COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR245Mar17

In the matter between:

Competition Commission of South Africa	Applicant
And	
Afrion Property Services CC	First Respondent
Belfa Fire (Pty) Ltd	Second Respondent
Cross Fire Management (Pty) Ltd	Third Respondent
Fire Protection Systems (Pty) Ltd	Fourth respondent
Fireco (Pty) Ltd	Fifth Respondent
Fireco Gauteng (Pty) Ltd Now known as KRS Fire (Pty) Ltd	Sixth Respondent
Tshwane Sprinklers CC	Seventh Respondent

Panel:	Yasmin Carrim (Presiding Member) AW Wessels (Tribunal Member) Medi Mokuena (Tribunal Member)
Heard on:	08, 11, 16, 24, 29 October 2018 and 16 January 2019
Last submission:	16 February 2019
Order issued on:	15 January 2021
Reasons issued on:	15 January 2021

REASONS FOR DECISION

Introduction

[1.] This matter involves a complaint referral brought by the Competition Commission ("Commission") against seven respondents, Afrion Property Services CC ("Afrion"), Belfa Fire (Pty) Ltd ("**Belfa**"), Cross Management (Pty) Ltd ("**Cross**"), Fire Protection Systems (Pty) Ltd ("FPS"), Fireco (Pty) Ltd ("Fireco"), Fireco Gauteng (Pty) Ltd now known as KRS Fire (Pty) Ltd ("Fireco Gauteng"), and Tshwane Sprinklers CC ("**Tshwane**"). The Commission alleges that the respondents

entered into an agreement and/or engaged in a concerted practice to directly or indirectly fix prices, divide markets and tender collusively in relation to tenders for the supply, installation and maintenance of fire control and protection systems in contravention of section 4(1)(b)(i), (ii), and (iii) of the Competition Act, No. 89 of 1998 ("the Act").

[2.] By the time the hearing began four of the respondents, Afrion, FPS, Fireco, and Fireco Gauteng had reached settlements with the Commission.

[3.] These reasons thus deal with the remaining three respondents: Belfa, Cross and Tshwane, against whom the Commission sought an order declaring that:

3.1. Belfa, Cross and Tshwane contravened sections 4(1)(b)(i), (ii) and (iii) of the Act; and

3.2. Belfa, Cross and Tshwane are each to pay an administrative penalty of 10% of their respective annual turnovers.

Background

[4.] On 13 March 2015, the Commissioner initiated a complaint against Afrion, Belfa, Cross, FPS, Fireco, ITF Fire, QD Air and TFI for allegedly fixing prices, dividing markets and tendering collusively in the market for the supply, installation and maintenance of fire control and protection systems.

[5.] On 26 June 2015, the Commissioner amended the compliant initiation to include Fireco Gauteng, QD Fire and Keren Kula as additional respondents.

[6.] On 29 March 2017, the Commissioner further amended the complaint initiation to add Tshwane as an additional respondent. The matter was then referred to the Competition Tribunal ("Tribunal") on the same day.

[7.] In its referral the Commission alleges that -

7.1. From at least 1996 to 2015, the respondents being firms in a horizontal relationship entered into an agreement and/or engaged in a concerted practice to directly or indirectly fix prices, divide markets and tendered collusively in relation to tenders for the supply, installation and maintenance of fire control and protection systems in contravention of section 4(1)(b)(i), (ii) and (iii) of the Act.

7.2. Belfa, Cross and Tshwane, being competitors, had a general agreement to fix prices, divide markets, and tender collusively in the market for the supply, installation, and maintenance of fire control systems.

7.3. The respondents implemented their agreement through bilateral and multilateral agreements by providing each other with cover prices in respect of tenders issued by various customers of fire control and protection services. The Commission alleged that the respondents exchanged cover prices through various forms including, sharing of bills of quantities, telephone calls, faxes, emails, meetings, etc. It records the tenders in which there was collusive activity in a schedule attached to its supplementary affidavit. This schedule has been reproduced and attached to these reasons as "Annexure A".

[8.] In relation to the respondents before us the Commission specifically alleges that:

8.1. Belfa was involved in collusion and cover quoting with respect to fifty-three (53) different tenders.

8.2. Cross was involved in collusion and cover quoting with respect to thirty-three (33) different tenders.

8.3. Tshwane was involved in collusion and cover quoting with respect to three (3) different tenders.

[9.] Further, the Commission alleges that Belfa, Cross and Tshwane were party to an agreement to divide the market by allocating customers. In doing so Belfa was allocated Makro as a customer.

[10.] In its answering affidavit Belfa admitted certain instances of collusion, disputed others for lack of clarity and disputed a third category of instances on the basis that they occurred prior to the promulgation of the Act in September 1999. Annexed to this was an "Annexure D" which provided details of the 53 tenders it was alleged to have colluded on.

[11.] Cross admitted to its involvement in cartel activity up until, and no later than February 2009, where-after it argued that it distanced itself from the cartel activity, triggering a price war and placing its conduct outside of the cartel early enough such that the time bar in section 67(1) immunises it from prosecution under the Commission's initiation in June 2015.

[12.] Tshwane denied its involvement in the cartel and was of the view that the Commission had failed to establish a case against it. In furtherance of this contention and at the close of the Commission's case it made an application for absolution from the instance. At that time, we dismissed the application on the basis that the Tribunal had the ability, through its inquisitorial powers to consider hearsay evidence and that unlike in other civil commercial disputes the nature of cartel conduct was such that evidence against a party could emanate from another respondent and not only from the Commission. On this basis we preferred to consider Tshwane's case with the benefit of the totality of evidence in the matter.[1]

The Hearing

[1] Transcript of Proceedings CR245/Mar17 (Transcript) p201.

[13.] Over the course of the hearing, the Commission called two witnesses. The first was its investigator Mr Monareng (**Monareng**) the second was Mr Bruce Thomas (**Thomas**) of FPS, the Fourth Respondent.

[14.] Tshwane called no witnesses.

[15.] Cross called three witnesses:

15.1. Ms. Catherine Stewart (**Stewart**) the Managing Director of Cross from August 2009;

15.2. Mr. Anton Kriel (**Kriel**) the Managing Director of the Africa Division since 2014; and

15.3. Mr. Hemand Rampursat (**Rampursat**) the sales director at Cross.

[16.] Before turning to the merits of the case, we record here a situation that arose in relation to Belfa. After filing its answering affidavit, Belfa made little else in the way of submissions. It did not call any witnesses nor did it cross examine the Commission's witnesses. It was represented for the first three days of the hearing however once the Commission concluded its case, the legal representative indicated they would not attend further but reserved their rights to make submissions in closing.[2]

[17.] Prior to closing argument, the legal representatives of Belfa withdrew from the case and notified the Tribunal that Belfa had entered business rescue. Belfa did not file heads of argument and made no submissions in closing.[3]

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[2] Email from George Wolfe Attorneys to the Competition Tribunal "B721- Competition Commission/Belfa Fire" (18 October 2018) and (23 October 2018).
[3] Email from George Wolfe Attorneys to the Competition Tribunal "B721- Competition Commission/Belfa Fire" (05 December 2018).

[18.] After closing argument, the Tribunal directed the parties to provide further submissions on potential penalties, and specifically requested the Commission to request the relevant financial documents from the liquidator of Belfa. It then came to the Commission's attention that a new entity called Belfa Solutions (Pty) Ltd (**Solutions**) had started operating in the market. The Commission noted that Solutions was using the same website as Belfa and that the contact details for the two firms were the same. The Commission alleged that this amounted to Belfa organizing its activities in a manner so as to avoid a possible fine by the Tribunal.

[19.] The Commission then sought various documentation from Solutions to determine whether the two firms are the same and a directive from the Tribunal as to how to handle the matter.

[20.] Solutions responded to the allegations in correspondence indicating that it was a distinct company to Belfa with entirely different shareholders and a separate legal personality. It submitted that it was irregular for the Commission to request any documentation from it in relation to the matter involving Belfa.

[21.] On 15 February 2019, the Commission filed its submissions on remedies, i.e. penalty calculations. The Commission submitted that it was of the view that the voluntary liquidation entered into by Belfa was part of its strategy to avoid paying a penalty for its cartel conduct and this should be viewed as an aggravating factor when the penalty was calculated. Here the Commission relied on the fact that Solutions and Belfa shared several common directors, a website, and both had the listing status of "Supervising sprinkler installer" with the Automatic Sprinkler Inspection Bureau (**ASIB**).

[22.] On the same day as its penalty submissions, the Commission filed a separate application in which it sought a declaration from the Tribunal that Solutions and Belfa were "the same" for the purposes of imposing an administrative penalty and ordering that Belfa and Solutions are jointly and severally liable for any penalty that may be imposed on Belfa.

[23.] This application was set down for hearing on 24 May 2019. At the hearing, the parties came to an agreement whereby the Commission would withdraw its application and information would be provided to the Commission about the liquidation of Belfa.

[24.] On 7 June 2019 Solutions provided the information to the Commission. The Commission thereafter, on 5 July 2019 stated that it was not withdrawing its application and requested a pre-hearing to determine the path forward. Solutions responded arguing that the Commission had withdrawn its application as part of the agreement reached at the hearing of 24 May 2019.

[25.] As we had already issued an order, being the agreement reached in the hearing on 24 May 2019, we were of the view that we were *functus* in relation to that application and advised the parties of this.

[26.] Accordingly, we held our decision in abeyance until further communication from the Commission. Such was never made.

[27.] In our view we are not precluded from determining the merits of this case while the issue of the liability of Solutions is yet to be determined for purposes of the penalty. The matter has already suffered significant delays and the interest of justice requires us to provide certainty to all the parties involved without any further delays. The Commission may still take whatever legal steps it deems necessary to pursue its position that Solutions must be jointly and severally liable for the penalty imposed on Belfa.

[28.] We turn now to first address the case against Tshwane.

Tshwane

[29.] In its referral affidavit, the Commission alleges that:

"From at least 2010 to 2015, representatives of Tshwane and Belfa engaged in collusive activities by agreeing to provide each other with cover prices in respect of tenders issued by various customers of fire control and protection services. When providing each other with cover prices, Tshwane was represented by Olivier and Belfa was represented by either Deventer, Odd or Macbride. Tshwane and Belfa agreed to exchange cover prices on at least three tenders. They exchanged cover prices through various forms including sharing of bills of quantities, telephone calls, faxes, emails, meetings, etc."[4]

[30.] In Annexure A to the Commission's supplementary affidavit to the referral, Tshwane is mentioned as an implicated firm in three instances:

30.1. July 2010 Ford tender;

30.2. A 2014 Ford plant 1 Market Area tender; and

30.3. Makro Carnival.[5]

[31.] Monareng, the investigator for the Commission, describes the process through which Tshwane was implicated in the cartel as follows:

"With Tshwane, when we started the investigation in 2015 we were not aware that Tshwane is also involved in the collusion. Then in November, October / November 2016 we spoke to Belfa. Specifically, we spoke to Mr Charles Van Deventer, and we asked Mr Charles Van Deventer in the interview if there are any other companies that they exchange cover prices with. He said he could not remember all the companies that he's exchanged cover prices with. And then we requested him to make written submission and give us a list of all tenders and names of companies that he's exchanged cover prices with. And when they made those submissions, in those submission, Belfa implicated Tshwane. That was in November 2016. We then amended the complaint to add Tshwane as a respondent. So that is why the tenders were Tshwane's implicated it's Tshwane and Belfa Fire."[6]

[32.] In the answering affidavit of Peter Booysen on behalf of Belfa, Belfa admits to colluding in several contracts, whether by giving or requesting ad-hoc cover prices. In Annexure D thereto, a schedule drafted by Mr Charles van Deventer (**Van**

[4] Commission Founding Affidavit Trial Bundle (TB) p22.
[5] TB p 40-41.
[6] Transcript p91.

Deventer), also of Belfa, and confirmed in his supplementary answering affidavit, Belfa implicates Tshwane in two of the three contracts. [7]

[33.] The Commission presented no other evidence against Tshwane, whether in documents or in oral testimony.

[34.] The absence of documentary evidence was not surprising because, on the version of the Commission's investigator, there was no investigation conducted in relation to Tshwane:

> *"MR MODISE: There is a debate from Tshwane that this, there's a strangeness about how they came up to be a respondent, in that the initiation against them happened very close to a referral. Are you able to put them at some kind of comfort why that happened?*
> *MR MONARENG: I agree with them. That's very strange, because there was nothing to investigate. The information that Tshwane is involved, we have someone who can talk to that conduct. All that we did was to add Tshwane as a respondent to an existing complaint, and then referred Tshwane to the Commission Tribunal for prosecution. That's all that we did. It was just to add them as a respondent."*[8]

[35.] Thus, the Commission's only link to Tshwane being implicated in the cartel activity is the affidavit of Van Deventer of Belfa.[9]

[36.] Under cross examination Monareng confirms this and testified that Van Deventer, when he was called, would confirm the alleged collusion in his testimony to the Tribunal:

> *"MS VORSTER: Okay Mr Monareng let me ask the question again did the Commission, you or any of the other interrogators, see for themselves a document linking Tshwane to collusion activities?*
> *MR MONARENG: He's going to come and testify.*
> *MS VORSTER: Okay it's a yes or no question it's actually not difficult.*

[7] See items 38 and 51 of Annexure D to Belfa's answering affidavit.
[8] Transcript p92.
[9] Transcript p50:
"*Then we have Mr Charles Van Deventer he is an employee of Belfa, we have not, given our time pressures, finalised the consultations with Mr Van Deventer. We intend to call him to specifically link Cross Fire and Tshwane Fire to the collusion*."

MR MONARENG: I did not see tender documents we saw Mr Charles Van Deventer's statement and a list of tenders where they…(intervention)
MS VORSTER: That was based on his recollection so as far as he could remember.
MR MONARENG: Yes that is correct."[10]

[37.] But ultimately Van Deventer was not called to testify before the Tribunal.[11]

[38.] In the course of the hearing, evidence to the effect that Tshwane was not a participant in the cartel was elicited under cross-examination of Stewart from Cross by Ms Vorster (the legal representative of Tshwane):

"MS VORSTER: Thank you. Ms Steward (sic)*, are you personally aware of the names of some players in this old guard, as you call it?*
MS STEWART: Yes.
MS VORSTER: Can you tell the Tribunal the names of those?
MS STEWART: Yes. I may miss off, but – are you talking about the names of firms?
MS VORSTER: Ja, and that you said that they would have the old guard, members of the old guard would have lunch together or play golf and so on.
MS STEWART: Yes.
MS VORSTER: Do you have those names?
MS STEWART: So those names would have been Belfa, Fire Control, SA Fire, QD Fire, Cross; off the top of my head.
MS VORSTER: Okay, thank you. In the time when your company was involved with the collusive practices, did anybody from Tshwane ever call to ask for cover prices?
MS STEWART: I'm not 100% sure if they ever called the company, but I can say I've never spoken to anybody from Tshwane.
MS VORSTER: Okay. Last question; in the times that you are referring to collusive practices prior to 2009, was Tshwane considered as a major player in the market?
MS STEWART: No."[12]

[39.] In summary, other than the allegation by Van Deventer in his supplementary affidavit no other evidence incriminating Tshwane was produced. The Commission could not support its own allegations because it did not call Van Deventer. Nor did

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[10] Transcript p 179.
[11] Transcript p192.
[12] Transcript p317-318.

it conduct an investigation that could have yielded more details of when, where and how Tshwane colluded with Belfa. No other witness confirmed Tshwane's participation in the cartel and no other evidence, either in documents or pricing, was elicited by the Commission. Van Deventer's allegation thus remains an untested allegation, which is undermined by Stewart's evidence that she could not recall speaking to anyone from Tshwane.

[40.] The Tribunal is alive to the difficulties of prosecuting cartels, and these difficulties may in the absence of direct evidence require the Tribunal to draw an inference from the available evidence that a firm is/was involved in cartel activities. Such inferences of collusion may be drawn on the balance of evidence in a specific case.[13]

[41.] However, in the case of Tshwane, the Commission's evidence was thin to begin with. Tshwane is only referenced in a list of purportedly rigged tenders compiled by Van Deventer on the basis of his recollection. There was no additional evidence as to how this collusion occurred, who gave whom cover prices or the identity of the parties involved.

[42.] The Commission simply added Tshwane to the referral on this basis. On its own admission it did not conduct an independent investigation of its own, had no site of the contracts, did not contact any customers, did not seek confirmation of the alleged collusion from other competitors and most importantly did not call Van Deventer, whose list was the sole piece of evidence for the Commission's case against Tshwane, to testify.

[43.] The Commission bears the onus to prove its case and, in our assessment failed to do so in respect of Tshwane.

[44.] Thus, in our order below, we dismiss the case against Tshwane.

[13] *See Competition Commission v Thembekile Maritime Services (Pty) Ltd & others*, unreported case number CR067May17 (14 August 2019) at para 51- 55 which set out the principles for drawing inferences.

Cross

[45.] The Commission alleges that Cross was involved in 33 instances of collusion. It lists these instances in Annexure C of its supplementary affidavit. Cross responded to the list as follows:

45.1. With respect to items 1 - 6, Cross, similarly to Belfa, contended that these tenders occurred at a time when the Act was not yet in force (before 1 September 1999) and so the Act itself finds no application.

45.2. With respect to items 7 – 26 (tenders from 1999 to 2008) Cross admits to the collusion. However, it argued that that these instances have prescribed in terms of section 67(1) as the conduct ceased prior to 13 March 2012, being three years before the Commission's initiation against it on 13 March 2015. Cross thus admits to these instances of collusive conduct but raises a prescription argument. At the time of hearing this matter the Constitutional Court had not yet delivered its judgment in *Pickfords*[14] in which it was held that 67(1) was a mere procedural and not a substantive bar to the Commission initiating a complaint against conduct that had ceased three years prior to such initiation.

45.3. With respect to items 27 – 33, Cross denies it colluded on these tenders.

[46.] Further, Cross denied participation in an agreement to divide markets by allocating customers such as Makro to Belfa, arguing that the relationship between Makro and Belfa was one driven by Makro's requirements as a customer.

[47.] Cross's second defence was that, whilst it may have participated in a cartel until 2008, it exited the cartel in 2009 and the last collusive conduct it was involved in ceased more than three years prior to the Commission's initiation date of 13 March

[14] Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited (CCT123/19) [2020] ZACC 14.

2015. Thus, by the operation of section 67(1), the Commission's referral against it was time-barred.

[48.] Cross broadly argues that its exit from the cartel occurred around the tender related to the One Monte Hotel and Retail project (**One Monte Project**). Cross argues that its repudiation of the collusive agreement was indicative of its exit from the cartel. In addition, its actions made its exit widely known in the industry. Finally, it argues that under the leadership of Ms Stewart, Cross (i) at a board level implemented a policy of competition law compliance and (ii) advertised this policy to its staff.

[49.] Cross argues that these facts, when read with the Commission's failure to provide any evidence of Cross's participation in collusive activities after 2009, should prove that it had exited the cartel at that time.

[50.] In response to this the Commission broadly argues that:

50.1. Cross's actions which relate to the One Monte Project were insufficient proof of a withdrawal as such was not communicated clearly to the market at large;

50.2. There was no evidence of Cross's adoption of a competition law compliance program;

50.3. Cross presented no evidence that it had told its competitors that it was no longer interested in colluding;

50.4. Cross failed to approach the Commission to apply for leniency with respect to the cartel, a clear sign that it had not fully exited therefrom; and

50.5. Cross was involved in instances of collusion after 2009 upon which the Tribunal could sustain an inference of Cross's continued participation in the cartel conduct.[15]

[15] The Commission relies on three instances:

[51.] Before considering Cross' defence that it exited the cartel we first set out what we understand the nature of the impugned conduct to be.

Nature of the conduct

[52.] Both Cross and Belfa, while admitting to the collusion, have sought to argue that the conduct constituted *ad hoc* collusive instances of cover pricing. In other words, each instance of cover pricing given or received must be viewed as a discrete instance of collusion.

[53.] Cross asserts that one of the facts that goes against the characterisation of its conduct as an overall agreement or understanding amongst the respondents is the occasional price war that occurred amongst them.

[54.] In Stewart's witness statement she submits that:

> "*The arrangement, however, was only ever transient because as soon as a large project went out to tender, one or more firms would 'cheat' in an attempt to secure the large project for themselves. That would undermine the collusive arrangement and other firms would respond by pricing as low as possible, a price war would ensue and so the cycle would begin afresh."*[16]

[55.] For big projects it was every man for himself. In the words of Stewart:

> *"Yes everybody would want that big project and then they would say well the agreement is off, I wouldn't use exactly that terminology in terms of agreement but gloves off it's a free for all everybody quotes or tenders competitively."*[17]

[56.] We note that according to Stewart the alleged instances of competitive tendering by all firms in the cartel were limited to the "*large*" / "*big*" projects and thereafter the

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The first was an instance of information sharing related to an August 2009 tender for VW Centurion. The second was the tender for Makro Alberton in 2012. The third was an alleged instance of information sharing in 2015.

[16] Stewart Witness statement Page 13 par 5.3.4.

[17] Transcript p 223.

firms would again engage in collusive conduct, in her words "*and so the cycle would begin afresh"*.

[57.] However, periodic price wars amongst cartels of long duration are not unusual.[18] As has been shown in several matters before the Tribunal as well as abroad in foreign jurisdictions.[19]

[58.] Of particular relevance is the European Commission's decision in the rubber chemicals cartel, in which the Commission was unpersuaded that the presence of price wars could be used to signal the exit of the parties from the cartel, "*a price war resulting from deviation from the cartel cannot be considered to put an end to the overall objective to restrict competition. If the parties truly wanted to quit the cartel ... complaints about the past and negotiations about the future would no longer have been necessary*".[20]

[59.] In discussing the duration of a common objective in European Law, David Baily writes the following on price wars:

> *"The price war was an example of the possibility, indeed the probability, of cheating in cartels. It is only normal in a cartel of long duration for there to be moments of unity and moments of tension. Although competitors' reliance upon one another's future behaviour may have been misplaced, the fact that any reliance is possible is unacceptable. The Commission rejected similar arguments in Copper Plumbing Tubes and Industrial Tubes. The reasons why cartels succeed or fail are therefore separate from the question of whether there has been a single and continuous infringement.*"[21]

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[18] Some theorise that price wars may assist in the long- term success of cartels *see* Edward J. Green & Robert H. Porter, *Noncooperative Collusion Under Imperfect Price Information*, 52 Econometrica 87 (1984).

[19] *See Competition Commission v Southern Pipeline Contractors & Another* 23/CR/FEB09; *Videx Wire Products (Pty) Ltd v Competition Commission of South Africa* (124/CACOct12) [2014] ZACAC 1 (14 March 2014); *Competition Commission of South Africa v RSC Ekusasa Mining (Pty) ltd and Others* (65/CR/Sep09) [2012] ZACT 82 (19 September 2012) para 65.; *Competition Commission v DPI Plastics (Pty) Ltd and Others* (15/CR/Feb09) [2012] ZACT 47 (4 July 2012) para 66. *Abroad see* Rubber chemicals, Commission Decision of 21 December 2005, Case No. COMP/F/38.443;

[20] Rubber Chemicals, Commission Decision of 21 December 2005, Case No. COMP/F/38.443 para 217.

[21] David Bailey, 'Single, Overall Agreement in EU Competition Law', Common Market Law Review, (Kluwer Law International 2010, Volume 47 Issue 2) pp. 473 – 508 pp494.

[60.] Periodic cheating amongst members of cartels of long duration are commonplace because cartels, aside from general bargaining problems often face the instability brought about by opportunistic behaviour and entry into a market by non-members of the cartel.[22] Opportunistic behaviour can be said to arise in instances where an individual cartel member has an incentive to deviate from the cartel to capture higher individual profits at the expense of lower joint profits. It is the existence of opportunistic behaviour which necessitates for disciplining mechanisms, such as 'collective predation' or price wars.[23]

[61.] Hence price wars may simply be an enforcement mechanism employed by dominant cartel members to discipline mavericks or cheaters and not necessarily an indication of durable competition amongst firms. For example, in *Southern Pipelines*,[24] the Tribunal found that price wars were used in particular regions to discipline smaller entrants not adhering to a previously defined agreement.[25]

[62.] Moreover, the idea that the respondents would only collude on ad hoc projects from time to time defies the economic rationale of cover pricing arrangements. It would not make economic sense for a profit-maximising firm to engage in cover pricing as a once off ad hoc practice *without* expecting a *quid pro quo* sometime in the future. Why would a profit maximising firm agree to provide a cover price to its competitor, at the risk of losing that customer or tender, if it did not have the comfort of knowing that it could rely on its competitor(s) for a similar cover price sometime in the future? It would be remarkably foolish of such a firm to extend a cover price in the absence of at least an assurance that it too would benefit from such cover sometime in the future. Thus, the argument that the respondents only colluded on an ad hoc basis is unsustainable.

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[22] Margaret C. Levenstein & Valerie Y. Suslow, What Determines Cartel Success?, 44 J. Econ. Literature 43 (2006).

[23] Fiona S. Morton, Entry and Predation: British Shipping Cartels 1879–1929 (Nat'l Bureau of Econ. Research, BER Working Paper No. w5663, June 1996); David M. Kreps & Jose A. Scheinkman, *Quantity Precommitment and Bertrand Competition Yield Cournot Outcomes*, 14 Bell J. Econ. 326 (1983).

[24] Competition Commission v Southern Pipeline Contractors & Another 23/CR/FEB09.

[25] *See generally* Khumalo J *et al Harm and Overcharge in the South African Precast Concrete Products Cartel* Journal of Competition Law & Economics, OUP 2014, Volume 10 (3)pp. 621.

[63.] By the same token, it would seem illogical to suggest that an agreement to provide cover prices amongst the firms was not in effect also an agreement on customer allocation. By the mere act of providing a higher cover price at the request of a competitor, that firm effectively agrees not to compete for that specific customer and thereby impliedly 'allocates' the customer to its competitor. Cross in fact admits to such allocation as part of the agreements in relation to the One Monte Project, where Cross, Belfa and FCS agreed that Belfa would be the preferred bidder.[26] This implies customer allocation. Whether the alleged sustained customer allocation of Makro (the one large customer alleged by the Commission to have been allocated to Belfa) was an element of this understanding or agreement is not a matter we need to make a finding on for purposes of this conclusion.

[64.] And indeed, the respondents' self-admitted conduct over the many years and the significant number of instances reflect *precisely* this kind of understanding namely that they could approach each other for cover pricing or pricing information regularly and could discuss tenders and customers with each other with relative ease over many years.

[65.] Both Cross and Belfa admit that they engaged in collusive tendering/cover pricing prior to the promulgation of the Act in 1999. While we accept that we would not enjoy jurisdiction over conduct in that period, the fact that it occurred is something we can have regard to in the process of characterising it. That the cover pricing arrangements or understanding persisted over so many years suggest that this was an overall arrangement or understanding amongst the firms which simply continued after the promulgation of the Act.

[26] Witness Statement Stewart p28-29 para 6. 9. "*A cover pricing agreement was struck between Mr Cross, FCS and Belfa in terms of which Belfa would be the preferred bidder. In line with that agreement, Belfa prepared and provided to Cross Fire the (inflated) prices at which Cross Fire was supposed to tender*."

[66.] Indeed, Cross itself, when it admits to its participation in the cartel, albeit claiming prescription, describes it as the "*long standing practice...of 'providing cover'*"[27], and the "*collusive arrangement*"[28]

[67.] There is no other reasonable explanation for why the relevant firms would continue with this conduct with such relative ease over so many years unless there was a general agreement, understanding or arrangement amongst them that they could engage in cover pricing and collude from time to time.

[68.] Thus, we conclude that the nature of the conduct in this matter was not once-off *ad hoc* instances of cover pricing or collusion on tenders but a long-standing overall arrangement, understanding or agreement amongst the respondents involving collusive bidding, cover pricing and customer allocation.

[69.] If the practice is a long-standing cartel and a particular firm that was part of it for many years alleges that it has exited that arrangement, then the onus is on that firm to show that it has indeed distanced itself from the cartel. It then becomes relevant to ask what is expected of a firm seeking to do so. In this enquiry we would necessarily assess what steps that firm took to send a clear and unambiguous message to its competitors that it no longer was part of the cartel.[29]

[70.] We now turn to assess the facts put up by Cross in justification of its alleged exit of the cartel in 2009 or at the latest 2011 when it alleges it received the last payment in respect of the Nampak Kliprivier tender.

The Evidence on Exit

[71.] Stewart's evidence was that she had always been uncomfortable with the practice of cover pricing,[30] but that prior to 2009, she had lacked sufficient authority to

[27] In her witness statement, Stewart describes the series of events at the "long standing practice in the industry of 'Providing cover' (par 5.3.4) p21.
[28] Witness statement of Stewart p22 para 5.3.5.
[29] Important to note is that the time at which a firm has exited a cartel is conventionally only relevant for the calculation of penalties and not, as it was being used by Cross in this context, as the first leg of a two stage enquiry to avoid liability and absolve itself entirely for participating in the cartel.
[30] Witness statement Stewart p25 para 6.1.

challenge the status quo which had been instilled over decades.[31] However, upon being promoted to MD[32] – which meant that she was in charge of the day-to-day running of the firm[33] – she sought to bring about an end to collusive behaviour at Cross.

[72.] She submitted that she had indicated Cross' exit from the cartel during the One Monte Project tender in late 2008 / early 2009, just prior to her appointment as MD.

[73.] The One Monte tender process was being handled by an independent firm of consulting engineers called Trevor Williams Consulting Engineers (**TWCE**). Only Cross, FCS30 and Belfa were invited to bid.[34]

[74.] According to Stewart, a cover pricing agreement was struck between Mr John Cross (the erstwhile MD and owner of Cross), FCS and Belfa in terms of which Belfa would be the preferred bidder.[35]

[75.] In line with that agreement, Belfa prepared and provided to Cross the (inflated) prices at which Cross was supposed to tender. However, on the tender closing date, Mr John Cross was out of the country. Stewart submits that she and her colleague, Kriel, saw this as their opportunity to repudiate on the collusive arrangement[36] and decided to not to submit a tender.[37]

[76.] Shortly thereafter, Stewart received a call from Mr John Goring (**Goring**), the chairperson of ASIB. Goring enquired why Cross had failed to submit a tender and Stewart informed him that Cross was no longer willing to be part of the collusive arrangement(s).[38]

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[31] Ibid. p23 para 5.3.7 and 5.3.4. Where the industry is described as an "old boys club" providing participants with no other option other than to adopt the industry norm or exit the industry.
[32] Managing director.
[33] Transcript p219.
[34] Stewart's witness statement, para 6.8 and 6.9, pp 28 – 29 of the witness statement bundle.
[35] Witness Statement Stewart p28-29 para 6. 9. See note **Error! Bookmark not defined.** above.
[36] Stewart's witness statement, para 6.9, p 29 of the witness statement bundle. See too Kriel's witness statement, para 7.5-7.7, pp 205 – 206 of the witness statement bundle
[37] Stewart's witness statement, para 6.9, p 29 of the witness statement bundle, as well as the transcript, p209 et seq.
[38] Transcript p 212.

[77.] Stewart then points to TWCE's "Tender Adjudication Report" dated 14 February 2009[39] as evidence that (i) Cross repudiated on the collusive arrangement by refusing to submit a tender, and (ii) that word of decision had spread throughout the industry. It reads, in relevant part:

> *"This report serves to provide an overview of the results following the invitation for tenders … of an automatic sprinkler installation to the following areas of the One Monte project, Fourways…*
>
> *Tender invitations were issued to the following contractors: Belfa Fire, Cross, Fire Control Systems*
>
> *Based on our analysis, we believe that this tender has been substantially "fixed" and are of the considered opinion that collusion occurred between the tenderers.*
>
> *As can be seen, Cross failed to return a tender… Subsequent discussions have indicated that the actual reason for declining to tender appears to be the fact that they were unwilling to participate in the collusion which took place between the other two parties.*[40]

[78.] TWCE's report does not detail who the subsequent discussions were held with. Nor was Trevor Williams called to explain or confirm his report.

[79.] Kriel, in his testimony at the Tribunal, testified that Messrs. Odd (**Odd**) and Dave Ford (**Ford**) from Independent Fire knew of Cross's repudiation from the cartel. Kriel testified that he met Mr Odd and Mr Ford at a restaurant where the two were ordering expensive whiskey. Kriel's version was that he bemoaned that he could only afford cheaper drinks, to which Odd and Ford commented that he (and Cross by implication) had chosen their fate. Kriel submitted this as proof that the industry was aware that Cross had exited the cartel. No date was given for this interaction, but we assume that it occurred about the same time as the One Monte tender.

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[39]Witness Statement Bundle p66.

[40] Page 3- 5 of the TWCE report, pp 70 – 71 of the witness statements bundle.

[80.] Reliance was then placed on an extract of the Commission's interrogation of a Mr Stephen Ayerst of FPS, the Fourth Respondent, who in response to being asked when the cover pricing arrangement in the industry came to an end, states:

> *"I think it was round about 2007. I might be wrong with the year, but it was the pivoted Monte Casino [project] that [ended it] …"*[41]
>
> *"… Trevor Williams was a fire consultant. He phoned and he was querying, and because I was now nervous all of a sudden, the questions he was asking…"*[42]

[81.] In that interrogation, when pressed by the Commission to admit to cover pricing post-2009, Ayerst responded "*I don't recall a project post 2009..."*[43] and *"I can't recall it*".[44]

[82.] Finally, Ayerst explained to the Commission that in the aftermath of the One Monte/ Monte Casino project, and having been very concerned by Trevor Williams' calls, FCS scheduled a strategy session, identified collusion as a big threat to its continued success and FCS no longer engaged in collusion.[45]

[83.] Thus far the evidence relied upon by Cross until this point in time (early 2009) raises a few inherent contradictions and is unpersuasive in the main.

[84.] In the first instance, by her own admission, Stewart did not enjoy the necessary authority at the time of the One Monte tender to withdraw Cross from the cartel. The owner John Cross had struck the agreement with Belfa and FCS. Second, she herself explained that there was another reason, other than the fact of collusion which caused unhappiness for her. She was concerned that the agreed tender prices were too inflated, and that this might raise suspicions on the part of the customer.[46] Third, the fact that she and Kriel withheld Cross' bid, without any

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[41] Transcript, pp 157 – 158, transcript of Ayerst's interrogation, p 13.
[42] Transcript, p 158, and transcript of Ayerst's interrogation, p 13.
[43] Transcript of Ayerst's interrogation, p 20.
[44] Transcript of Ayerst's interrogation, p 18.
[45] Transcript, p 159 – 160.
[46] Transcript p 303. This was also sourced from correspondence between the Commission and Cross (8 December 2016). Confidential Bundle p2.

explanation to its competitors at the time, does not in itself suggest a withdrawal from the cartel. It could simply suggest a decision not to compete in that one tender which in *effect* amounted to abiding the agreement struck between John Cross and Belfa that Belfa would be the preferred bidder.

[85.] Bid rigging agreements can take many forms, such as providing cover pricing or not putting in a bid, the objective of the agreement being to reduce competition for that tender/contract and raise prices. The fact that Cross failed to put in its bid for this tender does not on its own suggest exit from the collusive arrangements. It can only serve as confirmation that Cross did not submit its bid, which meant that the other cartelists could carry on with their cartel arrangement.

[86.] Further, as to Stewart's claim that her communication to Goring amounted to communication to the rest of the industry, no explanation is given by her what role Goring played in the collusive arrangements so that telling him would amount to sufficient notice to her competitors that Cross had exited the single overall arrangement. Her claim that this was a communication to the entire industry seems to be based on the fact that Goring was the chairperson of the ASIB as if this was an industry association. Yet no details were provided to us about the role or status of ASIB. The Commission points out that ASIB is an inspection bureau which inspects fixed automatic sprinkler installations with a view to issuing clearance certificates for the systems that have complied with the nominated standard of design and is thus not an industry association. Significantly, no date was provided for this communication. But we assume in favour of Stewart that it occurred more or less at the time the TWCE report was produced.

[87.] Goring was not called to confirm that this communication took place or that he in fact was in a position to convey Stewart's claim to the rest of the industry.

[88.] Mr Williams of TWCE was not called to testify. What is unambiguous in the language of the TWCE report of 14 February 2009, is that the concerns of collusion pertained *only* to the One Monte tender and not to the overall collusive agreement between respondents.

[89.] Kriel's evidence provides us with no time or date as to when these discussions with Odd and Ford took place or why a discussion about the affordability of whiskey should require us to treat that as evidence of *exit* from a cartel. In any event, Kriel's evidence does not hold up in the context of an email sent by Ford to Stewart (discussed later in these reasons) in March 2014, more than 5 years later, in which Ford shows that he considers Cross to still be part of the cartel.

[90.] As to the evidence of Ayerst, this remained untested. He was not called. Even if we are to have regard to his remarks under interrogation by the Commission, what we cannot discern is how this applies to Cross' exit from the cartel. What is clear from his evidence is that he was nervous for FCS after the TWCE report, not that Cross had stopped colluding with other players in the market.

[91.] We turn now to consider the evidence put up by Cross of events subsequent to the One Monte tender.

[92.] On 1 July 2009, after the undated conversation with Goring, and after the One Monte tender in February 2009, which Stewart says was the defining moment of Cross distancing itself from the cartel, Stewart herself provided Ford with Cross' pricing information in respect of the Nampak Kliprivier project in an email. When asked about this during the proceedings she stated that she could not recall it and was only made aware of it after reviewing the Commission's supplementary discovery. Her explanation for it was that she was not the author of the attachment and assumes that she was given the document and told to send it and at that time she lacked sufficient authority to overrule the instruction.

[93.] This stands in stark contrast to her testimony under oath that she had the authority to repudiate and withdraw from the cartel in her communication with Goring at the time of the One Monte tender.

[94.] Stewart was appointed MD in August 2009. Yet on 20 August 2009 Kriel, who supported her version that Cross had withdrawn from the cartel around February 2009, called Ford and asked him to confirm that the prices Cross was quoting to

Volkswagen (**VW**) were 'market related'. Recall that Ford was from Independent Fire.

[95.] Kriel had sent Ford Cross' pricing information that he had worked out for VW. Kriel's explanation for doing this is that VW and Cross had a good relationship and Cross was asked to do an estimate for the configuration of a new warehouse. VW had asked Kriel to confirm that the prices were 'market related'. Kriel sent the information to Ford at Independent Fire, Cross' competitor, to get an indication if his prices were market related. Ultimately Cross won the VW contract.

[96.] Ford was not called to testify. But the explanation provided by Kriel is implausible in the context of his and Stewart's own evidence. On their own version Cross had withdrawn from the cartel around February 2009 because they disagreed with colluding on the One Monte tender because in their view it was 'wrong'. This suggests, which is later confirmed by Stewart in her evidence on her action in 2010, that they understood this to constitute illegal conduct. Yet Kriel sees nothing 'wrong' in sharing Cross' confidential pricing information with a horizontal competitor, Ford at Independent Fire. In this exercise which Kriel claimed to have been done at the request of VW, he must have had sight of or discussed not only Cross' but Independent Fire's pricing. In any event the explanation by Kriel that VW *asked him t*o check that pricing was 'market related' can hardly be relied upon as a defence to illegal conduct.

[97.] Throughout the hearing, much was made of Stewart's attempts to 'right the ship' internally within Cross. It was submitted that Stewart made a presentation to the Cross board of directors in 2010 in which she explained her understanding of collusion[47] and highlighted the following:

> *"Collusion is criminal. Cross's longevity and reputation is at risk. Cross is Squeaky clean – put the word out that we price things our way"*[48]

[47] PB p172.

[48] PB p172.

[98.] She also explained that if Cross was to get "bust for collusion", that could mean the end of the company.[49] The main thrust of the presentation was that Cross should adopt an official policy in terms of which (i) it becomes squeaky clean, (ii) it prices independently, and (iii) it makes that decision known publicly. Stewart and Kriel both testified that the policy was duly adopted by the Board,[50] which at that stage comprised Stewart herself, along with Odd John Cross, Netherlands and Kriel.[51]

[99.] Further it was submitted that on 23 July 2010, following the Board's adoption of the policy, Stewart supposedly made the presentation to Cross' relevant staff members.[52]

[100.] The Commission argues that there was no evidence of the presentation being adopted as a strategy of Cross, either in the form of minutes or board resolution.

[101.] Ms Stewart explained the absence of official minutes as follows:

> *"MS STEWART: There actually isn't, so what we – this was an extraordinary meeting, and it wasn't attended by the people that normally – secretarial staff that would take our management minutes.*
> *So it was actually held on a weekend in 2010, and I think it was a Saturday morning, in our offices where only the directors were present. We did not take minutes. In hindsight that would have been really nice if we did, because we would have had documented stuff.*
> *MR WESSELS: So there's no document that tells us what the Board's feeling was about your presentation on collusion?*
> *MS STEWART: No."*[53]

[102.] We note that on this version the Board only adopted the policy of non-collusion at a workshop in mid-2010.

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[49] PB p171.
[50] Transcript, p 218 and 336-337.
[51] Transcript, p 218.
[52] Stewart's witness statement, para 6.20.2, p 34 of the witness statement bundle and the transcript, p218 and 272. There was some debate as to whether the presentation was made to all Cross Fire staff or only the relevant staff.
[53] Transcript p277.

[103.] But even if were to accept that Cross had adopted this anti-collusion policy internally, this does not mean that it had communicated its withdrawal from the cartel to its competitors at large.

[104.] Had Cross' withdrawal been known by the industry at large, competitors would not be under the impression that they could still approach Cross for collusive pricing arrangements.

[105.] That Cross' competitors were unaware of its firm and unambiguous exit from the cartel is confirmed by two relatively recent instances.

[106.] The first of these is the email sent by Ford to Stewart on 21 March 2014. From the content of this email which we reproduce below, he was aggrieved by the way he had been treated. In this email he threatens to tell all and approach the Commission with information about the cartel.

> *"Morning Cathy*
> *It's amazing when one's down and out how irrational they become, I've compiled a list of projects including all supporting documentation which includes the fire protection industry, consultants and certain people within the private sector relating to their knowledge and involvement with regards to the cartel within the fire protection industry.*
> *At this stage there is no alternative for me as this has been on my conscious for many years and feel it is only right to report this to the Competition Commission and turn state witness.*
> *If i'm going down i intend taking everybody down with me*
> *Dave Ford"*[54]

[107.] It appears that Ford and his erstwhile employer Mr Prinsloo of Independent Fire had fallen out. He did ultimately approach the Commission. As interesting as this development was, Stewart's response to this email is even more interesting,

[108.] Her response to Ford is not that which we would expect from a firm who has announced and made clear to its competitors in early 2009 that it had withdrawn from the cartel. We would have expected Stewart to simply point out to Ford that

[54] Email from Dave Ford to Cathy Stewart Untitled (4 March 2014) Confidential Document Bundle p14.

Cross had withdrawn from the cartel in 2009 because it had believed collusion to be wrong.

[109.] Instead, we see Stewart playing for time in her response and wanting further engagement with Ford:

> *"Hi Dave*
> *Please can you please call me or let me have your number so we can chat.*
> *Regards"*[55]

[110.] But that is not where the discussion ends. Later in the month, Ford emails Stewart again. This time referring to a conversation he had with John Cross. He writes:

> *"Hi Cathy, i don't know if John has spoken to the main players of the mob (listed below) to discuss my intentions the ramifications and possible solutions if any. You know my situation and all I can give you is 2 weeks to try and resolve this issue."*[56]

[111.] The "mob" listed by Ford included Dave McBride, Van Deventer, Odd, Mr John Robertson, Mr Dave Fish, and a number of other participants named only by their first name (Mike, Ralph, Don, and Roy).

[112.] Again, Stewart's response is not that which one would expect from a firm which had clearly distanced itself from a cartel. Stewart writes:

> *"Hi Dave,*
> *Thanks for your mail. What kind of solution are you looking for?"*[57]

[113.] After two weeks, Ford sends a further email suggesting that Stewart come up with a decent proposal and he would "*get out of [her] face*".

[114.] At this stage Stewart obtains legal advice from Lesley Morphet of Webber Wentzel. Ms Morphet responds to Ford on behalf of Stewart indicating that:

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[55] Email from Cathy Stewart to Dave Ford Untitled (4 March 2014) Confidential Documents Bundle p15.
[56] Email from Dave Ford to Cathy Stewart Untitled (21 March 2014) Confidential Documents Bundle p25.
[57]Email from Cathy Stewart to Dave Ford Untitled (21 March 2014) Confidential Documents Bundle p25.

"We are instructed to inform you that your threats are without foundation insofar as our client is concerned, and our client is satisfied that it has nothing to fear from the competition authorities. A complaint may only be initiated in respect of conduct taking place within the last three years, and our client's conduct over that period had been exemplary"[58]

[115.] Stewart submits that it was these mails that caused her to seek legal advice both on the immediate threat posed by Mr Ford's emails as well as a broader strategy of competition law compliance. Her explanation for this was that she needed expert advice because "*Mr Ford's mails kind of gave me a wakeup call about what we did.*"[59]

[116.] What remains unexplained by Stewart are two aspects flowing from this incident.

[117.] The first is her response to Dave as we discussed above. Nowhere does she say or lay claim to Cross' alleged withdrawal from the cartel in early 2009 or the latest 2011. If she was confident that her communication to Goring effectively sent out an unambiguous message of distancing from the cartel, we would have expected her to say something along the lines to Ford.

[118.] The second is that this incident offered Stewart, who was now MD of Cross, a further opportunity to categorically distance Cross from the cartel, which she clearly failed to take. At the stage of receiving this email and after taking legal advice from Ms Morphet, Stewart must have been aware of the Commission's corporate leniency policy since Ford threatens to "turn state witness" and "taking everybody down". However, Cross still does not approach the Commission with information about the cartel.

[119.] In any event none of her evidence explains why in February 2015, nearly a year after this email, Fireco, another competitor, still thought it could approach Zane

[58] Letter from Lesley Morphet to Dave Ford "Cross Fire Management (Pty) Ltd: Competition Query" (27 March 2014) Confidential Document Bundle p26
[59] Transcript p274.

Cousins (**Cousins)**, a senior employee of Cross, to discuss increasing prices in the industry.

[120.] In February 2015, some 6 years after it was claimed by Stewart that she had withdrawn Cross from the cartel, Cousins, the Cross Branch Manager in Cape Town, still received proposals on how to increase prices in 2015 from Fireco, a competitor.

[121.] This incident was first mentioned in Stewart's witness statement. Attached thereto was a Cross Branch management report from the Cape town Branch. In it, under the heading "market related issues" Cousins writes as follows:

> "*Some of the other companies have said that the year has started off very busy. As mentioned Fireco have a discussion about increasing future rates and I have not responded to them.*"

[122.] The Commission was of the view that this communication illustrated that Cross continued to communicate or at least receive collusive information from competitors up to 2015 which was indicative of its failure to distance itself from the cartel.

[123.] We agree. Had Ford, previously employed at Independent and Fireco known of Cross' withdrawal, these approaches would not have occurred.

[124.] Finally, we come to the Commission's reliance on several Makro contracts as proof of Cross's continued involvement in the cartel. The Makro contracts formed the basis of two allegations from the Commission. The first was that, on the basis of a margin analysis, the Commission sought an inference that the bid submitted by Cross relating to Makro Alberton in July 2012 was one submitted pursuant to a collusive agreement. The second was that, as Makro consistently awarded work to Belfa, there must have been a customer allocation arrangement in place, which would have endured throughout all the Makro tenders listed in Annexure C.

[125.] The Commission's first allegation ran as follows:

125.1. Mr Cross, during an interview with the Commission indicated that the average margin for a project within which there was collusion was 27% and above. A margin of 20 to 24% would be indicative of a bid where there was competition between firms. Ms Stewart supposedly supports this claim by submitting that the strategy of a 20% price margin was used during a price war.

125.2. Cross' margins in relation to 'Makro Contracts' (which are taken to be the bids relating to Makro Alberton and Makro Bloemfontein in 2012) appear to be in the █% range whereas the bids for the tenders relating to Makro Cape Gate and Makro Carnival had margins of █% and █% respectively.

125.3. This was sufficient to draw an inference that Cross continued its participation in the Cartel throughout at least the Alberton and Bloemfontein tenders.

[126.] The Commission's second allegation was that Makro's continued award of work to Belfa was a strong enough foundation from which to draw an inference of a customer allocation arrangement in which Cross was involved.

[127.] Cross raised an objection to this aspect of the Commission's case on the basis that it had not pleaded a case based on margins and this constituted a new case which was unfair to the respondents.

[128.] In our view there is no need for us to make conclusions on the Makro tenders. We are not required to. A finding that Cross was still a party to the underlying cartel agreement is dependent upon whether we are persuaded by the evidence put up by Cross in support of its defence that it exited the overall cartel in 2009. We find the evidence is not persuasive.

Conclusion on Cross

[129.] In evaluating the evidence put up by Cross we come to the conclusion that its alleged withdrawal from the cartel did not occur in 2009, 2011 or at all.

[130.] It may be that Stewart had a moral dilemma about the extent of collusion in the industry and that she might have made certain efforts to persuade her Board and employees of the risks to Cross of persisting with this conduct but her actions and that of the other employees did not amount to a clear and unambiguous communication to Cross' competitors that Cross had distanced itself from the cartel.

[131.] We say clear and unambiguous because that is what the law requires firms to do.

[132.] The reason why the law requires a firm to clearly, and without ambiguity communicate its withdrawal or distancing from cartel activities is because competition law is concerned with economic signals that cartel members send to each other. For as long as a firm does not distance itself from a cartel in a manner that is clear to its competitors, those competitors will continue to conduct themselves in the industry on the basis of co-ordination and not competition.

[133.] While the manner in which a firm is required to communicate its withdrawal from a cartel is not prescribed, the law requires a standard of conduct from that firm which ensures that competitors of the firm have no doubt that it has distanced itself <u>unambiguously</u>.

[134.] In addressing the requirements for a firm to successfully distance itself from cartel conduct, the CAC held in *MacNeil*[60] that under certain circumstances our law imposes on a person to speak and a failure to do so where the duty exists may amount to an objective manifestation of consent, regardless of the subjective intention of the silent party. In such circumstance, what is required is a firm repudiation.[61] The CAC made the prescient observation that silence on the part of the respondent was not in itself sufficient to draw the inference that it was not involved in the cartel. This is because these types of meetings between competitors involve them giving each other economic signals as to their individual

[60] *MacNeil Agencies (Pty) Ltd v The Competition Commission of South Africa* Case No: 121/CACJul12.
[61] Ibid para 64.

positions. Silence could be understood as acquiescence or agreement. A respondent firm had to do something more than remain silent in order to distance itself from anti-competitive conduct. In that case the respondent was found not to have distanced itself from the anti-competitive conduct.[62]

[135.] The CAC in the case of *Omnico*[63] found that where the Commission has made out a *prima facie* case against the respondent, the respondent attracts an onus to put up rebuttal evidence and "*their failure to overtly disagree or distance themselves from the contents of the September meeting* [the cartel] *meets the necessary standard of proof*"[64] required for a finding of guilt, and that there is a duty to speak or to publicly distance oneself from a cartel.

[136.] The position in the EU, as it relates to whether a firm might escape liability for a cartel it was part of, is that it is obligated to either approach the relevant competition authority or publicly distance itself from the cartel.

[137.] Professor Richard Whish explains the rationale behind the public distancing theory thus:

> *The reason for the rule is that having participated in the cartel without publicly distancing itself … the undertaking has given the other participants to believe that it subscribed to what was decided…*[65]

[138.] In *Adriatica v. Commission*,[66] the Court of first instance explained what was required by the public distancing approach:

> *In order to avoid liability by distancing itself, an undertaking … need do no more than inform the other companies represented, with sufficient clarity, that, despite appearances, it disagrees with the unlawful steps which they have taken*

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[62] Ibid para 70.
[63] *Omnico (Pty) Limited and Another v The Competition Commission and Others* 142/CAC/JUNE16 (19 December 2016).
[64] Ibid para 58.
[65] *Whish*, Competition Law, 9th ed OUP (2018), p 554.
[66] Case T-61/99, Adriatica di Navigazione SpA v. Commission [2003] ECR II-5349

What must be proved is that the means chosen by the undertaking in order publicly to distance itself did in fact have the effect of conveying its disagreement….[67]

[139.] In the case of *Westfalen*,[68] on appeal to the court of first instance, it was held that the concept of public distancing *requires "firm and unambiguous disagreement"* with what had been agreed, together with proof that the dissenting firm *"independently determined its commercial policy*".[69]

[140.] In *Archer Daniels Midland*[70] the European Court of Justice emphasized that when assessing whether a firm has adequately distanced itself from the unlawful agreement, what is of critical importance is the understanding of the other participants in the cartel have.[71]

[141.] A case that comes to mind in this regard is the *DPI Plastics* case.[72] In that case Michelle Harding, the then CEO of Petzetakis (second respondent) decided to withdraw the firm from all collusive activities on the basis of her recent conversion to support anti-corruption in the corporate sector. She convened a meeting of her competitors in which she advised them of the firm's withdrawal. Unbeknownst to her, DPI (the first respondent in the case), having sought legal advice as a consequence of her announcement, ended up being first at the door of the Commission in seeking corporate leniency.[73] DPI became the recipient of the conditional leniency despite being the leader of the cartel and despite the fact that the *de facto* termination of the cartel and restoration of competition to the industry was brought about by Petzetakis. Ms Harding's conduct however still stands out

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[67] Ibid para 137.
[68] Case T-303/02, Westfalen Gassen Nederland BV v. Commission [2007] 4 CMLR 334.
[69] Ibid para 43; 86-87.
[70] Case C-510/06 P, Archer Daniels Midland Co. v Commission of the European Communities.
[71] ibid para 120.
[72] *Competition Commission v DPI Plastics (Pty) Ltd and Others* (15/CR/Feb09) [2012] ZACT 47 (4 July 2012).
[73] The breakdown of a cartel may, in itself, be an indication that firm has successfully distanced itself therefrom. It is intuitive to us that a self-interested participant in a cartel, when faced with the clear and unambiguous communication of exit from another participant, would consider this an existential crisis and bolt for the safety of the Commission's leniency policy.

as the hallmark of the type of evidence that would be persuasive of a firm's clear and unambiguous distancing of itself from a cartel.

[142.] This is not to say that every firm has to demonstrate the courage of Harding when it distances itself, as long as there is convincing evidence of clear and unambiguous distancing.

[143.] However, in this matter, Cross has been unable to show that its competitors clearly knew that it had withdrawn from the cartel. The evidence shows that this was not the case at all because as late as <u>February 2015</u> competitors of Cross still laboured under the impression that Cross was open to discussions on "*market related issues*" and pricing.

[144.] We thus find that Cross was a party to the overarching understanding, arrangement or agreement (single overall conspiracy), which it itself describes as a "*a long-standing practice of çover pricing*" and "*collusive arrangements*" in contravention of section 4(1)(b)(i)-(iii) and continued to be so until at least the Commission's initiation and referral because there is no evidence of it clearly distancing itself from this arrangement.

[145.] This finding means that we do not need to deal with the argument that, with Cross' exit being in 2009, the initiation as against it was time barred by section 67(1).

Belfa Fire

[146.] During the proceedings before the Tribunal, Belfa did not call any witnesses, nor did it file heads of argument or make any submissions on potential penalties when requested by the Tribunal to do so.

[147.] In Belfa's answering affidavit it had attached an "Annexure D" which detailed the 53 tenders it was alleged to have colluded on. With respect to these tenders, it answered as follows:

147.1. Items 1 – 16 of “Annexure D” were disputed as the tenders took place before the current Act came into force. These tenders were all dated before 1 September 1999, before the Act came into force and cannot be within the jurisdiction of the competition authorities.

147.2. Items 17 – 22 of “Annexure D” were disputed for a lack of particularity, Belfa claimed that it did not have sufficient institutional memory to deal with these allegations.

147.3. Items 23 – 53 of “Annexure D”, save for items 25, 43, 50, 52, and 53 was said to fall in the direct knowledge of Van Deventer, a Belfa sales director from 10 June 2005. Crucially Belfa conceded that the remaining items were tenders that were colluded on. In summary Belfa conceded to collusion in 26 instances of cover quoting.

[148.] Belfa disputed that all of the Makro contracts were secured by collusive cover prices. For example, the Makro Cape Gate contract, item 43 on “Annexure D”, was won by Belfa despite competition from Cross. Another contested Makro contract which Belfa won was the Makro Carnival City in August 2015. This is item 52 on “Annexure D”. Again, Belfa won the bid against, inter alia, Crossfire.

[149.] However, Belfa conceded that six of the Makro contracts listed in “Annexure D” were subject to collusion involving cover prices. On Belfa’s submissions, each one of these instances was an ad hoc arrangement of cover prices, rather than the expression of a broader overarching agreement to allocate customers.

[150.] In response to the market allocation allegation, Belfa contended that it never colluded to divide markets by allocating customers or by being allocated Makro as a customer. Belfa stated that it became the preferred supplier to Makro because it complied with the Makro specifications fastidiously.

[151.] None of the allegations made in Belfa's affidavits could be tested due to its virtual non-participation in the proceedings and the failure of Van Deventer to testify to the 53 items listed on Annexure D.

[152.] However, by its own admission it had colluded on at least 26 tenders/contracts. In light of our finding that the nature of the conduct was a long-standing overall cartel, we find that Belfa's defence of prescription by virtue of s67(1) cannot apply. In any event there was an onus on Belfa to put up facts to support its own defences which it failed to do.

[153.] We are thus able to conclude that Belfa contravened section 4(1)(b)(i)-(iii) in that it was party to an understanding, arrangement or agreement to directly or indirectly fix prices, divide markets and collusive tendering for the supply, installation and maintenance of fire control and protection systems.

PENALTY

Cross

[154.] After closing argument was heard, the Commission and Cross were requested to make submissions as to the penalty to be imposed. Cross proposed that an administrative penalty in the region of R 684,427.00 would be fair and proportionate, as well as consistent with the established jurisdiction. The Commission deemed that a penalty of R19 341 168.00 was appropriate in the circumstances of this case.

[155.] The Commission arrived at their figure through the application of the *Aveng* 6 step approach. An approach which, both the Tribunal and the CAC jurisprudence maintains may be used as a guideline by the Tribunal in its determination of the penalty amount, but which we are not strictly bound to apply. The Commission process is summarised below:

155.1. Step 1 Determination of the affected turnover in the relevant year of assessment, the Commission used Cross's turnover for the year end 2015 which was R

155.2. Step 2: calculation of the base amount, the Commission used %, considering the nature, gravity and extent of the cartel conduct resulting in an amount base amount of

155.3. Step 3: multiplying the base amount by the duration of the contravention. The Commission used the multiplier of 16 years, being from 1999-2015. This resulted in penalty of R441 850 336.

155.4. In step 4, the Commission rounded the proposed penalty down to % of Cross's turnover in 2017. This resulted in an amount of (as Cross's turnover in 2017 was R

155.5. In step 5 the Commission proposed a % reduction of the amount, arriving at the total figure of This did not need to be rounded off further.

[156.] Cross took issue with several of the calculations utilised by the Commission. It argued that the base amount should be calculated from 2011, rather than 2015, that the use of the totality of turnover for the calculation of the affected turnover was overly broad, that the multipliers used in step 2 and 3 were too high, and that the mitigating factors involved militated for a greater discount than proposed.

[157.] It has been held by the CAC that the overriding principle in the determination of penalties is fairness and proportionality.[74] The Tribunal therefore had to take a holistic view of the penalty. As to duration we have rejected Cross' defence of exit and the Commission's reliance on the 2015 turnover is appropriate. Whilst Cross

[74] *Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and Another* [2005] 1 CPLR 50 (CAC), page 72. See too *Competition Commission v Southern Pipeline Contractors & another*, 105/CAC/Dec10 and 106/CAC/Dec10, para 9.

was involved in the cartel for an extended period of time it was seemingly not the leader of the cartel. Whilst internal steps were taken by Stewart, as claimed by her, to change a long-standing collusive arrangement, these were not sufficient to prove its exit. Further, whilst it is true that Cross opposed the Commission's referral, its opposition was, at all times, conducted with the overarching intent to resolve the matter as quickly and efficiently as possible. It participated in the Tribunal proceedings and made its witnesses available to testify and be cross-examined.

[158.] In the context we find that there are mitigating factors in favour of Cross which are deserving of a larger reduction than the 40% mitigation proposed by the Commission. We have increased this from 40% to 60%. Thus, the penalty would be:

158.1. R[redacted] – (R[redacted] x [redacted]%)
= R[redacted] – R[redacted] = R12 894 113

[159.] A further rounding off of this amounts to a penalty of R12 894 000 (twelve million eight hundred and ninety-four thousand rand).

[160.] We thus conclude that this penalty amount is just and equitable in the circumstances of the case.

Belfa

[161.] The situation with regard to Belfa was more complex and, indeed can be said to be the reason behind the substantial delay between closing argument in this matter and the release of our order and reasons.

[162.] In its heads of argument related to the penalty, the Commission alleged that one factor which should be taken as a factor in aggravation was that Belfa had purposefully elected to undergo liquidation to avoid the payment of an administrative penalty for its cartel conduct. The Commission argued that the owners of Belfa had liquidated Belfa and had established a new firm, namely

Solutions. This, the Commission argued, was sufficient grounds for the Tribunal to rule that not only should we view this step as aggravation in calculating the penalty amount, but also that we should hold the erstwhile Belfa and the new firm, Solutions, jointly and severally liable for the penalty.

[163.] To give effect to this, the Commission brought an interlocutory application for an order from the Tribunal declaring Solutions as the same as Belfa for the purpose of imposing an administrative penalty and ordering Belfa and Solutions jointly and severally liable for any penalty that the Tribunal may impose on Belfa.

[164.] As discussed earlier, the Tribunal heard the application, at which point an agreement was struck between the Commission and Belfa that the Commission would withdraw the application and Belfa would file further information as to the circumstances around its liquidation. This agreement was recorded in an oral order issued by the Tribunal.

[165.] The Commission was thereafter afforded ample opportunity to bring a further application to join Belfa solutions to the proceedings. The Commission failed to bring this application. We will thus make our determination on penalty below on the information which is before us. The Commission is free to, at a later stage, take whatever legal steps it deems necessary to pursue its position that Solutions must be jointly and severally liable for the penalty we impose on Belfa below.

Quantum of the penalty

[166.] The Commission applied the six-step approach to Belfa and arrived at a penalty amount of R6 060 076.

[167.] Their calculations are listed below:

167.1. Step 1: Determination of the affected turnover in the relevant year of assessment. The Commission used Belfa’s turnover for the year end 2015 which was R150 585 802.

167.2. Step 2: calculation of the base amount. The Commission used 15%, considering the nature, gravity and extent of the cartel conduct resulting in a base amount of R22 587 870.

167.3. Step 3: multiplying the base amount by the duration of the contravention. The Commission used the multiplier of 16 years, being from 1999-2015. This resulted in penalty of R361 405 920.

167.4. In step 4, the Commission rounded the proposed penalty down to 10% of Belfa's turnover in 2017. This resulted in an amount of R10 100 126 (as Belfa's turnover in 2017 was R101 001 259).

167.5. In step 5, the Commission proposed a 30% reduction of the amount, arriving at the total figure of R6 060 076. This did not need to be rounded off further and it amounted to 7% of Belfa Fire's annual turnover for the year 2017.

[168.] Belfa admitted to collusion over a long period of time. It identified 53 projects in which it was involved. Belfa says nothing about whether its culture or its conduct changed. On the contrary its conduct in our proceedings suggest a degree of contempt for the Act and the law in general. None of its executives or employees testified before the Tribunal. Furthermore, neither its business rescue practitioner nor the liquidator sought to present themselves to the Tribunal with an explanation.

[169.] Indeed, the only time the erstwhile shareholders and management of Belfa bothered to participate in these proceedings was when the Commission sought to hold Solutions jointly and severally liable for the penalty to be imposed on Belfa as discussed above.

[170.] In the absence of any mitigating factors put up from Belfa, we further found its conduct to be an aggravating factor and we therefore disregard the 30% discount (mitigation) proposed by the Commission.

[171.] Accordingly, we find the amount of R10 100 126 (10% of Belfa's turnover in 2017) to be appropriate in the case of Belfa.

[172.] We thus make the order below.

ORDER

The following order is made:

[1.] The Commission's complaint against Tshwane Sprinklers CC is dismissed.

[2.] Cross Fire Management (Pty) Ltd contravened section 4(1)(b)(i)-(iii) in that it engaged in an understanding, arrangement or agreement to directly or indirectly fix prices, divide markets and collusive tendering for the supply, installation and maintenance of fire control and protection systems.

[3.] Cross Fire Management (Pty) Ltd is ordered to pay an administrative penalty amounting **R12 894 000** (twelve million eight hundred and ninety-four thousand rand) within 30 days of the date of this order.

[4.] Belfa Fire Pty Ltd contravened section 4(1)(b)(i)-(iii) in that it engaged in an understanding, arrangement or agreement to directly or indirectly fix prices, divide markets and collusive tendering for the supply, installation and maintenance of fire control and protection systems.

[5.] Belfa Fire Pty Ltd is ordered to pay an administrative penalty amounting to **R10 100 126** (ten million, one hundred thousand and one hundred and twenty-six rand) within 30 days of the date of this order.

Signed by:Yasmin Tayob Carrim
Signed at:2021-01-15 09:47:40 +02:00
Reason:I approve this document

Yasmin Tayob Carrim

Ms Yasmin Carrim

15 January 2021
Date

Mr Andreas Wessels concurring

Tribunal case manager	:	Kameel Pancham, Alistair Dey-Van Heerden, Camilla Mathonsi
For the Commission	:	Mfundo Ngobese and Katlego Monareng
For the Second Respondent	:	George Wolfe of George Wolfe Attorneys
For the Third Respondent	:	Adv. A Gotz SC and Adv. S Quinn instructed by Cliffe Dekker Hofmeyr
For the Seventh Respondent	:	Isa Vorster of Stegmanns Attorneys