

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2014-404-003045
[2017] NZHC 1875**

BETWEEN

COMMERCE COMMISSION
Plaintiff

AND

LODGE REAL ESTATE LIMITED
First Defendant

LUGTON'S LIMITED
Second Defendant

MONARCH REAL ESTATE LIMITED
Third Defendant

ONLINE REALTY LIMITED
Fourth Defendant

SUCCESS REALTY LIMITED
Fifth Defendant

BRIAN KING
Sixth Defendant

JEREMY O'ROURKE
Seventh Defendant

Hearing: 2 August 2017

Appearances: J C A Farmer and J Carlyon for Plaintiff
G H J Brant for Fourth Defendant

Judgment: 8 August 2017

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 8 August 2017 at 3.00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

Introduction

[1] Online Realty Ltd (Online) is one of several real estate agents facing proceedings by the Commerce Commission for breaches of s 27 of the Commerce Act 1986 arising from the co-ordinated response of various agents to Trade Me's decision to revise its pricing model for listing residential properties on its website.

[2] A number of agents have admitted that their conduct was in breach of the Act and have had penalties imposed on them.¹ Online has also now admitted that it engaged in conduct that breached s 27. Online and the Commerce Commission have jointly recommended a penalty of \$1,050,000 which they say recognises the nature of the conduct and the relevant mitigating factors. They seek the Court's approval and imposition of a penalty at that level.

The contravening conduct

Relevant statutory provisions

[3] Section 27 of the Commerce Act prohibits certain types of conduct which have the effect of substantially lessening competition:

- (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) of this section 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.

¹ *Commerce Commission v Lodge Real Estate Ltd* [2016] NZHC 3115 (Lugton's); *Commerce Commission v Lodge Real Estate Ltd* [2016] NZHC 1494 (Success); *Commerce Commission v Unique Realty Ltd* [2016] NZHC 1064 (Unique Realty); *Commerce Commission v Property Brokers Ltd* [2016] NZHC 2851 (Manawatu 1994); *Commerce Commission v Property Brokers Ltd* [2017] NZHC 681 (Property Brokers and Mordaunt); *Commerce Commission v Bayley Corp Ltd* [2016] NZHC 1493 (Bayleys); *Commerce Commission v Barfoot & Thompson Ltd* [2016] NZHC 3111 (PPL).

[4] Under s 30 certain contracts or arrangements are deemed to have the purpose or effect of substantially lessening competition:

- (1) Without limiting the generality of section 27 of this Act, 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 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) of this section 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.

Online's anti-competitive conduct

[5] Online is a franchisee of Ray White (Real Estate) Ltd with one office in Hamilton. It holds about 8.5 per cent of the Hamilton residential real estate market. Other real estate agencies active in the Hamilton market include Success Realty Ltd (approximately five per cent), Lugton's Ltd (approximately 24 per cent), Monarch Real Estate Ltd (approximately 28 per cent) and Lodge Real Estate Ltd (approximately 33 per cent).

[6] These real estate agencies all provide services to the vendors of residential properties including arranging the listing of properties online. One of the websites on which properties are listed is TradeMe.co.nz. Prior to an announcement in mid-2013 real estate agents could advertise on Trade Me under a subscription-based model under which they paid a capped standard fee of approximately \$990 plus GST

per office, per month, for an unlimited number of standard property listings.² Ray White (of which Online is a franchisee) had a “one system” agreement with Trade Me under which it paid a monthly fee for unlimited standard listings for all offices within the Trade Me network and recovered those monthly fees from its franchisees, including Online. This enabled Online to upload standard listings onto Trade Me at no charge to the vendors. Other “feature” listings were treated slightly differently and usually paid for by the vendors rather than the real estate agent.

[7] In 2013 Trade Me advised real estate agents that it was revising its pricing model and introducing a new “price per listing” model under which it would charge \$159 plus GST for each standard residential property listing. Ray White negotiated a transitional arrangement with Trade Me under which its franchisees would not transition to the per-listing price model until 1 July 2014. That agreement was later extended to 1 October 2014. Ultimately, Trade Me introduced a revised subscription pricing model and a revised listing model, so that Ray White franchisees, including Online, never actually operated under the original per-listing pricing model.

[8] Under the transitional arrangement Online could have remained on the subscription pricing model and absorbed the cost of standard Trade Me listings at no additional cost until 1 August 2014 when the revised subscription pricing model came into effect. However, on 30 September 2013 Online representatives³ met with representatives of other Hamilton agencies (Lodge, Lugton’s, Monarch and Success) and reached an agreement which is now known as the Hamilton agreement.

[9] Under the Hamilton agreement the participating real estate agents agreed that they would remove their residential property listings from Trade Me and, in the event of vendors requesting that their properties be listed on Trade Me, would pass the cost of that listing on to the vendor. In pursuance of the Hamilton agreement Online withdrew all its existing standard listings from Trade Me on 20 January 2014 and ceased to upload standard listings from that date. Instead, it offered Trade Me listings to its vendors for a per-listing price. This was despite the fact that under the transitional agreement Online could have continued to provide standard listings to

² Some larger agency networks were able to negotiate even lower fees.

³ The managing director, Carl Glasgow, and general manager, Dennis Coombes.

vendors free of charge at no extra cost until Trade Me introduced the revised subscription pricing model on 1 August 2014.

[10] The other real estate agents took similar steps. Between December 2013 and January 2014 Lugton's removed its existing Trade Me listings and ceased uploading listings as a matter of course, only doing so if the vendor agreed to pay the full fee. Lodge and Monarch withdrew their existing Trade Me listings and subsequently passed on the cost of listings to vendors. Success was already charging its vendors a fee for a standard Trade Me listing and therefore did not withdraw its existing listings. It did, however, implement a system of requiring vendors to fully fund Trade Me listings from 1 March 2014.

[11] Online admits that by entering into and giving effect to the Hamilton agreement it contravened s 27, via s 30 of the Commerce Act.

Penalty

[12] Online accepts that under s 80(1)(a) it is liable to a penalty in respect of its contravening conduct. The maximum penalty for contravening conduct of this kind is the greater of \$10 million or either three times the commercial gain obtained from the breach (if readily ascertainable) or 10 per cent of the company turnover from trading within New Zealand (if commercial gain is not readily ascertainable).⁴

[13] The Commission and Online have agreed that, while there was the potential for commercial gain (through cost saving to Online when it moved from the subscription pricing model to the per-listing pricing model) any commercial gain is not readily ascertainable for the purposes of assessing a penalty under the Act. As a result the maximum penalty available is \$10 million per breach of the Act.

[14] It is uncontested that the parties to proceedings such as this may reach a common view as to an appropriate penalty and seek to have the Court impose that figure as the penalty. The Court recognises that this approach is in the interests of the parties and the community because of the saving in time and cost as a result of

⁴ Commerce Act 1986, s 80.

resolving matters at as early a stage as possible.⁵ As Rodney Hansen J observed in *Commerce Commission v Alstom Holdings SA*, the Court should play its part in promoting such resolutions by accepting penalties that are within the proper range and a defendant should not be deterred from a negotiated resolution by the fear of it being rejected because it is different from the penalty the Court might otherwise have imposed.⁶

[15] I approach the assessment of the appropriateness of the proposed settlement figure in a broadly similar way to a criminal sentencing i.e. finding an appropriate starting point and considering the aggravating and mitigating factors.⁷ Of course, this is not a mathematical calculation and it is the end result that really matters. In this case parity with comparable cases involving other parties to the Hamilton agreement is highly relevant.

[16] I start from the well recognised position that in assessing penalties for these kinds of breaches the primary objective is to achieve both general and specific deterrence.⁸ In particular, penalties must be sufficient to ensure anti-competitive conduct is not profitable.⁹ The relevant factors in assessing the seriousness of the conduct to establish an appropriate starting point include¹⁰ the nature of the market, the nature and seriousness of the conduct, the role of the defendant, the deliberateness of the conduct, the seniority of personnel involved, the duration of the conduct, the potential gain to the defendants and the harm caused by the conduct.

[17] Online was one of a relatively small number of real estate agents who, between them, controlled some 90 per cent of the residential property market in Hamilton. Given the widespread use of Trade Me to advertise residential property it is obvious that the Hamilton agreement would have affected a very large number of vendors in Hamilton during the relevant period. Some vendors, who would

⁵ *Commerce Commission v New Zealand Milk Corporation* [1994] 2 NZLR 730; *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18]; *Commerce Commission v Air New Zealand* [2013] NZHC 1414 at [23].

⁶ Above, n 5.

⁷ *Commerce Commission v Kuehne+ Nagel International AG* [2014] NZHC 705 at [21].

⁸ *Telecom Corporation of New Zealand v Commerce Commission* [2012] NZCA 344 at [53].

⁹ *Telecom Corp of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [20].

¹⁰ *Commerce Commission v Alstom Holdings SA*, above n 5, at [20]; *Commerce Commission v Unique Realty Ltd*, above n 1, at [30]-[36]; *Commerce Commission v Property Brokers Ltd* (Manawatu 1994), above n 1, at [5].

otherwise have listed on Trade Me, would have been put off doing so. Those who chose to list on Trade Me paid more than they may have done had they been able to negotiate the cost of a marketing package that included a Trade Me listing. The Hamilton agreement deprived vendors of that ability.¹¹

[18] Although entering into the Hamilton agreement was serious conduct in terms of its impact on vendors, not all the parties to the agreement acted in the same way. It is accepted that Online, whilst an active participant, was not a ringleader or initiator. I also accept that, although Online deliberately entered into the Hamilton agreement, it did not intentionally breach the Commerce Act. As against this, the most senior of Online's personnel (its managing director and general manager) were involved and I accept that their seniority contributed to the likelihood that others would have become involved in the Hamilton agreement.

[19] Finally, I note the Commerce Commission's submission that the Hamilton agreement had an ongoing effect on the real estate market in Hamilton. Prior to the agreement, the status quo was that the cost of standard Trade Me listings was commonly absorbed by the real estate agents. In the normal course, any move to a vendor-funded listing arrangement against that background would most likely have resulted in some real estate agents electing to negotiate, thereby retaining competition in the market. Although Trade Me did not ultimately implement the per-price listing arrangement initially proposed, as a result of the Hamilton agreement the majority of Hamilton real estate agents implemented a vendor-funded model. This has been retained despite the implementation of the revised subscription model. The Hamilton agreement has brought a significant and lasting change to the market.

[20] I turn then to consider an appropriate starting point and I do so with reference to the penalties already imposed on Lugton's and Success. In imposing a penalty on Success I accepted a starting point range of \$1.4 – \$1.7 million was available, taking into account my view of the gravity of the offending, the fact that Success had not intentionally infringed the Act, that its most senior employee had been involved in negotiating the Hamilton agreement on behalf of Success and that Success' share of

¹¹ See my comments in *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [14] and Heath J's adoption of those comments in *Commerce Commission v Lodge Real Estate & Ors*, above fn 1 at [18].

the Hamilton real estate market was about 5 per cent. I accepted that a 45 per cent discount was appropriate to reflect Success' early co-operation, compliance with a formal co-operation agreement and acknowledgment of its contravening conduct at an early stage. I therefore approved and imposed a final penalty of \$900,000.

[21] In *Lugton's*, Heath J imposed a penalty of \$1 million. He took a slightly higher starting point range of \$1.7 – 2.1 million with a discount of 45 – 50 per cent to reflect the early admission by Lugton's, their active co-operation and provision of a witness in the proceedings.

[22] Also of assistance are the decisions in *Commerce Commission v Unique Realty Ltd*, *Commerce Commission v Property Brokers* and *Commerce Commission v Property Brokers*. These related to an agreement reached amongst real estate agents in the Manawatu region similar to the Hamilton agreement. It was a slightly more limited agreement, only involving vendor funding rather than the removal of existing Trade Me listings. In *Unique Realty* and *Manawatu* starting points of \$1.5 – 1.8 million were taken with discounts of 25 – 30 per cent to reflect early admission of responsibility and in both cases penalties of \$1.35m were imposed. In the *Property Brokers* case a slightly higher starting point range was taken of \$1.8 – 2.3 million and a higher end penalty of \$1.45 million, reflecting Property Brokers' role as ringleader and the party that took responsibility for monitoring its implementation.

[23] I accept that given Online's modest market share and its role as participant rather than ringleader, the appropriate starting range sits above the *Success* case on one hand and below the *Lugton's*, *Property Brokers*, *Bayleys* and *Barfoot & Thompson* cases on the other. It is similar to *Unique Realty* and *Manawatu 1994*. I accept the parties' assessment of an appropriate starting point range of \$1.5 – 1.8 million.

[24] A substantial discount is available to Online. It has acknowledged its responsibility and, although that was not at the earliest available opportunity, it was before the Commission's briefs were filed, thereby enabling the Commission to avoid the time and cost in preparing that evidence. It has also entered into a settlement agreement under which it has agreed to provide ongoing co-operation,

including the provision of its former general manager as a witness in the proceeding and the use of a brief of evidence signed by its managing director.

[25] The Commission recommends a 40 per cent discount which recognises Online's co-operation but reflects the fact that it occurred at a later point relative to *Lugton's* and *Success*. This results in a final penalty range of \$900,000 – \$1,080,000.. I am therefore satisfied that the recommended penalty of \$1,050,000 is an appropriate one that falls within the correct range and properly reflects the relevant factors.

Staged payment

[26] Online seeks orders that would enable it to pay the penalty over a period of three years. Its managing director, Mr Glasgow, has provided an affidavit in support of this application in which he sets out confidential financial information in support of the application.

[27] I accept for the reasons canvassed in Mr Glasgow's affidavit that current uncertain trading conditions mean that provision for staged payment would allow the full penalty to be paid while Online continues to trade in an orderly way. The Commerce Commission does not oppose staged payment and Mr Farmer, for the Commission, confirmed that the Commission was not seeking interest.

Result

[28] For the reasons set out above, I:

- (a) make a declaration that Online's conduct contravened s 27, via s 30, of the Commerce Act 1986; and
- (b) impose a pecuniary penalty of \$1,050,000;

[29] The penalty is to be paid as follows:

- (a) \$350,000 within 20 working days of the date of this decision;

- (b) \$233,333 one year from the date of the first payment referred to at (a);
- (c) \$233,333 two years from the date of the first payment referred to at (a);
- (d) \$233,334 three years from the date of the first payment referred to in (a).

[30] No issue as to costs arise, the parties having agreed that costs will lie where they fall.

P Courtney J