

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

**CIV-2015-404-003051  
[2016] NZHC 2851**

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

BETWEEN COMMERCE COMMISSION  
Plaintiff

AND PROPERTY BROKERS LIMITED  
First Defendant

MANAWATU (1994) LIMITED  
Second Defendant

TIMOTHY JOHN MORDAUNT  
Third Defendant

Hearing: 25 November 2016

Appearances: J C L Dixon and A L McConachy for Plaintiff  
A N Isac for Second Defendant

Judgment: 28 November 2016

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**JUDGMENT OF GILBERT J**

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*This judgment is delivered by me on 28 November 2016 at 4.30 pm  
pursuant to r 11.5 of the High Court Rules.*

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*Registrar / Deputy Registrar*

*Counsel/Solicitors:*  
John Dixon, Barrister, Auckland  
A N Isac, Barrister, Auckland  
Meredith Connell, Auckland

## **Introduction**

[1] Manawatu (1994) Ltd (Manawatu) is a real estate agency trading under the L J Hooker banner in Palmerston North. In October 2013, in response to price increases resulting from a change in Trade Me's pricing model for online advertising, Manawatu entered into an agreement with at least 10 other real estate agencies in the region to pass these costs on to vendor clients instead of absorbing them as overhead as they had previously done. This was an anti-competitive price-fixing agreement in contravention of s 27 of the Commerce Act 1986 (the Act).

[2] Manawatu has admitted that it was a party to this agreement which operated from 1 February 2014 until 1 August 2014. Manawatu has agreed with the Commerce Commission, subject to the Court's approval, to pay a penalty of \$1.25 million for its anti-competitive conduct. The Commission seeks a declaration that Manawatu's conduct contravened s 27 of the Act and asks the Court to impose the recommended penalty.

[3] The recommended penalty is in line with penalties imposed by the Court against other real estate agencies in similar circumstances and is the same as that imposed by Venning J against Unique Realty Ltd, a similar sized agency that was a party to the same agreement.<sup>1</sup> Counsel agree that there is no basis for distinguishing between the positions of Unique Realty and Manawatu and the penalty should be the same. I agree. My reasons for approving the recommended penalty can therefore be brief.

## **Penalty**

[4] Section 80(2B) of the Act provides that the maximum penalty for a body corporate is the greater of: \$10 million; or either three times the value of any commercial gain resulting from the contravention or, if this cannot be readily ascertained, 10 per cent of the turnover of the body corporate and any interconnected bodies corporate. The commercial gain resulting from the agreement is not readily

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<sup>1</sup> *Commerce Commission v Unique Realty Limited* [2016] NZHC 1064; *Commerce Commission v Bayley Corporation Limited* [2016] NZHC 1493; *Commerce Commission v Success Realty Limited* [2016] NZHC 1494.

ascertainable but is likely to be modest. Manawatu's turnover for the 12 month period ending 12 June 2014 was substantially less than \$10 million. Accordingly, the maximum penalty in this case is \$10 million.

[5] Deterrence is a key factor in setting penalties for this type of contravention. Other relevant factors in determining the appropriate starting point, before considering any mitigating factors, include:

- (a) the nature and seriousness of the contravention;
- (b) whether the contravention was deliberate;
- (c) the duration of the contravening conduct;
- (d) the financial strength of the defendant and its market power;
- (e) the seniority of the personnel involved;
- (f) the extent of any benefit gained;
- (g) the extent of any loss suffered by others; and
- (h) the desirability of imposing penalties that are consistent with those imposed in similar cases.

*Nature and seriousness of the contravention*

[6] Participation in price fixing agreements is regarded as serious misconduct. In this case, the agreement involved at least 11 real estate agencies representing most of the relevant market in the region. The agreement therefore had the potential to affect a large number of consumers. Balanced against this, the agreement did not eliminate all price competition, nor was this the aim, and Manawatu did not initiate the agreement.

*Was the contravention deliberate?*

[7] The Commission accepts that Manawatu acted in ignorance of the law and did not knowingly breach the Act. However, senior personnel attended the meeting and entered into the agreement. They deliberately implemented it confident in the knowledge that the other participating agencies would follow suit.

*Duration of the contravening conduct*

[8] Although the agreement was entered into in October 2013, Trade Me's new pricing model did not take effect until 1 February 2014 and was discontinued on 1 August 2014. The price-fixing agreement therefore spanned six months. However, the Commission notes that the effect of the agreement is ongoing in that Manawatu and other agencies in the region continue to pass the cost of Trade Me listings to vendors.

*Financial strength and market power*

[9] Manawatu has a similar market share to Unique Realty, of the order of 20 per cent. It has modest financial resources and will need time to make arrangements to pay the recommended penalty.

*Seniority of the personnel involved*

[10] Manawatu's most senior personnel were involved in reaching the agreement and directing its implementation.

*Extent of benefit gained*

[11] Although it is difficult to ascertain the exact benefit gained through the contravention, it appears that the amount was quite modest, of the order of \$9,000.

### *Loss suffered by others*

[12] Many vendors in the region will have been affected by the agreement because most agencies gave effect to it. The standard fee for a Trade Me listing was \$159 and this was the cost passed on to the vendors where properties were listed on Trade Me. However, the overall loss could have been greater because Trade Me listings for residential properties in the region reduced during the period of the agreement. As a result, some vendors may have suffered from less comprehensive marketing and exposure through not having their properties listed on Trade Me.

### *Consistency in penalties imposed*

[13] The circumstances of this case are almost identical to those in *Commerce Commission v Unique Realty* where Venning J considered that a starting point in the range of \$1.5 million to \$1.8 million was appropriate. The same range is proposed by the parties in this case. This compares with a starting point in a range from \$1.4 million to \$1.7 million approved by Courtney J in *Commerce Commission v Success Realty*. A lower starting point was justified in that case because Success Realty had a significantly smaller share of the relevant market and was already passing on some of the costs to vendors prior to the agreement being entered into.

### *Conclusion on starting point*

[14] Taking all these matters into account, I am satisfied that the starting point proposed, ranging from \$1.5 million to \$1.8 million, is appropriate in this case.

### *Mitigating factors*

[15] Manawatu is entitled to a discount for two reasons. First, there is no indication that Manawatu has previously contravened the Act. Second, Manawatu cooperated with the Commission's investigation and admitted its contravention at an early stage. The Commission submits that a discount at the lower end of a range between 25 and 30 per cent is appropriate to reflect these factors. Venning J

approved a reduction in this range for similar reasons in *Unique Realty*. I accept that such a reduction is equally appropriate here.

*Conclusion*

[16] The recommended penalty of \$1.25 million is appropriate taking into account the starting point range adopted and applying a discount of 25 to 30 per cent for the mitigating factors I have identified.

**Result**

[17] I make a declaration that Manawatu (1994) Ltd's conduct contravened s 27 of the Commerce Act 1986.

[18] I impose a pecuniary penalty pursuant to s 80(1) of the Act in the sum of \$1.25 million.

[19] Manawatu (1994) Ltd is ordered to pay \$25,000 towards the costs of the Commission's investigation.

[20] These sums are to be paid by Manawatu (1994) Ltd to the Commission as follows:

- (a) \$1,030,000 within 20 working days of this judgment.
- (b) The balance of \$245,000 by 31 March 2017.

[21] By consent, the costs of these proceedings are to lie where they fall.

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M A Gilbert J

