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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CIV-2015-404-003045  
[2017] NZHC 1497**

UNDER Sections 27, 30 and 80 of the Commerce  
Act 1986

BETWEEN COMMERCE COMMISSION  
Plaintiff

AND LODGE REAL ESTATE LIMITED  
First Defendant

cont .../2

Hearing: 12-15, 18-22, 27-28 September 2017

Appearances: J C L Dixon QC, L C A Farmer and A L McConachy for  
Plaintiff  
L J Taylor QC and M A Cavanaugh for First and Seventh  
Defendants  
D H McLellan QC, M S Anderson and J H Whitehead for Third  
and Sixth Defendants

Judgment: 2 November 2017

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**JUDGMENT OF JAGOSE J**

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*This judgment is delivered by me on 2 November 2017 at 4.30 pm  
pursuant to r 11.5 of the High Court Rules.*

.....  
*Registrar / Deputy Registrar*

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DAC Beachcroft New Zealand, Auckland (3<sup>rd</sup> and 6<sup>th</sup> Defendants)

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

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## Summary

[1] Trade Me facilitates online financial transactions between buyers and sellers, for a fee charged to sellers. Trade Me Property, which provides advertising aspects of that service to buyers and sellers of real estate by publishing property listings, extended that more limited service to real estate agencies. Real estate agencies were charged a capped subscription fee, entitling publication of any number of real estate listings on Trade Me. The agencies typically absorbed the cost of Trade Me publication.

[2] In late 2013, Trade Me notified a change to the fee charged to real estate agencies, from the capped subscription fee to a 'per listing' fee. The change meant many agencies would incur substantial increases in their annual cost of publishing new Trade Me listings. Agencies continuing to publish their real estate listings on Trade Me had two options for dealing with the new fee: either they could thereafter continue to bear the cost themselves, or require the relevant vendor (or their individual agent) to fund all or some of the cost of each Trade Me publication. Trade Me encouraged the latter, described as a 'vendor funding model'.

[3] On 30 September 2013, a number of real estate agencies based in the Hamilton area met to discuss an alternative to Trade Me publication: publication on realestate.co.nz, the real estate industry's own property listing website.

[4] The plaintiff (the "**Commission**") alleges, at that meeting, the agencies agreed to withdraw their current residential real estate listings from Trade Me by 20 January 2014, not to bear any of the cost of any further listings on Trade Me, and to require vendors and/or their individual agents to pay for any new listing on Trade Me.

[5] The agencies are alleged subsequently to have removed their residential real estate listings from Trade Me. On Trade Me's implementation of its new pricing, the Commission alleges agencies only listed their vendors' properties on Trade Me if the cost of such publication was borne by the vendors and/or their individual agents.

[6] The agencies are thereby alleged, being in competition with each other for provision of various real estate services, to have entered into and given effect to agreements having the purpose, effect or likely effect of fixing, maintaining or controlling – or providing for the fixing, controlling, or maintaining – of the prices for those real estate services.

[7] Section 30 of the Commerce Act 1986 (the “Act”) deems such conduct to contravene s 27’s prohibitions on entry into, or giving effect to, agreements with the purpose, effect or likely effect of substantially lessening competition in a market. Section 80 of the Act entitles the Court to order contravening persons to pay an appropriate pecuniary penalty to the Crown.

[8] The Hamilton real estate agencies who met on 30 September 2013 are the first to fifth defendants in this proceeding. The second, fourth, and fifth defendants (respectively, “**Lugton’s**”, “**Online**”, and “**Success**”) admitted their liability, and were ordered to pay pecuniary penalties. Each agency was represented at the meeting by one or more of their principals; the seventh and sixth defendants, Mr O’Rourke and Mr King, represented the first and third defendants (respectively, “**Lodge**” and “**Monarch**”). The Commission pleads Mr O’Rourke’s and Mr King’s conduct also contravened the Act; alternatively, Mr O’Rourke and Mr King were ancillary parties to the agencies’ contraventions.

[9] Lodge and Monarch (and Mr O’Rourke and Mr King) accept they met with the other agencies on 30 September 2013, and accept the agencies were all in competition with each other for defined ‘Real Estate Sales Services’, but deny they were in competition to supply subsidiary services pleaded by the Commission, and deny they entered into or gave effect to the agreement alleged by the Commission. They also deny, even if proven to have entered into and/or given effect to the alleged agreement, the agreement fell within s 30’s prescription (and thus was not deemed within s 27’s proscription).

[10] This judgment concerns only liability for breach of s 27; if liable, a hearing to determine penalty will follow. Here I am to determine:

- (a) whether, on 30 September 2013, Lodge and Monarch (and Mr O'Rourke and Mr King) entered into the alleged agreement with the other defendants;
- (b) whether Lodge and Monarch (and Mr O'Rourke and Mr King) subsequently gave effect to that agreement as alleged by the Commission;
- (c) whether the agencies compete with each other in provision of subsidiary defined advertising services, distinctly from the defined Real Estate Sales Service; and
- (d) whether the alleged agreement fell within s 30.

[11] For the reasons set out in the balance of this judgment, I find:

- (a) the defendants were part of a consensus giving rise to expectations each would not absorb the cost of Trade Me's proposed per listing fees, and each (other than Success) would withdraw their standard listings from Trade Me by January 2014, subsequent Trade Me listings to be vendor funded. For the purposes of s 27, the defendants entered into an arrangement, or arrived at an understanding, to those ends;
- (b) by withdrawing agencies' standard listings from Trade Me, and moving to vendor funding of Trade Me standard listings, being actions in accordance with their arrangement or understanding, the defendants gave effect to it; and
- (c) the defendants were in competition with each other for the supply of both real estate sales services and real estate advertising services to prospective vendors of residential property in Hamilton; but
- (d) the arrangement or understanding between the defendants did not have the purpose or effect of fixing, controlling, or maintaining (or providing for the fixing, controlling, or maintaining) of the price for, or any discount, allowance, rebate, or credit in relation to, real estate

sales or advertising services supplied by the defendants in competition with each other.

My findings mean the Commission's claim is unsuccessful.

### **The pleadings**

[12] The Commission alleges the Hamilton real estate agencies offer services to vendors of residential property to assist or promote sale of the vendor's property. The services range from arranging for the listing of the property on Trade Me ("**Trade Me Services**") and on other websites (together with Trade Me listing, "**Online Advertising Services**"), to marketing and promotion of the property generally ("**Real Estate Advertising Services**"), to assistance with and advice on all aspects of the sale process ("**Real Estate Sales Services**"). In that hierarchy, each defined service includes its predecessor.

[13] Lodge and Monarch deny all but the last services, but admit they each provided that last in competition with the other agencies. Mr King and Mr O'Rourke join in that denial and admission.

[14] The Commission also alleges:

- (a) at a meeting between them on 30 September 2014, the agencies (including Mr King and Mr O'Rourke) agreed:
  - (i) they would, no later than 20 January 2014, remove from Trade Me all of their listings of residential property for sale; and
  - (ii) if, after that date, vendors requested their residential property be listed for sale on Trade Me, the cost of that listing would be funded by the vendor, and/or the particular real estate agent (alone or in combination defined by the Commission as 'vendor funding');
- (b) Lodge (and Mr O'Rourke) gave effect to the agreement, including by complying with it, seeking to have another Hamilton real estate agency attend a subsequent meeting of the agencies, communicating

that agency's refusal to attend to the other agencies, and advising Lugton's of Lodge's steps taken to give effect to the agreement; and

- (c) Monarch (and Mr King) gave effect to the agreement, including by complying with it, and corresponding with Online and Success about their continuing Trade Me listings.

[15] Lodge and Monarch (and Mr King and Mr O'Rourke) admit attending the 30 September 2013 meeting, but deny both entering and/or giving effect to any agreement arising from it.

[16] The Commission alleges, as a result of the agreement, the agencies fixed, controlled or maintained the price, or components of the price, vendors paid for the pleaded services – such being a deemed breach of s 27(1) and (2) of the Act. In the alternative for Mr King and Mr O'Rourke, the Commission alleges they were accessories to the agencies' deemed breaches. Lodge and Monarch (and Mr King and Mr O'Rourke) deny all that.

### **The law, in outline**

[17] Section 30 of the Act provides, under the heading 'Price fixing':

#### **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 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.

[18] Section 27(1) and (2) in turn provide:

**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.

[19] The effect of the two sections read together is to render competitors' entry into or arrival at, or giving effect to, a price fixing agreement (to use a neutral term) a breach of s 27. It is irrelevant whether the agreement has the purpose, effect, or likely effect of substantially lessening competition in a market. Section 30 deems that to be the agreement's result.<sup>1</sup>

[20] The threshold question is whether there is a 'contract, arrangement or understanding'. Plainly, the focus is on some concerted action. The phrase is interpreted disjunctively: a contract is a legally enforceable agreement,<sup>2</sup> but 'arrangement' and 'understanding' are more nebulous concepts.

[21] The Courts have struggled to define 'understanding' materially distinctly from 'arrangement'. The distinction may be no more than a matter of degree.<sup>3</sup> In *Giltrap City Ltd v Commerce Commission*,<sup>4</sup> Gault P's and Tipping J's joint judgment articulated the test as follows:<sup>5</sup>

Before there can be an arrangement under s 27 (or for that matter an understanding) there must be a consensus between those said to have entered

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<sup>1</sup> *Commerce Commission v Taylor Preston Ltd* [1998] 3 NZLR 498 at 504.

<sup>2</sup> *Commerce Commission v Carter Holt Harvey Building Products Ltd* (2000) 9 TCLR 535 at 555.

<sup>3</sup> *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 at 662.

<sup>4</sup> *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608.

<sup>5</sup> At [17].

into the arrangement. Their minds must have met – they must have agreed – on the subject matter. The consensus must engender an expectation that at least one person will act or refrain from acting in the manner the consensus envisages. In other words, there must be an expectation that the consensus will be implemented in accordance with its terms.

The bar is determinedly not set high.<sup>6</sup>

[22] The joint judgment earlier stated:<sup>7</sup>

We do not consider it appropriate to be tied in any determinative way to the concepts of mutuality, obligation and duty. While the concept of moral obligation is helpful in that it will often reflect the effect of an arrangement or understanding under s 27, the flexible purpose of the section is such that it is best to focus the ultimate inquiry on the concepts of consensus and expectation. A finding that there was a consensus giving rise to an expectation that the parties would act in a certain way necessarily involves communication among the parties of the assumption of a moral obligation.

But McGrath J added “one cannot have an expectation to the necessary degree that another will perform an act unless the first person considers the other legally or morally obliged to do so”.<sup>8</sup>

[23] The parties’ concurrence (again, to use a neutral term) must have the purpose, effect or likely effect of price fixing:

- (a) by ‘purpose’ is meant a substantial object or aim, even if there are multiple purposes,<sup>9</sup> and is to be assessed objectively;<sup>10</sup> and
- (b) ‘effect or likely effect’ has regard for the result – either actual, or anticipated as “a real and substantial risk”.<sup>11</sup>

Where it is obvious the concurrence could not have the prescribed effect then, assessed objectively, that cannot have been its purpose.<sup>12</sup>

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<sup>6</sup> *Commerce Commission v Wellington Branch NZ Institute of Driving Instructors* (1990) 4 TCLR 19 at 24.

<sup>7</sup> Giltrap, above n 4, at [15].

<sup>8</sup> At [68].

<sup>9</sup> *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 at 707.

<sup>10</sup> *Todd Pohokura Ltd v Shell Exploration NZ Ltd* [2015] NZCA 71 at [256] and [266].

<sup>11</sup> On ‘effect’, *Commerce Commission v Bay of Plenty Electricity* CIV-2001-485-917, 13 December 2007 at [342]; on ‘likely effect’, *Commerce Commission v Woolworths Ltd* (2008) 12 TCLR 209 at [63].

<sup>12</sup> *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) at [256]-[258].

[24] ‘Price fixing’, in the vernacular, is technically “fixing, controlling, or maintaining” the price of goods or services. It encompasses “any discount, allowance, rebate, or credit in relation to goods or services”. The section also catches concurrences “providing for” such results – that is, establishing a formula or process by which price may be fixed, controlled or maintained.<sup>13</sup> The phrase has a defining unity – it seeks to capture artificial interferences with the competitive determination of price.<sup>14</sup> The Act defines ‘price’ as including:<sup>15</sup>

... valuable consideration in any form, whether direct or indirect; and includes any consideration that in effect relates to the acquisition or supply of goods or services..., although ostensibly relating to any other matter or thing.

[25] The concurrence must also be between “parties... in competition with each other” to acquire or supply the goods or services subject to the price fixing. Section 30 does not refer to a ‘market’ (and need not, as market power is not under scrutiny under the section), which would otherwise bring in irrelevant market definition considerations.<sup>16</sup> The question is simply whether the parties compete with each other to acquire or supply the goods or services at issue. Or, to be more precise – given the section’s references to “or any of them” – whether any of the parties so compete with at least another of the parties.<sup>17</sup>

[26] Given inclusion of Mr King and Mr O’Rourke as defendants, if not themselves qualifying parties to the concurrence, they may nonetheless be liable as accessories. Section 80(1) of the Act extends liability to those who have “aided, abetted, counselled, or procured any other person to contravene” the Act, or “been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person”.

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<sup>13</sup> *Commerce Commission v Siemens AG* (2010) 13 TCLR 40 at [255].

<sup>14</sup> *Commerce Commission v Caltex New Zealand Ltd* [1998] 2 NZLR 78 at 84-85; *Commerce Commission v Caltex New Zealand Ltd* (1999) 9 TCLR 305 at 311 and 313.

<sup>15</sup> Commerce Act 1986, s 2.

<sup>16</sup> *Commerce Commission v Air New Zealand Ltd* (2011) NZBLC 103,318 at [75].

<sup>17</sup> *Trade Practices Commission v David Jones (Australia) Pty Ltd & Ors* (1986) 13 FCR 446 at 474; 64 ALR 67 at 95.

[27] Last, the standard of proof is “the standard of proof applying in civil proceedings”.<sup>18</sup> “the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them”.<sup>19</sup>

## **Facts**

### *Hamilton real estate market*

[28] Lodge, Lugton’s, Monarch, Online and Success each provide real estate agency services in Hamilton. They compete by securing properties for sale through their respective agency.

[29] Lodge is Hamilton’s only member of the New Zealand Realtors Network (“NZRN”), which is a network of geographically-separate real estate agencies. Lugton’s is not affiliated with any other real estate agency. Monarch, Online and Success are respectively franchisees in the national Harcourts, Ray White and Bayleys groups of real estate agencies. There is a number of smaller agencies, including Eves Realty (owned by Realty Services Limited, the same company as owns Success), and George Boyes & Company Limited (a franchisee of the national L J Hooker group). Assessments of market share (calculated by average monthly sales volumes) vary, but it is generally accepted Lodge (with approximately 35% market share), Monarch (28%), and Lugton’s (25%) are the larger agencies in Hamilton, with the other agencies’ shares in single figures.

[30] The agencies provide a variety of services aimed at obtaining the sale of residential real estate. Those services include promotion and marketing of the property for sale, by point-of-sale advertising and in various media. The property may be listed for sale in the agency’s (and/or its group’s) proprietary publications and website, in relevant newspapers and magazines, and on specialist property websites (in particular, realestate.co.nz and trademe.co.nz/property). Generally speaking, some proportion of marketing costs – especially those incurred with third

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<sup>18</sup> Commerce Act 1986, s 79A.

<sup>19</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at [112].

parties – is paid for by the prospective vendor, regardless of whether a sale eventuates.

[31] Real estate agents obtain income from commission earned on the property's sale. Both the level of commission charged by an agency, and the split of marketing costs between vendor and agency, provide a basis on which agencies may compete between each other, to secure listings of residential real estate for sale by their registered proprietors. The larger three agencies publish materially identical commission rates, of 4% of the first \$250,000 of sale price and 2% thereafter, but the actual commission rate and split of marketing costs for all agencies is for negotiation with each prospective vendor.

[32] A feature of the Hamilton real estate market is 'conjunctional sales arrangements'. Under such arrangements, listing agencies permit other agencies to view their stock. If sale is secured by other than the listing agency, the agencies share the commission. Success (and later Eves) was a latecomer to the Hamilton market. Success was initially unable to obtain conjunctional sales arrangements with four of the five other real estate agencies in Hamilton, although it later secured them with those four. When Eves entered the market in February 2013, Lodge, Lugton's and Monarch all cancelled the arrangements with Success.

*Trade Me's new pricing structure for real estate agencies*

[33] Trade Me is a publicly listed company, carrying on business as an online marketplace and classified advertising platform. Since 2005, it provides a standalone property listing service to vendors and lessors of real estate, and to real estate agencies representing them, known as Trade Me Property (but referred to in this judgment simply as "**Trade Me**").

[34] Trade Me provides a standard listing service, by which a residential property is listed for sale or rent, optionally accompanied by photographs of the property, on the vendor's payment of a fee. Trade Me also offers premium listing services ("**feature listings**"), giving the listing greater prominence on Trade Me's site, for an additional fee. Unless withdrawn by the vendor, the property remains listed until sold or rented.

[35] Trade Me provided its standard listing service to real estate agencies, at a capped monthly subscription fee. The headline fee comprised a base fee plus a fee for each listing, capped at \$999. The fee would be charged to each office of a subscribing real estate agency. In practice, the cap was reached by an office listing more than five or six residential properties for sale in the month at issue. Further listings during the month attracted no additional fee. Discounted feature listing fees were also available to agencies.

[36] Some national real estate agencies had negotiated a set monthly fee for unlimited residential real estate listings by offices in their networks. Others had negotiated reductions in elements of the standard listing fee available to offices or franchisees in their networks. Some franchisees had negotiated their own terms for residential real estate listings. And Trade Me also had individual agreements with some independent real estate agencies, discounted from the standard listing fee. Trade Me understood most real estate agencies absorbed the cost of the subscription fee.

[37] Most real estate agencies uploaded their residential listings to Trade Me by means of an automatic upload function, or 'feed', in software used to publish their real estate listings online. The feed automatically uploaded listings to any number of online platforms, including the agencies' own or others' websites.

[38] In about 2012, Trade Me began to consider changing its fee structure to real estate agencies. It was aware people's time online was increasing dramatically, while time spent television viewing or newspaper and magazine reading was declining. From independent market studies, it apprehended expenditure on online advertising was rapidly increasing and would overtake expenditure on newspaper advertising in the next few years. It commissioned market research (albeit from a small sample), which suggested around 60% of recent purchasers first found their property, or the real estate agent who sold them their property, on Trade Me; around 70% of recent purchasers said they used Trade Me first to search for properties, and around 80% of vendors (given a budget of \$500 and one choice of marketing channel) would choose to list on Trade Me. The research suggested vendors on average were prepared to pay \$241 (excluding GST) to list a property for sale on Trade Me.

[39] In Trade Me's view, given its market position, it could obtain reallocation of some of vendors' expenditure on print advertising. That required Trade Me to replace real estate agencies' subscription fee model with one incentivising agencies to treat Trade Me listing comparably with print advertising. Real estate agencies typically require vendors to pay for all or most print advertising. Trade Me's primary objective was to recover at least \$120 for each real estate agency listing.

[40] By mid 2013, in pursuit of its 'property yield project', Trade Me arrived at a new fee structure for residential listings by real estate agencies. Instead of the previous subscription fee model, it proposed a single fee for each standard residential listing of \$199, \$40 of which was to be a commission payable to the real estate agency. (The commission element was soon dropped, when Trade Me understood it complicated agents' disclosure obligations to vendors.)

[41] Trade Me's CEO's report to its 15 August 2013 Board of Directors meeting noted:

While we are hopeful that realtors recognise this will accelerate the move to vendor funding, we're acutely aware this is still a six-fold price increase for many franchises. The listing price increase was driven by a desire to reach a price where most agents would be inclined to pass the cost on to vendors.

The minutes of that meeting recorded "Industry speculation and some negative real estate industry sentiment was apparent after a Morningstar report on property yield plans", but "Vendors are expected to demand that their agents list on Trade Me Property".

[42] In September 2013, Trade Me's CEO reported to the Board the pricing changes were "proceeding as planned". He advised Trade Me would announce the pricing changes on 19 September 2013, but noted the risk of "Some kind of cooperation amongst the big franchises where they agree to withhold their inventory from Trade Me". As to risk, he advised:

There is still a reasonable level of risk in the yield project, due to two factors:

1. **The major players in the industry are talking, and more aligned than they have been in the past.** The PPL shareholders<sup>20</sup> have already agreed to stop their brands receiving [Trade Me Property (“TMP”)] sponsorship, and are likely to be ‘less active’ in promoting use of TMP. However, at this stage it does not appear any will actively discourage use.
2. **Gaining upfront volume commitment from franchises and discounts.** The franchise structure of many of the businesses, combined with our level of pricing means that franchises are not committing to volume. Some franchises indicate they expect we may lose 50% of their volumes. Despite a willingness from vendors to pay..., agents need to secure listings and are increasingly willing to offer free marketing. We then become a cost to the agent. We have developed an offering that should better enable decentralised commitment from the largest franchises, and we’ll ‘road-test’ this with Harcourts.

We will run a consumer campaign to drive vendors to ask for TMP by name, which we expect to keep the acid on real estate agents. This will lean heavily on the results of our recent survey of buyers and sellers of property....

[43] The CEO also noted under a heading “Competitors and disruptors”:

Following our initial pricing discussions with the major real estate franchises, the Realestate.co.nz board have met several times. The only known actions are a hold on all sponsorship/group events from Trade Me from the five franchises who are shareholders (Ray White, Harcourts, Bayleys, Barfoots and LJ Hookers). We have been told there may be large investment back into the site, or a partnership with APN (though this speculation seems to have subsided recently). Realestate.co.nz audience and listings – while consistent – have not grown over the last 12 months.

[44] The minutes of Trade Me’s 19 September 2013 meeting record:

[T]he property yield project is proceeding and the team is cautiously optimistic that there will be no effective competitive move by Realestate.co.nz. Agents have reported though, in the course of meetings with Trade Me on the price changes, that with a shortage of listings in the market there is considerable competition between agents to secure listings and in many instances marketing costs are not being passed to vendors but are absorbed by agents themselves. An increase in Trade Me property listing fees therefore affects agents directly, not just their vendor clients.

[45] Trade Me was aware it risked losing volume “(and therefore a loss of comprehensive inventory)” through its per listing model. It sought to mitigate that by

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<sup>20</sup> ‘PPL’ is Property Page (NZ) Limited, whose shareholders are the national real estate agencies Barfoot & Thompson, Bayleys, Harcourts, LJ Hooker, and Ray White New Zealand. PPL owns 50% of the property listing website realestate.co.nz, which is a competitor to Trade Me.



convincing vendors directly of Trade Me's value. However, by April 2014, Trade Me's CEO was reporting to the Board he expected "to be passed in residential for sale listings imminently" by realestate.co.nz, losing Trade Me's long-term leading position.

*Hamilton real estate agencies learn of new Trade Me pricing structure*

[46] Trade Me initially dealt exclusively with the major real estate agency groups and networks, and agreed not to approach individual franchisees and agencies while the new pricing structure was finalised, by negotiation or otherwise. By late August 2013, as news spread through those groups and networks, real estate agencies became aware of Trade Me's proposed new pricing structure.

—Lodge (NZRN)

[47] Lodge annually paid Trade Me \$8,000-\$9,000 in subscription fees for standard residential listings, under an arrangement negotiated with Trade Me by NZRN in 2008. That equated to approximately \$6 per listed property, which Lodge absorbed.

[48] On 28 August 2013, NZRN's General Manager, Vaughan Borcovsky, met with Trade Me's Head of Property, Brendon Skipper. Mr Borcovsky learned Mr Skipper had already met with a number of the major real estate franchises (including at least one of NZRN's board members, Peter Thompson of Auckland's Barfoot & Thompson agency) to advise of Trade Me's intended pricing change. That was consistent with rumours Mr Borovsky heard in about May 2013 of a significant change in Trade Me's pricing.

[49] At the meeting over breakfast at Sky City in Auckland, Mr Skipper spoke to a presentation, which – after outlining some of Trade Me's rationale and justifications for the pricing change, to take effect by late 2013 – offered to continue Trade Me's existing rates for NZRN member agencies until 1 February 2014, and to discount the new rates thereafter. The presentation expressly urged NZRN to "Vendor fund where possible", on the basis of Trade Me's comprehension from its market research "vendors already see value in Trade Me Property – and expect to pay for it".

Acknowledging most real estate agencies absorbed the cost of the subscription fee, the presentation noted “There’s an opportunity here to reduce your marketing spend”.

[50] The next day, Mr Borcovsky summarised and emailed Trade Me’s presentation to NZRN’s board members, noting Mr Skipper did not intend to contact individual agencies directly, and recommending Mr Skipper be invited to a forthcoming NZRN principals’ meeting to discuss the pricing change. One of NZRN’s board members – Tim Mordaunt, of Property Brokers in Palmerston North – responded to say “I guess it was inevitable that Trade Me would start cranking prices”. Drawing on his observation of the Australian real estate industry’s online experience, Mr Mordaunt said:

[realestate.co.nz] is our vehicle.... The obvious path is that we should shore up our own site, it will have the vast bulk of listings and the public would soon understand where to go for property. The challenge is can our industry work together or will we always have the individuals who see indust[r]y collaboration as a short term opportunity for gaining market share. I would be interested to canvas[s] NZ Realtors to see where everyone stands on this matter. We are working with our competitors on a number of industry concerns at present so there may be more of a meeting of minds here than we think. I will ask Vaughan to collate feedback from the group to see if we can agree a way forward here.

[51] Mr Borcovsky forwarded Mr Mordaunt’s response to NZRN board members Peter Thompson and Jeremy O’Rourke, suggesting “I would take Tim’s note below and combine it with the Trade Me Presentation and forward out to the group and then call each [principal] to get their feedback.” Jeremy O’Rourke, Lodge’s Managing Director, agreed.

[52] Mr Borcovsky then emailed Trade Me’s presentation to NZRN’s principals – including Mr O’Rourke (again) and Lodge’s General Manager, Ann Peel – together with a memorandum summarising the changes and including Mr Mordaunt’s response. Mr Borcovsky said he would contact each recipient over the next days to “decide our course of action”.

[53] On receiving Mr Borcovsky’s emails, Mr O’Rourke discussed Trade Me’s proposed pricing changes with his fellow director in Lodge, David Couch. Both

thought the indicated increase made the fee too large to be absorbed, moving from an annual \$8,000-\$9,000 to \$200,000-\$220,000. Mr Couch described himself as “incensed” by the change and increase in Trade Me’s pricing, because he “felt that Trade Me was capitalising on” its market presence. Both Mr O’Rourke and Mr Couch thought agencies could do better for vendors through realestate.co.nz, and their own websites. They decided, if vendors nonetheless wanted their property listed on Trade Me, the vendor (and/or their individual agent) would have to pay for it. Lodge would not continue to absorb the cost of standard listings on Trade Me.

[54] On 2 September 2013, NZRN board members held a conference call to discuss Trade Me’s proposed new pricing structure. Lodge’s Jeremy O’Rourke participated in the call. Mr Borcovsky circulated notes of the call to its participants and absent board members. The notes record principals’ feedback to Mr Borcovsky. They would not absorb the cost increase into their businesses, and supported passing the cost on to the vendor. Some thought it possible another real estate group may absorb the cost “to try and use this as a competitive advantage”. Mr Borcovsky advised Trade Me was looking to roll out the new pricing to NZRN early in 2014.

[55] The call discussed the position of other real estate agencies. Barfoot & Thompson’s contract with Trade Me was noted to be due for renewal in April 2014. A Wellington-based agency was noted as having always passed the cost of Trade Me on to vendors. Peter Thompson also advised the PPL group had agreed “all uploads to Trade Me be 100% funded by the client”, and “All properties to be uploaded to realestate.co.nz”. In general discussion, participants noted timing of Trade Me’s new pricing as an issue. Mr Borcovsky’s note recorded:

If we were to work together as an industry we need to ensure we don’t create the situation where one group, e.g. Ray White are charging for Trade Me listings but another company is not as their Trade Me contract has come up for renewal.

Below that, in an indented bullet, Mr Borcovsky noted “Jeremy expressed that we should become proactive with the companies in our areas to open dialogue and ensure a joint approach.” In evidence, Mr Borcovsky thought the indentation was a formatting mistake, and not intended to indicate a comment on the preceding text as other indented bullets signified. Mr O’Rourke thought the indented bullet was

misplaced more generally, and should have appeared elsewhere in the note. Either way, the indented bullet is clearly illustrative of Mr O'Rourke's wish for local agencies' 'joint approach' to, in context, Trade Me's proposed new pricing structure.

[56] The discussion moved on to agencies' support for realestate.co.nz, including on social media, and recorded:

Internet Content is king and if we are delaying uploading to Trade Me by a couple of days, e.g. to clear vendor funding cheques, etc, then Trade Me will be behind realestate.co.nz for listing and will start lose relevance as the industry highlight that the most up to date site is realestate.co.nz

At the end of the noted discussion, there was an observation listings under the new Trade Me contract expired after 90 days, meaning unsold listings for longer than 90 days would incur a further listing fee.

[57] Mr Borcovsky's notes of the meeting, dated 4 September 2013 and emailed to attendees on 5 September 2013, also record under a heading "Subsequent to the Conference Call":

- Jeremy has communicated that he has contacted each residential principal in Hamilton and they agreed in principle to;
  1. Only vendor funding for Trade Me listings
  2. Advertise realestate.co.nz in their weekly newspaper advertising
  3. Individual social media campaigns to promote realestate.co.nzHe will meet to confirm this will happen in the next two weeks.

There was a paucity of evidence of Mr O'Rourke's contacts with the other agencies on or before 4 September 2013. Mr O'Rourke denied any agreement in principle had been reached, other than to meet. But the specificity of Mr Borcovsky's notes is hard to gainsay.

[58] On 5 September 2013, Mr O'Rourke forwarded Trade Me's presentation to NZRN to Simon Lugton of Lugton's under cover of a note saying "can you please keep this to yourself as it's confidential to NZ Realtors. However, it will give you an idea of what Trade Me have in store for the industry".

[59] Mr Borcovsky met Trade Me's Mr Skipper again on 12 September 2013. Mr Skipper confirmed he would not be contacting individual NZRN agencies.

Mr Borcovsky sought confirmation from Mr Skipper on Trade Me's start date for the new pricing, NZRN's historic listing volumes, and Trade Me's indicated prices based on those volumes. Mr Borcovsky noted:

He is aware that the current base listings numbers he has worked on would be [too] high as at present all listings from the group get listed on Trade Me. Going forward it would only those vendors that chose to pay to be on TradeMe and this is different to current listing volumes.

A further NZRN conference call was to be held on 16 September 2013, to formulate a recommendation to principals.

[60] The 16 September 2013 conference call discussed Trade Me's revised proposal. Mr Borcovsky's notes of the call record a suggestion "the industry should all decide not to sign a contract with Trade Me", observing:

It will not make much difference to the client if they pay \$15-20 more. As an industry we are not competing with each other and this will clearly show to TradeMe how important they are to clients selling their properties.

From this we are to organise an industry meeting with all of the heads of the various groups with an independent facilitator.

The notes also record "Jeremy advised that the principals in his area had agreed to not offer TradeMe to vendors and only to put them on TradeMe if they request it." (This notation underscores the likely accuracy of Mr Borcovsky's 4 September 2013 notes.) The final item noted "as an industry we need to all have small adverts that promote realestate.co.nz, which are independent to company branding to bring awareness to the public about realestate.co.nz".

[61] On receipt of Mr Borcovsky's notes of the meeting the following day, Mr O'Rourke responded:

I had a thought that we could also look at sending less information to Trade Me. This could be in the form of sending selected information only, restricted descriptions and only a limited number of photos. In this way buyer interest is decreased as the buyer learns they have to go to either realestate.co.nz or our own sites to get the full information on property listings.

[62] NZRN's industry meeting occurred on 26 September 2013. Mr Borcovsky's notes of that meeting identified NZRN's proposal "we should look to not sign a

contract with TradeMe and to pass on the full retail cost to the vendor”. Other attendees were of like mind, but advised “they have franchisees within their groups who are considering absorbing the cost of the increase”. Although Mr O’Rourke was not in attendance at the meeting, the notes specifically record (in connection with an agenda item about area-specific support of realestate.co.nz) “The Hamilton companies are likely to [remove] Trade Me as an offering in their marketing and will only put a listing on Trade Me if a vendor requests it.”

—Lugton’s

[63] Lugton’s followed Lodge in publishing its listings on Trade Me in 2008. It incurred annual fees of approximately \$36,000, which amounted to less than \$30 per listing. Lugton’s absorbed the whole of that cost, along with other costs of online publication on its own website and on realestate.co.nz.

[64] Lugton’s managing director, Simon Lugton, was unsure whether he first had read about Trade Me new pricing model in a news report, or in the attachment of Trade Me’s NZRN presentation to Jeremy O’Rourke’s 5 September 2013 email to him. He did not recall reading the presentation or discussing it with Mr O’Rourke at the time.

[65] After a later telephone conversation with Mr O’Rourke, inviting Mr Lugton to a meeting in a week’s time or so with other real estate agencies to discuss the impacts of Trade Me’s new pricing model, Mr Lugton reviewed the Trade Me presentation. He calculated the new model would increase Lugton’s Trade Me costs five-fold, which was an increase Lugton’s could not bear. In discussion with his fellow director, David Lugton, they agreed the increased costs should be passed on to the vendors.

—Monarch (Harcourts)

[66] Monarch was relatively slow to offer Trade Me standard listings to its clients. Harcourts and Monarch both had their own websites for real estate listings, which they preferred. But, in August 2010, Harcourts’ Hayden Duncan advised franchisees, including Monarch, of the result of its review of Trade Me use:

Our view about Trademe.co.nz/property has not changed as we still do not support listings being placed on this site, however we accept that due to the shortsighted actions of a number of our competitors they are now doing a hard-sell on the Trademe site and some of our business owners/sales consultants are experiencing increasing pressure from clients in their local markets as a result.

We think the strength of the Trademe site in various markets reflects that some of our competitors have not shown strong leadership around the industry-owned website [www.realestate.co.nz](http://www.realestate.co.nz), they have failed to adapt to the online real estate space and not made adequate investments in their own websites.

Our strong preference is still, and will continue to be, to support and invest in our Harcourts' website first and foremost. It remains an industry-leading website in terms of functionality, design and unique visitors and we are committed to continuing to innovate to ensure it continues to have value for you and your clients. We also remain totally committed to [www.realestate.co.nz](http://www.realestate.co.nz). Our country is one of the very few in the world to have created a successful industry-owned option to provide some form of protection from the profit-driven media-owned sites and we must continue to support this site or we will all pay in the end.

That said, we also do not want your business to lose significant opportunities due to not having Trademe as an option.

For those reasons, Harcourts adapted its IT facilities to provide for franchisees' optional uploading of Harcourts listings to Trade Me.

[67] Monarch's Brian King and Davinder Singh remained sceptical about Trade Me's utility. At the subscription fees negotiated by Harcourts with Trade Me, Monarch faced an additional annual cost of roughly \$36,000. But – after consultation with its agents, a majority of whom supported using Trade Me – it included all its listings on Trade Me. Monarch deducted \$75 from each commission earned on sale as a contribution to the additional cost.

[68] Mr King thought he first found out about of Trade Me's proposed pricing change in mid 2013, at a Harcourts franchise council meeting, from Monarch's "usual Harcourts contacts, Joanne Clifford and Hayden Duncan". Mr King advised Mr Singh of the proposed change at the time.

[69] Hayden Duncan formally advised Harcourts franchisees of Trade Me's price changes by email on 24 September 2013. Mr Duncan explained Trade Me's changes, to take effect from 1 November 2013, would not affect Harcourts franchisees until

1 February 2014 “at the earliest”, subject to “discussions being concluded this week”. He advised “Effectively the changes to the charges will require all advertising on trademe, should the client insist on using it, being vendor funded”, and added:

The opportunity that these changes will provide to us will allow us all to wrestle back the online channels towards the industry owned portal of [www.realestate.co.nz](http://www.realestate.co.nz) and maintain control of our online marketing costs, not only for our businesses but also for our clients in the future.

[70] Mr Singh calculated Monarch’s annual cost of Trade Me listings would increase from about \$36,000 to nearly \$225,000, based on Monarch’s then-current listings. He and Mr King considered they could not absorb such cost, if that was the final position in Harcourts’ negotiations with Trade Me, which meant Trade Me listings would need to become vendor funded.

—Online (Ray White)

[71] Ray White enabled publication of its agencies’ property listings from the outset of Trade Me’s standalone property listing service in 2005. Ray White had an agreement with Trade Me which provided agencies with discounts, a last mover advantage on any pricing changes, and “industry best pricing”. Ray White levied franchisees a fee to recover Trade Me’s subscription fees paid by the franchisor.

[72] On 3 September 2013, Online’s managing director, Carl Glasgow, received an email from Ray White’s chief executive officer, Carey Smith, enclosing a memorandum from Mr Smith on Trade Me. Mr Smith advised Ray White was in the final stages of negotiation of the latest iteration of Trade Me’s subscription fee contract. He noted Trade Me wished to move to a listing fee “which means that individual properties must now be funded by a vendor”, the result of which would be a reduction in the number of Trade Me listings “by approximately 50% (maybe more)”. He observed “realestate.co.nz, we understand, will remain a subscription based offering which could give them a distinct point of difference”. Ray White would transition to the listing fee model from 1 June 2014, with discounted listing fees applying thereafter in return for Ray White’s commitment of a minimum



number of listings. Mr Smith noted an upside to the new model was the removal of a meaningful annual cost from the business, and added:

More importantly though is the potential relevance of realestate.co.nz, which is industry owned. It will be the only place, for the time being after the transition period, that has all the listings. Currently it is under funded, under resourced and does not have a defined direction. As part owners of real estate.co.nz within the PPL Group, it is our intention to change that and to ensure that while not underestimating the value of Trade Me, is to lift the relevance of realestate.co.nz from a defence platform to one that offers genuine value in the online marketing space for the agent and the vendor.

[73] Later in September 2013, Mr Smith confirmed the detail of Ray White's arrangements with Trade Me, adding:

The change in the Trade Me model will give us a small advantage given that our company will be the last to transition, so that will mean that we will potentially dominate Trade Me for a short period of time.... The change by Trade Me brings realestate.co.nz into relevance. It will be incumbent on us to understand with more clarity the realestate.co.nz offering as it will be the only online portal that will have all of the stock.

[74] Mr Glasgow, who ran Online's day-to-day business and was responsible for the agency's residential properties portfolio, did not give evidence. But his business partner at Online, Mr Coombes (Online's general manager, running its rural division), said in evidence Trade Me's new pricing was "a significant annual increase well in excess of the then current subscription fee being paid".

—Success (Bayleys)

[75] Success (together with Eves, owned by Realty Services Limited) saw itself as occupying the top end of Hamilton value and quality property listings. It adopted Bayleys' business model of vendor funded marketing, passing on its cost of standard Trade Me listings to its clients.

[76] On 6 September 2013, Realty Services's Group Sales and Marketing Manager, Karen Worley, emailed Trade Me's Silvana Vulinovich to ask about the correctness of rumours about Trade Me's move to a listing fee. Ms Vulinovich responded "There are conversations currently happening at Head Office level but unfortunately I have no information that I can pass onto you at the moment."

[77] Later in September 2013, Ms Worley was copied an article, characterising Trade Me’s new pricing structure as “bold and challenging”, and questioning whether vendors would accept the increased prices, which the article considered could not continue to be absorbed by agents or agencies. She forwarded that to Realty Services’ chief executive officer, who asked for her view on Success’ marketing and pricing strategy for dealing with Trade Me listings. Ms Worley opined “vendors need to pay for their own now or this will get out of control”.

[78] Ms Worley also followed up with Ms Vulinovich, who advised, although Trade Me’s pricing change had been announced, this would not apply to Success “until early next year”, after communications to the Bayleys group.

[79] On 26 September 2013, Bayleys group’s general manager, Greg Hornblow, copied Trade Me’s price change presentation to the Bayleys group to all franchisees, and advised the price change would not come into effect for them until 1 February 2014. He explained, through PPL, the major agencies had “unanimously agreed that the attached model will only be taken on as a vendor or agent funded model. No company or office funding should or will be entered into.” He reinforced:

... we are not suggesting you or your teams do not use TradeMe, indeed a strong argument could be made that [the new standard listing price of] \$156.20 is still a great price. We are simply saying that this is now a vendor funded or agent funded model.

[80] While such directives are not required to be followed by franchisees, Realty Services’ director and shareholder, Stephen Shale, said in evidence “Success would continue with a vendor funding model”, as recommended by Bayleys and suggested by Trade Me.

—realestate.co.nz

[81] Realestate.co.nz is a property listing website operated by Realestate.co.nz Limited (“**REL**”), which is owned in equal shares by PPL and (ultimately) the Real Estate Institute of New Zealand (Inc). As news of Trade Me’s new pricing model spread, REL also began to take interest. It viewed the change as an opportunity to increase its market share. REL directed its account managers to speak to real estate

agencies and agents in their areas, to understand their reaction to Trade Me's pricing change.

[82] REL's Hamilton account manager, Joanne Baylis, then new to the role, set up a series of meetings in Hamilton for 18 September 2013 with Lodge, Monarch, and Success. On that morning, she met with Success, and recorded Stephen Shale's advice "if what he hears is true he will not be continuing with them and thinks Hamilton as a section of the industry could walk and just use us". In the afternoon, she met with Monarch's Jeremy O'Rourke and noted:

He is however very concerned about the Trade Me price increase and wants me to get ads together for him and all the local big wigs to place in the local paper at their expense so that we educate the public that our site is where you go to purchase real estate and not trade me.

Later that evening, she responded by email to her manager's request to "keep track of these conversations", saying "2 of my key Hamilton offices ready to group together and boycott...". Ms Baylis explained in evidence 'boycott' was a word she used "to describe the market's dissatisfaction nationally with Trade Me's pricing mistake". She could not recall which two offices she meant. Given her meetings with Mr O'Rourke and Mr Shale (her other meetings were with administrative personnel), she must have meant Lodge and Success.

*Meeting of Hamilton real estate agencies on 30 September 2013*

—arranging the meeting

[83] At some point after NZRN's 2 September 2013 conference call, Lodge's Jeremy O'Rourke contacted owners of other Hamilton real estate agencies to set up a meeting. He contacted Lugton's Simon Lugton, Monarch's Brian King, Online's Carl Glasgow, and Success' Stephen Shale, as evidenced by Mr O'Rourke's electronic meeting request to them. The request's subject line was 'Industry Meeting for Realestate.co.nz', to be held at 3:30pm on Monday, 30 September 2013, in Monarch's boardroom.

[84] In giving evidence, Mr O'Rourke could not recall when he had made those calls. He thought he had spoken to Mr King first, and possibly on an unrelated

matter. Their discussion led to Mr O'Rourke's suggestion the agencies should take the opportunity to promote realestate.co.nz. Mr King offered Monarch's boardroom for the meeting.

[85] Mr O'Rourke also recalled speaking to Mr Lugton and Mr Shale similarly, although both Mr Lugton and Mr Shale thought their calls with Mr O'Rourke were made in late September. However, as noted at paragraphs [57] and [58], Mr O'Rourke appears to have had contact at least with Simon Lugton on 5 September 2013. Mr O'Rourke agreed in cross-examination he "would've spoken to Simon Lugton prior to sending him a document. I wouldn't have just sent him a document out of the blue".

[86] Mr O'Rourke also agreed he must have spoken to the other owners before advising Mr Borcovsky of their intended meeting. Mr O'Rourke accepted the discussions could have extended to the first two items recorded in Mr Borcovsky's 4 September 2013 note of Mr O'Rourke's advice, but he couldn't explain the third item's reference to 'social media', because he thought only Lodge had a social media platform at the time. He was "puzzled" by Mr Borcovsky recording the owners had "agreed in principle" to those matters. As far as Mr O'Rourke was concerned, the only agreement at the time was to meet.

[87] Mr Borcovsky, meanwhile, had no recollection of his conversation with Mr O'Rourke after the 2 September 2013 conference call. He accepted in cross-examination his note of the call contained a summary of what he had taken from the conversation, rather than being a verbatim account of what Mr O'Rourke may have said, and restated that on re-examination as "a summary of what I've heard".

[88] Mr Lugton understood the purpose of the 30 September meeting was "to discuss the change in Trade Me pricing, and to brainstorm ideas for raising the profile of realestate.co.nz".

[89] Monarch's Mr King recalled Mr O'Rourke telling him Lodge "was having a vendor funding model imposed" and he (Mr O'Rourke) wanted to discuss

“increasing the profile of realestate.co.nz in Hamilton” with other real estate agency principals. Mr King told Mr Singh about the meeting.

[90] Mr Glasgow did not give evidence. But his partner at Online, Dennis Coombes, understood they had both been invited to attend “to discuss Trade Me’s pricing changes and possible steps that could be taken in response to it”.

[91] Success’ Mr Shale understood from Mr O’Rourke the meeting was “to discuss what we might do in response to the Trade Me pricing model change”. Mr Shale thought the meeting might be an opportunity to re-establish Success’ conjunctional sales arrangements with other agencies.

—attending the meeting

[92] With one possible exception, there is no contemporaneous record of the 30 September 2013 meeting. What occurred at the meeting is instead largely to be drawn from what its participants said occurred at it. The evidence was of transcripts of Commission investigatory interviews with the meeting’s attendees, and their oral evidence in Court.

[93] The possible exception is a handwritten note produced by Mr O’Rourke. He said he took the note during the meeting. The note set out five numbered topics:

Trade Me Meeting

1//—RPF!

2//Realestate.co.nz

3//Product—} Less of  
—

4//Rentals

5//Simon} 3:30  
Kingy

The note was dated “29/09/13”, which Mr O’Rourke said was a mistake. The second item noted tasks for newspaper and radio advertising, not replicated here.

[94] Under cross-examination, Mr Lodge acknowledged the note's heading was at odds with his electronic invitation's subject 'Industry Meeting for Realestate.co.nz', but explained:

... when we got in there this was a blank piece of paper obviously and everyone was talking about Trade Me. We were there to discuss realestate.co.nz but everyone was chatting recklessly to each other, all over the show about Trade Me and the, and the move to vendor funding.

By 'recklessly' he meant "it was everybody talking over each other and it was chaos would be a better word than reckless".

[95] Mr O'Rourke also acknowledged the note was subject to the Commission's information requests, but had not been provided in response to those requests. He accepted there was no mention of the note or its content in any of interviews conducted by the Commission. He explained he had misfiled the note and, on rediscovering it in another file, thought to give it to Lodge's solicitors.

[96] Mr O'Rourke explained the first entry, "RPF", was "shorthand for 'retail price fixing'". A few months before the 30 September 2013 meeting, he instructed Lodge's lawyers to advise on restrictive trade practices, in the wake of Success disputing Lodge's conjunctional agreements policy. He recalled the lawyers advised competitors should not talk about prices they were charging, which might constitute retail price fixing. 'Retail price fixing' was the lawyers' term; 'RPF' was Mr O'Rourke's abbreviation.<sup>21</sup>

[97] Mr O'Rourke and Mr Couch (for Lodge), Mr Lugton (for Lugton's), Mr King and Mr Singh (for Monarch), Mr Glasgow and Mr Coombes (for Online), and Mr Shale (for Success) all met in Monarch's boardroom at about 3:30pm on Monday, 30 September 2013.

[98] Mr Coombes and Mr Glasgow agreed in the car on their way to the meeting not to disclose either Trade Me's deferred start date of per listing fees for Ray White franchisees, or their perceived advantageous discount from Trade Me for feature

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<sup>21</sup> With the aid of a magnified version of the abbreviation, the Commission's senior counsel, Mr Dixon QC, suggested to Mr O'Rourke 'RPF' was written over some other letter or character. Mr O'Rourke said "I didn't write anything else and write over the – I just wrote 'RPF'".

listings. Mr Coombes said the meeting was led by Mr King, which he assumed was because the meeting was at Monarch's offices. He said "the meeting began with a discussion about Trade Me's pricing changes and the financial impact those changes would have on agencies if they continued to absorb the cost". He recalled "everybody was upset at the huge price increase, and nobody was happy to continue to absorb the cost". He said "None of the attendees at the meeting were prepared to bear the costs themselves, which led to the understanding, described below".

[99] Mr Coombes' evidence in chief continued:

There was a discussion about agencies no longer posting listings on Trade Me. There was also a discussion about agencies removing existing listings from TradeMe. I was left with the clear impression that as a result of those discussions, an understanding was reached by all present that:

- (a) We would all remove our standard listings from Trade Me by early 2014. (While I do not recall agreement being reached on an exact date in January, there was a consensus that everyone would pull their listings from Trade Me around that time); and
- (b) If any vendors wanted to list on Trade Me after that date, they would need to pay for it (or the salesperson would have to pay for it).

Certainly, coming out of the meeting, I had the expectation that this is what we would all be doing.

After that understanding was reached, the discussion turned to ways to promote realestate.co.nz as an alternative.... We considered withdrawing listings from Trade Me would help bolster realestate.co.nz.

[100] Under cross-examination from Lodge's senior counsel, Mr Taylor QC, Mr Coombes agreed he and Mr Glasgow were going to the meeting "to listen and learn", and to not give any commitments on price. He agreed there was a brief period at the beginning of the meeting when people were expressing their views about what Trade Me was doing, and he was sure he "would've put his two bobs worth in". Asked if that part of the meeting was "a free for all", he said he thought:

... it would've gone round the table and everybody had a little, had their little piece and there was a bit of just interjecting and throwing things around the table but it wasn't like a formal board meeting or anything like that.... It was informal but straight to the point really.

[101] Mr Coombes said "we did disclose what our intentions were", to not promote Trade Me's standard listings. He said "We indicated that we were going to withdraw

all our properties off Trade Me”, meaning Online’s standard listings; “we said that we would take them off sometime in January the following year”. Asked by Mr Taylor why that time was chosen, Mr Coombes said:

I can’t honestly, honestly answer you that but to me if a decision is going to be made in life, the best time is December/January.... No, no. just for me because then if the, if the game started in June, July August you’ve change the rules when the game’s already in process.... In progress but if you do it in January it’s a new year. There’s less stock on the books.... So there’s less people to become upset about it.... And we’ve found it was a lot easier for us to make that decision at that month.

[102] Mr Taylor asked “you didn’t give any commitment to do that. You were simply indicating your intention, is that right?”, to which Mr Coombes responded “Yeah, and we did, along with everybody else because we all agreed around about the same thing”. Mr Taylor then asked “was anybody in that room giving you any sort of commitment that they would do it?”, and Mr Coombes answered:

I believe so but that’s my opinion.... My opinion is that we were all going to take our properties off Trade Me but that’s my opinion and I’m being straight up with you.

[103] Mr Coombes was repeatedly pressed in cross-examination on his understanding of the ‘commitment’. He was unwavering in his belief “everybody who was in the room” committed to remove their Trade Me standard listings in January. He said:

I believe that everybody had made their mind up before they came to that meeting and I’m sure Brian wanted to take his properties off Trade Me and I’m sure Jeremy did as well and I’m just saying that’s my understanding and I can’t say – if they disagree they disagree but that’s my understanding, I mean I don’t know how many more times I can tell you that.

Mr Coombes’ exchange with Monarch’s senior counsel, Mr McLennan QC, illustrates the point:

Q. What makes you say it was a commitment?

A. Well we had said, as far as I’m concerned, to my understanding that Online Realty had said that we were going to withdraw our properties from Trade Me.

Q. And what did the others say?



A. I think they – as far as I was concerned I went away with the understanding that they were going to do the same.

Q. And you've described that as a commitment?

A. Well I think it was a commitment.

Q. And are you a person who keeps commitments?

A. I do.

Q. And in January of 2014 when the other agencies withdrew their listings do you see that as consistent with the commitment?

A. I think it is. I think it is because we all took them off in around about the same period.

[104] However, Mr Coombes understood no-one would be offering Trade Me standard listings at all. He affirmed the position on re-examination: “We were replacing our standard Trade Me listings with Realestate.co standard listings.... I have the understanding that the other companies were doing exactly the same”.

[105] His comprehension of the position reached at the meeting was agencies would only offer Trade Me feature listings. Although he initially agreed the understanding was Trade Me feature listings would only be offered at vendors' expense, he also described Online's consequent change in policy:

... as from January or in the New Year there would be no standard Trade Me listings. The standard listings, realestate.co, and feature listings Trade Me which would be vendor funded and generally I offered or paid for by the vendor, the agent or sometimes Online.

In cross-examination, Mr Coombes agreed Online would negotiate on who would pay for Trade Me feature listings – “at the end of the day you've got to look after your customer don't you, if it's going to cost a few dollars you just do it” – and agreed he would not have committed to doing otherwise than looking after his customers.

[106] Mr Coombes said that first part of the meeting took “Five or seven minutes, five minute, I don't know, three minutes, we didn't sit there”, before transitioning into a discussion about realestate.co.nz.

[107] Asked by Mr Taylor about the divergence between his evidence in chief and under cross-examination on only Trade Me feature listings to be vendor funded,

Mr Coombes said “I don’t know why that’s not in there but it’s not”. He also agreed his brief’s reference to the vendor or salesperson paying Trade Me’s fee should have included Online. His commitment at the meeting did not foreclose that. He affirmed on re-examination, if vendors wanted to be listed on Trade Me after the agencies removed the standard listings, “either the agency would have to pay for it or the agent or the vendor”.

[108] But Mr Coombes had also said of Online’s decision to withdraw current, and not to pay for new, Trade Me standard listings:

This decision was made because Mr Glasgow and I wanted keep faith with the understanding reached at the meeting on 30 September 2013 that the agencies would withdraw their listings and not pay for the standard listing prices going forward.

Under cross-examination, he said ‘keep faith’ were not his words. But on re-examination, he said “It wouldn’t have been my choice of words but I like it, I understood it, I read it and I accepted it”.

[109] Mr Couch thought he attended the meeting because he “happened to be around”. He described the meeting as “fairly loose, in that no one was chairing or facilitating it”. He could not recall Mr Singh being at the meeting. He recalled a general discussion about Trade Me’s price increase and attendees upset with its size. He said, without specific recollection, “some of those present may have said that they couldn’t or wouldn’t absorb the increase”. He did not recall “any discussion or suggestion that we should all vendor fund”. Neither did he recall discussion about withdrawing listings from Trade Me. The majority of the meeting was about realestate.co.nz.

[110] Under cross-examination, in which he described the meeting as “very heated”, he said:

Everybody came to the first meeting and everybody commented on how annoyed they were with Trade Me, how it wasn’t acceptable. Everybody in their own mind had made their decision that they weren’t going to fund it or they were going to pass it on to the vendor and then the discussion came up amongst the people in the room, “Well, how do we promote realestate.co?”

...

[E]verybody in that room had made the decision well before they got there that they weren't going to carry on with Trade Me in the form that was recommended by Trade Me. That was very, very clear and they added a bit of colour to it because of the name calling and so on so on. But no there was no going around the table saying, "Are you doing it, are you doing it, are you doing it?"

The Commission's senior counsel, Mr Dixon QC, suggested there was a 'meeting of minds' to vendor fund. Mr Couch responded "Probably a better way of putting it would be a, a confirming of the prior decisions before the meeting because of the comments individuals were making at that meeting".

[111] Mr King said the meeting "was no longer than 30 minutes", in which "Trade Me was briefly discussed over probably only a few minutes". He said it was an informal meeting, in which Mr O'Rourke led most of the discussion on realestate.co.nz. He welcomed people to the office, as host of the meeting. But the discussion was otherwise "free for all and unstructured".

[112] Under cross-examination, Mr King said:

I'll tell you what the meeting was like. It was like eight guys standing around the leaner before the rugby everybody – a lot of egos, everybody trying to talk over the other person. I couldn't tell you what was happening down the other end of the table let alone what was happening next to me. It was, it was bedlam.

...

... everybody just didn't appear at the same time. People came in, into our board room –

Q. Sat down at the table?

A. – and, and away it went and, and it was quite obvious what people were going to do or what they thought about the Trade Me's new model or proposal.

[113] The initial discussion about Trade Me was "not led by anyone in particular". Mr King may have asked others what they were to be charged by Trade Me. Possibly Simon Lugton mentioned \$185 or \$200, to which Mr King said something to the effect "if that was going to be the price, then we would probably be out of there". Under cross-examination, he said of the \$185-\$200 price "I must admit when someone said that I felt fairly good after. I had read Hayden Duncan's email prior to

that and knew that we could even get it better”. When the issue of price came up, Mr Singh told the others Harcourts Group were still negotiating for Monarch. Others said similarly in relation to their agencies.

[114] Mr Dixon took Mr King to the transcript of his s 98(c) interview with the Commission on 3 February 2015, in which he said of the 30 September 2013 meeting “there was consensus ‘Hey that’s what Trade Me wants us to do well hey that’s – let’s do it’”.

[115] Mr King explained that as “consensus that if it was going to get to the levels that people were talking it was going to be unaffordable to be absorbed into businesses”:

There was no agreement in that meeting to do anything. There was nothing held for me to do anything or anybody else to do anything but in the murmurs and in the talk around that meeting that’s the feeling I got when I came out of the meeting that nobody could absorb that cost.

Q. And that everyone was going to pass it on?

A. Well that was up to them.

[116] Mr Lugton said the meeting began with a discussion about Trade Me’s price increase. He said:

It quickly became clear that all of the principals shared the same view as me, that absorbing the cost of the price increase would have a very significant impact on profitability, and that each of the agencies were extremely unhappy about Trade Me’s change. We briefly discussed what the cost increase would be for our businesses and I recall Mr O’Rourke saying that the increase for Lodge would be ten-fold.

He added “We discussed realestate.co.nz and the option of boosting it, because we wanted it to become the main vehicle for internet marketing”:

As part of raising the profile of realestate.co.nz we agreed that we would remove all of our property listings from Trade Me. We decided that this would happen by 20 January 2014. Thereafter if a vendor wanted to list their property on Trade Me we were not going to deny it to them but it needed to be vendor pays. That was the agreement.

...

In terms of deciding when the agencies represented at the meeting would implement these changes, the attendees talked about withdrawing listings from Trade Me post-Christmas.

[117] Under cross-examination, Mr Lugton thought the meeting ran for approximately 90 minutes. He said he had inferred 'vendor pays' from attendees saying they could not absorb Trade Me's price increase: "what I took from the meeting was that none of us wanted to absorb any of it". Asked by Mr Taylor if there was "even any suggestion that everybody had to pass on 100%", Mr Lugton said "No there was just a feeling that we – that's what we all wanted to do".

[118] However, in answer to a later question about agencies absorbing part of Trade Me's fee, Mr Lugton responded:

The inference I took out of the meeting is that there was going to be – that cost was going to be passed to the vendors. So it's not a matter of slicing it up.... [I]t wouldn't be in the spirit of what the understanding we had in the meeting.

Mr Lugton had a similar earlier exchange with Mr Taylor:

Q. So rather than there being some agreement or some sort of moral obligation imposed on you, the inference that you drew from the meeting was nobody wants to absorb this, pretty obvious to me that they're going go to the Vendor Funded Model correct?

A. Yes.

Q. And it wasn't an agreement. It was simply an inference, an obvious inference from what people were sayin[g], correct?

A. Well, there was a plan to – how we were going to do it but.

Q. Pardon?

A. There was a plan of how it was to be enacted.

[119] On re-examination, Mr Lugton agreed he decided to vendor fund Trade Me listings before attending the meeting, but had "a bit of an open mind" about how to do so:

How we get there and what hurdles we have to cross to get there I hadn't made any fixed decisions before I probably went into, into that meeting and there are some things I possibly hadn't considered.

In the meeting,

... there was talk about logical timeframes, Christmas being you know a time to – you do it after Christmas and the low time in January and that was the, that was where we fell on you know that timeframe.

[120] Mr O'Rourke remembered "the meeting started with everyone complaining about the Trade Me change". He said "Everybody seemed to know that the increase would be big". He recalled Mr Shale saying Bayleys were still in negotiations with Trade Me. He added Lodge was also in negotiations with Trade Me through NZRN, and Mr King or Mr Singh said similarly in relation to Harcourts, and Mr Glasgow in relation to Ray White.

[121] Given his note of the meeting, Mr O'Rourke thought he may have said the meeting should not discuss prices, but "as soon as someone said that", "the conversation on Trade Me died. This was only a few minutes into the meeting". At that time, Mr O'Rourke recalled saying:

... we should focus on what we can change, rather than the Trade Me fee and model which we couldn't. We could change the visibility of realestate.co.nz. That's what the second point in my note refers to: promoting realestate.co.nz.

Under cross-examination by Mr Taylor, Mr King thought Mr O'Rourke may have said something to that effect; similarly, Mr O'Rourke may have said something to the effect of not discussing prices. Under cross-examination by Mr Dixon, Mr King acknowledged he had not referred to that in his brief; neither was he aware of having earlier mentioned it in Commission interviews. Mr King agreed it was the first time he had said it.

[122] Mr O'Rourke explained the balance of the meeting discussed using agencies' own advertising spend in part to promote realestate.co.nz, and to approach their advertising suppliers – the Waikato Times, the Radio Network, and Mediaworks – to provide additional advertising specifically for realestate.co.nz. There would be fewer listings on Trade Me when Trade Me's new rates commenced, meaning that would be a good time to promote realestate.co.nz.

[123] Under cross-examination by Mr Dixon, Mr O'Rourke said:

... what happened we came into the room and there was discussion with everybody about what Trade Me – what was happening with Trade Me. Brian welcomed – my recollection is Brian welcomed us to the room because it was his board room and then he said, “Look does everybody know what they’re getting charged with Trade Me?” And he went around the room but everybody was in negotiations and I think maybe even [Mr Singh] might have said look I’m in – we’re in negoti – Harcourts are in negotiations for us. Ray White same sort of thing, Steve Shale same sort of thing and I’m pretty sure Simon Lugton said, “look I’m not going to, I’m not going to talk about that, I can’t,” or something like that and, “I don’t think we can be talking about that,” and that’s when I went, no, in my own mind I’m going, “No I don’t think this is, we can’t talk about this sort of thing,” ... and I wrote down retail price fixing ‘cos I thought we’re talking about you know, you know something that is going to be vendor funded and we couldn’t actually all come to the same arrangement on it and that’s when I said, “We shouldn’t be talking about the things we can’t control, we should be talking about things which we can which is actually us promoting together realestate.co.nz and what ideas do we have for that?” And that’s how the meeting moved on which is why that discussion – when you talk about the discussion on Trade Me it was very informal as everyone entered the room and it ended very, very quickly in my recollection and we moved straight on.

[124] In his Commission interviews Mr O'Rourke had said of the meeting “there was no real discussion on that other than discussion around, you know, what Trade Me – it was a general feeling that everybody was going to vendor funding”.

Mr O'Rourke clarified:

When we had those discussions those discussions were between different people at different – all at the same time so the discussions with individuals I – and what they were doing or what anyone was doing or what Trade Me were doing wasn’t – I couldn’t accurately record it so that’s probably in the light of what you’re actually asking now that’s not something that I would stand by. What I was trying to convey to him was that it was a general discussion amongst everybody about Trade Me moving to a vendor funded model.

...

...everybody was talking atop at everybody else but the general feeling from everybody was that Trade Me were going to a vendor funded model and the industry couldn’t sustain it and it would end up being vendor funded.

Mr O'Rourke maintained that position through sustained questioning.

[125] The Commission interviews included a persistent topic about “a roundtable discussion where attendees were asked what they intended to do regarding the Trade Me price increase”. Under cross-examination by Mr Dixon, Mr O'Rourke said:

... we were sitting around a table and everyone was talking to everybody else so I don't know what he means by a round table discussion and when Brian went around the table and asked he simply asked what was, did everybody know what their charges for Trade Me were going to be, as I've mentioned.

He later said:

It was, it was a very loose chaotic discussion that wasn't – it wasn't one discussion. It was many discussions. That's what I'm trying to convey to you and in that sentiment of those many discussions it was that Trade Me wants to go to a vendor funded model and that's the likely direction that the entire industry will so –

He resisted Mr Dixon's combination of those two characterisations as the meeting reaching a consensus to follow Trade Me's recommendation and vendor fund Trade Me's standard listings.

[126] Mr Shale could not be certain Mr Coombes was at the 30 September 2013 meeting. He said the meeting was chaired by Mr King. It commenced with a discussion around the Trade Me price changes. Mr Shale said "the approach was basically, 'there's new pricing from Trade Me, what are you going to do?' – basically an 'uncover'". The larger agencies (Lodge, Lugton's, and Monarch) were trying to find out how other agencies would deal with Trade Me's price increase:

... everyone disclosed what their business' intention was, and at that stage I understood them all to be saying that they would be vendor funding. I felt there was a bit of pressure, mainly from Brian King, about not using Trade Me going forward. By this, I mean withdrawing Trade Me listings, and removing Trade Me as an option from marketing packages. Brian King said that Monarch were going to take that approach. I recall that Jeremy O'Rourke said something similar.

The initial part of the discussion was around each company's existing arrangements with Trade Me. Different companies who were at the meeting had different arrangements with Trade Me.... I recall Carl Glasgow saying that Online's subscription pricing did not expire until a later date.

Brian King said that Monarch were not going to support Trade Me going forward i.e., Monarch would not promote Trade Me to vendors. I recall that Jeremy O'Rourke also said that they would withdraw current stock off the website. I recall at the meeting that the Online representatives did not say very much. I kept fairly quiet also, as I was the most junior attendee in the room, but I did say that Success were not going to be withdrawing listings, as they had already been paid for.



The balance of the meeting discussed better promoting realestate.co.nz. Success did a lot of radio marketing, and Mr Shale had good local radio contacts.

[127] Under cross-examination by Mr Taylor, Mr Shale agreed the “uncover” was not structured, but consisted of various expressions of dissatisfaction with Trade Me’s pricing, which the agencies could not absorb. He said what was said at the meeting “was all independent”.

[128] Under cross-examination by Mr McLennan, Mr Shale agreed Success had decided prior to the meeting how to deal with the Trade Me price increase. He said “our rationale was in line with everyone else anyway so there was [no] decision for me”. He thought the discussion about Trade Me lasted less than ten minutes.

[129] On re-examination, Mr Shale said Mr King was not so much chairing the meeting as hosting it, but still leading the discussion.

[130] Mr Singh said he attended the meeting “because it was held at our office and I sat in the office next door, so it was really out of courtesy to the others attending”. He recalled Mr King introducing himself at the start of the meeting but, beyond an initial welcome, not leading any discussion. He said “the meeting took its own course from there with various parties expressing views on various matters, including Trade Me, realestate.co.nz”.

[131] Mr Singh said the Trade Me discussion “only lasted a few minutes of the meeting” before turning to discuss improving the profile of realestate.co.nz. He said one of the attendees expressed a view Trade Me’s charge “might be in the region of up to \$200 per listing”. He recalled Mr King responding “if we had to pay anything like that, then we would be ‘out of there’”. He told the agencies Monarch was in negotiations with Trade Me through Harcourts. He thought Mr Shale led many discussions in the meeting, with Mr O’Rourke. Mr Singh said “The discussion did not progress beyond a general discussion about a dissatisfaction that Trade Me was increasing its price. There was general annoyance expressed around the table”.

[132] Under cross-examination by Mr Taylor, Mr Singh agreed he heard Mr King at the meeting ask someone about the price they were to be charged by Trade Me, and someone declining to answer, saying prices should not be discussed. Under cross-examination by Mr Dixon, Mr Singh agreed he had not mentioned that in Commission interviews or in his brief.

[133] Mr Dixon took Mr Singh to the transcripts of his Commission interviews, in which he had characterised the Trade Me discussion as being about “if it gets too expensive then more likely it would become a vendor funded option”. In answer to Commission questions, he had accepted he or Mr King was asked at the meeting what Monarch was doing, to which he or Mr King responded Trade Me standard listings cost Monarch \$20 per listing but “we weren’t prepared to fund it ourselves if it was going to be significantly more”. Then asked by the Commission whether others were asked a similar question, Mr Singh had said “Yeah, I think there was a similar feeling around the room”.

[134] Mr Dixon asked Mr Singh who had said that at the meeting, and Mr Singh identified Mr O’Rourke, Mr Lugton, and possibly Mr Shale. In the Commission interview, Mr Singh had said:

And when the question came up what people were going to do about it, you know, when the first one or two said “Well, if this is what the price is then it will be a vendor-paid option”, that was kind of music to my ears....

In cross-examination Mr Dixon asked Mr Singh why that was music to his ears, and Mr Singh responded:

Well I’ve just heard our two biggest competitors saying their [*sic*] definitely not going to be paying for it.

Q. Why is that music to your ears?

A. Because we hadn’t made our mind up yet and I saw it as an opportunity that if the more favourable pricing comes through from Harcourts group we’ll still vendor fund it, sorry, we will still absorb the cost.

Q. So you were thinking going into the meeting that you might absorb the cost?

A. Yes. If the figures were right.

—after the meeting

[135] The day after the agencies' 30 September 2013 meeting, Mr King made arrangements to meet with the Waikato Times. He confirmed that in an email to Mr O'Rourke, titled "Waikato Times and Greg Metcalfe". His email added "I have also talked to Greg Metcalfe, he is on board". Greig Metcalfe was the principal at George Boyes, the L J Hooker franchise in Hamilton. By 'on board', Mr King meant "onboard with the realestate.co.nz... To help market realestate.co.nz". He said:

I can't even remember the conversation, it would've been solely that we are getting together to escalate the advertising regarding realestate.co.nz because of the absurd price and the unrealistic pricing around Trade Me.

[136] Mr O'Rourke also spoke with realestate.co.nz's Joanne Baylis the same day, as did Mr King.

[137] On 10 October 2013, the Waikato Times confirmed by email to Mr King its "commitment to supporting the campaign for realestate.co.nz". It would work with Mr O'Rourke on the details of the campaign. Mr King forwarded the confirmation to Mr O'Rourke, Mr Lugton, Mr Glasgow, Mr Shale, and Mr Metcalfe.

[138] Joanne Baylis met with Mr King on 14 October 2013. Her notes of the meeting included:

Jo meet with Brian King to introduce myself we talked about how come January the whole of Hamilton realestate [*sic*] business will be using realestate.co.nz only him and the other business owners in Hamilton have meet and decided that they will all collectively move across. They have told Brendon at Trade me! the only company that is not convinced in town in LJ Hooker.

Under cross-examination, Mr King said he had meant the Hamilton agencies would all move across to "market" realestate.co.nz.

*Meeting of Hamilton real estate agencies on 16 October 2013*

—arranging the meeting

[139] On 11 October 2013, Mr O'Rourke made arrangements for a further meeting of the agencies on 16 October 2013, again in Monarch's boardroom, inviting

Mr Lugton, Mr King, Mr Glasgow, Mr Shale, and Mr Metcalfe to a “realestate.co.nz meeting”.

[140] Mr O’Rourke also called Ms Baylis, to advise her of the meeting and his wish then to have realestate.co.nz marketing materials to show the agencies. He forwarded Mr King’s email of the Waikato Times’ support to Ms Baylis. She recorded in an internal email:

... the offices in Hamilton are keen to get behind us and promote our site (at no cost to us) through deals they have negotiated with the local press and working on one with the local radio....

... Lodge, Bayleys, and Harcourts are on board and happy to spend some of their money to get behind this campaign – the rest of them they need to be convinced.

[141] Mr Metcalfe responded to Mr O’Rourke’s meeting invitation by email on 12 October 2013. Mr Metcalfe advised:

Thanks for the update Jeremy – but to be frankly [*sic*] since you and others decided to marginalise my company in conflict with the spirit of co-operation that existed amongst Hamilton agencies for decades I now find it puzzling that you want to include me in this meeting or any agreement around Trade me. Sure you will be worried that I may break ranks and drive Trade me company funded advertising in the future and thus gain market share, at my lesser level of stock volumes this option is affordable for me. Until we play on the same playing field you and the others cannot serious expect me to support your initiatives.

Sorry I won’t be at your meeting.

[142] Mr O’Rourke said in evidence he had not spoken to Mr Metcalfe. On returning to work on 14 October 2013, he replied by email to Mr Metcalfe:

Hi Grieg, thanks for your response. The nature of the meeting is around what we can do to [*sic*] as an industry to better promote realestate.co.nz. You are welcome to attend and share any ideas but understand if you prefer not to participate.

—attending the meeting

[143] Again, there is no contemporaneous record of the 16 October 2013 meeting. Mr Glasgow, Mr King, Mr Lugton, Mr O’Rourke, and Mr Shale attended.

[144] The meeting was again held at Monarch's offices, and discussed implementing realestate.co.nz's advertising in local media. Mr Lugton said Trade Me was not discussed "in any detail". The focus was on improving public awareness of realestate.co.nz. The men discussed incorporating realestate.co.nz's logo into agency documents and advertising. Mr O'Rourke suggested January 2014 as a good time to push the advertising, when Lodge's Trade Me contract was expiring and Lodge would be removing its listings from Trade Me. Transfer of Lodge's listings from Trade Me to realestate.co.nz would present a significant local difference between the sites. Mr King thought that timing made sense. Mr Shale could not recall being at the meeting. Mr O'Rourke recalled Mr Shale saying Bayleys would be coming off Trade Me at the end of January.

—after the meeting

[145] The day after the agencies' 16 October 2013 meeting, emails exchanged between Mr O'Rourke, Mr Lugton, Mr King, Mr Glasgow, and Mr Shale, making arrangements to promote realestate.co.nz. Mr King discussed a radio campaign; Mr Shale obtained approval to include the realestate.co.nz logo on Success' Bayleys masthead; Mr Lugton said Lugton's would do likewise; and Mr O'Rourke advised of arrangements with the Waikato Times, including:

The Waikato Times will run a range of filler ads from realestate.co.nz which will be inserted on an ad hoc basis, whenever the Times have space, starting immediately up until the 22<sup>nd</sup> of January. We are going to rework some of realestate.co.nz's generic advertising to include a line which reads "All Hamilton Agencies in one location." (appreciate any other suggestions for a tag line)

...

I have asked Andrea to start the ¼ page campaign from the 22<sup>nd</sup> of January. We agreed at yesterday's meeting the rationale being that from this date there should be a significant difference between the number of properties which appear on realestate.co.nz to the number which appear on Trade Me.

*Hamilton real estate agencies' actions in the wake of the meeting(s)*

—Lodge

[146] At a Lodge managers' meeting on 16 October 2013, managers were advised:

At the start of next year, when our agreement with Trade Me is due for renewal, the pricing structure will change from a 'per office' charge to a 'per listing charge'. The increase is such that the company will no longer be able to cover the cost of listing a property on Trade Me, it will however be available as an add on marketing item at a cost of approx \$183. The company will therefore be utilising the industry owned realestate.co.nz as the main national website to advertise properties on.

[147] On 25 October 2013, Lodge's General Manager, Ms Peel, drew developments with Trade Me to the attention of Lodge's administrators, noting Lodge would "no longer place every listing on Trade Me", but only if vendors wished and at their cost, and in January 2014 Lodge would "remove all our listings from Trade Me and stop automatically uploading to the site".

[148] At about the same time, Ms Peel asked Lodge's IT providers, PropertySuite, to withdraw all Lodge's listings from Trade Me from 20 January 2014, while retaining a facility to upload selected listings at the respective vendor's expense. Property Suite agreed, and its Garry Stark added:

... you can leave all of your current listings on TradeMe (until you withdraw or sell) as of the date that TradeMe switch to per-listing charging at NO cost to you or the vendors of those listings. It's only new listings from that date onwards that will incur the per listing charge, not existing current listings.

[149] Lodge's 30 October 2013 managers' meeting was advised the important dates for listings advertised on Trade Me were 1 January 2014, after which new listings would not be uploaded to (but current listings would remain on) Trade Me; and 20 January 2014, when "All listings will be removed from Trade Me". In either case, vendors could have their listings uploaded to Trade Me at their expense.

[150] In early December 2013, Ms Peel told Lodge's salespeople uploads of new listings to Trade Me would cease from 1 January 2014, and all current listings would be removed from Trade Me on 18 January 2014. Any subsequent listings uploaded to Trade Me were required to be paid for by the vendor. She reminded them of the dates on return to work after the Christmas/New Year break. Mr O'Rourke, still away from the office, checked with Ms Peel systems were in place to remove current Trade Me listings and to account for any new Trade Me listings at vendors' expense. Ms Peel confirmed she had "turned off the 'authorise all' facility for the websites in PS", meaning all uploads had to be done individually.

[151] In mid January 2014, NZRN's Vaughan Borcovsky enquired of its network what agencies were doing as the 31 January date for Trade Me's new pricing approached. Ms Peel confirmed Lodge's timing on 1 and 18 January, with vendors to pay for any new listings on Trade Me.

[152] On 23 January 2014, Lugton's Simon Lugton followed up a conversation with Mr O'Rourke to ask for a copy of the letter they had been discussing. Mr O'Rourke obliged, sending Mr Lugton Mr O'Rourke's "Private and confidential – not for re-distribution" advice to Lodge's salespeople on how to respond to vendors contacted by Trade Me about removal of their listings.

—Lugton's

[153] Mr Lugton prepared a memorandum to Lugton's sales team on 17 October 2013, titled 'Discontinuation of TradeMe Advertising'. The memorandum read:

Due to a massive price increase, continued dissatisfaction with sharing a property portal that caters to Private Sellers, and the inflexibility and inability of TradeMe to display property in a quality manner **ALL HAMILTON REAL ESTATE COMPANIES** have agreed to stop supporting TradeMe for property promotion from January 2014 onwards.

We have all agreed to fully support and endorse REALESTATE.co.nz as the only property portal apart from our own company websites. Lugton's will incorporate REALESTATE.co.nz logos into our website, Waikato Times liftout and our property brochures. Simultaneously there will be an extensive Print and Radio campaign commencing shortly to educate the consumer to use REALESTATE.co.nz as the preferred property website.

- All Lugton's listings will be removed from TradeMe by 20 January 2014
- All mention of TradeMe promotion has been removed from Lugton's Pre-List materials as of now.
- When listing a property prior to January if a Vendor asks about TradeMe promotion you will need to disclose it will be for a limited period; not past 20 January.
- Lugton's will cease to load new Listings to TradeMe sometime prior to Xmas to ease the transition
- From 20 Jan onwards TradeMe advertising will solely be at the Vendors cost at \$159 and Lugton's doesn't want salespeople to proactively offer it to Vendors. If they insist on it they must pay for it.

- From 20 Jan onwards TradeMe in Hamilton will have very limited content. It will have mainly Private Sales on it so will have a QUARTER of the listings that REALESTATE.co.nz has.

[154] In late January or early February 2014, in the course of a telephone call with Monarch's Mr King, Mr Lugton observed Online and Success standard listings continued to appear on Trade Me.

—Monarch

[155] On 1 November 2013, Harcourts' chief executive officer, Mr Duncan, advised, after negotiations with Trade Me, Trade Me's \$139 per listing pricing would take effect for Harcourts franchisees from 1 April 2014. He added "Effectively the changes to the charges will require all advertising on Trademe, should the client insist on using it, being vendor funded", and "These charges are unreasonable and we believe now is the time to wrestle back control of the online channel by focusing on our industry owned portal [www.realestate.co.nz](http://www.realestate.co.nz)".

[156] Later, on 12 December 2014, Mr Duncan advised franchisees Harcourts discussions with Trade Me were "at an end", but "We are not boycotting Trademe completely as we are more than happy for any vendor paid Trademe advertising to be placed". Saying Harcourts would not underwrite Trade Me's listing volumes, he warned franchisees against Trade Me's individual approaches for volume commitments.

[157] On 20 December 2014, Trade Me made direct contact with Harcourts franchisees, including Monarch, offering to postpone the new Harcourts rate until 1 May 2014 (in return for a five listings/\$695 minimum monthly commitment, and a 12 month agreement). Trade Me indicated it was negotiable on price and/or commencement in return for greater commitment.

[158] On 15 January 2014, Mr King advised all Monarch's managers and agents:

As advised in today's Sales Meeting (Rural meeting yesterday) we will be withdrawing from Trademe by the end of the week (Monday at the latest). All our listings will come off their site.



If anybody has current vendor paid upgrades which are running or about to start, please contact Allan or myself asap so these can be reloaded.

All future Trademe advertising will be by way of Vendor paid. (or agent paid)

...

I will confirm pricing for Trademe advertising as soon as possible.

[159] Mr King followed that up on Monday, 20 January 2014, to confirm all Monarch's listings had been removed from Trade Me, and new listings were \$159 + GST at the vendor's expense:

This is due to their new pricing structure which they are putting in place.

We cancelled our subscription with Trademe last week which as far as we are concerned was effective immediately.

Please note, this is NOT a boycott of Trademe but is in response to their new impending pricing structure.

Mr King included a memorandum addressed to vendors, enumerating the reasons Harcourts favoured withdrawal from Trade Me and exposure on Harcourts own website and on realestate.co.nz, which concluded with reference to vendors' ability to list their properties on Trade Me for \$183 (including GST).

[160] That same day, Mr King spoke with Online's Carl Glasgow, and provided him with a copy of Trade Me's correspondence addressed to "The Property Owner" of one of the listings removed from Trade Me by Monarch. He emailed the same letter to Monarch's contacts at Harcourts, Hayden Duncan and Jo-Anne Clifford, advising:

Just giving you heads Up.

We exited Trademe on Thurs night and took all our listings off their site.

Trademe sent personal letters to all our agents by email on Friday.

They couriered a letter to each of our vendors Friday (letter attached)

Thought you should know as they will be doing it to others.

They have just re emailed all out [*sic*] staff with hit reports on each of the properties they had on the site prior to us taking them down.

They are trying to do a good job on everybody.

[161] Monarch's accountant, Allan Archer, had given notice of Monarch's cancellation on 16 January 2014. In that email he enquired:

... do we need to do anything about a contract for adding listings only as vendors pay for them?? There have been several emails received regarding pricing and I am not too sure what the final pricing agreement is for us to advertise on Trademe.

Monarch's Trade Me account manager, Michaele Barr, responded to Monarch's cancellation the next day, noting 30 days' notice was required, meaning Monarch retained subscription pricing until at least 14 February 2014. However, as part of the Harcourts group, the pricing changes did not take effect until "1 April at the earliest". She added:

Given the listings which came off site last night after the feed was deactivated have already been paid for the vendors do have a right to continue to have their listings on site, and to reiterate the above under the new pricing structure there is no further charge for existing listings on site, listing costs will only be incurred when new properties are loaded.

Mr Archer replied:

We would like to start the vendor paid asap

We want to have our vendors pay what we are going to be charged for an advert before the advert goes up.

We dont [sic] want to be having to refund bits and pieces or have 1 rate for a period then another after that. I think it would be far easier to move off contract rates asap and move to the casual rates sooner than later.

To keep things cleaner and easier to manage i would like to go onto the casual rates from 1feb [sic] 2014 even though we have cancelled our contract and there is still the notice period.

[162] Technical problems caused some of Monarch's listings to continue automatically to be uploaded to Trade Me. Mr Archer sought Monarch's IT support's advice "Still got probs with Trademe. Properties still randomly going up everyday. Causing a bit of grief with vendors and other companies. What else can we do?".

—Online

[163] Mr Coombes said he received a call from Mr King in mid January 2014, while Mr Glasgow was on away on holiday, in which Mr King said “You buggers have still got your stuff on Trade Me”. Mr King did not recall ever saying such a thing to Mr Coombes. He also said mid-January 2014 timing made no sense, because Monarch also had its listings on Trade Me until about 20 January 2014.

[164] After Mr Glasgow’s return from holiday, Online withdrew its standard listings from Trade Me on about 20 January 2014.

—Success

[165] Success’ Mr Shale responded to Bayleys’ Mr Hornblow on 17 October 2013 by email, copied to Ms Worley:

We have made significant progress on this one locally. We have 7 Residential brands in Hamilton- Harcourts, Lugtons, Lodge (NZ Independent Realtors), Ray White, Eves and Bayleys committed to turning off the trade me feed as our individual agreements finished. LJ Hooker will probably do the same, but may then pay for their listing to go on. We will offer it as a vendor funded option, but will not include in standard packages-favouring bayleys.co.nz, realestate.co.nz and nzherald etc.

The Waikato Times have agreed to fund in fill a print media campaign to promote realestate.co.nz through there distress space. In addition most brands will also look to ensure the realestate.co.nz brand image is built up. The print Media campaign is due to start in mid January. I am aware many other regions have had similar discussions.

[166] Ms Worley, based in Tauranga, forwarded the email chain to other local Success and Eves managers as a backgrounder to their attendance at realestate.co.nz’s forthcoming presentation. She added “I don’t see the need to meet with other licensees around the city”. She enlarged on that in a later email to Mr Shale:

I have been in discussion with realestate.co.nz and they are doing everything they can to ramp up their exposure in the marketplace. This is a great opportunity for us to drop our Trade Me expense but still allow a vendor the opportunity to go on to Trade Me at their cost. Currently we recover very little Trade Me funding and the costs to the Company are approximately \$170,000 per annum.

Going forward realestate.co.nz is our company and we should be supporting them. We have not organised meetings in Tauranga/Mount with other companies but I suspect that won't be necessary. There wouldn't be one company keen to pay Trade Me at their new rates. Perhaps Bayleys could be talking to APN about supporting realestate.co.nz as well.

[167] Mr Shale responded, querying her reference to not recovering Trade Me listing costs, asking "Is my office the only one currently charging for trademe?". Mr Worley replied "A number of offices do charge but there are many, particularly in the Eves brand, that do not recover anything like the subscription".

[168] On 21 October 2013, Mr Hornblow emphasised to Bayleys franchisees, including Success:

Bayleys stance is very much one of this will be a vendor funded model from the time of the next contract change which is Feb 1<sup>st</sup>. Harcourts, Ray White, L J Hookers, Property Brokers and Barfoot and Thompson have agreed to do the same along with most independent operators around the country. In addition we also see this as a great (and one-off) opportunity to push Real Estate.co as the main place consumers should go to find property online.

Mr Hornblow reiterated the points to franchisees on 5 November 2013.

[169] On 1 November 2013, Trade Me's Ms Vulinovich advised Ms Worley of the final pricing model negotiated with Bayleys, at \$149 per sale listing. Ms Worley observed the rates included rental listings, and referred Trade Me's advice to the Realty Services rental department, noting "In real estate we will be charging the vendors to go on here. The Company will not be carrying the cost." Early in the new year, Ms Vulinovich offered the Realty Services group \$134 per sale listing, to commence from 1 July 2014, with a commitment of approximately two-thirds the group's recent volumes. Ms Worley referred the offer to her supervisors, Realty Services' chief executive officer and Success' Mr Shale; Mr Shale responded he was "happy with the vendor paid status".

[170] In mid January 2014, Ms Worley advised all Success' and Eve's managers and administrators of the shift to vendor funded Trade Me listings from 1 February 2014:

Up until 1 February though we are still paying a 'per office' cost. If you haven't already done so, please ensure every listing we have is on Trade Me.

There is no additional cost to the Company to do this. Often we have charged a vendor \$50 to go on Trade Me but effectively immediately and until 1 February there is no cost. Just get them on there.

...

So, what do I want you to do? Please ensure all listings in your branch are loaded on Trade Me prior to 30 January.

On 22 January 2014, she corrected the advised date to 1 March 2014, on expiry of the Realty Services contract.

[171] In mid January 2014, Mr Shale says Mr King called him: “the theme of his call was to say, ‘why are your listings still on Trade Me, get them off there’”.

[172] In advance of expiry of the Realty Services contract, Ms Worley engaged in negotiations with Trade Me. Success’ new marketing ratecard proposed a vendor ‘opt-out’ from Trade Me standard listings, still at the vendor’s expense. Trade Me formally offered a reduction to \$139 (from \$159) for standard sale listings, deferred to 1 April 2014. It also offered \$99 per listing, if Success uploaded all its listings. Ms Worley advised Realty Services’ chief executive officer and directors of the alternative offer, saying:

I am happy with this deal however I am nervous to enter into an agreement that ties us into this. I suspect the negotiations with Trade Me and the Real Estate fraternity could go on for some time.

Ultimately Ms Worley advised Ms Vulinovich she was “not keen to enter into a contract in case things change with Trade Me and we lose a competitive advantage by being dearer than other real estate companies”. But she would “honour our commitment to put Trade Me into all campaigns in return for a discount of \$20 per property”. A formal contract was entered on those terms on 30 April 2014.

### **Ultimate position**

[173] In the six months after January 2014, the agencies had far fewer residential listings on Trade Me than in the same period the preceding year:

Agency	1 Feb 2013-31 Jul 2013	1 Feb 2014-31 Jul 2014
Lodge	781	55
Lugton's	547	46
Monarch	717	79
Online	293	150
Success	102	46

[174] On 30 July 2014, Trade Me reintroduced a monthly subscription fee for its standard listing service to real estate agencies, capped at \$999 for agency offices in the regions and \$1,399 in metropolitan areas.

## Discussion

*Entering a “contract, arrangement, or understanding”?*

[175] The first question is whether there was qualifying ‘concurrence’ between the parties.

[176] There is no contract at issue here. In an arrangement or understanding, the Court of Appeal’s formulation in *Giltrap* requires “a consensus between those said to have entered into the arrangement” and “an expectation that the consensus will be implemented according to its terms”.<sup>22</sup>

[177] The issue is whether the defendants were “part of a consensus giving rise to an expectation that some proscribed action or inaction take place”.<sup>23</sup> By ‘consensus’ is meant “an apparent meeting of the minds”.<sup>24</sup> The consensus must engender “an expectation in the minds of the participants that at least one person will act in a proscribed manner”.<sup>25</sup>

[178] The test is objective: it is “to be judged by reference to what reasonable people would infer from the conduct of the person whose participation in the

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<sup>22</sup> See paragraph [21] above.

<sup>23</sup> *Giltrap*, above n 4, at [18].

<sup>24</sup> *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560 (CA) at 567.

<sup>25</sup> *Giltrap*, above 4, at [17].

consensus is at issue”;<sup>26</sup> it is to be assessed from “outward appearance rather than inner thoughts”.<sup>27</sup>

[179] The relevant ‘terms’ or ‘action or inaction’, on the Commission’s pleading, are for the participating agencies to withdraw vendors’ standard listings from Trade Me by January 2014, and to bear none of the cost of subsequent Trade Me standard listings.

[180] From outward appearances, a reasonable person would infer each defendant agency, to each other’s comprehension – in anticipation of Trade Me’s move from subscription to per listing fees charged to each agency, and to improve the standing of realestate.co.nz in Hamilton – expected neither itself nor any of the others would absorb the cost of Trade Me’s new fees, and all (except Success) would withdraw their respective vendors’ standard listings from Trade Me by January 2014, leaving realestate.co.nz as the comprehensive site for Hamilton real estate agency listings, and any subsequent Trade Me listings to be vendor funded. There was an apparent meeting of the defendants’ minds on those subjects.

[181] In coming to that assessment, I disregard witnesses’ statements in evidence of their own comprehensions or expectations in the wake of the 30 September 2013 meeting. In particular, I disregard witnesses’ assertions of a “consensus” arising from the meeting.

[182] Any reasonable observer of the whole of that meeting (that is to say, having heard each exchange in the tumult of the first part of the meeting), would have seen and heard the agencies’ various explanations of their individual refusals to absorb the cost of Trade Me’s future per listing fees at the rates promoted by Trade Me (including, by the time of the meeting, the discounted rates offered to or negotiated by various franchises and networks, whether or not expressed at the meeting). It was also the position earlier consistently expressed from franchisees to franchisors, and within networks, and subsequently asserted within each agency.

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<sup>26</sup> At [23].

<sup>27</sup> At [37].

[183] The consensus was as to agencies' non-absorption of the cost of Trade Me's future per listing fees, with the consequence any subsequent Trade Me listings would be vendor funded. The agencies had regard for Trade Me's proposed new pricing in terms of its financial impact on their businesses, imposing substantially greater cost than each then absorbed. Mr Coombes, for example, expressly referred to attendees' upset at the 'price increase' and the 'cost' in the singular, meaning their totality. So too did Mr Lugton, who recalled "Mr O'Rourke saying that the increase for Lodge would be ten-fold". All witnesses attending the meeting, one way or another, identified discussion at the meeting agencies could not afford to bear the cost of Trade Me's future standard listing fees as most had been doing to date, with the result the move to vendor funding was inevitable.

[184] Any reasonable observer of the whole of the defendants' conduct also would have concluded the agencies had decided together to withdraw their standard listings from Trade Me by January 2014, to promote realestate.co.nz as the comprehensive source of online Hamilton real estate agency listings.

[185] Mr Coombes, Mr Lugton, and Mr Shale each assert the withdrawal decision was made at the 30 September 2013 meeting. Agreement to withdraw by January 2014 is consistent with that meeting's discussion of realestate.co.nz's promotion and the seasonally smaller volume of listings then to be removed. On the other hand:

- (a) although Mr Coombes was not at the 16 October 2013 meeting, his evidence of the withdrawal discussion at the 30 September 2013 meeting is pure assertion;
- (b) Mr Lugton's evidence does not address the coincidence of the 16 October 2013 meeting and his internal advice on 17 October 2013 Lugton's listings would be removed by 20 January 2014;
- (c) January 2014 as a convenient time by reference to expiry of agencies' Trade Me contracts is at odds with Mr Lugton's knowledge Lugton's contract was month-to-month, meaning withdrawal for Lugton's should occur much earlier; and



- (d) Mr Shale’s evidence of the withdrawal discussion at the 30 September 2013 meeting is also conclusionary, and does not explain his coincident 17 October 2013 response to his franchisor’s 26 September 2013 email, to which response might have been made more immediately after the 30 September 2013 meeting.

[186] Mr Couch, Mr King, Mr O’Rourke and Mr Singh all say the decision was made on 16 October 2013, and timed for January 2014 to coincide with the relative quiet of January and the proximity of expiry of agencies’ contracts with Trade Me. But Mr Coombes was not at the 16 October 2013 meeting, and there is no evidence of how otherwise he knew about withdrawal for January 2014. Lugton’s was on a month-to-month contract, and only escaped Trade Me’s new pricing for November 2014 by inadvertence; January was too late for it. And Ms Baylis records Mr King’s advice before the 16 October 2013 meeting “the whole of Hamilton realestate business” would be coming off Trade Me in January 2014, although that is around the time Mr O’Rourke, who had also been speaking with her, said Lodge decided to withdraw from Trade Me.

[187] On balance, it is more probable the details of the withdrawal decision were made at the 16 October 2013 meeting, when withdrawal of listings from Trade Me was an obvious boost to their retention on realestate.co.nz, and the combination of its timing with media publicity was understood. But that does not exclude the possibility withdrawal from Trade Me was discussed more generally in the 30 September 2013 meeting, particularly given some agencies’ comprehension Trade Me’s new fees would apply to all then-current listings on expiry of their Trade Me contracts. In terms of ‘promoting realestate.co.nz’, the intended subject of the 30 September 2013 meeting, withdrawal from Trade Me is also an obvious topic. Mr O’Rourke’s note “3. Product—less of” may reflect that discussion; alternatively, it may just reflect an expectation there would be fewer listings at Trade Me’s higher price.

[188] There was no sense of conditionality objectively to be drawn from any of the ‘will not absorb’ or ‘will withdraw’ expressions. Each was an expression of what the individual agency would do, without regard for the others, although a number of the

agencies expressed taking comfort from the universality of their competitors' responses, at least in the sense it affirmed the sensibility of their own choice. And some of the agencies had expressly earlier noted risk from divergent approaches. But whether the defendants' comprehensions included a sense of reciprocity or moral obligation between them is irrelevant. The majority judgment in *Giltrap* dictates objective focus be on "the concepts of consensus and expectation".<sup>28</sup>

[189] Lodge and Monarch (and Mr O'Rourke and Mr King) resist such conclusions on the basis the agencies decided in advance of the 30 September 2013 meeting to vendor fund standard listings on introduction of Trade Me's 'per listing' fees. Both Mr Taylor and Mr McLennan emphasised each agency came to its "independent decision" in those respects. Further, at the meeting, there was no discussion of reciprocity or giving of assurances.

[190] That is not a complete answer. None of the agencies acted on their decisions in advance of the 30 September 2013 meeting. At least some of the agencies were aware a decision to vendor fund Trade Me listings risked others' decisions to continue to absorb that cost. The agencies' decisions were thus at least capable of adjustment in light of further information. The further information came from the 30 September 2013 meeting. The independence of the agencies' prior decisions is undermined by the mutuality of their understanding arising from the 30 September 2013 meeting.

[191] In *Caltex*,<sup>29</sup> Salmon J accepted "mutuality or a meeting of the minds is therefore an essential ingredient of an arrangement or understanding". By that he meant "an apprehension shared by two and more persons that there will be accord among them as to future acts in a specified area".<sup>30</sup> While he went on to describe that mutuality as establishing reciprocal moral or legal duties, the Court of Appeal in *Giltrap* is clear: the focus is to be on consensus and expectation.<sup>31</sup>

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<sup>28</sup> At [15].

<sup>29</sup> Above n 14.

<sup>30</sup> At 314.

<sup>31</sup> *Giltrap*, above n 4, at [15].

[192] It is enough to establish consensus here that the defendants communicated to each other their intended and common course.<sup>32</sup> And the consensus gave rise to the defendants' expectations of how they each would act. That is what objectively establishes "communication among the parties of the assumption of a moral obligation".<sup>33</sup>

[193] I find the defendants were part of a consensus giving rise to expectations each would not absorb the cost of Trade Me's proposed per listing fees, and each (other than Success) would withdraw their standard listings from Trade Me by January 2014, subsequent Trade Me listings to be vendor funded. For the purposes of s 27, the defendants entered into an arrangement, or arrived at an understanding, to those ends.

*Giving effect?*

[194] Section 2 of the Act provides:

**give effect to**, in relation to a provision of a contract, arrangement, or understanding, includes—

- (a) do an act or thing in pursuance of or in accordance with that provision:
- (b) enforce or purport to enforce that provision.

[195] The Commission alleges the agencies gave effect to the arrangement or understanding, by withdrawing their current standard listings from Trade Me, and moving to vendor funding of any future standard listings.

[196] Lodge and Monarch (and Mr O'Rourke and Mr King) oppose that allegation, on grounds there was no agreement reached at the 30 September 2013 meeting, and each agency took those actions in accordance with only their own decisions and reasons. Neither contention can be maintained in the face of my finding of an arrangement or understanding arising at the 30 September 2013 meeting; in particular, a consensus participant acting in its own interests congruent to that of the

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<sup>32</sup> Compare *Caltex*, above n 14, at 320: "If, for example, the advice given by Mr Crum just prompted the other companies to follow his lead without any of them giving any indication to Caltex that they were intending to do so, there would not be an understanding".

<sup>33</sup> *Giltrap*, above n 4, at [15].

arrangement or understanding is still giving effect to the arrangement or understanding.<sup>34</sup>

[197] The Commission alleges Mr King also gave ‘enforcement’ effect to the arrangement or understanding, by querying Online’s and Success’ continued Trade Me listings respectively with Mr Coombes and Mr Shale. Mr King denies making such calls. In any event, both Mr Coombes and Mr Shale say Mr King called them in mid January 2014, which seems premature for ‘enforcement’ of withdrawal, which Mr King said Monarch had yet to do. Monarch’s listings remained on Trade Me until at least the night of Thursday, 16 January 2014. Mr Coombes was insistent Mr King called him while Mr Glasgow was away on holiday, from which he did not return until Monday, 20 January 2014. If Mr King is to be taken to have been ‘enforcing’ the consensus from a position of Monarch’s own compliance, the call can only have been on Friday, 17 January 2014, before the date on which compliance was expected.

[198] Even if the telephone conversations happened at the times alleged, Mr Coombes’ recollection of the call as Mr King’s observation only, and Mr Shale’s description of his more directive call as being along a ‘theme’, is insufficient to give the calls the necessary enforcement quality.

[199] Mr Dixon did not press in closing the Commission’s pleaded contention Mr O’Rourke’s dealings with Mr Metcalfe and Mr Lugton were ‘enforcement’. I am not aware of any authority on the meaning of ‘enforce’ in s 30. I prefer the interpretation ‘enforce’ in s 30 means ‘to compel observance’,<sup>35</sup> rather than incorporating some lesser sense of affirmation. Mr O’Rourke’s communications did not go further than affirming the existence of the arrangement or understanding. To that extent, they may have been actions “in pursuance of” the arrangement or understanding, but that is not what is pleaded.

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<sup>34</sup> *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (1977) ATPR 40-056, 17,571: “...there is good reason for thinking that those words [‘in accordance with’] are intended to cover the situation where what is done is or may be done for reasons other than to implement the arrangement”.

<sup>35</sup> *Black’s Law Dictionary* (10th ed, Thomson Reuters, St Paul, 2014) at 645: “1. To give force or effect to (a law, etc.); to compel obedience to. 2. Loosely, to compel a person to pay damages for not complying with (a contract)”; *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 355: “1. Compel observance of (a law etc.). 2. Impose (an action, conduct, one’s will). 3. Persist in (a demand or argument)”.

[200] I find, by withdrawing agencies' standard listings from Trade Me, and moving to vendor funding of Trade Me standard listings, being actions in accordance with their arrangement or understanding, the defendants gave effect to it.

*"In competition with each other"?*

[201] There is no dispute the parties supply real estate sales services, defined as the entirety of the real estate agency's services in the marketing and sale of residential property, in competition with each other. The issue is whether there is a closer relevant focus, down to supply of Trade Me services alone, defined as arranging for the listing of the property on Trade Me.

[202] Mr Dixon argued disaggregation to that degree was justified, first, because Trade Me listings were the subject of the agencies' arrangement or understanding, and second, because Trade Me listings were charged separately from other marketing costs. But the former is a circular argument, and the latter would establish as a separate service, for example, print advertising on a particular day, which too is individually charged to prospective vendors.

[203] In *Australian Competition and Consumer Commission v Olex Australia Pty Ltd*, the Federal Court of Australia recently opined "It is impermissible to artificially disaggregate the supply into component parts and purport to apply the statutory provisions to each component of the product", and added subsidiary services "did not become disaggregated from [the principal service] merely because Olex charged a fee".<sup>36</sup> There the ACCC alleged a 'cable cutting service', subsidiary to a 'cable sales service'. But every acquisition involved the cable being cut to length; that Olex levied a fee for cutting did not make it a distinct service.

[204] Such an approach also risks missing the wood for the trees. *Flight Centre Ltd v Australian Competition and Consumer Commission*<sup>37</sup> emphasises the need to identify the area of competition – without s 30, the 'market' – with a sense of "commercial reality": "It must accurately and realistically describe and reflect the

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<sup>36</sup> *Australian Competition and Consumer Commission v Olex Australia Pty Ltd* [2017] FCA 222 at [652]-[653].

<sup>37</sup> *Flight Centre Ltd v Australian Competition and Consumer Commission* [2015] FCAFC 104.

interactions between, and perceptions and actions of, the relevant commercial community”.<sup>38</sup>

[205] Here, commercial reality is agencies compete, to obtain and retain residential property listings for sale, by providing both vendor-focused and purchaser-focused services. The purchaser-focused services are the marketing and publicity effort, usually largely paid for by the vendor, irrespective of any eventual sale of the property. In the pleading’s nomenclature, that is the Real Estate Advertising Services.

[206] It is not legitimate to descend below that to describe the existence of competition between the defendants. Online advertising of residential property for sale, including its listing on Trade Me, is one of numerous means of advertising property to potential purchasers. The evidence is of the utility of effective advertising, not access to particular media. The absence of vendor complaint on agencies’ withdrawal from, and vendor funding of, Trade Me listings is informative.

[207] In any event, it may not much matter here: the necessary qualification is the defendants supply services in competition with each other, and that is admitted.<sup>39</sup>

[208] I find the defendants were in competition with each other for the supply of both real estate sales services and real estate advertising services to prospective vendors of residential property in Hamilton.

*“Fixing, controlling, or maintaining, of the price”?*

[209] In a general sense, s 30’s focus is on collusive restraint of the price (or of discounts, etc) for goods or services. ‘Control’, in particular, carries that meaning.<sup>40</sup>

[210] To ‘control’ the price is not necessarily to determine it. That is the job of ‘fix’. So the price may be controlled, even if not fixed. While colluders may otherwise freely determine the price, their collusion in its control will relieve some aspect of the price from competitive pressures: “An arrangement or understanding

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<sup>38</sup> At [120]-[121].

<sup>39</sup> See paragraph [211] below.

<sup>40</sup> *Caltex*, above n 14, at 311.

has the effect of ‘controlling price’ if it restrains a freedom that would otherwise exist as to a price to be charged”.<sup>41</sup>

[211] Mr Taylor frankly admitted the reason for disputing the subsidiary services pleaded by the Commission was to support a submission any established price control was *de minimis* compared to the amount of commission on sale. Trade Me’s headline ‘per listing’ fee was “less than 1%” of commission and marketing costs on the median sale price of Hamilton residential property. Mr Taylor relied in particular on the Federal Court’s observation in *Olex*:<sup>42</sup>

Generally, more needs to be shown than merely that a provision has the likely effect of controlling a *component* of the price. It must have the likely effect of controlling the *overall* price, ie be a materially significant proportion of the price.

[212] The Federal Court was there continuing its critique of the ACCC’s “flawed” services analysis;<sup>43</sup> the Court’s emphasis of ‘component’ and ‘overall’ requires to be seen in that light. But the Court’s “materially significant proportion” condition cannot mean a ‘mathematically significant proportion’, when s 30 is to identify artificial interferences with competitive price setting, and ‘control’ in particular carries that meaning.<sup>44</sup> Section 30’s policy objective is to provide ‘bright line’ certainty.<sup>45</sup> Thus the relevant ‘proportion’, if proportion is relevant at all, must be of the degree of constraint to price setting. Where, for example, profit margins are slim, price control may be asserted over a mathematically small proportion of the price, which nonetheless is materially significant.

[213] I do not accept there is a *de minimis* qualification to s 30, at least not in the sense of any mathematically insignificant amount of the price. The availability of Trade Me standard listings appeared to be ‘materially significant’ in competition between agencies to secure vendors’ business. Control of that aspect of the price – whether as a proportion of marketing costs and/or commission paid by the vendor, or

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<sup>41</sup> *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* [1999] FCA 954 at [168].

<sup>42</sup> *Olex*, above n 36, at [657] (original emphasis).

<sup>43</sup> See paragraph [202] above.

<sup>44</sup> See paragraphs [24] and [209] above.

<sup>45</sup> *Commerce Commission v Air New Zealand Limited* (2011) 9 NZBLC 103,318 at [84].

simply in its dollar terms – would engage s 30. And, of course, marketing costs were incurred regardless of sale; commission is not a relevant denominator.

[214] Mr Dixon submits “price was controlled because there was a restraint on the competitive setting of it – the price charged to the vendor would include the whole of the Trade Me listing fee”.<sup>46</sup> I disagree.

[215] As I have found, the defendants’ concurrence was as to the cost of Trade Me’s new ‘per listing’ fees, if to be absorbed by each agency. The agencies would not absorb them, as they generally had done in the past for Trade Me’s subscription fees, and would move to vendor funding of Trade Me’s ‘per listing’ fees. By ‘vendor funding’, they meant comparably with other third party advertising, including Trade Me feature listings – in principle, to be paid for by the vendor. But that was not to prevent, in particular necessary or desirable circumstances, the agency and/or the agent bearing some portion or all of that third party expense. Each of the Commission’s agency witnesses who attended the 30 September 2013 meeting confirmed that position.

[216] Mr Coombes’ evidence in chief was “additional marketing costs... will generally be at the vendor’s cost”. While Online previously provided vendors with Trade Me standard listings at its own cost, it ceased offering those listings after Trade Me’s price increase, and subsequently “generally requires vendors to fund feature listings on Trade Me”. ‘Generally’ means there are circumstances in which such costs are not exclusively borne by the vendor. He went on to say of the feature listings “This was generally paid for by either the vendor or the salesperson”. Again, ‘generally’ means there are circumstances in which such costs are not exclusively borne by the vendor or the salesperson.

[217] Under cross-examination Mr Coombes initially said attendees at the 30 September 2013 meeting were going to pass on all of the cost for Trade Me.

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<sup>46</sup> Mr Dixon also argued such an agreement “could be viewed as an agreement not to discount the price of the relevant services by the amount of the Trade Me Listing fee”, and subject to s 30’s reference to ‘discount’. Mr Dixon acknowledged there was likely to be “considerable overlap” between ‘price’-fixing and ‘discount’-fixing, but they were “not necessarily the same thing”. To my mind, agreement ‘not to discount’ must be price control in itself; the agreement constrains price setting, and nothing is gained by reference to s 30’s ‘discount’.



He said the same in relation to Trade Me feature listings. But he then described that as ‘vendor funding’, by which he meant:

... the option with us that if they stay on Trade Me we could offer them a feature ad that they either paid for, the agent paid for or we paid for.

He continued Online would negotiate with vendors who wished to use Trade Me.

[218] Later under cross-examination, Mr Coombes said “I’m very sure we said that, ‘If anybody wants Trade Me they will have to pay for a feature ad themselves’”, but returned to “any feature ad on Trade Me was going to be vendor funded”. He said Online then advised its staff:

... as from January or in the New Year there would be no standard Trade Me listings. The standard listings, realestate.co, and feature listings Trade Me which would be vendor funded and generally I offered or paid for by the vendor, the agent or sometimes Online.

[219] Mr Coombes affirmed the position on re-examination: “Someone had to pay... the agent... the vendor or the company”:

We were all at the meeting and as I said to you my understanding was that we’d all agreed, or all had a consensus or an arrangement or whatever that we, we would take our properties off Trade Me in a very short period of time.

Q. And if anyone wanted to be on it [after] that?

A. Lord knows but we pulled ours and other people pulled theirs off not long after.

Q. And how would it be paid for thereafter if people wanted to be on Trade Me?

A. Well the ve – they would either the agency would have to pay for it or the agent or the vendor.

[220] Mr Lugton’s evidence in chief was:

... if a vendor wanted to list their property on Trade Me we were not going to deny it to them but it needed to be vendor pays. That was the agreement. None of the companies represented at the meeting wanted to bear the cost of paying for Trade Me listings....

...

The consensus from the meeting was that none of the agencies wanted to bear the cost of Trade Me listings, and so the agencies agreed on a vendor funded model going forward.

[221] Under cross-examination, Mr Lugton described 'vendor funding' as "a wide variety of things you can offer to a vendor". That the entirety of the cost of Trade Me listings was to be passed to a vendor was the "inference", the "spirit", he took from the meeting:

Q. And there was nothing said or discussed at that meeting that said, "If I want to negotiate with my vendors to contribute part or all or share that new Trade Me price with them," there was nothing said or agreed at that meeting that restricted you from doing that was there?

A. Well I, I previously said that we could go out and do what, what we wanted but the inference that I got was that I had (inaudible) to continue down the course that we wanted to go which was pass the cost of Trade Me.

...

Q. And what I understood you to say earlier is that that wasn't discussed in that way but the inference that you drew from the comments by people made at the meeting was that none of them wanted to absorb the cost is that fair?

A. And, and that they – their position was that they wouldn't.

Q. They wouldn't absorb the cost?

A. Yeah.

Q. So is it fair to say that what you inferred from that was that they would pass on the cost to the vendor correct?

A. Yes.

Q. But there was certainly no agreement that you would only, between each of these parties that they could only pass on 100% and couldn't negotiate around that figure correct?

A. There was no discussion around that. Oh I took the inference that we were talking 100%.

[222] On re-examination, Mr Dixon asked:

Q. What do you mean by the inference that you drew?

A. People saying things like, "Oh yeah we won't be supporting Trade Me. We're – you know this needs to be, this needs to be vendor funded," echoed around the room.

[223] Mr Shale explained Bayleys' Greg Hornblow directed Trade Me's 'per listing' pricing:

“will only be taken on as a vendor or agent funded model. No company [or] office funding should or will be entered into

...

... this is now a vendor funded or agent funded model.

[224] Of the 30 September 2013 meeting, Mr Shale said “everyone disclosed what their business' intention was, and at that stage I understood them all to be saying that they would be vendor funding”:

When I left the meeting, my expectation was that all of the agencies present were going to move to a vendor funded model for Trade Me listings. I believe that each represented agency had already individually decided to do this before the meeting. Certainly, I personally saw vendor funding as the only strategy (and I was aware of Greg Hornblow's email directive) when I went to the meeting. The meeting “uncover” highlighted to me that everyone thought the same as far as a vendor funding approach was concerned.

[225] Under cross-examination, Mr Shale confirmed nothing in the meeting restricted sharing part or all of Trade Me's listing costs between the vendor, agent, and agency. He agreed there was no discussion about the form of vendor funding.

[226] Success, as part of the Bayleys franchise, had always vendor funded Trade Me listings. Mr Shale was pressed on re-examination to define what he meant by 'vendor funding':

Q. ... and what I'm trying to ask you is would you still describe yourself as vendor funding Trade Me listings even though sometimes you covered it as part of the marketing package?

A. Well the, the term vendor funding would apply to the property that had money coming from an owner versus no money from an owner but there wouldn't be many listings that we would contribute entirely to the campaign without any owner investment.

Q. Do you think your use of the term vendor funding in that sense, in the way you've described it is consistent with industry use of the term vendor funding?

A. Well the industry term is any money coming from an owner and I think most companies would offer the vendors an opportunity to expand their marketing we probably do it more than most.

Mr Dixon sought clarification of his cross-examination response “Some were going to vendor fund”:

Q. Some were going to vendor fund it and by that you mean have it as an option that the vendor could pay for, is that right?

A. Mhm, yeah, to put that a different way I don't believe anyone was going to company fund it. Does that make sense?

[227] By ‘vendor funding’, the agencies meant only some portion of the new cost would be borne collectively by vendors – that is, no agency ‘was going to company fund it’. That is the persistent theme of the evidence from the Commission agency witnesses who attended the 30 September 2013 meeting. It is also Monarch’s Mr King’s evidence, under cross-examination from Mr Dixon: “... there can be vendor funding by someone paying a 100%. There can be vendor funding by someone just paying part of it. There can be agent funding.” On any individual transaction in the supply of real estate sales services or real estate advertising services, the full range of price setting options remained. The saving of agencies’ former Trade Me subscription fees also provided opportunity to access that range on any particular transaction. And it is at that individual level of analysis ‘price’ is to be understood – the “prices at which goods are in fact sold or offered for sale on terms where acceptance will result in a contract”: it is not an expansive concept.<sup>47</sup> The arrangement or understanding does not interfere with the competitive setting of price.

[228] That was demonstrated in Mr O’Rourke’s evidence. In response to the Commission’s s 98(b) notice, Lodge was required to provide “tabulated information for identified listings”. Although the precise scope of the Commission’s notice was not in evidence, it appeared to require information for 12 listings in February 2014, of which Mr O’Rourke said “Lodge paid the whole of the Trade me fee for 7 and part of the fee for 1”, and 9 listings in August 2014, of which “Lodge paid the whole fee for 5 and part of the fee for 2”.

[229] Mr Dixon emphasised this “very small number of listings”, compared to Lodge’s “very large total number of listings” (in the order of 1,500 per year).

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<sup>47</sup> *Commerce Commission v Siemens AG* (2010) 13 TCLR 40 at [246]-[248].

Without knowing the basis for the Commission's selection of the particular February and August 2014 listings, I have no way of knowing whether these examples are representative of Lodge's listings. But they illustrate, to some presently indeterminate degree, Lodge's continuing freedom to set prices, notwithstanding the arrangement or understanding.

[230] If anything, although it provides no ground to resist s 30's deeming, Trade Me's new pricing removed an artificial subsidy in the price for real estate sales or advertising services. Listings of residential properties for sale were generally published without charge to the vendor on the websites of the particular agency and its franchise. Other publications, including online, incurred a cost to the agency, generally charged to the vendor. Trade Me's capped subscription pricing model to agencies meant (above a small number of properties) the relevant share of the agency's cost could not be attributed directly to each vendor concerned. Section 128 of the Real Estate Agents Act 2008, or comparable disclosure requirements, made allocation of Trade Me's cost difficult or impractical. The majority of agencies (except Success, and Monarch in part) preferred to bear the modest cost directly. That preference ceased when the cost lost its modesty.

[231] The defendants' refusal to absorb the cost of Trade Me's new fees says nothing about the price of their services to vendors. Nothing in the arrangement or understanding reached between the defendants constrains any freedom to charge any price to any individual vendor on any individual transaction, including by absorbing part or all of the cost of the residential property's standard listing on Trade Me.

[232] Neither does anything in the arrangement or understanding 'provide for' such constraint: the only relevant constraint on an agency's price-setting is the degree to which it is prepared to absorb, rather than to pass on, the expenses it incurs in the delivery of the service. Even if the comfort any agency drew from knowing of its competitors' intentions made it less likely any proportion of those expenses would be absorbed, that does not 'provide for' price-fixing in s 30's sense. "Providing for" means steps taken in advance of the direct fixing, controlling, or maintaining of the

price as well as alternative means of achieving that result.<sup>48</sup> But agencies retained their full pricing discretion, despite the arrangement or understanding.

[233] As the arrangement or understanding between the defendants is not effective to fix, control, or maintain the price of real estate sales or advertising services to vendors, objectively that cannot be its purpose.<sup>49</sup> That is so, in any event, by reason of the arrangement or understanding I have found, which did not have price control as its target.

[234] I find the arrangement or understanding between the defendants did not have the purpose or effect of fixing, controlling, or maintaining (or providing for the fixing, controlling, or maintaining) of the price for, or any discount, allowance, rebate, or credit in relation to, real estate sales or advertising services supplied by the defendants in competition with each other.

### **Sundry matters**

#### *Mr King's and Mr O'Rourke's status*

[235] Given my findings above, I do not need to determine whether Mr King and Mr O'Rourke were to be regarded as principals or accessories in terms of s 80(1)(a) or (c). My inclination would have been to regard them as principals.<sup>50</sup>

#### *Expert evidence*

[236] The defendants sought to rely on expert economic evidence to the end the agencies' agreement could not have controlled price, because the same price would have resulted in the counterfactual. That is to say, on Trade Me's change to its standard listing fees, agencies would independently have decided to vendor fund Trade Me standard listings. The Commission objected to admission of such evidence, but obtained its own expert economic evidence in anticipatory response.

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<sup>48</sup> At [255].

<sup>49</sup> *ANZCO Foods*, above n 12, at [257].

<sup>50</sup> *Giltrap*, above n 4, at [51].

[237] Because arrangements had been made for the experts to give concurrent evidence (a ‘hot tub’), for which the experts were to consult with each other, the Commission sought a ruling on the expert evidence’s admissibility before the experts met. For various reasons, the issue could not be dealt with until during the trial.

[238] I decided to exclude the experts’ evidence, with reasons to follow. My reasons were:

- (a) in principle, s 30 type conduct does not avail of a competition analysis. Constraints on price-setting are deemed in breach of s 27. That the same price may have arisen in the counterfactual (*ie*, absent constraint) does not respond to the presence of constraint in the factual. The proposed evidence was irrelevant, and therefore inadmissible;<sup>51</sup> and
- (b) Mr Taylor conceded, if the Commission’s pleaded ‘vendor funding’ meant the agencies were to bear none of the Trade Me standard listing price, the expert evidence was not substantially helpful. That, of course, was the Commission’s case, with the result the evidence was also inadmissible.<sup>52</sup>

### *Admissibility objections*

[239] Perhaps unusually, the parties have reserved a number of admissibility objections for my determination after conclusion of the trial.

[240] The defendants object to admission into evidence of the videos and transcripts of the defendants’ witnesses’ interviews with the Commerce Commission, save to the extent they contain admissions. Principally, the defendants rely on ss 34 and 35 of the Evidence Act 2006:

#### **34 Admissions in civil proceedings**

- (1) Subpart 1 (hearsay evidence), subpart 2 (opinion evidence and expert evidence), and section 35 (the previous consistent statements

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<sup>51</sup> Evidence Act 2006, s 7(2).

<sup>52</sup> Evidence Act 2006, s 25(1).

rule) do not apply to evidence of an admission offered in a civil proceeding that is—

- (a) given orally by a person who saw, heard, or otherwise perceived the admission being made; or
  - (b) contained in a document.
- (2) Evidence of an admission that is a hearsay statement may not be used in respect of the case of a third party unless—
- (a) the circumstances relating to the making of the admission provide reasonable assurance that the admission is reliable; or
  - (b) the third party consents.
- (3) In this section, **third party** means a party to the proceeding concerned, other than the party who—
- (a) made the admission; or
  - (b) offered the evidence.

### **35 Previous consistent statements rule**

- (1) A previous statement of a witness that is consistent with the witness' evidence is not admissible unless subsection (2) applies to the statement.
- (2) A previous statement of a witness that is consistent with the witness' evidence is admissible if the statement—
- (a) responds to a challenge that will be or has been made to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness; or
  - (b) forms an integral part of the events before the court; or
  - (c) consists of the mere fact that a complaint has been made in a criminal case.

[241] Conversely, the Commission objects to admission into evidence of a non-witness', Mr Glasgow, interview with the Commerce Commission, on grounds it is inadmissible hearsay. Section 4 of the Evidence Act 2006 defines a 'hearsay statement' as meaning a statement that was made by a person other than a witness; and that is offered in evidence at the proceeding to prove the truth of its contents. Sections 17 and 18 of the Evidence Act provide:



**17 Hearsay rule**

A hearsay statement is not admissible except—

- (a) as provided by this subpart or by the provisions of any other Act; or
- (b) in cases where—
  - (i) this Act provides that this subpart does not apply; and
  - (ii) the hearsay statement is relevant and not otherwise inadmissible under this Act.

**18 General admissibility of hearsay**

(1) A hearsay statement is admissible in any proceeding if—

- (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
- (b) either—
  - (i) the maker of the statement is unavailable as a witness; or
  - (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

(2) This section is subject to sections 20 and 22.

[242] Some of those interviews were voluntary. Others were compelled under the Commerce Act's s 98:

**98 Commission may require person to supply information or documents or give evidence**

(1) Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person—

- (a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or
- (b) to produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice; or

- (c) to appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice.
- (2) For the purposes of subsection (1), the Commission's powers under this Act include the power to investigate whether an exception or exemption from this Act (whether under this Act or any other enactment) applies to a person or to a person's conduct.

Section 103 establishes refusal of such compulsion as an offence. And s 106(4) and (5) provide:

**106 Proceedings privileged**

...

- (4) A person shall not be excused from complying with any requirement to furnish information, produce documents, or give evidence under this Act, or, on appearing before the Commission, from answering any question or producing any document, on the ground that to do so might tend to incriminate that person.
- (5) A statement made by a person in answer to a question put by or before the Commission shall not in criminal proceedings or in proceedings for pecuniary penalties, be admissible against that person.

...

[243] The Commission accepts Mr Couch, Mr King, Mr O'Rourke and Mr Singh's s 98(1)(c) interviews are not admissible in this proceeding against the respective interviewee. But the Commission says the s 98(1)(c) interviews are otherwise as admissible as their voluntary interviews – they are relevant, and not rendered inadmissible by anything in the Evidence Act 2006, or any other legislation.

[244] In reliance on s 35 (1) of the Evidence Act 2006, the defendants say the witnesses' prior interviews are generally consistent with their evidence, and are therefore inadmissible. The Commission counters, saying the interviews are admissible under s 35(2)(a) and/or (b). But all counsel (to some degree) led witnesses under cross-examination through their respective interviews, seeking to establish *inconsistency* with their oral evidence.

[245] I can address the Commission's reliance on s 35(2)(b) immediately. It cannot be said the interviews form "an integral part of the events before the court". They are

at best post facto accounts of those events, and arise because of the Commission's investigation of – not intervention in – those events.

[246] As to s 35(2)(a), Mr Dixon says challenge to the veracity or accuracy of the defendants' accounts of the relevant events was inevitable, and "inclusion of the entire interview is therefore necessary to allow the defendants to respond to that challenge". He leaned heavily on the "fundamental" ss 7 and 8 of the Act, which favour admission of relevant evidence, unless its probative value is outweighed by its prejudicial risk.

[247] The current version of s 35 omits reference to "necessary to respond" to a challenge to the witness' veracity or accuracy, to which "extent" a previous consistent statement was admissible. Thus the prime focus of Mr Dixon's submission no longer appears in the section. The changed drafting has not received judicial scrutiny.

[248] Mr Dixon's primary submission also falls slightly uneasily from the Commission's lips. After all, it is the *defendants* contending for the interviews' inadmissibility. Regardless of the inevitability of challenge to the defendants' accounts, that challenge must be "based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness" (which the Commission does not universally contend), before s 35(2)(a) bites.

[249] Section 35's exclusion of previous consistent statements is to avoid repetitious or superfluous evidence.<sup>53</sup> It appears, however, once admitted, the previous statement is admitted for all purposes, including for truth of its contents.<sup>54</sup>

[250] The witnesses' complete interviews are not in themselves equivalent to "a previous statement of a witness" for the purposes of s 35. Instead, the interviews contain a number of such statements – *ie*, the witness' "assertion" of various

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<sup>53</sup> *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23 at [46]; *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1, at [8] per Elias P, and [57]; and *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [54].

<sup>54</sup> *Hart v R*, above n 53, at [54]; *Singh v R* [2010] NZSC 161, [2011] 2 NZLR 322. And note *Guy v R*, above n 53, at [48], as discussed in *Penman v R* [2015] NZCA 364 at [22] and *Carseldine v R* [2016] NZCA 573 at [15].

matters.<sup>55</sup> But they also contain statements of other persons, such as the Commission's interviewers (who also make various assertions, beyond their questions asked). Any particular assertion will be inadmissible if consistent with the witness' evidence, unless responsive to a relevant challenge in terms of s 35(2)(a) (or otherwise admissible in terms of s 35(2)(b) or (c)).

[251] From those observations, I come to the view:

- (a) the transcripts (and videos) of the Commission's interviews have a tendency to prove or disprove things of consequence to determination of this proceeding. They are therefore relevant in the proceeding;
- (b) the transcripts (and videos) are therefore admissible as evidence in this proceeding, except to the extent they comprise evidence that is inadmissible or otherwise excluded; and
- (c) to the extent (*ie*, assertion-by-assertion) the transcripts (and videos) contain previous statements by witnesses consistent with their evidence, those statements are inadmissible unless admissible under s35(2); but
- (d) such assertion-by-assertion inadmissibility says nothing about the overall admissibility of the transcripts (and videos).

[252] In the end, I do not need to decide the objections. The witnesses' evidence was offered without repetition of consistent statements in their interviews; contended evidential inconsistencies with those statements were thoroughly explored with the witnesses, whether or not on the basis of previous inconsistent statements or on claims on the witness' invention; and I have not required to rely on Mr Glasgow's contentious statement.

## **Result**

[253] The Commission's claims against the first, third, sixth and seventh defendants are dismissed.

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<sup>55</sup> Evidence Act 2006, s 4(1), 'statement'. And see *Rongonui v R*, above n 53, at [9] per Elias P.

## **Next steps**

### *Costs*

[254] The defendants are entitled to costs. If costs cannot be agreed, I will determine them on short memoranda of no more than five pages – annexing a single-page table setting out any contended allowable steps, time allocation, and daily recovery rate – to be filed and served by each defendant claiming costs within ten working days of the date of this judgment, by the Commission within five working days of service of the defendants’ memoranda, and by any defendant strictly in reply within five working days of service of the Commission’s memorandum.

### *Interim confidentiality orders*

[255] My minute of 14 September 2017 explained:

[1] A large number of documents to be exhibited in this proceeding are sourced from third parties, who have asserted confidentiality claims over some of their contents.

[2] The Commission maintains those assertions on the third parties’ behalf, by highlighting the relevant content in yellow, and redacting that content from the documents exhibited in open court.

[3] The process has caused difficulties in referring witnesses to such documents. For that reason, I proposed interim orders requiring all such highlighted material to be treated confidentially outside the courtroom, enabling witnesses otherwise to be referred to the material in open court. I acknowledge such interim orders would be at odds with open justice considerations, but I see no present way otherwise efficiently to progress the proceeding without requiring passage-by-passage defence of the claims to confidentiality.

[4] The Commission agrees with the proposed orders, but seeks by memorandum of today identified documents to be excluded from their operation, as containing competitors’ commercially sensitive information not for disclosure to the defendants themselves (but disclosed to their counsel). Although I have my doubts about some of those claims to confidentiality, on an interim basis I would be prepared to permit those exclusions for trial efficiency.

[5] The defendants agree with or abide my proposal.

[6] I therefore order, pending further order of this Court, except for those documents identified in the Commission’s memorandum of today’s date, the yellow highlighted material identified in the common bundle, or referred to in witness briefs or in oral evidence, may be addressed in open

court but is to be treated confidentially and not disclosed outside the courtroom.

[256] I said I would revisit the order on application, or in my ultimate decision in this proceeding. That time has come. The Commission should file and serve a formal application for any permanent confidentiality orders sought within ten working days of the date of this judgment; the defendants to file and serve any opposition within five working days of service with the Commission's application; and the Commission to file and serve anything strictly in reply within five working days of service of the defendants' opposition.

*Embargo on publication*

[257] Finally, to permit the parties to address any contended confidential information disclosed in this judgment, I prohibit publication or broadcast of any part of this judgment in any medium for two working days after its delivery.

—Jagose J