

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

**CIV-2015-404-003045
[2016] NZHC 1494**

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

BETWEEN COMMERCE COMMISSION
Plaintiff

AND LODGE REAL ESTATE LIMITED
First Defendant

LUGTON'S LIMITED
Second Defendant

MONARCH REAL ESTATE LIMITED
Third Defendant

ONLINE REALTY LIMITED
Fourth Defendant

SUCCESS REALTY LIMITED
Fifth Defendant

BRIAN KING
Sixth Defendant

JEREMY O'ROURKE
Seventh Defendant

Hearing: 10 June 2016

Appearances: J C L Dixon and L C A Farmer for Plaintiff
T D Smith and R M Dixon for Defendant

Judgment: 1 July 2016

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 1 July 2016 at 4.00 pm pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

Introduction

[1] Success Realty Limited is a real estate agency trading under the Bayley brand.¹ It operates in the Hamilton region, as do four of the other defendants in this proceeding (Lodge Real Estate Limited, Lugton's Limited, Monarch Real Estate Limited and Online Realty Limited). These companies are the five largest real estate agents in the Hamilton region. Of them, Success is the smallest, holding approximately five per cent of the residential real estate market in that area.

[2] Success has admitted conduct that constitutes a breach of s 27, via s 30, of the Commerce Act 1986. The conduct related to an anti-competitive price fixing agreement with the four other real estate agents. The Commission and Success have agreed to recommend to the Court that a penalty of \$900,000 would be appropriate to be imposed in respect of the conduct and the Commission asks the Court to make a declaration as to the contravening conduct and to impose the recommended penalty.

The anti-competitive conduct

[3] The price fixing agreement related to the use of the Trade Me website for advertising real estate listings. The defendants in this case all used Trade Me for this purpose. Prior to 2013 Trade Me charged a standard capped fee per office per month for an unlimited number of standard listings, though some agencies had negotiated better rates. Bayleys Realty Group (BRG) had negotiated a preferential rate of \$799 (plus GST) per month with Trade Me for members of the Bayleys Group and Success adopted that rate. Under the subscription pricing model operated by Trade Me and the preferential rate negotiated by BRG, Success typically passed on a charge of \$30 plus GST to vendors for each standard Trade Me listing.

[4] In mid-2013 Trade Me signalled a change to its pricing model. In early September 2013 members of the New Zealand Realtors Network (NZRN), which included the managing director of Lodge, Mr O'Rourke, attended a meeting at which Trade Me's proposed new pricing regime was discussed. Subsequently,

¹ Success is a franchisee of Bayley Realty Group Limited (BRG), which is wholly owned by Bayley Corporation Limited.

Mr O'Rourke contacted representatives of various Hamilton real estate agencies to arrange a meeting to discuss that development. Success was one of these agencies. On 30 September 2013 representatives from Success, Lodge, Lugton's, Monarch and Online met to discuss possible responses. These discussions resulted in an agreement under which the parties committed to remove their listings of residential property for sale from the Trade Me website from 20 January 2014 and to require any vendors who requested their property to be listed on Trade Me to pay the per-listing fee.

[5] Success did not, in fact, withdraw all its Trade Me listings from the website on 20 January 2014 because it had already charged its vendor clients a \$30 fee for the cost of standard listings and did not consider that it was able to remove the listings. However, when the new per-listing pricing model came into effect on 1 March 2014 Success did charge all its vendor clients the full \$159 fee for a standard listing (though there were some occasions when it uploaded listings for free). Success subsequently negotiated a lower per listing cost with Trade Me of \$139 per listing from 1 April 2014 though there were eight vendors who were charged at the higher rate.

[6] In July 2014 Trade Me revised its pricing model, introducing a revised subscription-based pricing model and a revised per-listing pricing model. The price fixing agreement between the Hamilton agents effectively ended on 1 August 2014 when Success became aware of Trade Me's revised pricing model. However, Success retained the per-listing pricing model and continues to pass on the full Trade Me listing charge to vendors at the rate of \$115 per listing that it has negotiated with Trade Me. The other Hamilton agencies (except for Online) retained a vendor-funded model rather than reverting back to an agency-funded model.

[7] Success has admitted entering into and giving effect to an agreement that contravenes s 27, via s 30, in that the agreement had the purpose, effect or likely effect of fixing, controlling or maintaining prices for the supply of real estate sales services in competition with other real estate companies in the real estate sales services markets. Success admits that it is liable to a penalty under s 80(1)(a).

Penalty framework

[8] The agreed penalty procedure, whereby the Court imposes a penalty recommended by the parties, is recognised as being of significant benefit to both the parties and the public because it avoids lengthy litigation.²

[9] The maximum penalty for the contravening conduct is the greater of \$10m or either three times the commercial gain obtained from the breach (if readily ascertainable) or 10 per cent of the company turnover from trading within New Zealand (if commercial gain is not readily ascertainable).³ In this case it is agreed that, although there was potential for commercial gain, that gain was not readily ascertainable. As a result, the maximum penalty is the greater of \$10m or 10 per cent of Success' relevant turnover. On the basis of information provided to the Commission it is agreed that the maximum penalty was \$10m for each breach, a total maximum penalty of \$20m.

Starting point

[10] The primary objective in imposing a penalty for a breach of s 30 is general and specific deterrence.⁴ In determining an appropriate starting point the relevant factors include the nature and seriousness of the contravening conduct, the deliberateness of the conduct, the duration of the conduct, the seniority of the employees or officers involved, the extent of any benefit derived, the extent of any loss or damage suffered, the market share/degree of market power held by the defendant, the defendant's role in the impugned conduct and the size and resources of the defendant.

Nature of the market

[11] The relevant market is the market for real estate sales services in Hamilton. The parties alleged to have been involved in the agreement hold a majority share of this market, although Success itself holds only a modest share.

² *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC) at 733; *Commerce Commission v Alstom Holdings SA*, [2009] NZCCLR 22 (HC) at [18]; *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21].

³ Commerce Act 1986, s 80.

⁴ *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [53].

Seriousness of the conduct

[12] The Commission characterises the conduct as serious because it was entered into by five of the largest real estate agencies in Hamilton who, between them, control and substantially influence a significant share of the real estate sales services market in that region and therefore had the potential to effect a large number of transactions. It was entered into by staff at the highest level, in the case of Success that was the regional manager and director of Success' parent company, Realty Services Limited. It impacted upon ordinary people in the area selling and buying houses.

[13] Although Success acknowledges that a price fixing agreement is a serious contravention of the Act it characterises its conduct as being at the lower end of the spectrum of price fixing conduct. It points out that the agreement arose as a reaction to the significant price increase imposed by Trade Me for listing services and, further, that it already had a vendor-funded approach in terms of charging for Trade Me listings rather than absorbing all of the costs itself. It characterised its approach as an entirely legitimate reaction to Trade Me's price increase and suggests that its legitimate intention only became unlawful when it agreed with the four other real estate agencies to pass on the listing fee to vendors and to remove existing listings from Trade Me. It also points out that the agreement did not eliminate all competition between the agencies but only affected a small fraction of the total charges associated with ordinary residential real estate sales.

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

Role of the defendant in the impugned conduct

[15] Success did take an active role in the agreement but it is accepted that it was not the ringleader.

Deliberateness of the conduct

[16] It is accepted that Success did not intentionally infringe the Act. Nevertheless, the conduct was deliberate.

Seniority and number of employees or officers involved

[17] The Success employee involved in the agreement was Mr Shale, who holds the most senior position at Success and reports to the CEO, managing director/chairman and Board of Directors of Realty Services Limited. He attended the meeting and took part in the discussions that resulted in the agreement and took an active role in giving effect to it.

Duration of contravening conduct

[18] The agreement was reached on 30 September 2013 and Success implemented vendor funding in relation to the Trade Me per listing fees from 1 March 2014. Its negotiated lower charge came into effect from 1 April 2014. The agreement ended on 1 August 2014 when Success became aware of Trade Me's revised subscription pricing model.

[19] The Commission asserts that the effect of the agreement was, nevertheless, ongoing because Success and other real estate agencies in the Hamilton region continue to pass Trade Me listing fees on to vendors. It views the impact that the agreement had on competition in the Hamilton area as persisting into the future because it removed a degree of uncertainty about how much each agency would respond to future changes to fees by Trade Me. As a result, the standard practice is now vendor funding of the full Trade Me price.

[20] Success does not accept this perception and points to the fact that the agencies involved in the Hamilton agreement each now take different approaches to the charges with each having negotiated a lower per listing charge with Trade Me. Moreover, it points out that its current approach is consistent with its conduct prior to the agreement being entered into.

[21] I consider that the Commission is correct to say that, in a general sense, there is a residual effect from the change in the status quo that the agreement brought about. Prior to the agreement there was genuine competition among the agencies in relation to the price of this service. Now the status quo is a form of vendor funding, to a greater or lesser extent.

Potential commercial gain to and harm caused by the defendants

[22] Success accepts that there was potential commercial gain to it; although it did not recover any greater amount from its vendor clients than it was charged by Trade Me (with the exception of eight vendors who were mistakenly charged a higher fee) the agreement meant that Success did not have to compete in relation to the absorption of part of the Trade Me fee. To that extent vendors may have paid more for Trade Me listings than they otherwise would have.

[23] Although Success points to the relatively small number (51) of Trade Me listings that occurred while the agreement was in place as showing that any commercial gain must have been very small, the Commission emphasises that, in the corresponding period for the previous year, Success had more than twice that number of standard Trade Me listings which it says indicates that vendors may have decided against paying the full price of the Trade Me fee, thereby missing out on access to potential purchasers that the Trade Me listing would have offered. It also deprived vendors of the benefit that would have come from true competition on this issue.

Comparable cases

[24] The case most comparable factually is that of *Commerce Commission v Unique Realty Ltd*.⁵ That case also involved a collective response by real estate agents to the change in the Trade Me pricing model. Eleven real estate agencies in the Manawatu region agreed that they would no longer absorb the cost of the Trade Me listings but instead pass on the whole of the increased fee to their vendor clients. Unique was the third largest agency involved, with a market share of approximately 19 per cent. As in the present case, Unique was not an instigator or ringleader in the agreement and, although Unique did not recover more from its vendor clients than it

⁵ *Commerce Commission v Unique Realty Ltd* [2016] NZHC 1064.

was charged by Trade Me, the agreement meant that it did not have to compete on price in relation to that particular service so there was clear potential for commercial gain and harm to the vendors. Although the agreement was only in force for approximately six months the level of competition in relation to the Trade Me listing service was affected and the effect was likely to continue into the future. In that case a starting point of \$1.5m – \$1.8m was taken, with a discount of 25 – 30 per cent to reflect Unique’s early admission of its contravening conduct. The end penalty was \$1.25m.

[25] The decisions in *Commerce Commission v PGG Wrightson Ltd* and *Commerce Commission v Rural Livestock Ltd* are also of assistance.⁶ They involved arrangements between livestock companies and saleyard owners regarding fees to be charged for cattle movements, following the introduction of a scheme to track the movements of cattle and deer in New Zealand. Rural, one of the smaller companies, had a 6.8 per cent share of the market (comparable to Success’ share) and a substantially smaller turnover than the other companies. It was not a ringleader and did not take a key role in the arrangements that were agreed on. A starting point of \$1.6m – \$2m was regarded as appropriate, with a discount of 25 per cent for Rural’s acceptance of responsibility. The appropriate range for the final penalty was found to be \$1.2m – \$1.5m, though the penalty actually imposed was substantially adjusted to reflect Rural’s financial circumstances.

[26] In comparison, PGG Wrightson, which was involved in the same agreements, played a much more significant role, was a much larger company, its senior managers who were involved should have been aware of the relevant competition laws and there was internal legal advice advising that the arrangements could constitute price fixing. Moreover, PGG Wrightson was the initiator of the contravening conduct. A starting point in the range of \$3.4m – \$4.3m was regarded as appropriate, with a 25 per cent discount for PGG Wrightson’s acceptance of responsibility. The end penalty was \$2.7m.

⁶ *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360; *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361.

Starting point in this case

[27] The Commission submits an appropriate starting point should be in the range of \$1.5m – \$1.8m, which was the range taken in *Unique*. It points out the similarities between this case and *Unique* in that they both concerned real estate agents operating at a regional level, of similar size and similar contravening conduct. The Commission also points out that the agreement in this case included an agreement to withdraw vendors' existing listings from Trade Me whereas the agreement in *Unique* did not. However, although this is a serious aspect of the present case that did not exist in the *Unique* case, it is tempered by the fact that Success did not, in fact, give effect to this aspect of the agreement.

[28] Success contends that its conduct was less egregious than the conduct in Rural, given that the market was a regional one rather than national and that the duration of the conduct was only a matter of months rather than the three years in Rural. As a result the potential commercial gain and harm to consumers was much less in the present case.

[29] Overall, I consider that the range ought to be slightly less than that of *Unique* and accept Success' assessment of a range between \$1.4m – \$1.7m. This does not, however, make any difference to the recommended penalty that the parties have agreed on.

Mitigating factors

[30] It is agreed that a substantial discount of 45 per cent is warranted for the mitigating factors that exist in this case and I accept that that is an appropriate figure.

[31] First, Success has no previous contravening conduct. Secondly, as part of the Bayleys Group Success cooperated with the Commission from an early stage. This early cooperation by both Success and the wider Bayley group enabled the Commission to conclude its investigation without unnecessary expense and to file proceedings promptly. Moreover, Bayley entered into a formal cooperating agreement with the Commission in October 2014 under which it agreed to provide ongoing cooperation, including making its staff available for interviews and

procuring those staff to make themselves available as witnesses in related proceedings and to use material provided to it on a without prejudice basis in related proceedings. Success complied with the formal cooperation agreement.

[32] Thirdly, Success acknowledged its contravening conduct at an early stage and filed a notice of admissions and agreed to the agreed statement of facts filed in the proceeding.

[33] A 45 per cent discount would be consistent with other cases in which a similar level of acceptance of responsibility and cooperation have been present.⁷

Final penalty range

[34] Taking a range for the starting point of \$1.4m – \$1.7m and allowing a discount of 45 per cent would produce a final penalty in the range of \$825,000 – \$990,000. The recommended penalty of \$900,000 is within that range.

[35] I accept that the recommended penalty is an appropriate one. I therefore:

- (a) make a declaration that Success' conduct contravened s 27, via s 30, of the Commerce Act 1986;
- (b) impose the recommended penalty of \$900,000.

[36] By consent, costs are to lie where they fall.

P Courtney

⁷ *Commerce Commission v Qantas* HC Auckland CIV-2008-404-8366, 11 May 2011; *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010; *Commerce Commission v British Airways PLC* CIV-2008-404-8347, 5 April 2011; *Commerce Commission v Deutsche Bahn* HC Auckland CIV-2010-404-5479, 12 October 2011.