ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-404-180
[2018] NZHC 2555

UNDER THE	Criminal Disclosure Act 2008
IN THE MATTER OF	The Fair Trading Act 1986
BETWEEN	BUNNINGS LIMITED Appellant
AND	COMMERCE COMMISSION Respondent

Hearing:	7 August 2018
Appearances:	T J Lindsay & T M Pasley for Appellant J C L Dixon QC & I M Brookie for Respondent
Judgment:	28 September 2018

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 28 September 2018 at 4:00 pm pursuant to r 11.5 of the High Court Rules.

[redacted]

~~Registrar~~/Deputy Registrar

Solicitors:
Lindsay Litigation, Auckland
Kayes Fletcher Walker, Auckland

Introduction

[1] Bunnings Ltd, a large retailer of home improvement and outdoor living products, faces 45 charges under the Fair Trading Act 1986.[1] The charges allege that it made false or misleading representations in relation to the prices of its goods between June 2014 and February 2016.

[2] Bunnings applied under s 30 of the Criminal Disclosure Act 2008 for disclosure of 67 documents withheld by the Commerce Commission. Judge Cunningham dismissed the application on 23 May 2018.[2] Bunnings now appeals against Judge Cunningham's decision in relation to 28 documents withheld by the Commerce Commission on the basis of litigation privilege.

The alleged offending

[3] With reference to Bunnings' nationwide advertising, the Commerce Commission says that Bunnings promoted its stores as offering the lowest priced goods in the home improvement, outdoor living and general merchandise markets. It refers to Bunnings' slogan "Lowest prices are just the beginning", as well as other representations such as "Lowest prices every day"; "Lowest prices guaranteed"; and "Nobody beats our prices".

[4] The Commerce Commission alleges that Bunnings did not in fact have the lowest prices in the market for many of its products. It refers to surveys carried out by Bunnings itself, and by a competitor (Mitre 10) that made a complaint to the Commission, and research carried out by the Commission itself. The research carried out by an independent research company instructed by the Commission (Perceptive) demonstrated that Bunnings did not have the lowest prices on approximately 33 per cent of products surveyed in Auckland, 32 per cent of products surveyed in Wellington, and 20 per cent of products surveyed in Christchurch. The Commerce Commission therefore says that Bunnings' representations were false and misleading, and would have caused harm to consumers and competitors.

---

1 Sections 10, 13(g) and 40(1).
2 *Commerce Commission v Bunnings Ltd* [2018] NZDC 4053.

[5] Bunnings was charged on 23 December 2016 under ss 10, 13 and 40 of the Fair Trading Act. The 45 charges each carry a maximum fine of $600,000.[3]

Commerce Commission procedures leading up to prosecution

[6] It is relevant for the purposes of litigation privilege to describe the Commerce Commission's practices and procedures in deciding whether to bring criminal charges, and to set out the chronology of events in the present case.

[7] The Commerce Commission's *Competition and Consumer Investigation Guidelines* describe an initial screening and prioritisation process, whereby a complaint is received and the Commission decides whether to take further action.[4] If the matter proceeds to the investigation stage, the Commission will gather information to determine whether a breach of the law has occurred. This may include carrying out legal, marketing, or economic research, or seeking external expert opinion.[5] The *Guidelines* state that an investigation is not complete until:[6]

(a) staff have decided that the investigation can be closed without an enforcement response being made; or

(b) the relevant Division has decided on an enforcement response.

[8] Once the investigation team has completed its inquiries and assessed the available evidence, it presents a report to the decision-maker containing the salient facts and a summary of the evidence and issues; an assessment as to whether there is likely to have been a breach of the law; and if so, a recommendation as to the enforcement options.[7] Decisions to take a high-level enforcement response, such as court action, are made by the relevant Division of the Commerce Commission, rather than individual staff.[8] The Commission's *Enforcement Response Guidelines* set out the factors that the Commission will consider in deciding whether to proceed with a

---

3 Fair Trading Act 1986, s 40(1).
4 Commerce Commission *Competition and Consumer Investigation Guidelines* (December 2015).
5 At [57].
6 At [58].
7 At [63].
8 At [65].

high-level enforcement response.[9] If the Commission decides that court action is appropriate,[10] it will choose whether to commence civil or criminal proceedings based on factors set out in the *Guidelines*.[11]

[9] Further information about commencing criminal prosecutions is found in the Commission's *Criminal Prosecution Guidelines*.[12] The Commission is subject to the *Solicitor-General's Prosecution Guidelines*,[13] and therefore must be satisfied that both the following tests are met before initiating a prosecution:[14]

(a) the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction (the Evidential Test); and

(b) criminal prosecution is required in the public interest (the Public Interest Test).

[10] In the present case Stuart Wallace, Consumer Manager in the Competition Branch of the Commerce Commission, has filed an affidavit in which he describes the steps taken leading up to the Commission's decision to prosecute Bunnings:

4 May 2011	The Commission sent a warning letter to both Bunnings and Mitre 10 informing them that their "lowest price" claims were likely in breach of the Fair Trading Act.
14 February 2014	The Commission received a letter from Mitre 10 alleging that Bunnings had not complied with the 2011 warning letter and was continuing to make "lowest price" claims.
25 November 2014	The Commission opened an investigation into the allegations that Bunnings was misleading customers with its "lowest price" claims. Wiremu Lourie was the assigned investigator.

9 Commerce Commission *Enforcement Response Guidelines* (October 2013) at [12]–[19].
10 See Commerce Commission *Enforcement Response Guidelines* (October 2013) at [50]–[53].
11 At [55].
12 Commerce Commission *Criminal Prosecution Guidelines* (1 October 2013).
13 Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013).
14 Commerce Commission *Criminal Prosecution Guidelines* (1 October 2013) at [14]–[15].

January 2015	The Commission conducted its own price-scoping surveys, which indicated that Bunnings did not have the lowest or lowest equal prices for a material proportion of its products.
27 May 2015	The Commission received information from Bunnings regarding price surveys, Bunnings had carried out through the market research firm HOED Research NZ. At this point Mr Wallace says the investigation team contemplated a prosecution was "likely".
October 2015	The Commission instructed Perceptive, a market research company, to undertake independent price surveys.
October and November 2015	The Commission received confidential price comparison information from Mitre 10, which indicated a more significant level of breach than that disclosed in Bunnings' own price surveys.
6 February 2016	The Commission received the research results from Perceptive, which indicated that Bunnings' prices were not the lowest for a significant portion of its products.
12 February 2016	The Commission instructed Dr Phillip Gendall to provide an expert marketing opinion.
March 2016	The Commission issued a Stop Now letter to Bunnings.
May 2016	Mitre 10 provided the Commission with the results of its price surveys for the previous year, which showed that Bunnings did not offer the lowest price on a substantial number of products.
22 June 2016	The investigation team recommended to the Consumer Division of the Commission that criminal charges should be laid against Bunnings.
28 June 2016	The Consumer Division agreed with that recommendation.
1 July 2016	Bunnings was advised of the Commission's decision to prosecute.

23 December 2016	The Commission filed charges against Bunnings.

[11] Mr Wallace says that the investigation has continued since the charges were laid, noting that the team is continuing to have discussions with expert witnesses and to consider what other expert evidence may be required.

District Court decision under appeal

[12] Bunnings filed several applications for pre-trial disclosure orders throughout 2017, which were heard together in December 2017. By the time of hearing, the Commerce Commission had disclosed certain previously withheld documents, meaning that 67 withheld documents remained in issue at the hearing. The Commission withheld these documents on various grounds under s 16(1) of the Criminal Disclosure Act. The primary ground relied on, and that which is challenged on appeal, is litigation privilege under s 16(1)(j):

> **16 Reasons for withholding information**
>
> (1) A prosecutor may withhold any information to which the defendant would otherwise be entitled under this Act if—
>
> ...
>
> (j) the information could be withheld under any privilege applicable under the rules of evidence ...

[13] Judge Cunningham set out s 56 of the Evidence Act 2006 and noted that for litigation privilege to apply, two requirements must be met:[15]

> (a) the communication or information must be made, received, compiled or prepared for the dominant purpose of
>
> (b) preparing for a proceeding or an apprehended proceeding.

[14] Having set out a chronology of events based largely on Mr Wallace's evidence, the Judge then set out the relevant law. She observed that the "mere spectre of eventual

---

15 At [89]–[90].

litigation" is not enough for a proceeding to be "apprehended".[16] Litigation must be "probable".[17] Whether an investigation can be equated with a reasonable contemplation that a person will be prosecuted depends on the facts.[18] Her Honour referred to the English case of *R v Jukes*, where a document was not privileged because there were no investigations or proceedings in existence at the time.[19]

[15] Mr Wallace's evidence was that a prosecution was contemplated from May 2015 and viewed as likely from July 2015. Over the following seven months, the Commission gathered evidence before sending the "Stop Now" letter in March 2016. Judge Cunningham considered that she needed to determine as a matter of fact which date applied: at the earliest, litigation was probable in July 2015, while at the very latest, the "Stop Now" letter in March 2016 meant litigation was probable.

[16] Her Honour agreed that a date in July 2015 was when a prosecution was "likely". She noted that in May 2015, the Commerce Commission had received information from Bunnings about its own price surveys, which indicated that Bunnings did not have the lowest prices on a material number of products and had been made aware of this.

[17] As for the "dominant purpose" for which the documents were prepared, the Judge considered this on a document-by-document basis. In respect of each of the 28 documents relevant to the appeal, her Honour concluded that they were prepared for the dominant purpose of preparing for the prosecution and therefore they attracted litigation privilege.

Submissions on appeal

Bunnings

[18] Bunnings appeals on the grounds that the Judge erred in refusing disclosure of 28 specified documents on the basis of litigation privilege. All 28 documents are dated between February and May 2016 and consist of correspondence between Mr Lourie,

---

16 At [96].
17 At [96].
18 At [97].
19 *R v Jukes* [2018] EWCA Civ 176, [2018] 2 Cr App R 9.

the assigned investigator from the Commerce Commission, and Dr Gendall, an academic in the Department of Marketing at Otago University. Dr Gendall is to give evidence for the Commission on how he considers consumers would have understood Bunnings' advertising.

[19] Mr Lindsay for Bunnings says that the "dominant purpose" of the withheld documents was not "a proceeding or an apprehended proceeding". Rather, they were prepared for an investigative purpose, to which litigation privilege does not attach. He makes the following submissions:

(a) The Judge erred by failing to apply the objective test required by s 56 of the Evidence Act. In determining whether litigation was probable, the Judge did not take into account the requirement for the Consumer Division to consider the Evidential Test and the Public Interest test.

(b) The Judge erred in accepting and proceeding on the basis of Mr Wallace's subjective evidence as to when litigation was likely or probable, when neither Mr Wallace nor Mr Lourie had the authority themselves to decide to prosecute.

(c) When properly considered from the perspective of the Consumer Division of the Commerce Commission, the evidence demonstrated the documents were prepared for an investigative (not litigation) purpose.

(d) Mr Wallace's evidence and the Judge's decision focus exclusively on Bunnings' price audit evidence that the Commission had received in May 2015, without considering that to satisfy the Evidential Test, the Commission also had to gather evidence as to how consumers might understand Bunnings' advertising, which issue was the subject of Dr Gendall's report.

(e) The Judge erred in concluding that the Commission would have considered the Evidential Test satisfied simply by reference to

Bunnings' price audit information received in May 2015, when it had not yet received the results of independent research from Perceptive.

(f) Mr Wallace's evidence is based solely on the Evidential Test, not the Public Interest Test, being met, although the Public Interest Test is a necessary element in the Commission's decision to prosecute.

(g) The Commission's withholding of correspondence between Mr Lourie and Dr Gendall on the grounds of litigation privilege is inconsistent with its disclosure of correspondence between the Commission and Mr Shaw of Perceptive.

(h) It may be that on the basis of Mr Wallace's evidence the withheld documents serve dual purposes, namely investigative and with an eye to potential use in possible future legal proceedings. But the mere fact that litigation may be contemplated is insufficient.

[20] Mr Lindsay therefore submits that litigation privilege should not have applied to the 28 withheld documents.

Commerce Commission

[21] The Commerce Commission submits that there was no error by the Judge. Mr Dixon QC argues that litigation privilege is available where the party reasonably apprehends proceedings, and for an organisation such as the Commission, it is sufficient that responsible senior staff have the required knowledge and contemplate a prosecution. He submits that Bunnings is attempting to replace the ordinary accepted test for litigation privilege with the applicable prosecution guideline tests, which Mr Dixon says is inappropriate and would fundamentally impact on the Commission's approach to investigations and prosecutions.

Approach on appeal

[22] Bunnings brings its appeal under s 33(1) of the Criminal Disclosure Act. An appeal under s 33 proceeds as if it were an appeal against a pre-trial decision under

Subpart 2 of Part 6 of the Criminal Procedure Act.[20] The Court must determine the appeal by confirming the decision appealed against, varying the decision or setting it aside and making any other order considered appropriate.[21] An appeal under s 33 is a general appeal that proceeds on the principles set out in *Austin, Nichols & Co v Stichting Lodestar*, which means that the appellate court may come to its own view on the merits.[22]

Relevant law regarding litigation privilege

[23] As Judge Cunningham noted, s 16(1)(j) of the Criminal Disclosure Act and s 56 of the Evidence Act work together. Section 16(1)(j) states that the prosecutor may refuse disclosure if the information could be withheld under any privilege applicable under the rules of evidence. Section 56 of the Evidence Act provides for litigation privilege:

> **56 Privilege for preparatory materials for proceedings**
>
> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the **proceeding**).
>
> (2) A person (the **party**) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
>
> (a) a communication between the party and any other person:
>
> (b) a communication between the party's legal adviser and any other person:
>
> (c) information compiled or prepared by the party or the party's legal adviser:
>
> (d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.

[24] As Judge Cunningham recognised, s 56 has two basic requirements:

(a) litigation must be in progress or reasonably apprehended; and

---

20 Criminal Disclosure Act 2008, s 33(4).
21 Criminal Procedure Act 2011, s 221.
22 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

(b) the information must be prepared for the dominant purpose of preparing for the proceeding or apprehended proceeding.

[25] As for the first limb, it is well established that a "vague apprehension" of litigation is not enough to trigger the privilege.[23] Rather, litigation must be regarded as "probable",[24] or as a "real likelihood".[25] Whether or not litigation was reasonably apprehended at the time the documents were prepared is a factual question, to be determined objectively. Because it is an objective test, there need not have been any formal decision to commence proceedings.[26] The question is whether a reasonable person placed in the position of the party in question, and possessed of the same information at that time, would have regarded the future commencement of litigation as probable.[27]

[26] Bunnings relies on the test in Australia, as articulated in *Australian Competition & Consumer Commission v Australian Safeways Stores Pty Ltd*.[28] There, Goldberg J held that it could not be said legal proceedings were reasonably anticipated until the Competition and Consumer Commission had sufficient evidence to proceed. His Honour drew a dividing line between the investigation phase and the phase in which proceedings are reasonably anticipated:[29]

> The process of investigation is logically anterior to, and a precursor to, the point at which it may be said that proceedings are prospective or reasonably anticipated. If evidence is required for proceedings it can be expected that until that evidence gathering process is well advanced, a view will not be able to be formed that proceedings are prospective or reasonably anticipated. That is a reason why it is difficult to ascribe a dominant purpose to the preparation of the anticipated proceedings before the evidence gathering process is well advanced and the evidence has been evaluated.

---

23 *Dinsdale v Commissioner of Inland Revenue* (1997) 10 PRNZ 704 (HC) at 713–714, cited in *Commerce Commission v Telecom Corp of New Zealand Ltd* HC Auckland CIV-2004-404-1333, 3 October 2006 at [46].

24 *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA) at 606, cited in *Financial Markets Authority v Hotchin* [2014] NZHC 2732 at [47].

25 *Financial Markets Authority v Hotchin* [2014] NZHC 2732 at [52].

26 *Commerce Commission v Caltex New Zealand Ltd* HC Auckland CL33/97, 10 December 1998; *Financial Markets Authority v Hotchin* [2014] NZHC 2732 at [52].

27 *Commerce Commission v Caltex New Zealand Ltd* HC Auckland CL33/97, 10 December 1998; *Commerce Commission v Telecom Corp of New Zealand Ltd* HC Auckland CIV-2004-404-1333, 3 October 2006 at [46].

28 *Australian Competition & Consumer Commission v Australian Safeways Stores Pty Ltd* (1998) 81 FCR 526 (FC).

29 At 546.

[27] Bunnings relies on this distinction to say that the dominant purpose for which the documents were created was investigation, not preparation for an apprehended prosecution. In *Commerce Commission v Telecom Corp of New Zealand Ltd*, however, Harrison J rejected the Australian test as being inapplicable in New Zealand:

> [47] ... Mr Hodder cited *Australian Competition & Consumer Commission v Australian Safeways Stores Pty Ltd* (1998) 153 ALR 393 (FCA) in support. However, on analysis, Goldberg J adopted a stricter test than is applied in New Zealand. In identifying an investigative phase, to which privilege would not apply, the Judge considered that legal proceedings were not reasonably anticipated until it became apparent there was sufficient evidence to proceed against a party.
>
> [48] With respect, that test does not reflect the law of New Zealand. Litigation privilege protects the process of obtaining evidence and advice.

[28] In *Financial Markets Authority v Hotchin*, Winkelmann J also rejected the notion of a strict division between investigation and preparation for litigation.[30] The documents in issue in that case were reports prepared for the Financial Markets Authority (FMA) by an independent forensic accounting firm. Winkelmann J was satisfied that by the time the documents were prepared, the FMA was aware of circumstances which rendered litigation between the FMA and the defendants probable or a real likelihood. The fact that the FMA continued to seek information, investigate and develop its views after that time did not assist the defendants. Nor did the FMA need to know the exact form that the litigation would take, or believe that the proceedings would definitely be issued.

[29] Winkelmann J also rejected the defendants' contention that the reports were prepared for an investigative purpose, or at best for the dual purpose of continued investigation and preparation for proceedings, and therefore litigation privilege could not attach. Her Honour held that the accounting firm was engaged as expert witnesses with a view to their providing evidence in Court should the matter proceed to trial. In her Honour's view, the reports were prepared for the dominant purpose of preparing for that eventuality; there was no duality of purpose.

[30] I conclude from these authorities that the distinction between investigation and preparation for litigation is not always clear-cut, and the issue of whether the

---

30 *Financial Markets Authority v Hotchin* [2014] NZHC 2732 at [48]–[52].

documents were prepared for the dominant purpose of an apprehended proceeding is ultimately a question of fact for the Court.

[31] *Financial Markets Authority v Hotchin* and *Commerce Commission v Telecom Corp of New Zealand Ltd* are both civil cases in which the regulatory body sought pecuniary penalty orders against the defendants. Bunnings contends that where criminal charges are contemplated, the position is different. It relies on the Commerce Commission's *Criminal Prosecution Guidelines*, submitting that the point in time at which a criminal prosecution will be reasonably contemplated is likely to be later because of the need to gather sufficient evidence, and the formality with which decisions to prosecute are made, including the fact that the decision-making power cannot be delegated.

[32] Mr Lindsay indicates in supplementary submissions filed after the hearing that Bunnings does not contend that in *every* case a formal decision to prosecute must have been made before litigation privilege can attach. But Bunnings does appear to argue that the Commission must have turned its mind to both the evidential and the public interest test before it can be said that a prosecution is reasonably contemplated. In my view, however, the formal requirements for commencing a criminal prosecution under the Commission's *Guidelines* do not dictate the point at which a prosecution can be said to be reasonably contemplated. The Commerce Commission may reasonably view a prosecution as probable, and be preparing for that eventuality, even though the evidence-gathering process is not yet complete and the investigation is continuing. There are no grounds for imposing a more restrictive test in the context of criminal proceedings, based on the prosecution guidelines, before litigation privilege can attach. To do so would undermine the policy rationale for litigation privilege, which is designed to allow a party apprehending proceedings to seek evidence and prepare the case without being obliged to disclose the material created to their opponent.[31]

[33] Also following the hearing, both the Commerce Commission and Bunnings have drawn my attention to a recent decision of the English Court of Appeal concerning litigation privilege in the criminal context. In *Director of the Serious*

---

31 *R v King* [2007] 2 NZLR 137 (HC) at [20].

Fraud Office v Eurasian Natural Resources Corp Ltd,[32] the question was whether the defendant could claim litigation privilege. The Court accepted that the defendant was reasonably anticipating a prosecution at the relevant time, reversing the High Court's decision on that point. In doing so, the Court commented:[33]

> ... whilst a party anticipating possible prosecution will often need to make further investigations before it can say with certainty that proceedings are likely, that uncertainty, in our judgment, does not in itself prevent proceedings being in reasonable contemplation.

I respectfully agree with those comments as a matter of general principle.

[34] The Court also found that the documents were prepared for the dominant purpose of litigation. It discussed the case of *Waugh v British Railways Board*,[34] where the House of Lords held that a report into a fatal accident was prepared both for internal purposes in connection with railway safety, and to prepare for litigation. There was therefore a duality of purpose in which preparation for litigation was not the dominant purpose, meaning litigation privilege could not attach. The Court in *Eurasian Natural Resources* compared *Waugh* with *Re Highgrade Traders*,[35] where it was held that the reports commissioned by the insurers into the cause of a fire were made for the dominant purpose of preparing for litigation, not as a matter of academic interest.

[35] The Court in *Eurasian Natural Resources* considered that the facts of that case lay somewhere between *Waugh* on the one hand and *Highgrade* on the other. It was possible that the defendant's dominant purpose was to investigate the facts to see what had happened and deal with compliance and governance, or to defend the apprehended proceedings. The Court of Appeal concluded that it was the latter, holding that it was necessary to take a realistic, indeed commercial, view of the facts.

[36] Mr Lindsay submits that this case is more similar to *Waugh* than to *Highgrade*, such that litigation privilege does not apply. He also relies on the decision in *R v Jukes*, where the English Court of Appeal commented:[36]

---

32 *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006.
33 At [98].
34 *Waugh v British Railways Board* [1980] AC 521 (HL).
35 *Re Highgrade Traders* [1984] BCLC 151 (CA).
36 *R v Jukes* [2018] EWCA Civ 176, [2018] 2 Cr App R 9 at 119.

> At the time, in February 2011, no decision to prosecute had been taken by the Health and Safety Executive and matters were still at the investigatory stage. An investigation is not adversarial litigation.

[37] In my view, however, *Eurasian Natural Resources*, *Waugh v British Railways Board*, *Re Highgrade Traders* and *Jukes* are each cases that turn on their own individual facts. Neither is particularly analogous to the present case, and I derive no real assistance from a close analysis of the courts' conclusions on the facts of those cases.

[38] As for the evidence on which the Court may rely, Mr Lindsay points out that Mr Wallace lacked the authority himself to decide to prosecute, and submits that the Judge erred in accepting and proceeding on the basis of Mr Wallace's subjective evidence. He cites a passage from *Commerce Commission v Caltex New Zealand Ltd*, in which Fisher J commented that it is not necessarily sufficient that a particular employee or investigator within the Commerce Commission had a subjective apprehension of litigation if that individual had no power to make the significant decisions on behalf of the Commission. However, in my view Fisher J was merely highlighting that it is an objective test. Furthermore, I do not take the comments in *Caltex* to mean the Court cannot take into account the evidence of a senior employee or investigator as to their apprehension of legal proceedings when all the relevant indicators suggest that it was reasonable to contemplate litigation at that time. In *Commerce Commission v Telecom Corp of New Zealand Ltd*, for example, Harrison J accepted the evidence of a senior Commerce Commission employee and reached the following conclusion on the facts:[37]

> I am satisfied that this litigation was reasonably apprehended by mid 2000. By then Mr Thorn [the Commerce Commission's General Manager] said the investigation team had been undertaking a factual inquiry for at least a year and had moved on to gathering detailed evidence. Its investigation had progressed through a number of stages. I accept that, at the completion of each stage, the Commission would have been satisfied with the strength of its case. This process culminated in a decision to seek outside economic and legal advice in December 2000.

---

37 At [49].

[39] I reiterate that ultimately it is a question of fact as to whether proceedings were reasonably apprehended, and as to whether the relevant documents were created for the dominant purpose of preparing for the apprehended proceedings.

The facts of the present case

[40] The 28 withheld documents that are the subject of the present appeal were prepared between 12 February and 3 May 2016, and consist of communications between Mr Lourie of the Commerce Commission and Dr Gendall. The first is a letter of instruction, and the last is a draft report sent to Mr Lourie. The Commission says that Dr Gendall was instructed to provide an expert marketing opinion that the Commission contemplated would form the basis of an expert brief. On the other hand, Bunnings says that the Commission was simply seeking information about the likely effect of Bunnings' representations on members of the public, as part of its investigation before determining whether to prosecute.

[41] The Commission commenced its investigation into Bunnings' conduct in November 2014, and throughout 2015 it gathered price comparison information from Bunnings itself and from Mitre 10. On 6 February 2016, it received results from independent research company Perceptive which indicated that Bunnings' prices were not the lowest for a significant portion of its products. By 12 February 2016, therefore, the investigation team had gathered a substantial amount of information (including from an independent source) about the representations Bunnings made to the public and whether its prices across a range of products were in fact the lowest in the market. The evidence they had assembled supported the proposition that Bunnings had made false representations in breach of the Fair Trading Act. I note that the Act creates strict liability offences, meaning they do not require proof of intent to mislead. Further factors that tended to indicate it was in the public interest to prosecute include the fact that Bunnings had continued its conduct after receiving a warning from the Commission in 2011, and that Bunnings' own price surveys showed its prices were not the lowest.

[42] From an objective standpoint, it was reasonable for the Commission's investigation team to consider it had a case against Bunnings and to view a prosecution

as a real likelihood by February 2016. The fact that the team continued to gather information and to refine its views by seeking the expert opinion of Dr Gendall after this point does not mean a prosecution was not already in reasonable contemplation in February 2016. As noted earlier, the courts have rejected the notion of there necessarily being a clear dividing line between investigation and preparation for proceedings in the context of litigation privilege. Nor does it matter that the Commission did not make a formal decision to prosecute until June 2016.

[43] Mr Wallace's evidence as head of the investigation team supports the conclusion that a prosecution was likely by this time, but is not the only basis for my decision. This conclusion is also informed by the steps taken by the Commission from as early as 2011, and the evidence it had gathered from a number of sources prior to 12 February 2016.

[44] It follows that I am satisfied the Judge was correct in concluding that a prosecution was reasonably contemplated by February 2016, when the first of the relevant documents were created.[38] Having reached that conclusion, I am also satisfied that the communications with Dr Gendall were made for the dominant purpose of preparing for the eventuality of a prosecution. I reject the submission for Bunnings that the documents were prepared for the dominant purpose of investigation rather than for the dominant purpose of a prosecution.

[45] Alternatively, Bunnings submits that the documents were prepared for the dual purpose of investigation and potential use in future legal proceedings. I do not agree. Although the formal decision of the Commission's Consumer Division to prosecute Bunnings was yet to take place, Mr Wallace says that the investigators were seeking Dr Gendall's expert opinion on the effect of the lowest price representations on consumers, as well as the validity of the methodologies used in each of the price comparison surveys and what those results meant. I consider that the obtaining of Dr Gendall's expert opinion was for the purpose of assembling further evidence to support a prosecution, which was already contemplated as being likely. While the obtaining

---

38 Judge Cunningham found that a prosecution was apprehended as early as July 2015. Because it is not relevant for the purposes of this appeal, I make no finding as to whether a prosecution was in reasonable contemplation before February 2016.

of such expert opinion evidence can be considered to include some level of investigation, here the investigation team had already assembled the core factual evidence and were seeking an independent expert opinion that would likely be used to support conclusions already reached by the team regarding Bunnings' marketing representations.

[46] For these reasons, I consider that the 28 withheld documents were prepared for the dominant purpose of preparing for an apprehended proceeding.

Result

[47] Litigation privilege attaches to the 28 documents that are the subject of this appeal, and the Commerce Commission was entitled to withhold those documents under s 16(1)(j) of the Criminal Disclosure Act.

[48] The appeal is dismissed.

Paul Davison J