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## **Introduction**

[1] This judgment determines the Commerce Commission’s (“Commission”) application for relief against the defendant, viagogo AG (“viagogo”), under the Fair Trading Act 1986 (“FTA”). viagogo operates a global online platform or marketplace on which sellers offer tickets to live events taking place around the world.<sup>1</sup> viagogo’s online presence in New Zealand is [www.viagogo.com/nz](http://www.viagogo.com/nz) (“website”).

[2] The first and most substantial part of the Commission’s case against viagogo is that, in conducting its business, viagogo engages, or has engaged, in conduct that is likely to mislead and that it has also made false or misleading representations, all in breach of ss 9, 11, and/or 13 of the FTA.

[3] The second, more confined, part of the Commission’s case is that cl 7.4 of viagogo’s terms and conditions is an “unfair contract term” within the meaning of the FTA, and it seeks a declaration to that effect. Clause 7.4 provides that all disputes pertaining to the terms and conditions will be governed by Swiss law and determined in the courts of Geneva. A declaration that the clause is unfair would require viagogo to omit the clause from its terms and conditions, and preclude future reliance on the provision.<sup>2</sup>

## **Background**

[4] Most tickets to live events in New Zealand are sold by the “host” for the event, be that the performer, promotor or venue. Sales are usually through a ticketing agent, such as Ticketmaster, Ticketek or iTicket, contracted by the host for that purpose. Ticketing agents are just that — agents, who act on instructions from their principal.

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<sup>1</sup> A reference below to a consumer is to a consumer in New Zealand.

<sup>2</sup> Fair Trading Act 1986, s 26A(1).

*viagogo*

[5] viagogo was incorporated in Switzerland in 2012. Its ultimate parent company is StubHub Holdings Inc, a company incorporated in the United States. It does not have a physical presence in New Zealand nor any employees here.

[6] viagogo is not, and never has been, a ticketing agent in the sense referred to above. Rather, third parties offer tickets for sale on the website. Someone wishing to purchase a ticket for an event can go to the website and purchase if they wish. The tickets offered for sale on the website are referred to as “resales”, in the sense that they are not offered for sale by the authorised agent.<sup>3</sup>

[7] More than 320,000 tickets were sold to (New Zealand) consumers via the website between 18 July 2016 and 31 October 2022, with approximately 90 per cent of those by parties whom viagogo classifies as “brokers”, being someone who sells more than [redacted] tickets per annum on the website. The resale or secondary market for tickets in New Zealand is believed to be modest. Most consumers purchase tickets through the authorised agent for the event and can be expected to be more familiar with their websites.

[8] A seller to an event need not be based in New Zealand, and indeed may be far afield. For instance, the seller of tickets to the matinee performance of the Nutcracker Suite at the Napier Municipal Theatre at Christmas may well be based in Uzbekistan. That is not to criticise. As viagogo submits, the host is usually willing to sell to buyers wherever they are located.

[9] viagogo requires a seller to confirm several matters before listing a ticket. They must confirm they have purchased the ticket listed or that they have the right to acquire it, to say where in the venue the seat(s) is located, and to identify material features of the ticket, such as that it is a child’s ticket or has an obstructed view. Despite this, viagogo accepts that sellers list tickets in breach of these requirements.

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<sup>3</sup> It is common ground that most tickets are sold by or for the host on terms which prohibit resale.

[10] For their part, the consumer is not able to see the ticket prior to purchase, and does not know its face value, the identity of the seller, whether they are a broker, or where they are located. Nor does the consumer know the seller's "breakage rate", being the rate at which the seller either fails to deliver the listed ticket, or delivers a ticket not matching description, or delivers a ticket "refused at gate", for instance because it has been sold more than once. This information is known to viagogo, but not disclosed.

*Investigation/statement of claim*

[11] The Commission commenced investigating viagogo in 2017, largely because of the number of complaints it was receiving regarding the company, as to which see below.

[12] The Commission then commenced this proceeding in 2018 and sought an interim injunction to prevent viagogo continuing to make representations the Commission considered were likely to mislead. The Commission encountered difficulties serving viagogo which caused delay. As it turned out, however, the interim position was resolved as a result of viagogo making substantial changes to parts of its website on 1 September 2019 pending the outcome of this proceeding. However, as I understand it, viagogo does not rule out reverting to the pre-1 September 2019 position if the Commission fails.

[13] Leaving aside the issues relating to cl 7.4 for the moment, the Commission alleges that viagogo has breached or is in breach of ss 9, 11, and/or 13 of the FTA, by failing to make sufficient disclosure that it is a resale site in the sense referred to in [6] above; by advertising on Google in a manner that conveyed viagogo was an authorised source of tickets for events (the "Official Seller Representations"); and by a series of representations on the website referred to as the Guaranteed Tickets Representations, the Scarcity Representations, and the Price Representations.

[14] The Commission also alleges that additional breaches arise from the combination of these representations. Given the decision I have reached it is unnecessary for me to address these allegations.

[15] The cause of action relating to the Guaranteed Tickets Representations is concerned with statements viagogo has made and which it continues to make that it “guarantees” that tickets for sale are “valid” and will be received in time for the event. The Scarcity Representations are representations as to the number of tickets available for a given event and the demand for those tickets. The Price Representations are principally concerned with the price viagogo displayed for tickets prior to 1 September 2019. The price displayed was net of viagogo’s fees, which were not disclosed until late in the purchasing process.

[16] viagogo denies all of the allegations of breach. It also denies that cl 7.4 is an unfair contract term.

### *Relief*

[17] To the extent it succeeds on any cause of action, the Commission seeks declarations of breach (whether the conduct is historic or not); in one instance an injunction pursuant to s 41(1)(a); and the publication of a corrective statement pursuant to s 42 FTA. There is no dispute that I may grant this relief, although viagogo submits that it would be pointless in respect of any breach that is historic.

### **viagogo’s website**

[18] The appearance of the website varies depending on the nature of the device — desktop, laptop, tablet, or mobile — from which it is accessed, but the following summary is sufficient for what follows:<sup>4</sup>

- (a) **Homepage** — the Buyer is presented with advertisements of Tickets available for particular events, and includes a search bar allowing the Buyer to search for a particular event. The Homepage is bypassed if the customer arrives at the Website by clicking on a search engine advertisement;
- (b) **Event Page** — displays the dates, times and venues for the selected event, and includes a link for the Buyer to select tickets to the event. If the buyer clicks a search engine advertisement, the Event Page is the first page they will see;
- (c) **First Loading Screen** — displays a “loading” screen after the Buyer clicks the ticket link — while the Website is “loading”, this page

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<sup>4</sup> This summary is taken from the Commerce Commission’s opening submissions.

contains representations about how many other people are currently “viewing this event”, or have “viewed this event” within a given period of time, and as to the number of “tickets left” for that event;

- (d) **Ticket Selection Pages** — allows the Buyer to select the number of tickets, location within the venue, and it displays the prices for tickets on offer — and contains representations about the number of tickets available for an event;
- (e) **Second Loading Screen** — displays a further “loading” screen after the Buyer clicks a link to purchase the selected tickets;
- (f) **Checkout Stage** — involves a series of webpages (nine in total) where the Buyer proceeds through the checkout process by confirming selections and entering details for purchase — includes an ever-present countdown timer (usually) starting with ten minutes or less remaining, with representations that after that time, the tickets may not be available, “will no longer be reserved”, or prices may rise, or if the Buyer clicks a button stating “Abandon My Tickets” or “Release My Tickets”;
- (g) **Order Confirmation Page** — contains a link for the Buyer to complete their purchase.

## **Evidence**

[19] It is necessary to refer particularly to the evidence before me regarding the appearance of the website from time to time, and the quite separate matter of consumer dissatisfaction.

### *Appearance of the website*

[20] The evidence as to the appearance of the website is not controversial.

[21] In the course of its investigation, the Commission made 125 video recordings between June 2017 and February 2022, showing the appearance of the website during the process of purchasing tickets. At the request of Professor Robert Slonim, an expert in behavioural economics who the Commission called to give evidence, Commission staff extracted “experience data” from 25 of the recordings, such as the time taken for particular screens to load, and the number of statements made regarding the “guarantee” and the “scarcity” of tickets. This evidence is referred to below.

### *Consumer dissatisfaction*

[22] The evidence of consumer dissatisfaction, or the lack of it, is controversial.

[23] The Commission did not call any consumer(s) to give evidence of their experience of the website nor that they believed they had been misled as to a particular matter. Nor did the Commission present evidence of a “survey” of consumers to support its allegations.

[24] viagogo was critical of these omissions and submits that the Commission cannot prove its case without such evidence.

[25] The Commission dismisses both criticisms, on the basis that whether any of ss 9, 11, and 13 has been breached is a matter of fact, to be determined objectively. Evidence from consumers to the effect that they believe they were misled is neither required, nor determinative if adduced. The Commission referred me to the following from *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*:<sup>5</sup>

Evidence that someone was actually misled or deceived may be given weight. The presence or absence of such evidence is relevant to an evaluation of all the circumstances relating to the impugned conduct. Where the conduct and representations are to the public generally and concern a body of simple direct advertising, the absence of individuals saying they were misled may not be of great significance. There was no such evidence here. The ACCC was criticised for that. That criticism is unfounded. The objective assessment of advertising using ordinary English words in an attempt to persuade can be undertaken without the lengthening of a trial by the bringing of witnesses of indeterminate numbers. Language, especially advertising, seeking to raise intuitive senses and associations, can have its ambiguities and subtleties. The task of evaluating the objective character and meaning of the language in the minds of reasonable members of the public is not necessarily one that will be assisted in any cost-effective manner by calling members of the public. The question is one for the court: *Taco Co of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202.

[26] I accept the Commission’s submission that evidence from a particular consumer or groups of them is not required to prove a case under Part 2 of the FTA, and it is not required in this instance.

[27] Despite the absence of evidence from any consumer directly, there was evidence of a great many communications by consumers to viagogo and to the Commission itself. viagogo emphasised that these are communications, and that they

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<sup>5</sup> *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634, (2014) 317 ALR 73 at [45].

include enquiries as well as complaints. My admittedly cursory examination suggests that most are complaints.

[28] Regardless, viagogo's principal submission on this evidence is that it is hearsay and not rendered admissible under any of the relevant provisions of the Evidence Act 2006. The Commission submits the evidence is relevant, admissible and that it bears out the Commission's allegations in the proceeding. I shall set out what the evidence is and then discuss its admissibility or otherwise. That said, as the Commission accepts, the evidence supports its case rather than proving it.

### *Discovery*

[29] In September 2021, viagogo gave discovery of spreadsheets of online communications lodged by consumers between July 2016 and December 2020. The spreadsheets included the consumer's initial communication and any subsequent of chain of correspondence between viagogo and that consumer.

[30] Each spreadsheet comprised communications lodged according to one of viagogo's nominated categories, such as "Can I cancel – I felt pressured into making this purchase"; Can I cancel – I was charged a final price different to what I saw before purchasing"; "There was an issue with my tickets at the venue"; and "Why is the price printed on the ticket different to what I paid".

[31] This discovery is said to have consisted of 7,211 individual complaints. There is some immaterial inconsistency in the figures but, taking the view most favourable to viagogo, approximately 6,700 of the complaints were lodged between July 2016 and August 2019.<sup>6</sup>

[32] Having reviewed each complaint, the Commission's solicitors, Meredith Connell, allocated it to an issue(s) which broadly allowed for complaints to be grouped according to the causes of action.

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<sup>6</sup> A "master" spreadsheet combining all the communications (to and from viagogo) runs to more than 25,000 rows.

[33] By way of example, the first communication appearing on the spreadsheet under viagogo's enquiry category "Can I cancel – I felt pressured into making this purchase", reads:

I felt from the moment I was on your website that the pressure was on to buy the tickets. It was flashing up that only a few tickets were remaining, then it flashed up that a large number of people were also looking at the same tickets. Then it also said something along the lines of only a few tickets remaining. The whole time I felt pressured. Then I mucked up, not realising that I was going to be charged a huge fee per ticket \$90 for a service charge or something. I feel extremely disappointed that we've been charged well above the rate these tickets went on sale for. I thought I was on the official sellers site. Now you have taken my money but you have not issued me any tickets yet ...

[34] This was assessed as a complaint by the consumer that they had been misled as to tickets being in short supply from any source; had felt pressured to buy tickets; and as a complaint regarding the late disclosure of fees, and was therefore allocated to the scarcity and price causes of action.

#### *Further discovery*

[35] Very shortly before trial, viagogo gave discovery of additional information which had been overlooked. The same exercise was carried out, although under time pressure given the proximity to trial. The number of individual complaints made prior to August 2019 increased to approximately 9,600.<sup>7</sup>

[36] The upshot of all of this work is in Professor Slonim's evidence. Taking Meredith Connell's allocation at face value, his evidence is that at least 5,830 of the complaints to viagogo related in some way to its guarantee; 1,846 were to the effect that the consumer did not realise viagogo is a resale platform; 279 related to the scarcity representations; at least 1,376 (and quite possibly substantially more — the lateness of the discovery was such that this number could not be updated) concerned the late disclosure of viagogo's fees in the purchasing process; and 27 were in respect of the Official Seller representations.

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<sup>7</sup> This added another 17,000 odd rows to the master spreadsheet, so that more than 42,500 rows were filled.

### *Communications by consumers to the Commission*

[37] Ms Jessica Chapman and Ms Veronika Andreeva, a senior lawyer and investigator respectively at the Commission, gave evidence of complaints the Commission itself had received regarding viagogo since 2014. Although the Commission categorised the complaints as Meredith Connell had done, the results are less significant. The number of complaints to the Commission is dwarfed by the number made to viagogo, and it is also possible that there is some duplication.

[38] However, what is notable from this evidence, is that the number of complaints made about viagogo to the Commission increased exponentially after 2014. Ms Andreeva's evidence was that the Commission received a total of four complaints regarding viagogo in 2014 and 2015 combined. It received 146 complaints in 2017 and 581 in 2018, with that level generally being maintained up to the start of the first COVID-19 lockdown in March 2020.

[39] Moreover, complaints about viagogo vastly exceeded complaints made regarding other firms in the business of selling tickets to events. Indeed, at times complaints about viagogo exceeded complaints about any other firm in any other industry whatsoever.

### *Submissions on evidence of consumer dissatisfaction*

#### *viagogo*

[40] viagogo submits the evidence of complaint, whether to the Commission or to viagogo, is inadmissible, as it is hearsay in the sense of the Evidence Act. For instance, the consumer who made the complaint quoted in [33] above, is not necessarily to be treated as telling the truth or as having given a fair account of their experience.

[41] viagogo also submits, correctly, that the process by which a complaint was allocated to one or other causes of action was subjective. It also submits that cross-examination of the Meredith Connell staff involved in the exercise revealed errors in the process.

### *Commerce Commission*

[42] The Commission disputes that the evidence is hearsay. It submits the complaints are not before the Court for the truth of their contents, but for the fact they were made. The Commission submits that what is relevant and probative is that so many consumers have reacted to the website in similar ways, and to aspects the Commission itself alleges are misleading. The Commission also submits the evidence is sufficiently reliable, given that only a handful of errors were identified in cross-examination.

[43] If the evidence is hearsay, the Commission submits that it is admissible under s 18 of the Evidence Act, because the circumstances relating to the statements provide reasonable assurance that they are reliable and the makers of the statements are either unavailable or undue expense would be caused if they were required to be called.

### *Discussion*

[44] I accept viagogo's submission that an out of court statement by a consumer that they were misled about a particular matter would be hearsay evidence if relied upon as proof that the person was so misled. However, the evidence is not relied on in that sense, or at least not by me. The relevance of the evidence lies in the sheer number of complaints made regarding the issues the Commission has raised.

[45] If I am wrong, and the evidence is hearsay, it would be admissible under s 18 of the Evidence Act. Undue expense or delay would be caused if the makers of the statements were required to be witnesses, and the circumstances provide reasonable assurance that the statements are reliable. As to this latter point, it was open to viagogo to identify those it considered false or unfair. It did not do so. Again, my cursory look at viagogo's responses suggest a genuine exchange with the consumer.

[46] I also note Professor Slonim's evidence that studies show that consumers tend not to complain of what they consider to be a "negative" experience. To complain requires time and effort. Most consumers simply elect not to make a repeat purchase. One study to which Professor Slonim referred indicated that as few as one in 26, approximately four per cent, of dissatisfied customers will complain. Given that, it is

safe to assume that a substantial proportion of the complaints are genuine, at least from the consumer's perspective even if not from viagogo's.

[47] Lastly, it is correct that the process by which complaints were allocated to an issue, and therefore a cause of action, is subjective. It is also correct that some of the complainants will not be truthful or fair. Regardless, the evidence is sufficiently reliable for my limited purposes.

#### *Other evidence*

[48] Quite aside from this evidence, the Commission called evidence from industry participants — hosts, ticketing agencies and promoters — who addressed matters such as the ticket selling process; the circumstances in which a host or hosts had instructed that ticketholders presenting “resold” tickets were to be refused entry; and of their experiences dealing with unhappy ticket holders, who said they had purchased on the website, but were refused entry to the event, for instance because the ticket had been presented more than once.

[49] This evidence was useful background but, with no disrespect to those concerned, it is unnecessary to discuss it in any detail as it has not affected my decision.

[50] I also heard evidence from Mr Richard Tims, an expert in Information Technology. Mr Tims was called to counter evidence from viagogo regarding the functioning of its website.

[51] viagogo called evidence from several of its senior employees, and from Professors Ali Hortaçsu and Ananish Chaudhuri, both experts in behavioural economics.

[52] As the Commission submits, expert evidence is not required to determine this case. That said, Professor Slonim and Professor Chaudhuri's evidence was useful. Each gave evidence on matters such as how consumers are (or are not) understood to navigate websites, and the general rules of thumb or “heuristics” they employ to overcome limitations of time.

[53] With respect to Professor Hortaçsu, I did not find his evidence as useful. In much of his evidence, the Professor expressed an unwillingness to comment on any matter not proved by empirical evidence, thereby limiting the assistance he was able to give.

[54] Ultimately, however, as both parties accepted, this is not a case that turns on the expert evidence. The facts — what was said, how many times, when and so on — are not in dispute. The issue is whether what was said and how it was said breached the FTA.

### **Fair Trading Act 1986**

[55] The FTA is consumer protection legislation. Consumers are entitled to know what they are buying or at the very least not to be actively misled on the subject.<sup>8</sup>

[56] The Commission alleges that viagogo has breached ss 9, 11 and, on four of its causes of action, s 13 of the FTA. Sections 9, 11, and those parts of s 13 relied upon provide:

**9 Misleading and deceptive conduct generally**

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

**11 Misleading conduct in relation to services**

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services

**13 False or misleading representations**

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

...

- (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or

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<sup>8</sup> *Cerebos Greggs Ltd v Unilever New Zealand Ltd* (1994) 5 NZBLC 103,497 at 103,511.

...

- (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or

...

- (g) make a false or misleading representation with respect to the price of any goods or services; or

...

- (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993; or

...

[57] There is no dispute that viagogo is “in trade” for the purposes of ss 9, 11, and 13, and no real dispute as to the principles to be applied, which are as follows.

[58] Section 9 prohibits conduct which is misleading or deceptive or likely to mislead or deceive. To mislead or deceive in this context means to lead into error.<sup>9</sup> Likely to means “might well happen”.<sup>10</sup>

[59] Whether conduct or a representation is misleading is a question of fact, to be determined objectively in the context of the prevailing circumstances. In making that determination, the first step is to identify the consumer or group of consumers targeted by the conduct. In a case such as this, where the allegation is that viagogo has breached the FTA by making “headline” representations, the leading authority is the Court of Appeal’s decision in *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*.<sup>11</sup>

[60] In that case, the Court said that if conduct is directed to a wide section of the community, the consumer comprises all consumers in the targeted class, or the public, except “outliers”.<sup>12</sup> Outliers include consumers who are “unusually stupid or ill

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<sup>9</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 6.

<sup>10</sup> *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611 at [14].

<sup>11</sup> At [59].

<sup>12</sup> At [50].

equipped, or those whose reactions are extreme or fanciful”.<sup>13</sup> Consumers are required to exercise a degree of care that is reasonable having regard to all the circumstances.<sup>14</sup>

[61] As to how a question of breach is to be determined, the Court of Appeal said as follows:

*The principles in considering headline representations with qualifying information*

[59] In considering whether headline representations such as these breach ss 9 and 13(i) of the Act the following principles should guide a court:

- (a) *Overall impression*: it is the “dominant message” or “general thrust” of the advertisement that is of crucial importance.
- (b) *Wrong only to analyse separate effect of each representation*: as a corollary from (a), when assessing the mental impression on consumers created by a number of representations in a single advertisement, it is insufficient only to analyse the separate effect of each representation. The overall impression cannot be assessed by analysing each separate representation in isolation.
- (c) *Qualifying information sufficiently prominent?*: whether headline representations are misleading or deceptive depends on whether the qualifications to them have been sufficiently drawn to the attention of targeted consumers. This includes consideration of:
  - (i) the proximity of the qualifying information;
  - (ii) the prominence of the qualifying information; and
  - (iii) whether the qualifying information is sufficiently instructive to nullify the risk that the headline claim might mislead or deceive.
- (d) *Glaring disparity*: where the disparity between the headline representation and the information qualifying it is great, it is necessary for the maker of the statement to draw the consumer’s attention to the true position in the clearest possible way.
- (e) *Tendency to lure consumers into error*: applying principles (a) to (d), the question for the court is whether the advertisement viewed as a whole has a tendency to entice consumers into “the marketing web” by an erroneous belief engendered by the advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded. Enticing

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<sup>13</sup> At [20].

<sup>14</sup> At [51].

consumers into “the marketing web” includes, for example, attracting them into premises selling the advertiser’s product. Once a prospective customer has entered, he or she will often be more likely to buy... That consumers could be expected to understand fully the limitations of the warranties by the time they actually purchased a carpet is no answer to the question whether the advertisement was misleading.

[62] After that lengthy introduction, I now turn to the Commission’s causes of action.

**First cause of action: inadequate disclosure of status as a resale platform**

[63] The Commission alleges that viagogo does not make sufficient disclosure to consumers that it is a resale platform and not an authorised or official ticketing agent. The Commission’s case is that viagogo breaches ss 9 and 11 of the FTA by this omission. It seeks a declaration to that effect; an injunction pursuant to s 41(1)(a); and an order that viagogo publish a corrective statement under s 42(1)(b).

[64] viagogo does not dispute that consumers should be informed that it is a resale platform. However, its case is that the current level of disclosure is such that there is no breach of the FTA.

*Test*

[65] An omission or failure to disclose information may constitute “conduct” for the purposes of ss 9 and 11.<sup>15</sup> The question is in what circumstances.

[66] viagogo submits an omission will only give rise to a breach if the circumstances create a reasonable expectation of disclosure, which they do not in the present case, or at least not greater disclosure than is given. In support of this submission, viagogo referred me to *Guthrie v Taylor Parris Cossey Ltd*.<sup>16</sup>

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<sup>15</sup> Fair Trading Act 1986, s 2(2).

<sup>16</sup> *Guthrie v Taylor Parris Group Cossey Ltd* (2002) 10 TCLR 367 (HC) at [17].

[67] The Commission submits that “a reasonable expectation of disclosure” is not the test to be applied, at least not in every case, and the question is as was put in *Demagogue Pty Ltd v Ramensky*:<sup>17</sup>

... whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive ...

[68] The Court of Appeal has recently approached the matter similarly in *McAlister v Lai* and *James Hardie Industries Plc v White*.<sup>18</sup> Given those authorities are consistent with *Demagogue*, I propose to proceed on that basis.

### *Background*

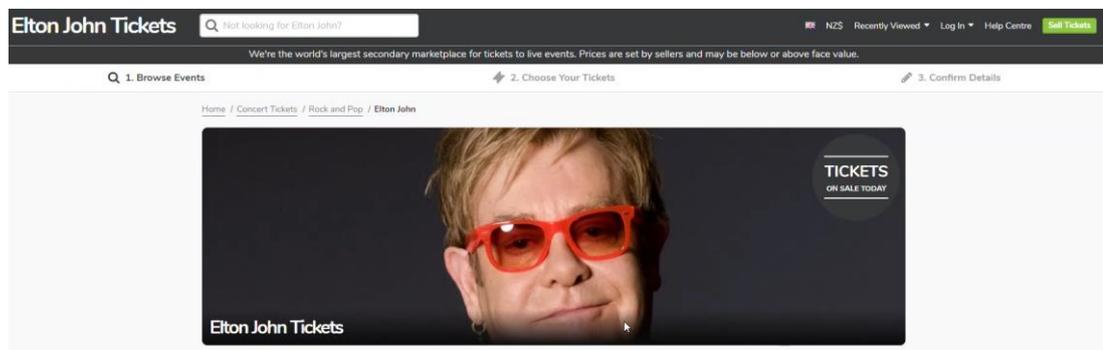
[69] The following statement appears towards the top of the Homepage and the Event Page (“resale banner”):

We're the world's largest secondary marketplace for tickets to live events. Prices are set by sellers and may be below or above face value.

[70] The resale banner has appeared on the website since 9 November 2017, as a result of Google’s requirements as set out in [173] below.

[71] The banner disappears from view on both pages if the consumer scrolls down, and it is not displayed on subsequent pages.

[72] The following example shows where the resale banner appears on the page:



<sup>17</sup> *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41.

<sup>18</sup> *McAlister v Lai* [2018] NZCA 141; and *James Hardie Industries Plc v White* [2018] NZCA 580, [2019] 2 NZLR 49.

[73] Although that is the extent of the express disclosure, viagogo submits that other features of the website combine to make it sufficiently clear to the consumer that viagogo is a resale platform, and thus there is no breach.

### *Submissions*

#### *Commerce Commission*

[74] The Commission submits that the extent of the disclosure at present is insufficient for the following reasons.

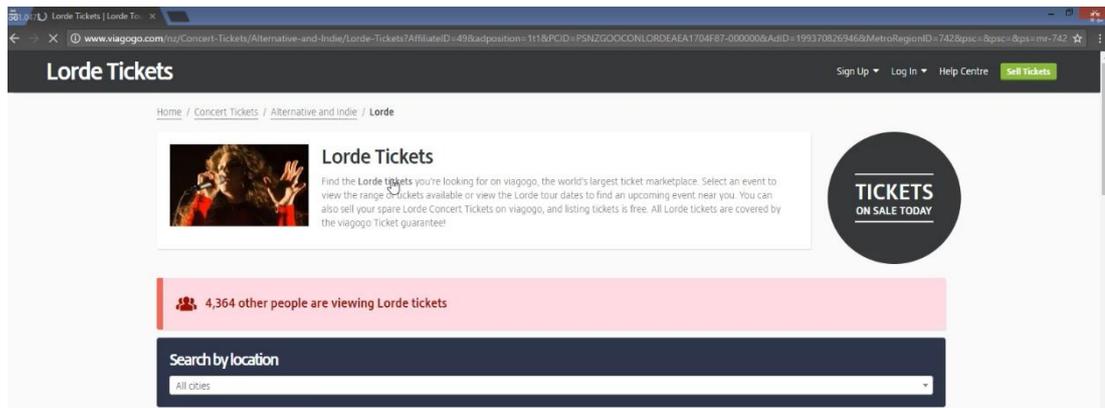
[75] First, the resale banner does not disclose in terms likely to be understood by consumers that tickets offered for sale on the website are offered by way of resale. Moreover, the resale banner is inconspicuous and disappears from view as the consumer scrolls down and/or leaves page.

[76] As a result, the Commission submits consumers are likely to be misled that viagogo is an official or authorised ticketing agency and be unaware of the risks they are taking in purchasing on the site. As to the former, the website presents similarly to the websites of one of the recognised agents. As to the risks, these are that the consumer may not receive a valid ticket or be able to obtain a refund, and may pay substantially more than the face value of the ticket. The consumer also may not understand that tickets may be available elsewhere.

#### *viagogo*

[77] viagogo does not dispute that consumers should be informed that the tickets offered on its site are being resold. However, its case is that the resale banner and other features of the website make the existing level of disclosure sufficient to avoid a breach of the FTA.

[78] The features to which viagogo referred me are the “Sell Tickets” button which appears on the Homepage, the Event Page, and on subsequent pages. viagogo submits the import of the button is obvious and would indicate to a consumer that the website is for resales:



[79] Secondly, the website shows forthcoming events all over the world. For instance, a search for Elton John will show all his future concerts wherever they may be. This is not what would be expected on the website of an authorised ticketing agent.

[80] Thirdly, tickets in the same sections for the same event are priced differently from one another. Again, this is not what would be expected on the website of an authorised ticketing agent. Tickets in Section A would all be priced the same, as would Section B and Section C et cetera.

[81] Lastly, viagogo submits the existence of its “guarantee” (discussed under the second cause of action) only makes sense if viagogo is a resale platform.

[82] Aside from these features of the website, viagogo submits that it is reasonable to expect that consumers accessing the website will be familiar with other websites, such as Trade Me or eBay, on which tickets and other items are re-sold, and also with the websites of recognised agents such as Ticketek or Ticketmaster, meaning the consumer will quickly identify material differences between the websites. viagogo also submits consumers can also be assumed to be familiar with other third party “sales” websites such as Booking.com or Expedia.com. viagogo submits this familiarity will lead consumers to recognise that the website is a resale platform.

### *Discussion*

[83] I am not as certain as the Commission that informing consumers that viagogo is a resale platform will alert them to what the Commission contends are the inherent risks of proceeding. For instance, knowing that tickets listed on viagogo are being

resold will not necessarily alert a consumer to the possibility that they may not receive the ticket in time or at all.

[84] That said, I accept the Commission's submission that the level of disclosure at present is not such as to adequately inform the consumer that all the tickets offered on the website are by way of resale. My reasons are as follows.

[85] First, consumers may not see the "secondary marketplace" statement given its location, the size of the font, and its lack of prominence.

[86] Secondly, consumers who do see the statement would need to understand that, by referring to itself as a "secondary marketplace", viagogo is informing them that the tickets for sale are resales. I am not persuaded that follows. viagogo did not call any evidence to establish that is how consumers would understand what is meant by "secondary marketplace". It was for viagogo to do so if it was going to rely on the statement.

[87] Nor am I persuaded that the other features of the website, referred to in [78] to [81] above, identify the website as one for resales. I accept that the listing of events and tickets in the manner referred to in [79] and [80] above is different to what one would expect to see on the website of a recognised agent. However, those matters on their own are insufficient to bring the level of disclosure to a satisfactory standard.

[88] I am not persuaded that it is reasonable to assume that consumers will be familiar with the other websites viagogo identified, let alone that such would stand them in good stead for recognising that viagogo's website is one for resales. The website presents similarly to those of the recognised agents. That is more likely to lead a consumer to assume viagogo is similarly authorised. Nor did viagogo identify how being familiar with Booking.com or Expedia.com would assist consumers to recognise that viagogo is a resale platform.

[89] Taking into account all the relevant circumstances, viagogo's existing level of disclosure is likely to mislead, and liable to mislead as to the nature of the services it offers.

[90] Accordingly, I am satisfied a breach of ss 9 and 11 is established.

### **Second cause of action: the Guaranteed Tickets Representations**

[91] The Guaranteed Tickets Representations are statements, some historic, by which the Commission alleges viagogo represents or has represented that consumers will receive “valid” tickets in time for the particular event. A valid ticket is one giving entry to the event. On the evidence referred to at [36], these statements are the subject of the most consumer complaints to viagogo, and by some margin.

[92] The Commission submits that viagogo is unable to guarantee validity or timely receipt because it has no control over these matters. Given that, the Commission alleges that viagogo has breached, and is in breach of, ss 9, 11, 13(e), and 13(i) of the FTA. The Commission seeks a declaration to this effect, and orders pursuant to ss 41(1)(a) and 42(1)(b) of the FTA.

[93] viagogo admits that it has made or makes the statements the Commission relies upon, but it denies any breach of the FTA.

#### *Background*

[94] The Guaranteed Tickets Representations comprise the following.

[95] First, there are the historic Event and Checkout Guarantee Representations, which viagogo made on the Event Page and/or during the Checkout Stage between July 2016 and 1 September 2019. viagogo ceased making these particular representations as at 1 September 2019, and they included representations such as:

- (a) “All tickets are fully protected by our guarantee”;
- (b) “All tickets are fully protected by our guarantee. Buy with confidence”;
- (c) “All Tickets Are 100% Guaranteed”; and
- (d) “We guarantee that you’ll get valid tickets in time for the event”.

[96] What follows are screenshots taken from the evidence showing how the statements appear:



### All Tickets Are 100% Guaranteed

Buy with confidence. We guarantee that you'll get valid tickets in time for the event.



### All Tickets Are Fully Protected By Our Guarantee

Buy with confidence. We guarantee that you'll get valid tickets in time for the event.

[97] Secondly, there is the FAQ Guarantee Representation. This is the following statement included as a “frequently asked question” in the “Help Centre” section of the website since at least July 2016:

What is the viagogo Guarantee?

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Buyers are guaranteed to receive valid tickets in time for the event. If a problem arises, viagogo will step in to provide comparable replacement tickets or a refund.

[98] Thirdly, there is the Resale Banner Guarantee Representation which, since November 2019, has appeared at the top of the page for some events at which tickets are subject to restrictions on resale. The statement is:

You will be protected by our guarantee if you attempt entry and are refused. That's our promise - enjoy the Event.

[99] To complete the evidence, it is necessary to refer to cl 1.3 of viagogo's terms and conditions, which provides:

### **1.3 viagogo Guarantee**

When You purchase tickets on viagogo, viagogo guarantees that You will receive the tickets You paid for in time for the event. In the rare instance that a problem arises and the original ticket Seller does not provide You with the tickets listed for sale, viagogo will, in its sole and absolute discretion, review comparably priced tickets and offer You replacement tickets at no additional cost, or viagogo will issue You a refund for the cost of the tickets. "Comparably priced" replacement tickets are determined by viagogo in its sole and absolute discretion ...

[100] In the first sentence of cl 1.3, viagogo repeats the guarantee. It then says that it may provide substitute tickets or a refund if a problem arises. The evidence at trial was that in the vast majority of cases viagogo refunds the purchase price and does not provide replacement tickets.

[101] The Commission alleges that all of these representations are or were in breach of s 9; of s 11 as being liable to mislead the public as to the characteristics and suitability for purpose of the tickets sold on the website; of s 13(e), as the representations convey that the tickets have particular benefits, namely a guarantee of entry, which they do not; and also of s 13(i) by misrepresenting the existence and effect of rights available to consumers under viagogo's terms and conditions.

#### *Submissions*

##### *Commerce Commission*

[102] The Commission submits that by the representations viagogo tells consumers that they are guaranteed, in the sense of an absolute assurance, to receive a valid ticket in time for the event. That is the only basis on which a consumer could "Buy with confidence" or "enjoy the Event!".

[103] This is misleading or false because viagogo is unable to give such an assurance and it does not do so because by cl 1.3 of its terms and conditions it reserves to itself the right to provide a refund.

[104] viagogo has no access to information from any authoritative source, such as the host or authorised agent, which would enable it to give a guarantee as to validity or receipt. Nor, with the exception of what it deems “high risk” events, does viagogo verify that a ticket listed for sale is valid.

[105] To compound matters, viagogo permits sellers with high breakage rates (in the sense referred to in [10] above) to continue to list tickets for sale. Mr Tom Crawford of viagogo gave evidence of the steps it takes, or rather does not take, to exclude sellers with high breakage rates. Mr Crawford’s evidence is that viagogo has a team dedicated to managing “bad” sellers. Certain formulas are applied to generate a suggestion to that team as to what to do with sellers in this category. The effect of Mr Crawford’s evidence under cross-examination was that the suggestion generated for any seller of [redacted]. To be fair to Mr Crawford he was at pains to emphasise that this was a suggestion only and ultimately it was a matter for the appointed team to make the appropriate decision having spoken to the seller concerned and ascertained why their record was so unsatisfactory.

[106] The Commission also submits that cl 1.3 of viagogo’s terms and conditions does not assist viagogo, because it repeats the guarantee.

[107] In summary, the Commission submits that the overall impression created by the Guaranteed Tickets Representations was/is that viagogo guarantees the tickets listed for sale will be received in time and will give the consumer entry to the event. This is misleading because viagogo is unable to give any such assurance and indeed does not do so.

*viagogo*

[108] viagogo submits that this cause of action fails for the following reasons.

[109] The first is that the Commission’s case is premised on the Court accepting that consumers understand a “guarantee” to be an absolute promise of the apparently guaranteed outcome. viagogo disputes that premise. It submits there is no evidence that consumers understand “guarantee” in this way and that the appropriate starting point must be that a consumer will understand it is impossible for viagogo to give an

absolute promise. viagogo submits that, at most, consumers would understand the guarantee to be a promise of a remedy if an issue arises.

[110] In support of this submission, viagogo referred me to *Commerce Commission v Bunnings Ltd*, in which the Commission took issue with numerous statements that Bunnings had made of the “lowest prices guaranteed” ilk. Judge Gibson dismissed the case against Bunnings and in doing so referred to the need to apply the “robust realism” referred to in *Geddes v New Zealand Dairy Board*, and to give consumers credit for the ability to “read between the lines”.<sup>19</sup>

[111] Applying that robust realism in the present case, viagogo submits that consumers would understand that viagogo is offering a remedy in the event of a problem, and that they will need to look elsewhere to know what that remedy will be.

[112] viagogo also referred me to the Consumer Guarantees Act 1993 as comparable to the situation prevailing in this case. The statutory guarantees provided for in that legislation are not in the nature of absolute promises but rather of a remedy. viagogo submits that consumers would understand that is how a guarantee works generally and how the viagogo guarantee works in practice.

[113] Secondly, viagogo draws a distinction between the first three of the Commission’s examples of the Event and Checkout Guarantee Representations and the fourth. The first three say nothing about the receipt of valid tickets and the Commission has led no evidence that to “guarantee” a ticket is to represent that it is valid. To the extent the Commission relies on Professor Slonim’s evidence (and it does not particularly in relation to this cause of action) viagogo submits it is countered by Professor Hortaçsu’s. With respect to both parties, I do not require expert evidence to determine this cause of action.

[114] viagogo acknowledges that the fourth statement in the Event and Checkout Guarantee Representations is in different terms, as it expressly refers to receipt of a valid ticket. However, viagogo submits the Commission has failed to establish that

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<sup>19</sup> *Commerce Commission v Bunnings Ltd* [2021] NZDC 8918, [2021] DCR 188 at [76], citing *Geddes v New Zealand Dairy Board* CA180/03, 20 June 2005.

consumers would understand this particular statement to be an absolute promise of receipt of valid tickets. That viagogo is offering a guarantee of valid tickets clearly signals the possibility of receipt of invalid tickets. There would be no need for a guarantee if that were not the case.

[115] viagogo's third submission is in respect of the FAQ Guarantee Representation. It submits that consumers would understand from the second sentence, "If a problem arises ...", that the guarantee does not constitute an absolute promise.

[116] Fourthly, viagogo submits that the clear message from the Resale Banner Guarantee Representation is that consumers may receive a invalid ticket and be refused entry.

#### *Discussion*

[117] The impression created by the various representations must be assessed in the context in which they are made. In this case, the statements are made to consumers who have accessed the website for one reason only, being to purchase a ticket to a live event. The situation is not comparable to Bunnings or the Consumer Guarantees Act. A breach of a guarantee of "lowest price" can be remedied. However, it is of the utmost importance to someone purchasing a ticket to a live event that they will be given entry. Moreover, the consumer may be incurring travel and accommodation costs to attend that event. The gist of viagogo's evidence at trial was that consumers should not care if they are refused at gate provided they get a refund. I do not accept that is so. viagogo's training materials acknowledge that being refused at gate is the "worst possible experience" a consumer can have.

[118] No distinction of any consequence is to be drawn between the first three and the fourth of the Event and Checkout Guarantee Representations. As the Court of Appeal said in *Godfrey Hirst*, statements are to be considered collectively, and their overall impression ascertained. Aside from that, however, there is no difference between guaranteeing a ticket and guaranteeing receipt of a valid ticket. It is the ticket that is guaranteed, not the remedy.

[119] The position is less clear cut in respect of the FAQ and Resale Banner Guarantee Representations which are those that viagogo continues to make. Ultimately, however, I am satisfied these too breach the of the relevant provisions of the FTA. The first repeats that the consumer is guaranteed to receive a valid ticket in time for the event, although it does refer to the possibility of a refund. The second does not say what the guarantee is, but it does advise that the consumer should “enjoy the Event”. As Mr Flanagan for the Commission submitted, a consumer who is refused at gate will not be enjoying the event.

[120] It follows that I am satisfied the Commission has proved its case on the second cause of action.

### **Third cause of action: the Scarcity Representations**

[121] The Commission’s third cause of action concerns what it refers to as the “Scarcity Representations”. These are representations to the effect that tickets for the event selected by a consumer are scarce and in demand.

[122] The Commission contends that, by making the scarcity representations, viagogo has breached ss 9, 11, and 13(b), (e) and (i) of the FTA. The Commission seeks declarations to that effect and for the matter to be addressed in a corrective statement.

#### *Pleading point*

[123] An immediate issue arises on the Commission’s pleading, which is whether the allegation of breach is confined to representations made between 18 July 2016 and 1 September 2019, or extends beyond 1 September 2019. From 1 September 2019, viagogo qualified the representations, for instance by adding the words “on our site”. The Commission submits that even the qualifications added do not remedy the breach, particularly as the words appear in faint, less prominent font than the representations themselves. However, the relevance of the Commission’s submissions on that point depend on the pleading putting that post 1 September 2019 period in issue.

[124] Counsel for viagogo submit that this third cause of action is confined to statements that viagogo made prior to 1 September 2019. The Commission submits it is not so confined.

[125] The statement of claim is to the effect that viagogo breached the relevant provisions of the FTA by “making the Scarcity Representations”. The relevant paragraph of the statement of claim is as follows:

36 From at least 18 July 2016 until on or about 1 September 2019, Viagogo made representations on the Website that Tickets for the particular event selected by a Consumer were scarce, without effective qualification (the **Scarcity Representations**). The Scarcity Representations included ...

[126] Then [37], [39] and [41] of the statement of claim set out the impression said to have been created by the representations and why they were in breach of the FTA. The pleading does refer to the (alleged inadequacy of the) qualifications to the statements added after 1 September 2019. However, the allegation of breach is in the past tense and confined to the Scarcity Representations as defined in [36] of the statement of claim.

[127] I am satisfied that on a fair reading of the statement of claim, viagogo’s submission is correct, and the allegation of breach itself is confined to the representations made between the 2016 and 2019 dates.

### *Background*

[128] The Scarcity Representations (that is, those made between 18 July 2016 and 1 September 2019) include statements as to the number of tickets available to the event and as to demand for those tickets. The types of statement made (and there is no dispute they were made) include the following:

- (a) as to the number of tickets available that there were only a specified number of tickets left or “left for this event”; there was less than a specified percentage of tickets left for the event; there were “only a few tickets left”; tickets were “likely to sell out soon”, “about to sell out”, or “almost gone”; that particular tickets were the “last tickets in this

section” of the venue; that a specified number of sections within the venue had “already sold out”; and that it was the consumer’s “LAST CHANCE!” to purchase tickets for the event.

- (b) as to demand, tickets were “selling fast”; “likely to sell out soon”; “about to sell out”; “almost gone”; and that a specified number of other people were viewing tickets for the event and/or were viewing the tickets the consumer had selected.

[129] Statements such as those referred to above appeared on many of the pages the consumer was required to navigate as they progressed through the website, often with more than one statement per page. Professor Slonim’s evidence was that, on average, 21 such statements appeared in each of the 25 selected videos, some of which post-dated 1 September 2019.

[130] Ms Saho Hashida, a manager employed by viagogo, gave evidence that the messages displayed to the consumer were affected by several matters, such as the total number of tickets remaining on the site and the total number of tickets matching the buyer’s preferences. As I understood her evidence, the messages are affected by the capacity of the venue, if that is known. It is apparent from her evidence that the messages may be highly inaccurate for smaller venues, such as the Napier Municipal Theatre.

### *Submissions*

#### *Commerce Commission*

[131] The Commission submits that the statements created the impression that tickets available to the event, *from any source*, were scarce and rapidly diminishing. The Commission’s case on this third cause of action depends on my accepting that the statements convey they relate to tickets available from all available sources and not just the website.

[132] The Commission submits the impression of scarcity was reinforced by three additional matters, all creating a sense of urgency and the need to hurry. The first is

the appearance and number of representations. They were in red or were surrounded by red, often in bold font, and in many cases accompanied by an “!”.

[133] The second is the “loading screens”, of which there are two. Prior to 1 September 2019, the effect of the loadings screens was to waylay a consumer by a minute or more.

[134] The third is the “countdown timer” referred to in [18](f) above, which shows the time available to complete the purchasing process.

[135] The combined effect of the statements, the manner of their presentation, the loading screens and the timer is to hurry the consumer to complete the purchase without delay.

[136] Plainly, the Commission could not prove that every statement was false. However, viagogo, not being an authorised source of tickets, could not properly make any statement regarding overall availability. In addition, in the statement of claim, the Commission gave particulars of individual events where representations had been made which were inconsistent with the true availability of tickets. None of these particulars was challenged. Two examples are as follows:

- (i) Viagogo represented that only 97 Tickets were left for a Michael Bolton concert, being only 5% of Tickets left for the venue, and that Tickets were about to sell out. In fact, at the time those representations were made, there were at least 507 Tickets available to that concert from an authorised ticketing agent, representing over 25% of the venue’s capacity.

...

- (iv) On 26 October 2018 Viagogo represented that there were “Only 16 tickets left” for a performance of The Nutcracker in December 2018, being “Less than 2% of tickets left for this event”. In fact, at the time those representations were made, there were at least 382 Tickets available for that performance, representing nearly 40% of the venue’s capacity.

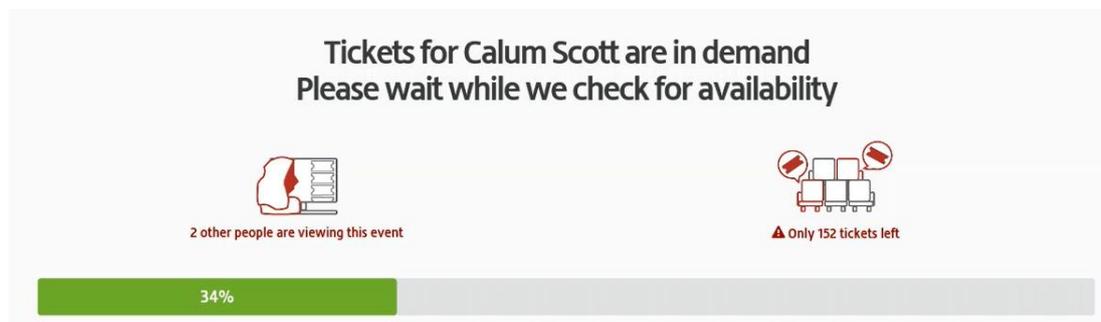
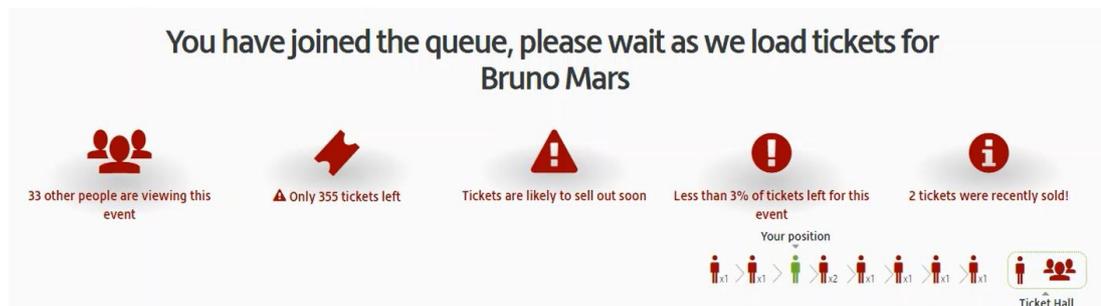
*viagogo*

[137] viagogo's submits the Commission cannot establish the underlying premise of this cause of action, being that consumers are likely to have understood the scarcity representations to be references to the total remaining tickets from all sources.

[138] viagogo submits there is no evidence to this effect, and it does not accept the criticisms of the loading screens or countdown timer. Ms Hashida's evidence was that the loading screens serve to manage traffic on the website, a suggestion that Mr Tims did not accept. As to countdown timers, these are commonplace, whether for booking tickets or hotels and so on.

### *Discussion*

[139] Some of the scarcity representations made in the pre-1 September 2019 period were unqualified. The following screenshots, taken in June 2017 and August 2018, evidence this:



[140] Subsequent to that but still prior to 1 September 2019, the representations began to appear with an "i" next to them and if the consumer clicked or hovered over that symbol, text would be displayed as follows:



[141] Accordingly, any consumer who saw the underlying text was informed that the representation was based on the tickets that were available on the website, rather than being a blanket statement as to availability of tickets from all sources.

[142] On balance, I am satisfied this cause of action is proved. In reaching that conclusion, I take into account the unqualified nature of the statements made on the website in the earlier videos to which I have referred. Although the statements were subsequently qualified to some extent by the “i”, consumers would be required to click or hover over the symbol to display the qualifying text. The effect of *Godfrey Hirst* is to require the maker of the representation to ensure that any qualification is sufficiently drawn to the attention of consumer.<sup>20</sup> I am not satisfied that the “i” symbol meets this requirement. Not every consumer in the targeted class needs to be misled to establish a breach. It is sufficient if a significant number is misled.

[143] The Commission has established a breach of ss 9 and 13(e). I am not persuaded the representations were as to a “service”, so as to establish a breach of s 11, or fall within ss 13(b) or (i).

#### **Fourth cause of action: the Price Representations**

[144] The Commission’s fourth cause of action concerns what it refers to as the “Price Representations”, which were made on the website prior to 1 September 2019.

[145] The price displayed for the ticket until close to the end of the purchasing process was the “initial price”, being the price set by the seller. This price was net of viagogo’s handling or delivery fee (“delivery fee”) and its booking fee. A ticket could not be purchased without paying these fees. The amount of the delivery fee depended on the method of delivery, and tended to be relatively modest. However, the booking fee was (and is) substantial. The combined effect of the fees was generally to increase the cost above the initial price by approximately 30 per cent.

[146] By way of example, a ticket to a Lorde concert shown at the initial price of \$177.26 incurred total viagogo fees of \$51.72. This brought the total cost of purchasing the ticket to \$228.98, a 29 per cent increase from the initial price. A ticket to an All Blacks match shown at the initial price of \$342.63 incurred viagogo fees of \$102.28, bringing the total cost of purchasing the ticket to \$444.91, a 30 per cent increase from the initial price.

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<sup>20</sup> *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*, above n 10, [59(c)].

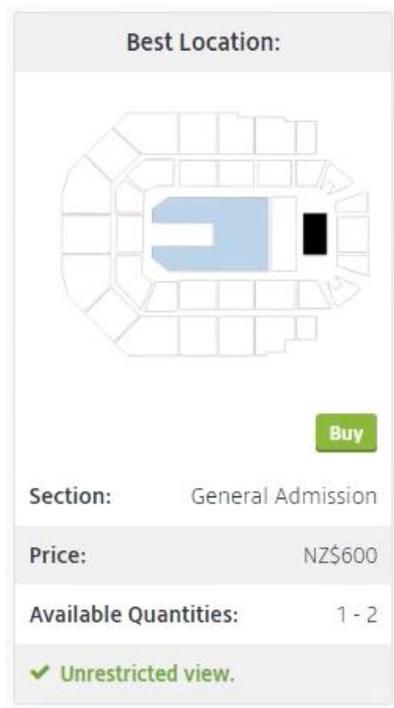
[147] The Commission contends viagogo breached ss 9, 11, and 13(g) of the FTA by representing the price of the tickets as it did.

[148] As of 1 September 2019, viagogo undertook to disclose the fees at a much earlier stage of the process. This it now does, with the amount of the booking fee being disclosed early on, and the delivery fee after the method of delivery is chosen. No issue is taken with this current practice.

### *Background*

[149] A seller listing a ticket for sale on the website nominates the price of the ticket, i.e. the initial price, and the currency in which they wish to receive payment, for instance US\$.<sup>21</sup>

[150] During the period in question, a consumer would first see the tickets available for an event at their initial price on the Ticket Selection Page. If the consumer's currency, say NZ\$, was different to the currency the seller had nominated, the price shown was the approximate equivalent in the seller's nominated currency:

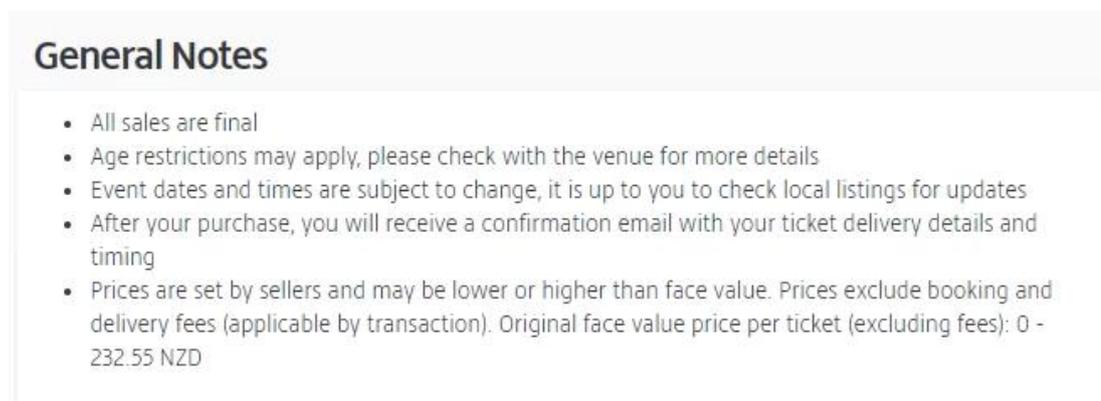


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<sup>21</sup> The initial price need bear no relationship to the face value of the ticket.

[151] At the Ticket Selection Page, the only reference to the additional fees was in a section headed “General Notes”. These appeared at the foot of the page, and stated that prices excluded booking and delivery fees. However, the notes were only visible if the consumer scrolled down to the end of the page. If the consumer selected one of the first sets of tickets shown on the page, there was no reason to scroll down.

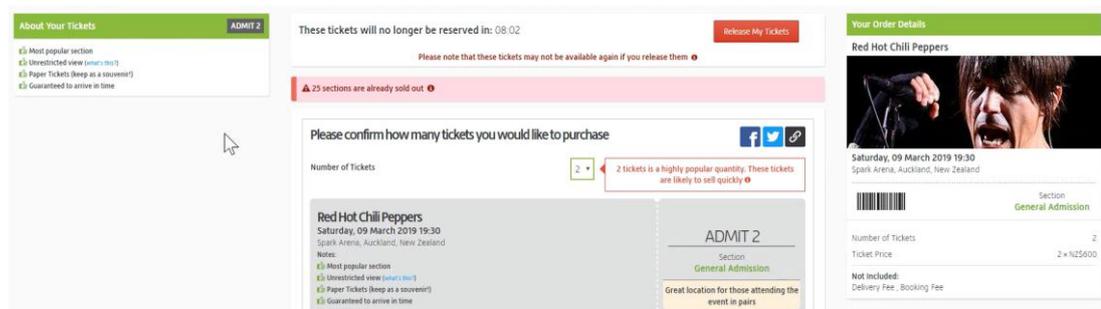
[152] The wording of the notes varied from time to time but what follows is a screenshot from the Ticket Selection Page on 30 January 2019 for a Red Hot Chili Peppers (“RHCP”) concert:



**General Notes**

- All sales are final
- Age restrictions may apply, please check with the venue for more details
- Event dates and times are subject to change, it is up to you to check local listings for updates
- After your purchase, you will receive a confirmation email with your ticket delivery details and timing
- Prices are set by sellers and may be lower or higher than face value. Prices exclude booking and delivery fees (applicable by transaction). Original face value price per ticket (excluding fees): 0 - 232.55 NZD

[153] Having selected a set of tickets, and having seen the General Notes or not, the consumer is taken to the Checkout Stage, the first page of which was and is the Confirmation Page. On this page, the price of the tickets (2 x NZ\$600 on the RHCP example), still net of fees, was shown in a panel on the side of the page, with the words “Not Included: Delivery Fee, Booking Fee” below:



These tickets will no longer be reserved in: 08:02

Please note that these tickets may not be available again if you release them

25 sections are already sold out

Please confirm how many tickets you would like to purchase

Number of Tickets: 2

2 tickets is a highly popular quantity. These tickets are likely to sell quickly

**Red Hot Chili Peppers**  
Saturday, 09 March 2019 19:30  
Spark Arena, Auckland, New Zealand

Notes:  
• Most popular section  
• Unrestricted view (unless marked)  
• Paper Tickets (keep as a souvenir)  
• Guaranteed to arrive in time

ADMIT 2  
Section: General Admission  
Great location for those attending the event in pairs

**Your Order Details**  
**Red Hot Chili Peppers**  
Saturday, 09 March 2019 19:30  
Spark Arena, Auckland, New Zealand

Section: General Admission

Number of Tickets: 2  
Ticket Price: 2 x NZ\$600

**Not Included:**  
Delivery Fee, Booking Fee

**Your Order Details**

**Red Hot Chili Peppers**



**Saturday, 09 March 2019 19:30**  
Spark Arena, Auckland, New Zealand

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Section  
**General Admission**

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Number of Tickets	2
Ticket Price	2 x NZ\$600

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**Not Included:**  
Delivery Fee , Booking Fee

[154] The price continued to be shown this way, up to and including the Personal Details Page, which is near the end of the process.

[155] The delivery fee was disclosed on the next page, being the Delivery Method Page. In the RHCP example, the fee was “2 x NZ\$23”. The words “Not Included: Booking Fee” appear immediately below:

**Your Order Details**

**Red Hot Chili Peppers**



**Saturday, 09 March 2019 19:30**  
Spark Arena, Auckland, New Zealand

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Section  
**General Admission**

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Number of Tickets <a href="#">(Change)</a>	2
Ticket Price	2 x NZ\$600
Delivery Fee	2 x NZ\$23
Tracked Delivery	FREE

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**Not Included:**  
Booking Fee

[156] The amount of the Booking Fee was not disclosed until the Payment Method Page which is where the consumer enters their credit card details. In the RHCP example the booking fee was “2 x NZ\$173”. A note also appears about the listing being in Euros (being the seller’s nominated currency), so the total cost shown of NZ\$1,593 is only approximate:

The screenshot shows a ticket booking interface. At the top, a red button says "Release My Tickets". Below it, a warning message states: "Please note that these tickets may not be available again if you release them". The section is "General Admission". A table lists the following items:

Number of Tickets (Change)	2
Ticket Price	2 x NZ\$600
Delivery Fee	2 x NZ\$23
Tracked Delivery	FREE
Booking Fee	2 x NZ\$173
<b>TOTAL PRICE</b>	<b>NZ\$1,593</b>

Below the table, a note says: "This is an approximate conversion. These tickets are listed in EUR. You will pay €952.83." To the right, there are two green sections: "About The Event" with a warning "Less than 4% of tickets remaining" and "About The Venue" with a warning "25 sections are already sold out". There are also social media sharing icons and a thumbs-up icon with the text "Don't forget to send your friends a reminder to pay you back!"

### *Submissions*

#### *Commerce Commission*

[157] The Commission submits that by displaying the price as it did throughout most of the purchasing process, viagogo created the impression that tickets were available for purchase at the initial price when they were not. On the contrary, the tickets were only able to be purchased for substantially more. The Commission also notes, correctly, the fees were disclosed when the countdown timer was well advanced.

[158] On Professor Slonim’s evidence, the fees were disclosed at a point in time where the consumer could be expected to feel more committed to the purchase. The gist of his evidence was that, by the time consumers were informed of the amount of the fees, they were more likely to be willing to pay a substantially higher price than they would have done had the true cost been disclosed at the outset.

[159] In support of its submissions, counsel for the Commission referred me to two Australian cases in which the effect of “drip pricing” on consumers has been addressed, these being *Australian Competition and Consumer Commission v AirAsia*

*Berhad Company and Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd.*<sup>22</sup>

[160] The following passage from the *AirAsia* case is relevant:<sup>23</sup>

... it is necessary to have regard to the entire booking process and to the fact that, having completed it, a consumer would have become aware of the full price to be paid before committing him or herself to a purchase. It is also relevant that, on Page 2, the potential customer was advised that the fares there quoted excluded taxes and fees. These considerations do not, however, weigh heavily in mitigation. The principal vice to which s 48 is directed is the seductive effect of a quoted price which is lower than the actual amount which the consumer will have to pay in order to receive the relevant service. Unless the full price is prominently displayed the consumer may well be attracted to a transaction which he or she would not otherwise have found to be appealing and grudgingly pay the additional imposts rather than go to the trouble of withdrawing from the transaction and looking elsewhere ...

[161] The *AirAsia* case was brought under s 48 of the Australian Consumer Law which requires a supplier of goods for personal use to specify by way of a single figure the price for the goods offered. As counsel for the Commission acknowledged, s 48 is thus more specific than our equivalent provisions.

[162] *Jetstar* concerned a “before” and “after” situation.<sup>24</sup> *Jetstar*’s initial practice was similar to *viagogo*’s prior to 1 September 2019. Late in the booking process, *Jetstar* added a fee to any purchase not made by a particular payment method. The Court held that contravened the equivalent of our ss 9 and 11 FTA. In the “after” scenario, *Jetstar* disclosed the fact and the quantum of the fee at a much earlier stage, which the Court accepted was sufficient to avoid a breach. The Commission submits, rightly, that *viagogo*’s pre-1 September 2019 practice was equivalent to the “before” scenario in *Jetstar*.

[163] Overall, the Commission submits this case is on all fours with *AirAsia* and *Jetstar*, and that the breaches it alleges are proved.

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<sup>22</sup> *Australian Competition and Consumer Commission v AirAsia Berhad Company* [2012] FCA 1413; and *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263.

<sup>23</sup> *Australian Competition and Consumer Commission v AirAsia Berhad Company*, above n 22, at [31].

<sup>24</sup> *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd*, above n 22.

*viagogo*

[164] viagogo submits that qualifications regarding price and fees were sufficiently drawn to the consumer's attention to avoid a breach of the FTA. In this, viagogo is referring to the General Notes section referred to above; the reference on the Confirmation Page to the fact that the delivery fee and booking fee were not included; and that the booking fee was quantified on the Payment Method Page, in addition to identifying, if necessary, that the consumer would be charged in different currency.

[165] Ms Hashida gave evidence that viagogo's approach prior to 1 September 2019 reflected its belief that the "best customer experience" would be achieved by confirming each pricing aspect when the quantum was certain. This is a reference to the fact that the booking fee is calculated as a percentage of the ticket price. This evidence of Ms Hashida is difficult to accept. The method of calculating the booking fee has not altered but viagogo now discloses the amount of the fee at an early stage. There is no reason why this could not have been done prior to 1 September 2019 and viagogo would have known from the complaints it was receiving that the late disclosure of the fees and their quantum was an issue for consumers.

[166] Lastly, insofar as concerns expert evidence, neither of viagogo's experts were willing to accept Professor Slonim's evidence as to the "conditioning" effect of drip pricing on consumers.

### *Discussion*

[167] The Commission is correct in submitting that the overall impression created by the representations as to the price of the ticket was that it could be purchased for the initial price. The qualifying information viagogo referred to was not sufficiently prominent or proximate to nullify the risk that the consumer might be misled.

[168] Given that, by displaying the price as it did, and only disclosing the fees late in the process, viagogo engaged in conduct that was likely to mislead, was liable to mislead the public as to the characteristics of the services it offered, and it also made a misleading representation in respect of the price of its services

[169] It is unnecessary to address the expert evidence about the effect of “drip pricing” on consumers. Suffice to say that the statements referred to above in the *AirAsia* case are apposite here and entirely consistent with Professor Slonim’s evidence. In the words of *Godfrey Hirst*, consumers continued through the “marketing web”, believing they were able to purchase the ticket for substantially less than was the case and, where applicable, in their local currency.<sup>25</sup> That the true position was disclosed immediately before the consumer paid is irrelevant.

[170] I am satisfied the Commission has established a breach of ss 9, 11, and 13(g).

### **Fifth cause of action: the Official Seller Representations**

[171] The Commission’s fifth cause of action concerns what it refers to as the “Official Seller Representations”. viagogo made these representations between July 2016 and November 2017 in advertisements it placed on Google containing the words “Buy Now, viagogo Official Site”.

[172] For example, the first item yielded from a search on Google on 16 June 2017 for “bruno mars tickets nz” was:



[173] The effect of the evidence at trial was that viagogo and others would have “bid” to appear first in the list of hits, or within the first four hits, on searches for “Bruno Mars tickets” or something of that nature on the particular day. Sometimes the bid succeeded, sometimes not. In any event, such advertisements by viagogo and

<sup>25</sup> *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*, above n 10, at [59(e)].

other ticket resale platforms ceased to appear on Google from 23 November 2017. That is the date on which Google required them to cease using words in advertisements that Google considered implied the platform was a “primary” ticket seller, such as “official” and “authorised”. Google also imposed other requirements at the same time, including that such platforms make prominent disclosure of their status as a resale site.

### *Submissions*

#### *Commerce Commission*

[174] The Commission alleges that the overall impression created by the representations was that viagogo was the, or an, official ticketing agent for the event; that it was authorised or appointed by the host as such; and as a result that tickets available on the website for the event were not by way of resale. The Commission alleges the representations were misleading because viagogo was not authorised by the host of any event, and because all tickets on the website are resales.

[175] The Commission submits the plain and obvious implication of the words “Official Site” is that viagogo is an authorised source of tickets for the event. Moreover, that meaning is reinforced by other features of the advertisement, being that the statement is made in relation to a particular event (Bruno Mars); after a consumer has searched for a specific event (Bruno Mars again); and by the text appearing below the headline text, including “On Sale Today”; “Secure your Seats”; and “100% Guarantee”.

[176] As viagogo was not an official source of tickets, the Commission alleges that it breached ss 9, 11, 13(e), and 13(i) in placing such advertisements. The Commission seeks a declaration of breach and an order requiring viagogo to publish a corrective statement.

#### *viagogo*

[177] viagogo denies the advertisements gave rise to any breach. It submits that “Official” conveys the link is to the “official” viagogo website, as opposed to some imposter’s; that the Commission has not adduced any admissible and/or probative

evidence as to what consumers might have concluded from the advertisements; and that evidence regarding “click throughs” from searches on Google containing the word “official” indicate that consumers were not misled in fact.

[178] Elaborating, viagogo submits that the Commission is overreaching in its contention that consumers would infer the matters in [174] and [175] above from the wording as it actually appears, being “viagogo Official Site”. Even if the words might cause a degree of confusion regarding viagogo’s status (which viagogo denies), viagogo submits more than that is required to render a representation likely to mislead or false.<sup>26</sup>

[179] viagogo also submits that any confusion would have been quickly dispelled by the features of the website referred to in [78] to [80] above.

[180] viagogo also referred me to the expert evidence. Professors Slonim and Chaudhuri agreed that the fact a consumer might click on the link says nothing about why they did so, let alone that they clicked because of the word “Official”.

[181] Although Professor Chaudhuri could not say whether viagogo had been impersonated, viagogo referred me to statements that it had sent to customers defrauded by people purporting to be “official” members of viagogo’s staff. Accordingly, viagogo contends it had a legitimate purpose for using the word “official”.

[182] As to relief, viagogo submits the case falls outside the ambit of s 13(i). Given the conclusion I have reached, nothing turns on whether I find a breach of s 13(i), and I shall put it to one side.

### *Discussion*

[183] I accept the overall impression created by the advertisement was that viagogo was an official or authorised source of tickets to the particular event. That impression is created by the words “viagogo Official Site”, and the additional words to which the

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<sup>26</sup> *Insight Radiology Pty Ltd v Insight Clinical Imaging Pty Ltd* [2016] FCA 1406, (2016) 122 IPR 232 at [143].

Commission referred me, such as “Secure Your Seats”, “100% Guarantee”, “Book Today”, “Selling Fast”, and “Best Seats”. Those words assist in creating that impression because they could only properly be included if viagogo was an authorised source of tickets.

[184] I do not accept viagogo’s submission that such an impression would have been dispelled once the consumer navigated to the website. The “Sell Tickets” link, shown at [78] above, is small and, in any event, does not necessarily convey that every ticket for every event on the website is by way of resale.

[185] That tickets to a performer’s concerts throughout the world were and are displayed is also not determinative, although consumers who observed that tickets in the same section were priced differently might question why that was so. I am also not persuaded that the guarantee would inform a consumer that viagogo was not an official source of tickets. That might reinforce that viagogo was an authorised source of tickets.

[186] Overall, I do not accept that the matters to which viagogo referred me negate the otherwise misleading nature of its advertisement.

[187] Viewed as a whole, the advertisement was misleading in the sense referred to by the Court of Appeal in *Godfrey Hirst*. It had a tendency to entice consumers onto the website, by engendering an erroneous belief that viagogo was an authorised ticketing agent for the event.<sup>27</sup>

[188] As I said above, viagogo’s intention in making the representation is irrelevant. However, it is fair to say there was no evidence of any substance that any other entity had ever purported to pass itself off as viagogo, let alone in the relevant 17-month period. None of viagogo’s witnesses pointed to such an occurrence. Nor was there any reference to such an occurrence in the emails passing between [redacted]. Nor did the incident referred to in [181] above warrant the use of the word Official.

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<sup>27</sup> *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*, above n 10, at [59].

[189] It follows that the Commission has proved a breach of ss 9 and 11 of the FTA. The representations were likely to mislead the targeted class and liable to mislead the public. The representations were also in breach of s 13(e), as they falsely conveyed that viagogo was “approved” or “endorsed” by the host to sell tickets to the event.

#### **Sixth cause of action: the unfair contract term**

[190] The Commission seeks a declaration under s 46I of the FTA that cl 7.4 of viagogo’s terms and conditions is an “unfair contract term” in the sense of s 46L of the FTA.

[191] Clause 7.4, set out below, provides for any dispute regarding viagogo’s terms and conditions to be governed by Swiss law and to be resolved by the courts of Geneva.

[192] There is no evidence that any consumer has commenced proceedings against viagogo in New Zealand, for instance as to a refusal by viagogo to refund money paid for tickets. Given that, the clause is untested in this jurisdiction, and it is not inevitable that cl 7.4 would be applied here if viagogo sought to rely upon the provision. Regardless, the Commission seeks the declaration referred to, and if that declaration is made, the term must be excluded from the terms and conditions and it may not be applied, enforced, or relied upon.<sup>28</sup>

#### *Background*

[193] The provisions in the FTA relating to the circumstances in which the Court may declare a contractual term unfair (ss 46H to 46M) were added to the FTA in March 2015. They largely mirror provisions in Australia’s Competition and Consumer Act 2010 (Cth) (“CCA”).

#### *Section 46I*

[194] The circumstances in which the Court may declare a term unfair are governed by s 46I of the FTA. The term must be contained in a “standard form consumer

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<sup>28</sup> Fair Trading Act 1986, s 26A(1).

contract” as defined in ss 2 and 46J of the FTA; the declaration must not be prohibited by s 46K; and the term must be unfair in the sense of s 46L.

*Standard form consumer contract/s 46K*

[195] Any user of the website must accept, or is deemed to accept, viagogo’s terms and conditions. It is common ground between the parties that such acceptance gives rise to a standard form consumer contract for the purposes of s 46L.

[196] It is also common ground that the declaration sought is not prohibited by s 46K.

*Unfair*

[197] That leaves the issues of whether the term is unfair in the sense of s 46L and, if so, whether the declaration should be made.

[198] A term is unfair in the sense of s 46L if the Court is satisfied that it causes a significant imbalance in the parties’ rights and obligations arising under the contract; that it is not reasonably necessary to protect the legitimate interests of the advantaged party (viagogo); and that it would cause detriment to the consumer if relied upon.

*Significant imbalance*

[199] Whether a term would cause significant imbalance in the required sense is a question of fact.<sup>29</sup> An imbalance is significant if it is sufficiently large to be important.<sup>30</sup>

[200] Whether the clause would create a significant imbalance in the parties’ rights and obligations under the contract requires consideration of the clause itself and the rights and obligations each party has under the contract.

[201] A significant imbalance in those rights and obligations exists if “a party’s obligations and rights are not broadly equivalent” or are “so weighted in favour of the

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<sup>29</sup> *Russell V Miller* Miller’s Australian Competition and Consumer Law Annotated (45<sup>th</sup> ed, Thomson Reuters, Pyrmont (NSW), 2023) at 1606.

<sup>30</sup> *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377 at [54].

supplier as to tilt the parties' rights and obligations under the contract significantly in his favour".<sup>31</sup> The assessment may be assisted by comparing the effect of the contract with and without the term in question.<sup>32</sup>

### *Reasonably necessary*

[202] A term is presumed not to be reasonably necessary to protect the legitimate interests of the party advantaged by the term (viagogo) unless that party proves otherwise.<sup>33</sup>

### *Other matters*

[203] Section 46L also provides that, in determining whether the term is unfair, the Court may take into account any matters it considers relevant but it must take into account the extent to which the term is transparent and the contract as a whole. Section 46L does not expand on what is meant by transparent, but s 24(3) of the CCA states that a term is transparent if it is expressed in reasonably plain language, is legible, presented clearly, and is readily available to any affected party. There has been no suggestion that cl 7.4 lacks transparency, and I shall proceed accordingly.

[204] Lastly, without limiting s 46L, s 46M lists examples of the kind of term that may be unfair. The common feature of the listed terms is that they confer unilateral rights or benefits, for instance a term that purports to permit the unilateral termination of the contract or the unilateral variation of its terms, and a term which has the effect of penalising one party only for breach. A term that has the effect of limiting one party's right to sue is another identified.<sup>34</sup> The Commission relies on this point in support of its case. Clause 7.4 does not in fact have that effect in law, but I accept the Commission's point that any apparent requirement for a consumer to proceed in the courts of Geneva would be a significant deterrent to a claim by any but the most determined, aggrieved, and resourceful consumer.

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<sup>31</sup> *Commerce Commission v Home Direct Ltd*, [2019] NZHC 2943, [2019] 3 NZLR 904, at [32] citing *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481.

<sup>32</sup> *Commerce Commission v Home Direct Ltd*, above n 31, at [37].

<sup>33</sup> Fair Trading Act 1986, s 46L(3).

<sup>34</sup> Section 46M(k).

### *Terms and conditions*

[205] The terms and conditions, which apply to both buyers and sellers, make provision for matters such as:

- the obligations of buyer and seller;
- how and when issues arising with a transaction must be communicated to viagogo;
- how and when there may be a claim under viagogo's guarantee; and
- a clause purporting to limit viagogo's liability for damages to circumstances in which there is "unlawful intent" (presumably some kind of fraud) or gross negligence and, if that limitation is ineffective, capping viagogo's liability at CHF 300 (approximately NZ\$555) or the total value of the tickets, whichever is the lesser.

[206] Clause 7.4 provides:

#### **7.4 Governing Law**

This Agreement shall be governed by and interpreted in accordance with the Swiss laws, with the exclusion of its conflict of laws rules and the provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG). All disputes arising out of or in connection with this Agreement, including disputes on conclusion, binding effect, amendment and termination, shall be resolved exclusively by the competent Courts of Geneva, Switzerland. We also have the option of taking legal action against You at Your domicile.

[207] The effect of cl 7.4 is to provide, first, that the contract is to be governed by and interpreted in accordance with Swiss law and, secondly, to provide that any dispute raised by a consumer arising out of or in connection with the contract must be resolved exclusively by the courts of Geneva. viagogo does, however, reserve to itself the right to litigate against the consumer in the place of the consumer's domicile.

[208] Although the Commission submits that the clause is unfair in its entirety, I propose to deal with the two components separately. The discussion which follows incorporates the parties' submissions.

### *Courts of Geneva*

[209] I am satisfied the second part of the clause, providing for the exclusive jurisdiction of the courts of Geneva, gives rise to significant imbalance in the parties' rights and obligations under the contract, and that it would cause detriment to the consumer if relied upon. Two factors lead to this conclusion.

[210] The first is the lack of symmetry. viagogo may pursue the consumer in Geneva or the consumer's place of domicile (say New Zealand). However, that same consumer may only pursue viagogo in the courts of Geneva. But for the clause, it would be open to a consumer in New Zealand to commence proceedings, probably in the Disputes Tribunal, seeking relief.

[211] The second factor is that requiring a consumer to sue viagogo in Geneva "tilts the parties' rights and obligations" markedly in viagogo's favour.<sup>35</sup> It rules out any prospect of litigation against it by a consumer. If more is required, I would take into account the limitations viagogo seeks to place on its liability in its terms and conditions, as bullet pointed above.

[212] The more difficult issue is whether the exclusive jurisdiction component of cl 7.4 is reasonably necessary to protect a legitimate interest of viagogo. viagogo submits that it has a legitimate interest in confining disputes to its home jurisdiction and that it should not be required to respond to litigation in multiple jurisdictions. In support of its submission, viagogo referred me to three Australian cases in which courts dismissed submissions that similar clauses were unfair.

[213] viagogo is correct that the courts concerned did dismiss the submission that the clauses were unfair. However, these were different situations to the type of claim likely to be brought against viagogo.

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<sup>35</sup> *Commerce Commission v Home Direct Ltd*, above n 31, at [37].

[214] The first of the cases to which viagogo referred me was a claim by an Australian citizen arising out of a personal injury sustained in a hotel room in Paris, she having reserved the room on the defendant's website.<sup>36</sup> The relevant clause of the terms and conditions required any proceedings to be brought in Singapore. The Court upheld the clause.

[215] The second case involved a clause which required any dispute to be submitted to arbitration in California.<sup>37</sup> The applicant was a small business based in Melbourne. However, the effect of the clause was softened by the fact the respondent, Instagram, was required to meet much of the cost associated with the arbitration.<sup>38</sup>

[216] The third case was a substantial class action brought by many plaintiffs against a cruise line.<sup>39</sup> Many of the plaintiffs were subject to terms and conditions which required them to bring any litigation in California. The Court declined to strike out the clause on the basis of unfairness, holding that it was reasonably necessary to protect a legitimate interest.

[217] The context of the present case is different because the sums in issue will be modest. The likely scenario is that a consumer will wish to bring a claim against viagogo in respect of an event held in New Zealand, for instance a failure to refund the cost of tickets refused at gate. Any required witness is likely to be local. There is no obvious reason why viagogo, a worldwide business which operates solely online, could not participate, whether by audio visual link or by appointing a representative to attend any hearing on its behalf. Any dispute can be determined quickly by the Disputes Tribunal.

[218] Accordingly, cl 7.4, insofar as it requires any litigation against viagogo to be brought in Geneva, is not reasonably necessary to protect viagogo's legitimate interests. viagogo can defend itself as well here as in Geneva.

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<sup>36</sup> *Gonzalez v Agoda Company Pte Ltd* [2017] NSWSC 1133.

<sup>37</sup> *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 1846, (2020) 291 FCR 155.

<sup>38</sup> At [356].

<sup>39</sup> *Karpik v Carnival plc (The Ruby Princess)* [2021] FCA 1082, (2021) 157 ACSR 1.

### *Governing law*

[219] The Commission submits the governing law component of cl 7.4 is unfair because it imposes a prohibitive layer of cost on a consumer, being the cost of taking legal advice on Swiss law.

[220] I do not accept this submission, and I do not propose to declare this part of the clause unfair.

[221] First, there is nothing in the evidence before me that the provision mandating Swiss law gives rise to a significant imbalance in the parties' rights and obligations under the contract. There is no evidence that Swiss law is advantageous to viagogo, nor disadvantageous to a consumer.

[222] Secondly, the starting point for any Court or Tribunal dealing with a dispute raised here will be that Swiss law is the same as New Zealand law on the issues which arise. If viagogo wishes to adduce evidence of a material difference, it has the resources to do so. The matter would then have to take its usual course.

[223] Thirdly, before declaring a term unfair, it is necessary to consider the result that will follow from doing so. There must be a proper law of the contract. A vacuum will arise if the governing law provision is deleted, and I cannot say what will fill it. The proper law of the contract might depend on any number of matters. It would not inevitably be New Zealand law.

[224] To conclude, I am not persuaded that the governing law component of cl 7.4 is unfair, and I am certainly not persuaded that it would be sensible to exclude the provision without knowing the likely consequences of doing so.

### *Relief*

[225] I am willing to declare that the part of cl 7.4 of viagogo's terms and conditions commencing "All disputes arising out of or in connection with this Agreement ..." and concluding "against You at Your domicile" is an unfair contract term.

[226] I note s 46I(1) FTA permits a declaration in respect of “a term”. I am satisfied that it is open to make a declaration in respect of part of a term only.

[227] However, the precise form of the declaration needs to be settled. I refer the parties to s 46I(3) FTA. For instance, I expect the declaration should be confined to consumers within the reach of the FTA.

## **Result**

[228] I declare that viagogo has breached the following provisions of the Fair Trading Act 1986:

- (a) section 9 in respect of the first, second, third, fourth and fifth causes of action;
- (b) section 11 in respect of the first, second, fourth and fifth causes of action;
- (c) section 13(e) in respect of the second, third and fifth causes of action;
- (d) section 13(i) in respect of the second cause of action; and
- (e) section 13(g) in respect of the fourth cause of action.

[229] The parties are to make submissions regarding the terms of the injunction sought in respect of the second cause of action.

[230] Whilst I propose to order publication of a corrective statement, I am not satisfied as to the terms of the statement the Commission has proposed. For instance, the High Court will not be ordering that the information be “brought to your attention”. It will be making an order in terms of the relevant provisions of the Fair Trading Act 1986. Also, consumers do not purchase tickets “from” viagogo but from sellers who are listing on the site. The Commission should reconsider the information to be disclosed or published.

[231] In addition, the parties should liaise, in a constructive way, on what is a fair positioning of the statement on the pages of the website.

[232] Pursuant to s 46I of the Fair Trading Act 1986, I declare that part of cl 7.4 of viagogo's terms and conditions which commences "All disputes arising out of or in connection with this Agreement ... against You at Your domicile" is an unfair contract term.

### **Costs**

[233] The parties may make submissions on costs if they are unable to agree. No set of submissions is to exceed 15 pages (including schedules), in 1.5 line spacing.

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Peters J