

**SENTENCING HYPOTHETICAL\*****R v GOCO PTY LIMITED, SAMUEL SUNG AND ROBERT BARON****FEDERAL COURT OF AUSTRALIA****Brent Fisse**

On 10 February 2011 GOCO Pty Limited (**GOCO**), Sung and Baron were convicted in the Federal Court after pleading guilty to charges that they had committed certain cartel offences relating to the supply of arthritis drugs in Australia.

The cartel offences were discovered when PHARMACO Inc, the parent company of a global pharmaceutical group, made a leniency application to the US DOJ in relation to a conspiracy to fix the price of arthritis drugs. The other parties to the conspiracy in the US included GOCO Inc (GOCO's parent) and Baron, a director of GOCO Inc and an executive director of GOCO.

The conspiracy arose from an agreement in December 2004 between PHARMACO Inc and GOCO Inc to sell their new arthritis drugs (jTox and Arthrax respectively) around the world for no less than agreed minimum 'healthy joint prices' (the **Healthy Joint Agreement**). The Healthy Joint Agreement was reached at a meeting in a private cellar of the Faust winery in the Napa Valley. Under the agreement, the GOCO Group and the PHARMACO Group would each vary their respective prices in accordance with a schedule calculated to create an illusion of active competition (the **Joint Price Fixing Provision**). Both Groups adhered to the Healthy Joint Agreement until December 2009 when the CEO of PHARMACO Inc, became nervous and ran to PHARMACO's lawyers. Acting on their advice, PHARMACO made simultaneous applications for leniency/immunity in 15 jurisdictions including the US and Australia. Leniency/immunity was granted in all jurisdictions in return for an agreement that PHARMACO co-operate fully in the investigation of the cartel.

jTox and Arthrax were very popular drugs for the relief of serious arthritic conditions. The price of jTox and Arthrax has fallen around the world by approximately 70% since the cartel was uncovered. jTox and Arthrax have also been overtaken by ExonMobile, a new wonder drug introduced into the world market by CSIRO in June 2009.

Under a plea agreement with the US DOJ in March 2010, GOCO Inc agreed not to oppose a fine of \$US500 million. The US District Court, Northern District of California, imposed a fine of \$US500 million in June 2010.

Several class action proceedings have been brought in the US against GOCO Inc and PHARMACO Inc. At last count, the damages claims against GOCO Inc totalled \$3 billion (trebled) and the claims against PHARMACO amounted to \$1 billion (detrebled under the US DOJ's 'amnesty plus' policy).

Baron entered into a plea agreement with the US DOJ in March 2010. Under that agreement he agreed to plead guilty in the US to charges under s 1 of the Sherman Act and to a cartel offence in Australia in the event of a prosecution in Australia. The

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\* The facts set out below are entirely hypothetical and are not intended to refer to any real person or actual product.

agreement recommended a term of imprisonment of 2 years 6 months and provided for that term to be reduced 'by one day for each day of the total term of the sentence of imprisonment (other than a suspended term of imprisonment) imposed upon [him] following his conviction for the Australian cartel offence'. The agreement provided that Baron would plead guilty to such an offence in Australia and that he would not 'seek from the Australian court a sentence of imprisonment of less than 2 years 6 months'. The agreement acknowledged that the relevant course of criminal conduct in the US was from December 2004 until December 2009.

The Healthy Joint Agreement was discussed and adopted by Sung, Baron and Anne O'Dyne, the CEO of PHARMACO Pty Limited (PHARMACO Group's Australian subsidiary) at a meeting in the Cartel Bar in Melbourne in late December 2004. The Agreement was implemented thereafter until the cartel was unfolded in December 2009.

GOCO, Sung and Baron were later charged with giving effect to a cartel provision (the Joint Price Fixing Provision) in the Healthy Joint Agreement by authorising each of 20 major contracts for the supply of jTox to hospitals and chemist chains during the period 24 July 2009 to 24 December 2009 at prices determined in accordance with the Joint Price Fixing Provision. They were indicted and convicted on each count after entering pleas of guilty.

The 20 major contracts had a total value of \$10 million. The amount of the overcharge attributable to giving effect to the Joint Price Fixing Provision is unknown but has been estimated by a forensic accountant to be in the range of \$3-5 million. GOCO had an annual turnover of \$200 million in 2009 and 2010. By contrast, PHARMACO Pty Ltd entered into 25 major supply contracts for Arthrax during the same period. Those contracts had a total value of \$12.5 million. The amount of the overcharge by PHARMACO Pty Ltd is unknown.

During the period 1 January 2005 and 23 July 2009, GOCO, Sung and Baron gave effect to the Joint Price Fixing Provision in 100 major contracts for the supply of jTox. Those contracts had a total value of \$50 million. The amount of the overcharge attributable to giving effect to the Joint Price Fixing Provision is estimated to be in the range of \$15-25 million. The ACCC has not brought civil proceedings in relation to those earlier contracts. However, private actions have been brought against GOCO for contraventions of s 45(2) between 1 January 2005 and 23 July 2009 and contraventions of s 44ZZRK(1) between 24 July 2009 and 24 December 2009. The total amount of damages claimed in these actions is \$25 million.

Sung was CEO of GOCO for 8 years, before which he was a senior executive in the power transformer industry. He resigned from GOCO in January 2010. His salary in recent years was \$1 million p.a. He is 50 years old. He has no criminal record. However, he was the subject of civil enforcement proceedings by the ACCC for price fixing in 2000 and incurred a penalty of \$150,000 (then one of the highest penalties imposed on an executive for a breach of Part IV). He has cooperated with the ACCC in their investigation. He is an active churchgoer and has contributed generously to charities. His character witnesses verge on impeccable; they include an archbishop and a senior public servant from the Australian Treasury. He had been awarded an AO for his financial and other assistance to charities but relinquished that honour when news of the cartel broke.

Baron was an executive director of GOCO from 2000 and a director of GOCO Inc from 2004-. He resigned from GOCO and GOCO Inc in January 2010. His total remuneration

from both companies in 2008-2009 was \$1.5 million pa. He is 45 years old. He has an unblemished record apart from the proceedings against him in the US District Court and the plea agreement with the DOJ. He made an immunity application to the ACCC on his own behalf in December 2009 but the application was received shortly after PHARMACO had placed an immunity marker. He has cooperated with the ACCC in its investigation but the extent and value of that cooperation is disputed. He claims that he gave the ACCC detailed information orally about the involvement of other directors and employees of GOCO and GOCO Inc but that the ACCC has 'sat on its hands because they have got enough scalps'. He resigned from GOCO in the wake of the cartel but has since been employed by CSIRO as a consultant. He is anxious to avoid having to spend any time in prison in the US, partly because of the adverse implications for his wife who has been diagnosed recently with a terminal illness and has been given 3 months to live.

GOCO Inc has suffered a reversal of fortune as a result of the severe drop in the price of jTox resulting from the exposure of the cartel, the fine of \$US500 million, the GFC, the high cost of settling the class actions against it, and the market success of CSIRO's wonder drug, ExonMobile.

GOCO has also suffered a severe set-back. GOCO has few assets apart from \$10 million in term deposits and \$1 million in unsold jTox inventory. The profit forecast for 2011 and 2012 is negative. Insolvency is inevitable if GOCO is fined heavily and/or forced to pay substantial damages.

The DPP's submissions on sentence and relevant orders have the possible implications that:

- Sung be sentenced to a term of imprisonment over 3 years with a non-parole period of 65% of the term of the head sentence, and disqualified from managing a corporation for 10 years;
- Baron be sentenced to the same period of imprisonment as Sung and disqualified from managing a corporation for 10 years, with the commencement of the sentence of imprisonment to be delayed for 6 months;
- GOCO be fined for an amount at the upper end of the range set by the maximum of 10% of its last annual turnover (ie \$20 million).

Sung's submission contends that the principle of proportionality requires a much lower sentence and that the offences he committed are low in the range of severity set by the maximum term of imprisonment of 10 years. The submission argues that he was acting at all relevant times under superior orders from GOCO Inc and was thereby reduced to a state of 'diminished responsibility'. Reference is also made to his good character and the contrition shown by giving back his AO. A suspended sentence of imprisonment is urged, or a sentence of periodic detention or home detention.

Baron's submission does not oppose a sentence of over 3 years' imprisonment and suggests that the non-parole period be 50% of the term of the head sentence. One argument raised in support of a short non-parole period is that the cartel offences for which he has been convicted have not substantially lessened competition in the Australian market for arthritis drugs. Another is that he is at the mercy of the terms of the plea agreement with the US DOJ.

GOCO's submission contends that a fine is inappropriate given GOCO's limited assets and its inability to pay both a fine and the compensation it will have to pay as a result of

the private actions against it for damages. GOCO urges that, if a fine is to be imposed, the relevant maximum is not 10% of turnover but 3 times the amount of gain made from committing the offences. GOCO notes that it had a trade practices compliance guide (prepared by a former chairman of the ACCC in mid-2009) but the attempt in the guide to explain what is meant by a cartel provision under s 44ZZRD was 'like something written in Sanskrit'. Under all the circumstances, GOCO asks that a probation order be made against it and/or a community service order under which it will donate all the unsold inventory of jTox to nursing homes.

#### **Main questions/challenges**

- What factors need to be considered in determining whether or not a custodial sentence should be imposed on Sung or Baron and the length of any such sentence? What is the import of the 10 year maximum term of imprisonment under s 44ZZRG? In the case of Baron, what is the significance, if any, of the terms of the plea agreement with the US DOJ?
- In the case of GOCO, what considerations are relevant to the choice of sentence and/or order? If a fine is to be imposed, what maximum applies, and what factors are to be taken into consideration?
- Where the facts relating to the severity of the offence or the circumstances surrounding the commission of the offence are uncertain or disputed, how is the factual basis for sentencing to be determined?
- Write a submission on sentence on behalf of GOCO, Sung and Baron respectively.