IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV-2015-404-003054
[2016] NZHC 1064

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	UNIQUE REALTY LIMITED Defendant

Hearing: 6 May 2016

Appearances: J C L Dixon and L Farmer for Plaintiff
G Hall for Defendant

Judgment: 20 May 2016

JUDGMENT OF VENNING J

This judgment was delivered by me on 20 May 2016 at 2.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Meredith Connell, Auckland
Buddle Findlay, Auckland
Copy to: JCL Dixon, Auckland

Introduction

[1] Unique Realty Limited (Unique) is a real estate agency operating in the Manawatu region. It is associated with The Professionals' group.

[2] After an investigation into the activity of a number of real estate agencies, including Unique, the Commerce Commission (the Commission) commenced proceedings against Unique alleging that it had contravened ss 27(1) and 27(2) via s 30 of the Commerce Act 1986 (the Act); that is, it had entered into, and given effect to, a contract deemed to substantially lessen competition. The Commission seeks declarations of contravention and a pecuniary penalty.

[3] Unique accepts that it entered and gave effect to a price fixing agreement with at least 10 other real estate agencies in the Manawatu region, including Property Brokers Limited and Manawatu (1994) Limited (trading as LJ Hooker Palmerston North).

[4] The parties are agreed that an appropriate penalty range for Unique's actions is between $1.2 and $1.65 million. They jointly suggest a penalty of $1.25 million as appropriate.

The parties

[5] Unique has four branch offices located in Palmerston North (including a separate office dealing in rental property only), Feilding and Foxton. Its market share in the Manawatu region is approximately 19 per cent. Unique was formed in 1992 by Mr Maxwell Vertongen. Mr Vertongen is currently one of two directors and one of three shareholders. Mr Daniel Cunningham is Unique's residential manager. For the 12 months ended 31 March 2014 Unique's gross residential commissions totalled [redacted], comprising [redacted] residential sales. For the financial year ending 31 March 2014 the annual net profit before tax was approximately [redacted].

Background to the offending agreement

[6] Unique listed its properties for sale with Trade Me. Trade Me charged a monthly subscription of $699 for the service. The subscription had been negotiated by The Professionals' head office. The number of properties that could be listed under that monthly subscription was unlimited.

[7] In July 2013 Trade Me began informing key participants in the real estate industry of proposed changes to its pricing model. Trade Me intended to charge $159 for each property listing uploaded to its website.

[8] On 17 October 2013 representatives from Unique, Property Brokers and LJ Hooker Palmerston North, together with others, met to discuss the possibility of an industry wide response to Trade Me's proposal. Mr Vertongen and Mr Cunningham were both at the meeting. The agencies viewed the pricing change as only the first step in likely ongoing efforts by Trade Me to increase its revenues for property listings on its website.

[9] The discussion strayed into unlawful price-fixing when the agencies present at the meeting agreed that as from 1 February 2014 they would no longer absorb the cost of the Trade Me listings, but pass on the whole of the increased fee to their vendor customers (the Manawatu agreement). Unique, Property Brokers and LJ Hooker Palmerston North began passing on the cost of standard Trade Me listings to vendors from 1 February 2014 onwards in accordance with that agreement.

[10] In July 2014, Trade Me announced that it was revising its pricing again and intended to revert to a subscription based model with effect from 1 August 2014. With Trade Me's revision to its pricing approach the unlawful agreement effectively came to an end but the effect of the agreement persisted. Despite the reintroduction of the subscription based model, none of the agencies reverted to the previous approach under which they had absorbed some or all of the Trade Me costs to the benefit of their vendor customers.

[11] Unique accepts that the entry into and giving effect to the agreement had the purpose and effect of fixing, controlling or maintaining the prices vendors paid for the services from real estate agencies in competition with one another, and as such substantially lessened the competition in the Manawatu real estate sales services market.

[12] Unique gave effect to the agreement by directing its personnel that from 1 February 2014 onwards the costs of standard Trade Me listings were to be passed on to those vendors who wished to use Trade Me to advertise property. On 17 January 2014 Mr Campbell, Unique's company manager, sent an email to Realestate.co.nz advising that all Manawatu agencies had decided to exit Trade Me by 1 February 2014. From 1 February 2014 onwards, Unique, together with Property Brokers and LJ Hooker Palmerston North passed on the cost of the standard Trade Me listings of $159 plus GST to the vendors. While the per-listing pricing model did not come into effect until 1 March 2014 for Unique because of its contractual arrangements, it implemented the vendor funding from 1 February 2014 onwards.

[13] Although a number of agencies were involved the Commission has taken action against only three – Unique, Property Brokers Limited, (which had approximately 25 to 28 per cent of the residential real estate market in the Manawatu region), and Manawatu (1994) Limited trading as LJ Hooker Palmerston North, (which held approximately 23 to 26 per cent of the residential real estate market in the region).

The commercial gain/loss or damage caused

[14] In the absence of the Manawatu agreement the relevant real estate agencies would have been required to decide whether or not to impose the additional fee on vendors and if so at what level. The fees would have been a point of competition. There was clear potential for commercial gain arising out of the agreement.

[15] While Unique did not recover more from vendors than it was charged by Trade Me (except for the first month when it passed on the standard listing fee to one vendor before it began incurring the fee), it avoided the prospect that it would have

had to absorb at least part of the fee to remain competitive with other real estate agencies.

[16] Vendors who paid the full $159 fee have suffered harm to the extent they may have paid more for the standard listing than they would have in the absence of the agreement. It is also likely that some vendors elected not to list on Trade Me because they were confronted with paying the full $159 fee for a standard listing. The impact on competition that the Manawatu agreement has had is likely to persist into the future because it has removed a degree of uncertainty about how each agency will respond to future changes to fees by Trade Me, and consequently reduced the intensity of competition in this area.

Penalty

[17] Under s 80 of the Commerce Act the Court may impose a penalty for contravention of any of the provisions of Part 2 which include the prohibitions against anti-competitive behaviour engaged in by Unique. The Court must have regard to all relevant matters including the nature and extent of any commercial gain.[1]

[18] The maximum pecuniary penalty is set out in s 80(2B):

> (2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
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> (a) in the case of an individual, $500,000; or
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> (b) in the case of a body corporate, the greater of—
>
> (i) $10,000,000; or
>
> (ii) either—
>
> (A) if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or
>
> (B) if the commercial gain cannot be readily ascertained, 10% of the turnover of the body

[1] Commerce Act 1986, s 80(2A).

> corporate and all of its interconnected bodies corporate (if any).

[19] Turnover is defined as the total gross revenue (exclusive of any tax required to be collected) received or receivable by a body corporate in an accounting period as a result of trading by that body corporate within New Zealand.

[20] Accounting period has the same meaning as in s 5 of the Financial Reporting Act 2013 and means the year ending on a balance date of the entity. Balance date itself is defined as the close of 31 March. In previous cases the Court has taken the accounting period to mean the most recent year.[2]

[21] In Unique's case it is difficult to ascertain the value of the commercial gain. The actual gain to Unique is likely to have been minimal. It is the impact on the potential clients of Unique and on the operation of the market generally which is of more significance.

[22] By the way s 80(2B) is structured Parliament has acknowledged, that there may be occasions (such as the present) where the contravention may not produce any particular commercial gain. In that case the penalty is the maximum of 10 per cent of the company's turnover or $10 million. Again, Parliament has made its intention clear: a breach may warrant a substantial penalty compared to a company's turnover.

[23] Unique's turnover for the relevant period for the year ended 31 March 2014 was [redacted], 10 per cent of which would be [redacted].

[24] On that basis the maximum penalty available to the Court in relation to each breach by Unique in this case would be $10 million.[3]

[25] As noted the parties have suggested an end penalty in the region of $1.25 million. A full Court of this Court in *Commerce Commission v New Zealand Milk Corporation Limited* confirmed there can be no objection to the parties giving a joint

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2 *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2011] NZCCLR 19; and *Commerce Commission v Singapore Airlines Cargo Pty Ltd* [2012] NZHC 3583.

3 Each breach being a reference to the breaches of s 27(1) and 27(2).

view as to penalty.[4] That has been accepted and applied in a number of subsequent decisions.[5] Such joint approach is in the interests of the parties, the community and other litigants. It enables litigation to be certain, quick and cost effective. It encourages a realistic view to be taken of culpability and penalty. It saves resources as it dispenses with the need for a full hearing.

[26] The Court has accepted that if the proposed sentence agreed to by the parties is within a range which the Court considers appropriate then the Court may properly accept that penalty rather than imposing its own exact of the exact appropriate penalty on the parties: *Commerce Commission v Alstom Holdings SA*.[6]

[27] The Court still, however, has an obligation to perform its own independent assessment of the appropriate range of penalties. If the penalty is not within the proper range the Court must intervene and impose what it assesses as the appropriate penalty.

[28] While this is a civil penalty imposed by the Court following the Commission's application rather than a sentencing in the criminal sense it is still helpful to adopt aspects of the criminal sentence methodology, namely setting a

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4 *Commerce Commission v New Zealand Milk Corporation Limited* [1994] 2 NZLR 730.

5 *Commerce Commission v Koppers Arch Wood Protection (New Zealand) Ltd* (2006) 11 TCLR 581 (HC); *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC); *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010; *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010; *Commerce Commission v Cargolux Airlines International SA* HC Auckland CIV-2008-404-8355, 5 April 2011; *Commerce Commission v British Airways PLC* HC Auckland CIV-2008-404-8347, 5 April 2011; *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011; *Commerce Commission v Deutsche Bahn AG* HC Auckland CIV-2010-404-5479, 13 June 2011; *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011; *Commerce Commission v Japan Airlines Co Ltd* HC Auckland CIV-2008-404-8348, 6 July 2012; *Commerce Commission v Emirates* [2012] NZHC 1858; *Commerce Commission v Korean Air Lines Co Ltd* [2012] NZHC 1851; *Commerce Commission v Singapore Airlines Cargo Pty Ltd* [2012] NZHC 3583; *Commerce Commission v Cathay Pacific Airways Ltd* [2013] NZHC 843; *Commerce Commission v Thai Airways International Public Company Ltd* [2013] NZHC 844; *Commerce Commission v Malaysia Airlines System Berhad Ltd* [2013] NZHC 845; *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414, (2013) 13 TCLR 618; *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097, (2013) 13 TCLR 628; *Commerce Commission v Carter Holt Harvey Ltd* [2014] NZHC 531; and *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705.

6 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].

starting point for the offending itself and then taking account of aggravating and mitigating factors relevant to Unique.

Purposes of the Act

[29] In setting the starting point, the purpose of the legislation is important. General and specific deterrence is an important factor in cases of this nature. In *Telecom Corporation of New Zealand Ltd v Commerce Commission* the Court of Appeal accepted the observations of the High Court that by increasing the available maximum penalties in 2001 Parliament had sought to send a:[7]

> "much stronger signal … that the deterrence objective will only be served if anti-competitive behaviour is profitless".

[30] The following are also relevant to setting the starting point in the present case.

Importance and type of market

[31] The market is for real estate sales services in the Manawatu region. It is of importance to the Manawatu economy as all residential property listings in Manawatu were affected. The market affects ordinary people because for many individuals purchasing and selling a home is one of the most significant financial decisions they will make.

The nature and seriousness of the conduct

[32] While Unique did not intend to eliminate competition from the market, its conduct was nevertheless serious in that the agreement was entered into by at least 11 real estate agencies across the Manawatu region which represented the majority of agencies in the market (between them Unique, Property Brokers Ltd and Manawatu (1994) Limited held approximately three quarters of the market); the agreement was entered into by Unique's staff at its highest level; and the agreement had the potential to affect a large number of transactions.

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

The role of Unique

[33] The Commission accepts Unique was not the initiator of the conduct. However it attended the relevant meeting at which the agreement was reached, participated fully in it and implemented the agreement.

The deliberateness of the conduct

[34] While the Commission accepts Unique did not knowingly breach the Act its conduct was deliberate in that it knowingly and intentionally entered into the agreement with its competitors to pass on the Trade Me charge to the vendors.

Seniority and number of employees or officers

[35] In the present case Mr Vertongen, the principal and founder of Unique Realty and Mr Cunningham, the residential manager, attended the initial 17 October meeting. While Mr Campbell did not attend the 17 October meeting he was involved in implementing it by sending emails to advise of Unique's adherence to it. There was a deliberate decision on the part of the highest level management at Unique to enter and implement the agreement.

Duration of the contravening conduct

[36] The agreement was only in force from 1 February 2014 to 31 July 2014 but as noted, for the reasons above, its effect lasted for a much longer period.

Commercial gain

[37] As noted it is difficult to assess the likely commercial gain in this case.

Loss or damage caused

[38] The actions had potential to harm vendors in that a limited number of vendors paid the full $159 fee that Unique passed on to them, but more importantly some vendors may have elected not to list on Trade Me because they were facing a full $159 fee. The fact of not having a listing on Trade Me may have led to a lower number of "buyer eyes" or interest in their particular property. It might have meant

they have missed out on potential purchasers and ultimately a potentially higher price for sale. The market for real estate sales in the Manawatu was affected.

The market share/degree of market power held by Unique

[39] As noted Unique had approximately 19 per cent of the market share. Its involvement in the agreement was important.

Other cases

[40] I have considered the penalties imposed in a number of other cases for breaches of s 27 via s 30.[8] The most relevant case for present purposes is *Commerce Commission v Rural Live Stock*, a decision of Asher J.[9] In that case Asher J accepted the actual commercial gain to be less than $100,000. The annual revenue for the relevant year was approximately [redacted] so that 10 per cent of that would have been [redacted]. Asher J considered a starting point of between $1.6 and $2 million to be within range, noting that Rural had a market share of 6.8 per cent. The conduct was deliberate and involved a director of the company, although there was no conscious planning to infringe from the outset, similar to the present. The conduct ran for a considerably longer period than the present. As the Judge observed, in relation to harm to the market the damage would have been much less than minimal but it was far from most serious. The Judge accepted the starting point of between $1.6 and $2 million as appropriate.

[41] In Unique's case its annual revenue was less than that of Rural and there was little tangible gain. While the period of the infringing agreement was limited, Unique had a much larger share of the market so that its actions had the potential to have more of an effect on the market. Its involvement in the agreement was important to its success. Weighing the relevant factors I take an appropriate starting point of between $1.5 and $1.8 million.

[42] The next consideration is the appropriate mitigating factors to be taken into account. There are no aggravating factors relevant to Unique. It has not previously been found to contravene the Act.

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8 Above n 5.

9 *Commerce Commission v Rural Livestock* [2015] NZHC 3361.

[43] While it has not actively co-operated to the extent that it has provided witness statements Unique has admitted its responsibility at an early stage. It did comply with its obligations under the Act when the Commission instigated the inquiry.

[44] It is significant that, unlike *Rural*, there is no suggestion that it is unable to pay the fine that it has agreed to.

[45] Unique did not initiate the conduct, though it was a willing participant.

[46] I consider a reduction in the region of 25 to 30 per cent is appropriate in this particular case. A 30 per cent reduction on $1,800,000 would lead to a penalty of $1,260,000. A 25 per cent reduction as argued for by Mr Dixon on the lower figure of $1.5 million would lead to a figure of $1,125,000. The proposed penalty of $1.25 million is within that range. I can accept it as appropriate, particularly as the parties are agreed that apart from a modest contribution towards the costs of investigation no Court costs will be sought.

Result/orders

[47] I declare that Unique's conduct contravened ss 27(1) and 27(2) via s 30 of the Act by entering and giving effect to the Manawatu agreement.

[48] I impose a pecuniary penalty pursuant to s 80(1) of the Act in the sum of $1,250,000.

Costs

[49] Court costs are to lie where they fall.

[50] I record the agreement that Unique is to pay a contribution of $25,000 towards the costs of the Commission's investigation.

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Venning J