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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV 2015-404-3045
[2016] NZHC 3115

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	LODGE REAL ESTATE LTD First Defendant
	LUGTON'S LTD Second Defendant

Hearing: 16 December 2016

Counsel: L C A Farmer and A McConachy for Plaintiff
K M Burkhart for Second Defendant

Judgment: 16 December 2016

(ORAL) JUDGMENT OF HEATH J

Solicitors:
Meredith Connell, Auckland
Kennedys, Auckland

Introduction

[1] Lugton's Ltd is a real estate agent based in Hamilton. It offers a range of services, including assisting or promoting vendors to sell residential properties. Lugton's acknowledges that, between 30 September 2013 and 1 August 2014, it entered into and gave effect to an anti-competitive price fixing arrangement with four other agencies in the Hamilton region: Lodge Real Estate Ltd, Monarch Real Estate Ltd (trading under the Harcourts brand), On-line Realty Ltd (trading under the Ray White brand) and Success Realty Ltd (trading under the Bayley's brand). Success has already been dealt with by the Court in relation to its anti-competitive conduct. The Court approved and imposed a pecuniary penalty of $900,000.[1]

[2] The Commerce Commission (the Commission) seeks a pecuniary penalty to mark Lugton's breach of the restricted trade practices provisions of s 27 of the Commerce Act 1986 (the Act). It relies on the deeming provisions of s 30 of the Act. Those two provisions state:

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
>
> (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (3) Subsection (2) applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.
>
> (4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.
>
> **30 Certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition**
>
> (1) Without limiting the generality of section 27, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or

[1] *Commerce Commission v Lodge Real Estate Ltd* [2016] NZHC 1494.

> maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—
>
> (a) supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or
>
> (b) resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.
>
> (2) The reference in subsection (1)(a) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

[3] The Commission and Lugton's have agreed that it would be appropriate for a penalty of $1 million to be imposed to mark Lugton's conduct. The Commission does not seek costs in relation to the proceeding. I am asked to approve the agreement reached and to make a pecuniary penalty order in the amount requested.[2]

The Court's approach to fixing penalties

[4] Section 80(1) of the Act empowers the High Court to order that a person pay a pecuniary penalty in such amount as it thinks fit if that party has (among other things) contravened a provision within Part 2 of the Act.

[5] Although it is open to parties to litigation of this type to agree on an appropriate pecuniary penalty to be imposed, it remains necessary for the Court to give its sanction to it. The authorities make it clear that the Court should acknowledge the public benefits of prompt resolution of penalty proceedings through agreement. The approach that has been consistently applied is for this Court to consider whether the amounts agreed are within an appropriate range, rather than to determine whether the penalty is the same as that which would have been imposed

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2 Commerce Act 1986, s 80(1).

by the Judge who hears a defended penalty proceeding.[3] If so satisfied, the agreement reached between the parties will be sanctioned.

[6] I adopt the approach taken by Venning J in *Commerce Commission v Kuehne + Nagel International AG,*[4] in which His Honour emphasised the need for the Court to approach its evaluation of an appropriate penalty in a manner akin to the way in which a criminal sentencing would be undertaken. That means it is necessary to determine a starting point by reference to the maximum penalties involved, and then to consider relevant aggravating and mitigating factors in relation to the particular defendant. That exercise must be undertaken individually. The respective level of culpability and mitigating circumstances can obviously differ between defendants. Although there is more than one defendant to this proceeding, the only party with which I am concerned in this case is Lugton's.

[7] In imposing pecuniary penalties, the Court is endeavouring to provide both general deterrence to others in a market who might consider acting in the same or a similar way, and specific deterrence to those who have infringed and are subject to a penalty.

[8] It is necessary for such penalties to be pitched at a level which is commercially realistic; namely, one which outweighs the likely profit margin to be obtained from any breach of provisions relating to anti-competitive conduct. After maximum penalties were increased in 2001, the Court of Appeal observed that Parliament had intended "to send a much stronger signal than the current provisions that the deterrence objective will only be served if anti-competitive behaviour is

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3 Generally, see *Commerce Commission v Alstom Holdings SA* HC Auckland CIV-2007-404-2165, 22 December 2008 (Rodney Hansen J) at para [18], applying a judgment of the Full Court of the Federal Court of Australia in *NW Frozen Foods v ACCC* (1996) 71 FCR 285; *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 (Allan J) at para [45]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-4590, 22 December 2010 (Allan J) at para [38]; *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011 (Allan J) at para [15], *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at para [21] (Venning J), *Commerce Commission v Envirowaste Services Ltd* [2015] NZHC 2936 at para [27] (Heath J) and *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360 at paras [30]–[32] (Asher J).

4 *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705, at para [21].

profitless".[5] Deterrence is the primary public policy objective in fixing the level of appropriate penalties.

[9] In determining individual penalties, the aggravating factors relating to the conduct (as opposed to the person against whom an order is sought) will generally fall into three main categories:

(a) The first involves an assessment of the particular person's culpability. Those who initiate anti-competitive behaviour will ordinarily be treated more harshly than those who carry out instructions to implement an arrangement.

(b) The second is duration. The period over which the contravening conduct occurs is a relevant factor to be taken into account.

(c) The third involves causation. The question here is whether anti-competitive behaviour has caused loss to any person or produced a significant gain for the enterprise which undertook the contravening conduct.

The "Hamilton Agreement"

[10] The anti-competitive conduct in this case arose out of what has been called the "Hamilton Agreement". That followed an announcement in mid 2013 by TradeMe that it was adopting a standard fee price model, in substitution for a subscription based cost previously charged. The primary impact on real estate agents was the need to absorb significant additional costs. The extent to which they would need to do so depended upon an ability to pass on costs to vendor clients.

[11] Between 30 September and 16 October 2013, representatives of the five real estate firms (including Lugton's) exchanged communications regarding TradeMe's new pricing model. The initial meeting was called by the largest real estate agent in

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5 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at para [53], quoting Commerce Amendment Bill 2001 (296-2) (select committee report) at 23.

the Hamilton market. Lugton's was not an initiator in the process but was an important player.

[12] Those involved in the Hamilton Agreement agreed to remove all of their listings of residential property from TradeMe, and in future, any vendor who requested their residential property be listed would be required to fund the cost of the listing itself, or alternatively the cost would be met by an individual real estate agent. The companies agreed that they would not compete with each other by offering any discount on the costs of a TradeMe listing. This conduct constituted unlawful price-fixing. In short, it compromised the ability of individual vendors to negotiate a better price.

[13] In or about July 2014, TradeMe reverted to its previous pricing model, with some changes. At that point, agencies could have reverted to their previous practices in relation to TradeMe listings. However, many have continued to pass on costs to vendors. That, to me, does not necessarily represent an aggravating feature. It was almost inevitable that costs would be passed on to vendors as time progressed.

[14] The entry into and implementation of the Hamilton Agreement had the effect of controlling prices vendors paid for the services from real estate agents in relation to such listings. Because it is deemed to have substantially lessened competition in the Hamilton real estate market, it in breach of s 27 of the Act.

Lugton's Limited

[15] Lugton's is an independent Hamilton-based real estate agency dealing mostly in residential real estate. The present managing director is Mr Simon Lugton. Mr Lugton was involved in the discussions leading to the Hamilton agreement in his previous role as a sales director.

[16] I shall say a little more later about Mr Lugton's assistance to the Commission. It is a significant mitigating factor when the final penalty amount is fixed.

Analysis

[17] In the circumstances of this case, the maximum penalty that can be imposed is $10 million.[6] As indicated, the primary public policy goal is deterrence. That must be taken into account in assessing an appropriate starting point.

[18] In the proceeding involving Success Realty, the seriousness of the conduct involved was emphasised by Courtney J. She observed:[7]

> I do not accept that this conduct falls at the lower end of the spectrum. The listing of properties on TradeMe was a widespread and popular means of advertising for vendors and the agreement had the effect of depriving vendors of access to that service or, at the least, of the ability to negotiate for that service.

[19] In assessing the seriousness of Lugton's conduct, I take account of the following factors:

(a) A significant number of residential property listings in Hamilton were affected by the anti-competitive conduct.

(b) The Hamilton Agreement involved five separate real estate agencies which, together, controlled more than 90 percent of residential sales in that area.

(c) The Hamilton Agreement was implemented through active endorsement by executives, including the current managing director.

(d) The impact of the conduct was to save costs for Lugton and throw a greater cost on vendors.

(e) Lugton's was an active participant, though not a ringleader.

(f) While Lugton's deliberately and intentionally entered into the Hamilton Agreement, it did not do so with an intent to breach the restrictive trade practices provisions of the Act.

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6 Commerce Act 1986, s 80(2B)(b)(i).

7 *Commerce Commission v Lodge Real Estate Ltd* [2016] NZHC 1494, at para [14].

(g) The duration of the conduct between mid December 2013 and August 2014 was not significant overall.

[20] Any commercial gain to Lugton's cannot be quantified. It is accepted that there was a potential for commercial advantage, though it cannot be assessed safely.

[21] In selecting an appropriate starting point the Commission has referred to a number of existing penalty judgments relating to other real estate agencies and their responses to TradeMe's altered pricing model. In particular, I have been referred by Mr Farmer, for the Commission, to the Success Realty case[8] and to two other decisions which relate to agencies operating in Manawatu.[9]

[22] Similar issues arose in that case. Court approved penalties with starting points ranging between $1.4 million and $4.1 million have resulted. Starting points towards the upper end of that range have been reserved for offending which occurred on a much larger scale. In light of those cases, Mr Farmer submits that a starting point of between $1.8 million and $2.1 million would be appropriate. Lugton adopts a slightly lower range of $1.7 million to $2.1 million.

[23] There are no aggravating factors concerning Lugton's itself but there are significant mitigating factors relating to its conduct. In particular:

(a) Lugton's has not previously been found to have contravened the Act;

(b) Lugton's is a well-resourced company. It has promptly accepted responsibility and agreed that the scale of the penalty is appropriate;

(c) Lugton's has agreed to provide ongoing cooperation to the Commission in its investigation. Significantly, Mr Lugton has agreed to give evidence for the Commission in other claims in relation to the Hamilton Agreement. The ability to rely on someone who was involved in the discussions leading to the Hamilton Agreement cannot

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8 Ibid.

9 *Commerce Commission v Unique Realty* [2016] NZHC 1064 and *Commerce Commission v Property Brokers Ltd* [2016] NZHC 2851.

be overstated. This is a factor which must be taken into account and given significant weight in assessing the range for mitigating factors.

(d) Lugton's did not initiate discussions involving the Hamilton Agreement.

[24] On that basis, the Commission accepts that a reduction of between 45 and 50 percent of the starting point is justified. I accept that that is appropriate in the circumstances of this case.

[25] That results in a final penalty range of $850,000 to $1,155,000. The suggested penalty of $1,000,000 falls within that range. I am satisfied that in relation to the question of parity of penalties imposed, this penalty fits with those that have been ordered in the two Manawatu cases and in respect of Success Realty.[10]

[26] Having regard to the aggravating and mitigating factors, and the need for a deterrent penalty, I am satisfied that the recommended penalty of $1 million falls within an appropriate range. I am prepared to approve the proposed penalty and to make the declaration sought.

Result

[27] For those reasons:

(a) I make a declaration that Lugton's engaged in conduct, arising out of the Hamilton Agreement, that breached s 27 of the Act, through application of s 30.

(b) I impose a pecuniary penalty in the sum of $1 million.

[28] By consent, there is no order as to costs.

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[10] Ibid.

[29] To protect commercially sensitive information to which I have had regard but not referred, I make an order that the Court file in relation to this proceeding not be searched, copied or inspected without leave of a Judge, on an application made on notice to both the Commission and Lugton's.

[30] I thank counsel for their considerable assistance, without which I would not have been able to give judgment orally today.

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P R Heath J