

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

**CIV-2015-404-003051
[2017] NZHC 681**

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

BETWEEN COMMERCE COMMISSION
Plaintiff

AND PROPERTY BROKERS LIMITED
First Defendant

MANAWATU (1994) LIMITED
Second Defendant

TIMOTHY JOHN MORDAUNT
Third Defendant

Hearing: 10 March 2017

Appearances: J Dixon and L Farmer for Plaintiff
T Mullins and D Nilsson for First and Third Defendants

Judgment: 10 April 2017

JUDGMENT OF GILBERT J

*This judgment is delivered by me on 10 April 2017 at 2 pm
pursuant to r 11.5 of the High Court Rules.*

.....
Registrar / Deputy Registrar

Counsel/Solicitors:
J Dixon, Barrister, Auckland
Meredith Connell, Auckland
Lee Salmon Long, Auckland

Introduction

[1] Property Brokers Ltd is a real estate agency based in Palmerston North. It has 36 branch offices in the lower part of the North Island and a 25 to 28 per cent share of the residential real estate market in the Manawatu region. Timothy Mordaunt is the sole director of the company and his family trust owns all of the shares in it.

[2] Property Brokers and Mr Mordaunt admit that they contravened s 27 of the Commerce Act 1986 by entering into and giving effect to an anti-competitive price-fixing agreement with at least 10 other real estate agencies in the Manawatu region. The agreement was to pass on to vendor clients the costs of listing properties on Trade Me instead of absorbing these costs as overheads, as was the previous practice. This agreement was reached in October 2013 in response to a new pricing model signalled by Trade Me that would significantly increase the listing costs from 1 February 2014. From that date onwards, Property Brokers did not offer listings on Trade Me as an advertising option for its clients and would only place such a listing if specifically requested to do so by a client. In such cases, the listing cost was passed on to the vendor or to the individual agent.

[3] The Commerce Commission recommends that the Court should impose a penalty of \$1.45 million on Property Brokers and \$50,000 on Mr Mordaunt for their roles in this unlawful activity. Property Brokers and Mr Mordaunt support this recommendation.

[4] In considering whether these recommended penalties should be approved by the Court, the accepted approach is to establish an appropriate starting point having regard to the maximum penalty and then adjust this starting point to take account of any aggravating or mitigating factors specific to each defendant. The role of the Court is to ensure that the recommended penalty falls within an appropriate range rather than to substitute its own assessment of the particular penalty.

[5] Adopting this approach, and for the reasons set out below, I am satisfied that the recommended penalties are appropriate and should be confirmed. I first address the position of Property Brokers and then consider Mr Mordaunt's position.

Property Brokers

Starting point

[6] In considering the appropriate starting point, I must first identify the maximum penalty applicable for each breach: entering into the price-fixing agreement; and giving effect to it. Section 80(2B)(b) of the Act provides that the maximum penalty for a body corporate is the greater of: \$10 million; or either three times the value of any commercial gain resulting from the contravention or, if this cannot be readily ascertained, 10 per cent of the turnover of the body corporate and any interconnected bodies corporate. The commercial gain resulting from the agreement is not readily ascertainable but is likely to be modest. The turnover of Property Brokers and its subsidiaries in the 12-month period ending 31 March 2015 was well under \$100 million and accordingly the maximum penalty for each breach is \$10 million.

[7] Price-fixing agreements fundamentally undermine the proper functioning of competitive markets and have the potential to substantially erode the benefits the public is entitled to expect from them. Such agreements are antithetical to the purpose of the Commerce Act which is to promote competition in markets for the long-term benefit of consumers within New Zealand.¹ For these reasons, participation in price-fixing agreements is regarded as serious misconduct and must be met with a penalty that is sufficient to deter other market participants from engaging in this type of conduct.

[8] Although Property Brokers did not gain significant benefit from the agreement, the penalty must reflect the nature and seriousness of this type of misconduct. The price-fixing agreement involved 11 real estate agencies which represented most of the relevant market in the Manawatu region. The agreement therefore had the potential to affect a large number of consumers.

[9] After the agreement was reached, the number of residential properties listed on Trade Me substantially reduced. Vendors are likely to have suffered as a result of

¹ Commerce Act 1986, s 1A.

the more limited marketing of their properties. Those vendors who insisted on having their properties listed on Trade Me were required to bear the cost. The standard fee for a Trade Me listing was \$159 for each property.

[10] The price-fixing agreement continued in operation until 1 August 2014, when Trade Me abandoned the new pricing model. However, the effects of the agreement are still being felt. Property Brokers maintained its policy not to offer Trade Me listings to residential vendors and to pass on the costs of such listings where they are specifically requested. Many other agencies in the region have followed suit.

[11] The recommended penalty for Property Brokers is based on a starting point falling in the range between \$1.8 million to \$2.3 million.² This is higher than the starting points adopted by this Court when imposing penalties on two other real estate agencies in the Manawatu region for their participation in the same price-fixing agreement. In *Commerce Commission v Unique Realty Ltd* Venning J adopted a starting point of between \$1.5 million and \$1.8 million.³ I approved the same range of starting point for Manawatu (1994) Ltd.⁴ A higher starting point is required for Property Brokers because it was the ringleader in that it initiated the meeting at which the agreement was reached and took responsibility for monitoring its implementation. Mr Mordaunt arranged the initial meeting of the real estate agencies in the Manawatu region. He hosted the meeting at Property Brokers' offices and led the discussions which resulted in the agreement being reached. He directed the follow-up correspondence reporting on the outcome of the meeting. He also arranged a further meeting in December 2013 at which he (unsuccessfully) promoted enhancements to the existing agreement. Property Brokers also has a slightly greater market share than Unique Realty and Manawatu (1994) Ltd but this is a secondary factor in assessing the appropriate uplift to the starting point.

[12] I consider that an uplift on the starting points adopted for Unique Realty and Manawatu (1994) Ltd of the order of 20 to 25 per cent is appropriate to reflect the leading role played by Property Brokers and its marginally greater market share.

² The Commission proposes a starting point in the range of \$1.9 million to \$2.3 million whereas Property Brokers submits that the range should be from \$1.8 million to \$2.2 million.

³ *Commerce Commission v Unique Realty Ltd* [2016] NZHC 1064.

⁴ *Commerce Commission v Property Brokers Ltd* [2016] NZHC 2851.

This indicates that the appropriate starting point for Property Brokers is between \$1.8 million to \$2.25 million.

Mitigating factors

[13] The Commission accepts that Property Brokers is entitled to a discount for various mitigating factors. First, Property Brokers did not knowingly breach the Act. Second, it cooperated with the Commission by providing documents and attending voluntary interviews. Third, it admitted its wrongful conduct at a reasonably early stage in the proceedings, prior to discovery.

[14] The Commission submits that a discount of 25 to 30 per cent should be allowed to reflect these factors. Property Brokers supports this submission. Similar discounts were applied for these factors in Unique Realty and Manawatu (1994) Ltd. I agree that a discount in this range is appropriate.

[15] This produces an indicative end penalty in the range from \$1.26 million to \$1.69 million. The jointly recommended penalty of \$1.45 million is close to the mid-point of this range and is clearly appropriate.

Mr Mordaunt

Starting point

[16] The maximum penalty for each breach by an individual is \$500,000.⁵ Mr Mordaunt has committed two breaches and so the maximum penalty that can be imposed on him is \$1 million. The Court is required to impose a pecuniary penalty on an individual who has engaged in conduct covered by s 80(1) of the Act unless there is good reason not to do so.⁶

[17] Mr Mullins accepts that there is no good reason that could justify the Court not imposing a pecuniary penalty on Mr Mordaunt for his involvement in initiating and implementing the price-fixing agreement. As noted, Mr Mordaunt was the

⁵ Commerce Act 1986, s 80(2B)(a).

⁶ Commerce Act, s 80(2).

instigator of the agreement. He organised, hosted and chaired the meeting at which the Manawatu price-fixing agreement was reached. He directed the follow-up correspondence confirming the terms of the agreement reached and ensured that other parties implemented it as soon as their contracts with Trade Me expired. He also attempted to expand the terms of the initial agreement. His conduct was a deliberate attempt to save costs for his company and he indirectly stood to benefit from this because his family trust owned all of the shares in the company.

[18] While there are numerous precedents to guide the Court on the appropriate penalty to be imposed on corporate entities to reflect their involvement in the various price-fixing agreements that were entered into around the country in response to the change in Trade Me's pricing model, no pecuniary penalty has yet been set for an individual who participated in such an agreement.

[19] I have been referred to a number of authorities where pecuniary penalties have been imposed by New Zealand Courts on individuals for participation in cartel arrangements, including price-fixing agreements.⁷ The starting points have ranged up to \$200,000 and the end penalties from \$15,000 to \$100,000. However, the circumstances in each of these cases were reasonably far removed from the present and accordingly these authorities provide only limited assistance.

[20] In considering the appropriate starting point for Mr Mordaunt, I take into account the following factors:

- (a) Mr Mordaunt was the sole director of the largest real estate agency in the Manawatu region and was therefore in a strong position to influence the behaviour of other market participants;
- (b) Mr Mordaunt played a central role in initiating and implementing the agreement; and

⁷ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2009] NZCCLR 1; *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097, (2013) 13 TCLR 628; *Commerce Commission v Hodgson* [2014] NZHC 649; *Commerce Commission v PGG Wrightson Ltd* [2016] NZHC 2921.

- (c) Mr Mordaunt stood to benefit personally from the agreement because his family trust owned all of the shares in Property Brokers. However, this is at least partially offset by the fact that Mr Mordaunt's interests will bear the burden of meeting the substantial monetary penalty imposed on Property Brokers. For this reason, I consider that the penalties imposed on both defendants must not be a disproportionate response taking into account the totality of the unlawful conduct.

[21] A starting point of \$100,000 could be regarded as the equivalent of an indicative starting point of \$2 million for the company. These starting points represent 20 per cent of the maximum penalty for each breach by each defendant. However, a starting point of \$100,000 would be higher than indicated by a comparison with the other cases to which I was referred, particularly given that Mr Mordaunt's interests will have to meet the penalty imposed on the company. Taking all matters into account, I consider that the appropriate starting point for Mr Mordaunt would be of the order of \$70,000.

Mitigating factors

[22] Mr Mordaunt is also entitled to a discount in the range of 25 to 30 per cent for the same mitigating factors applicable to Property Brokers. This indicates that an appropriate penalty is \$50,000, as recommended.

[23] This would produce a total penalty for both defendants of \$1.5 million. This is still within the range of penalty that would be appropriate for Property Brokers on its own. It follows that this cannot be regarded as a disproportionate response overall, even taking into account that Mr Mordaunt's interests will have to meet both penalties.

Result

[24] I make a declaration that the conduct of Property Brokers and Mr Mordaunt contravened s 27 of the Commerce Act 1986.

[25] I impose a pecuniary penalty pursuant to s 80(1) of the Act in the sum of \$1.45 million for Property Brokers and \$50,000 for Mr Mordaunt.

[26] By agreement, costs are to lie where they fall.

M A Gilbert J