products and, ultimately, the public, may have been disadvantaged by the anti-competitive behaviour, quantification of such losses is elusive so, to the extent the Commission's estimate informs the recommended penalty for the overarching understanding, there is force in Koppers' rejoinder that the Commission's estimate of loss remains no more than an estimate.

[34] The second point of note is that although Koppers accepts that, with difficulty, Koppers NZ and Koppers Arch Investments will be able to meet the approved penalties, the financial circumstances of a defendant engaging in anti-competitive behaviour, including their resources, are a factor to be taken into account in setting penalty levels. Despite that, it is noteworthy that there is authority for the proposition that the quantum of penalties imposed for anti-competitive behaviour may, in egregious circumstances, be such that payment may put that defendant out of business (*ACCC v Leahy Petroleum (No.3)* (2005] ATPR 42,642, 42,653 para 66).

[35] In considering the anti-competitive behaviour together with its extent and gravity and the need to impose penalties at a deterrent level, the difficulty in this case - as in many where the Commission and defendants agree on a recommended penalty – is that a court may be much less optimally informed than counsel and the parties of the detail of relevant matters. That can result in the position as in *ACCC v FFE Building Services Ltd* (2003) ATPR 47,798, 47,805 paras 34-36) :

> 34. There is a danger in judges of this Court being overly influenced by the view as to penalty taken by the ACCC. In *Australian Competition and Consumer Commission v Colgate Palmolive Pty Ltd* (2002) ATPR 41-880; [2002] FCA 619, Weinberg J was confronted with a case where the ACCC and the respondent had agreed upon a particular penalty figure. Although he eventually decided to adopt the agreed figure, his Honour made it clear at [29] that he thought it too low. His Honour went on to make some

comments that apply equally to a situation where the Court is presented with an agreed narrow range of penalties. His Honour said, at [34] :

> "There are dangers associated with this approach. The Court may be seen, perhaps not altogether incorrectly, to act as a 'rubber stamp' in simply approving a decision taken at an executive level by a body charged with investigating and prosecuting contraventions of the Act, but having no role in actually imposing particular sanctions for those contraventions. Negotiated settlements are an important vehicle for resolving complex matters such as those involved in the present case. It must be borne in mind, however, that there is a public interest in ensuring that corporations that engage in behaviour of the kind that occurred in this case are dealt with appropriately, and that proper recognition is given to the need for specific and general deterrence. There are important parallels between the fixing of a pecuniary penalty under s 76, and the ordinary sentencing process which is quintessentially a matter for the courts."

35. Weinberg J noted the tendency of the Court simply to adopt the agreed figure. He said at [32]:

> "I acknowledge that both the ACCC and Colgate have accepted that the figure proposed is in no way binding upon the Court. However, when pressed to point to a single instance when the Court has not, in the past, endorsed such a figure, counsel found it difficult to do so."

36. This seems to me a most unsatisfactory position. It involves an abrogation of responsibility by the Court. My concern is exacerbated by the level of penalties often accepted by ACCC. In 1992, Parliament made a dramatic revision of the scale of penalties available for breaches of Part IV of the Act. The maximum penalty for a corporate respondent was increased from $250,000 to $10,000,000. Parliament obviously intended to achieve a quantum leap in the size of penalties imposed for breaches of Part IV. Yet, as the cases cited to me demonstrate, ACCC has continued to negotiate penalties that are but a small fraction of the new maximum.

[36] Those remarks are apposite in this case and it was partly as a result of those concerns that additional assistance was sought from counsel. But another factor which might be relevantly considered is that recommendations as to penalty on behalf of defendants admitting breaches of the Act gain additional weight where, as here, those defendants are represented by solicitors and counsel skilled and experienced in the field and who are unlikely to advise acceptance of the Commission's proposals if they go well beyond what is justifiable.

[37] That said, the appropriate view is that when parties approach the Court to seek approval of recommended penalties, they should hereafter advise of the process followed by which they have reached their recommended figures by reference to precedent and the facts rather than approach it, as was the case here, on a global factual basis with no great reference to such precedent

> as there is, both before and after the penalty increase and they should, in most cases, recommend a range of penalties and discuss the reasons for their recommendation within the range.
>
> [38] As *FFE Building Services* makes plain, courts are concerned to avoid party and counsel capture in this area. It is essential they retain an independent approach to the imposition of penalties, particularly those of the magnitude customarily imposed for anti-competitive behaviour and they are entitled to the full assistance of counsel and the parties in that regard when approval of penalty recommendations is sought.

[12] The first judgment also discussed appropriate penalty reductions for admissions and co-operation in the following passage:

> [42] The parties propose to halve the Commission's calculation of gross penalties after trial in the region of $5.6m for the admissions of liability and Koppers' co-operation since November 2002.
>
> [43] In *Ellingham*, as noted, a reduction in penalty of the order of 25—33% was approved. In so doing, the Judge drew some comparisons with well-settled reductions in sentence available to accused persons who plead guilty. In *Giltrap City* [*Ltd v Commerce Commission* [2004] 1 NZLR 608, 624 paras [17], [60]], again as noted, the Court of Appeal seemed to accept that much larger reductions, even up to 50%, might be appropriate for early admissions of anti-competitive behaviour.
>
> [44] Although, of course, Commerce Act proceedings alleging anti-competitive behaviour substantially differ from criminal proceedings, it is the Court's view that a rough-hewn comparability exists in the principles to be applied.
>
> [45] In the criminal arena, sentence reductions in the range of 25-30% are routinely made where pleas of guilty are entered at an early stage of the criminal process with reductions of lesser amounts the closer to verdicts the pleas are entered. Perhaps more relevantly, in criminal cases where an accused not only pleads guilty but co-operates with the Police and, sometimes, gives evidence, sentence reductions in the region of 50% are not uncommon.
>
> [46] The rationales in the criminal arena include that the community has an interest in miscreants acknowledging responsibility for their wrongdoing and being prepared to co-operate with the authorities, coupled with the community's interest in reduced stress for witnesses, particularly complainants, a more efficient court system resulting from savings in the cost of trials and pleas making Court resources more readily available to other litigants.
>
> …
>
> [48] As encapsulated in the Commerce Act, the community has an interest in the free and efficient functioning of fully competitive markets and thus an interest in those engaged in anti-competitive behaviour or other breaches of the Act acknowledging their culpability. That is particularly the case when

> they are prepared not merely to enter admissions but also to co-operate with the Commission and, if necessary, provide documents and give evidence on its behalf. That gains especial force when the covert nature of much anti-competitive behaviour is taken into account and additional force again when the length and cost of the trial of actions such as this is considered. The community also has an interest in avoiding the utilization of resources which might otherwise be consumed in appeals.

[13] That judgment also discussed timing issues in the following way:

> [50] An aspect of this matter not present in most of the earlier New Zealand cases or those in Australia is that Koppers and the Commission approached the Court for approval of the recommended penalties at an early stage of this proceeding and while not only is the claim nowhere near completion but, given that the several protests to jurisdiction remain undetermined, not even the ultimate parties to the claim have been determined.
>
> …
>
> [52] … because of those issues it is not possible for the Court to assess whatever may be the overall culpability of all the defendants who remain in the claim at its completion and adjust the penalties as between those defending who have been found liable in a way which reflects their culpability so as to comply with the "parity principle", as the Australian cases put it. (See e.g. *Schneider Electric (Australia) Pty Ltd v ACCC* (2003) ATPR 47,507, 47,511-47,512 paras [10] and [11] per Sackville J).

[14] Endorsing those views, the second judgment noted precedent to the effect that the penalty imposed on each offending cartel participant should be comparable with each other (*Schneider Electric* at 47,507, 47,512; *ABB Power* at 48,855 para 49).

[15] Finally, the second judgment discussed matters relevant to the imposition of penalties on individuals in the following passages:

> [43] In settling the recommended penalty, the Commission and counsel took account of precedent penalties set in Australasia and trends for the same, and likely penalty following trial in this case. For the reasons mentioned, Australian precedent is a general indicator only but, even so, in those cases most penalties are of the order of $100,000 or less with only a few exceeding that figure and none, it seems, exceeding $200,000. …
>
> [44] As with all such penalties, the Commission took into account the nature and extent of the breaches and their gravity, the extent of loss or damage suffered and the circumstances in which the offending took place, together with, and importantly, the need for deterrence in covert activities of this kind which result in breaches of the Act. Specifically in Messrs Newell's and Greenacre's cases, the Commission took account of personal circumstances.
> …

> [45] Accepting that the quantum of any market impact is largely unassessable in cases of breach of the Commerce Act, the Commission nonetheless agreed to discount what might otherwise have been its recommended penalties by 50% for admissions of liability, co-operation, personal circumstances and agreements to meet the penalty acknowledging that, jurisdictionally, it may have been open to both Messrs Newell and Greenacre as Australian residents to make it difficult for the Commission to take penalty proceedings against them or enforce any penalty imposed. …
>
> [46] Given the wide variation in offending conduct, comparison with other individual penalties in New Zealand gives no more than a broad indication as to justifiable penalty: $25,000 and $5000 were ordered for ophthalmologists in the Southland proceedings after a defended trial and penalties of $15,000 and $10,000 were imposed in the Palmerston North ophthalmologist's proceeding where liability was admitted a few months before hearing. (*Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689; …
>
> [47] It is noted that there was no increase in individual penalties when Parliament doubled the maxima for corporate penalties in May 2001.
>
> [48] Further, as noted in the 6 April judgment, New Zealand penalties are low, even miniscule, by comparison with those imposed in OECD and similar countries.
>
> …
>
> [54] Counsel also considered the maximum penalties imposable and, whilst individual maxima are only 5% of corporate maxima, accepted that an arithmetical "divide by twenty" approach provided no more than the broadest of guidelines.

Fernz defendants

[16] The settlement between the Commission and the Fernz defendants was on the basis that Fernz NZ and Nufarm admit liability as principals for breaches of the Act and FChem admits liability, either as principal or party, by being knowingly or indirectly knowingly concerned as a party to Fernz NZ's and Nufarm's contravention or conspiring with those in entering into and giving effect to the overarching understanding not to compete on CCA price or for certain customers and by sharing pricing information. They were also involved in offending price-fixing understandings in entering into and giving effect to the Fletcher Forests understanding which resulted in non-competitive bids for CCA supply, the 1998 and 2000 price rice understandings which resulted in broadly simultaneous and similar increases in CCA prices and entering into and giving effect to the Timber

Treatments' understanding whereby Koppers Arch NZ withdrew from negotiations with Timber Treatments and Fernz Group retained it as a customer.

[17] The penalties accordingly relate solely to price-fixing conduct, there being no exclusionary conduct involving the Fernz defendants. Rather the Fernz companies participated in the overarching understanding to avoid competition in the CCA market and for customers from mid-1998-31 January 2001.

[18] Mr Goddard QC, senior counsel for the Commission, submitted the conduct of the Fernz and Koppers Arch defendants were distinguishable as the former's participation in the understanding was for 32 months as opposed to the latter's participation for 48 months. In addition, the Fernz defendants did not participate in the TimTech exclusionary conduct.

[19] As with the Koppers and Osmose defendants, counsel highlighted the difficulty of disentangling actions of each Fernz defendant company because the persons principally involved had responsibility to more than one and their corporate capacities varied over time. That, counsel submitted, justified the penalty being imposed jointly and severally as with the Koppers Arch and Osmose defendants.

[20] Mr Goddard made the point that negotiations leading to the recommendation had followed a similar course with the Fernz defendants as previously in assessing the penalty likely to be imposed for the now admitted conduct following trial, comparing the recommended penalty with precedent penalty figures in Australasia and the upwards trend in relation to penalties, especially following the doubling of the corporate penalty régime. An appropriate discount was then applied for the admissions by the Fernz defendants and their co-operation.

[21] Understandably, Mr Goddard again referred to some of the criteria which informed the parties' approach to the Court for approval of the recommendations on the two earlier occasions. In particular, he submitted that, as with the Koppers Arch and Osmose defendants, though separate penalties might have been open in respect of each breach, it was more logical to impose a single penalty for each category of

anti-competitive conduct to reflect the totality of the defendants' actions within the particular class of conduct.

[22] Again, counsel submitted a discount of 50% in the penalty otherwise payable was justified for the Fernz defendants' early admissions of liability, their co-operation with the Commission both past and future, and their preparedness to waive any jurisdictional bar to the claims against them. That mirrored the parties' approach on the two previous occasions. Here, the Fernz defendants approached the Commission to explore the possibilities for settlement prior to the Osmose penalty hearing, with agreement in principle being reached in May 2007.

[23] As previously, the Commission submitted the actions of the Fernz defendants, though difficult to assess, must have affected the market for CCA and the downstream market for timber housing and the like.

[24] A further distinction between the Fernz defendants and the Osmose Group was that the former's breaches all occurred prior to the May 2001 penalty increases, with nearly all the latter's breaches following that date and with the Koppers Arch conduct straddling the two. That notwithstanding, Mr Goddard advised that the Commission considered the admitted breaches were numerous, serial, protracted and affected significant markets and a significant number of consumers, and exposed the Fernz defendants, if each breach had been prosecuted, to penalties of several orders of magnitude greater than those recommended.

[25] Mr Goddard then presented a detailed comparison between the penalties recommended for the Fernz defendants and those earlier imposed of $3.6m on the Koppers Arch companies including a price-fixing penalty of $2.85m and $1.8m on the Osmose companies including a price-fixing penalty of $1.075m. He reminded the Court that the recommendation for the Osmose Group derived from the penalty approved for the Koppers Arch companies and that, in the Osmose penalty memorandum, the Commission had submitted that were penalties ultimately to be imposed on all three corporate groups they should be assessed along a continuum proportioned to the length of ownership and the frequency of breaches. An "uplift" on the penalty proposed in the Osmose Group matter was, he submitted, equally

applicable to the Fernz Group given the deep, lengthy involvement of Mr Greenacre, a Fernz senior executive, and the claimed involvement of other Group executives. That would have resulted in a range of penalties for Fernz and Osmose over the entire period of ownership of $3m-$3.4m divided about two-thirds to the Fernz period and one third to the Osmose period. While the Osmose companies were involved in a greater number of breaches, the most egregious – the price-rise understandings – occurred during Fernz ownership. However, the doubling of penalty, principally during the Osmose period, largely offset that factor.

[26] Balancing all those factors, the Commission and the Fernz Group defendants had agreed to recommend the applicable penalty range for the price-fixing conduct as $1.9m-$2.2m starting from the Fernz/Osmose range of $3m-$3.4m, giving credit for the Osmore penalty imposed but with a departure from the usual mid-range penalty setting to acknowledge the Fernz defendants' contention that the calculation just outlined did not fully reflect the penalty doubling with the consequent effect on the Osmose and Fernz relative liabilities. That resulted in a recommended penalty of $1.9m, towards the lower end of the range.

[27] As to New Zealand precedent, Mr Goddard again submitted the most apt comparator was the $1.5m per company imposed on the three largest defendants in *Commerce Commission v Taylor Preston (No.2)* (1998) 6 NZBLC 102,598 though, for the reasons outlined in the earlier judgments, the Court takes the view that *Taylor Preston* should, in 2008, be regarded as providing no more than a largely historical and, now, very general guide.

[28] Mr Goddard also again referred to the comparison with Australian precedent and the OECD jurisdictions discussed in the earlier judgments.

[29] For the Fernz defendants, Mr Davison QC, senior counsel, stressed the co-operation agreement between the Commissioner and his clients, made the point that the Fernz defendants inherited the overarching agreement when they acquired their timber protection chemical business in 1996 (including taking over Mr Greenacre's employment) and made the point that these proceedings were issued long after the Fernz defendants had sold their timber protection business and after the major

offending (or allegedly offending) employees were no longer with them. Indeed, Mr Davison made the point that the Fernz defendants had almost no access to documents or information concerning the matters in issue in this proceeding until the filing by the Commission of affidavits in relation to the protests to jurisdiction, most notably that of Mr Greenacre. Once the Fernz defendants' involvement became clear, they acted promptly in July 2006 to initiate settlement discussions.

[30] The Fernz defendants' assistance given to the Commission to date was limited, Mr Davison submitted, from his clients' inability to assist to any greater degree. That notwithstanding , Mr Davison submitted – and Mr Goddard did not disagree – that the Fernz defendants had co-operated to the maximum extent available.

[31] As with counsel for other defendants, Mr Davison also submitted that there was an assumption but no evidence that the breaches by the Fernz defendants materially affected prices and purchases in the relevant markets.

[32] No detailed discussion is necessary in relation to the Court's consideration of the recommended penalty for the Fernz defendants save to say that the Court accepts the appropriateness of the approach undertaken by counsel. In particular, a comparative approach with the penalties approved for the Koppers Arch and Osmose Group defendants seems appropriate in time (including the impact of the doubling of the maximum penalties in May 2001), in the number and degree of admitted breaches, and as to the distribution of liability for all three groups. The sharing of responsibility would seem to reflect roughly the penalties that might have been imposed between them after trial (making allowance for admissions and any co-operation).

[33] Put more specifically, the Fernz defendants, in entering into and giving effect to not just the two price-rise understandings but additionally to the Fletcher Forests and Timber Treatment's understanding, were involved in repeated and serious breaches of the anti-competitive provisions of the Act - though the penalty to be imposed must be tempered by the lower maxima applying at the time their employees, inherited as they were, engaged in their anti-competitive conduct.

[34] For similar conduct - largely after the increase in the maximum penalties - the Osmose Group was ordered to pay $1.075m for price-fixing conduct and the Koppers Arch Group, employees of which breached the Act throughout the period covered by the claim, were ordered to pay $2.85m. Given the seriousness of the Fernz Group breaches through their employees, a penalty of $1.9m for their price-fixing conduct, though seemingly stern and slightly out of line with the penalty imposed on the Osmose Group, is not so far out of line as to warrant the Court declining to approve it.

[35] There will accordingly be an order approving the agreed penalty of $1.9m to be paid for price-fixing conduct by the seventh, eighth and ninth defendants, such penalty being payable jointly and severally.

[36] There will also be an order that those defendants pay the Commission the agreed sum for costs of $75,000. The lower costs award by comparison with the Koppers Arch and Osmose orders arises from the less time and expense required of the Commission in relation to the Fernz Group.

[37] Leave is reserved to the Commission to discontinue the appropriate causes of action against the seventh, eighth and ninth defendants.

Mr Mullen

[38] Mr Mullen admits he breached s 80(1) of the Act, first, either by contravening or being directly or knowingly concerned in or party to contraventions of the Act as an employee in entering into and giving effect to the overarching understanding to maintain market share, avoid unrestrained competition and keep CCA prices above fully competitive figures; secondly, in entering into and giving effect to the Timber Treatment understanding; and, thirdly, in entering into and giving effect to the 1998 price-rise understanding.

[39] As far as the facts are concerned, Mr Mullen was employed by Koppers Arch from 1978 to March 1999 and was responsible for the Australasian business, amongst others, between 1989-1999. Mr Newell, his immediate successor as

managing director of Koppers Arch, admitted his involvement in the anti-competitive understanding during 1999 and mid-2000. Mr Mullen was aware from shortly after his appointment in 1989 that there was extensive co-operation within the industry and, from the early 1990s, attended meetings with competitors with a view to co-operation on price setting and market sharing. His day to day involvement was spelt out in the agreed statement of facts. That led to his admission that he acquiesced in and encouraged Koppers Arch' performance of the overarching understanding through his interactions with Fernz and Koppers Arch senior executives. He was directly involved in the Timber Treatments 1998 price-rise understandings but has co-operated with the Commission and provided information since March 2006 and will appear as a Commission witness if so required.

[40] Mr Goddard again detailed the Commission's approach to penalty which followed the same course as the other defendants though the comparators in Mr Mullen's case were Messrs Greenacre and Newell. A discount for Mr Mullen's admission of liability was especially justified in his case through his co-operation from an early stage of the proceedings, even before the claim had evolved beyond its early interlocutory stages.

[41] That said, Mr Goddard submitted Mr Mullen's conduct was likely to have had a considerable effect upon relevant markets and consumers.

[42] Mr Goddard acknowledged the impact of the recommended penalty of Mr Mullen's personal circumstances and his willingness not to raise jurisdictional issues. He paid the recommended penalty and costs into his solicitor's trust account prior to the hearing.

[43] The Commission's approach to Mr Mullen's position was also on the basis that his conduct constituted one continuing breach over 11 months, though his participation during that period was significant and he was in a position to terminate the understandings but failed so to do.

[44] Though accepting the Court's earlier comment that the "divide by 20" approach comparing corporate and personal maxima was a very rough guide,

Mr Goddard made the point that such an approach, when adjusted for the length and duration of Mr Mullen's involvement resulted in an appropriate penalty in the region of $35,000-$36,000.

[45] Similarly, though the penalties approved for Messrs Greenacre and Newell bore some comparability, their personal circumstances and the duration and intensity of their breaches lessened the assistance to be derived from those precedents.

[46] Mr Goddard repeated his submissions discussed in the previous judgments as to the approach to individual penalties in light of Australasian precedent.

[47] Mr Johnson, for Mr Mullen, drew attention to the fact the infringing conduct was only of 11 months' duration and was now nearly nine years in the past. It resulted in him being forced out of his position with Koppers Arch. He has not had a full-time position since. He is of limited means and suffers poor health. He submitted there was no evidence Mr Mullen gained personally from his conduct in breach of the Act.

[48] Again, there is no call for a detailed review of Mr Mullen's position since the Court largely accepts counsel's approach.

[49] Mr Newell's penalty was $20,000 and Mr Greenacre's $65,000 for his price-fixing conduct.

[50] Mr Greenacre's involvement was significantly more serious than that of Mr Mullen and, as was noted in para [80] of the second judgment, might well have been significantly higher. Mr Newell's involvement was clearly well below that of either Messrs Greenare or Mullen, particularly that of Mr Mullen.

[51] In all those circumstances, there is no basis not to approve the penalty recommended by counsel and there will accordingly be an order that the fourth defendant, Mr Mullen pay a penalty to the Commission of $35,000 for his price-fixing conduct together with costs of $5,000.

Result

[52] In the result, the recommended pecuniary penalties are approved and the Court orders payment to the Commerce Commission of the following sums:

a) By the fourth defendant, Mr Mullen, $35,000 for price-fixing conduct plus costs of $5,000.

b) By the seventh, eighth and ninth defendants jointly and severally the sum of $1.9m for price-fixing conduct and costs of $75,000.

c) Leave is reserved to the Commission to discontinue the appropriate courses of action against the fourth, seventh, eighth and ninth defendants.

d) Publication or broadcast of any part of this judgment or its contents by all media is prohibited for 48 hours after delivery.

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WILLIAMS J.

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