IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2018-404-2659
[2021] NZHC 1398

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	VIAGOGO AG Defendant

Hearing: 9 June 2021

Appearances: N F Flanagan and S Evans for the Plaintiff
A J Lloyd and J T Hambleton for the Defendant

Judgment: 14 June 2021

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 14 June 2021 at 2:30 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

[1] The parties are in dispute as to the scope of discovery to be provided by the defendant (Viagogo). The parties agree that tailored discovery is appropriate, but disagree on the categories of documents to be discovered, and on the time within which Viagogo should provide discovery.

The substantive proceeding

[2] Viagogo operates a website that provides a secondary market for the resale of tickets to sporting, music and entertainment events in New Zealand and around the world. The (re)sellers of the tickets are not the official promoters of the events. The resellers are persons who have already purchased tickets, and wish to re-sell them.

[3] According to affidavits filed by Viagogo, its headquarters are in Switzerland. It also has, among other offices, a corporate office in New York and a customer service centre in Ireland.

[4] The plaintiff (the Commission) says that Viagogo has operated the website in a manner that is misleading or deceptive, in breach of the Fair Trading Act 1986 (the FTA). In particular, the Commission alleges:

(a) The website does not adequately disclose Viagogo's status as a resale platform. This was liable to create the (misleading) impressions that tickets may only be available through Viagogo, that tickets were sold through the website at their face value, that tickets were sold by an official ticketing agent, and that tickets could provide guaranteed entry to events.

(b) Viagogo made false or misleading representations to consumers (those who purchased tickets on the website) that they were guaranteed to receive valid tickets that would enable them to attend the event in question.

(c) Viagogo made false or misleading representations to consumers that tickets were in short supply.

(d) Viagogo made false or misleading representations to consumers that tickets were available at the "Initial Price" (when in fact consumers also had to pay GST and booking fees on top of that price).

(e) From July 2016 to November 2017, Viagogo made false or misleading representations to consumers that it was an official ticket seller to certain events.

[5] In respect of these matters the Commission seeks declarations of breach, restraining orders, and orders that Viagogo publish corrective statements on its website.

[6] The Commission also says that one of Viagogo's standard terms and conditions is, in terms of the FTA, an unfair contract term. It seeks a declaration to that effect.

Progress on discovery

[7] The Commission commenced this proceeding on 30 November 2018. Jurisdictional and other skirmishes occupied the parties for some time.

[8] In 14 August 2020 the parties filed a joint memorandum reporting that, among other things, they were giving consideration to the terms of a tailored discovery order. On 20 October 2020 they reported that they had agreed that the Commission should provide standard discovery by 4 December 2020, that they had agreed tailored discovery was likely to be appropriate for Viagogo, but that there was a significant dispute as to the appropriate categories for Viagogo's tailored discovery. They sought a hearing to resolve that dispute.

[9] A hearing was allocated for 22 February 2021. The parties filed submissions in advance of that hearing, each proposing tailored discovery categories. This led to some narrowing of the dispute. The Commission put a further proposal to Viagogo the day before the hearing. It appears Viagogo's lawyers could not obtain instructions in time. The hearing was adjourned.

[10] Discussions continued. The matter shuffled through Duty Judge lists until late March, when it became (or remained) apparent that agreement would not be reached. A new hearing was allocated for 9 June 2021.

[11] Further submissions were exchanged before that hearing, largely because the dispute had narrowed as a result of continued discussions and compromises. Those compromises continued up to and during the hearing. By the end of the hearing, few issues remained for me to decide. In what appears to me to be their logical order, those issues were:

(a) Should Schedule 1 record the Commission's reservation of its position?

(b) What should be the terms of category 1(d) in Schedule A?

(c) Which categories should be subject to a relevance test?

(d) By what date should Viagogo have to provide discovery?

[12] As I said at the hearing, I am grateful to the parties and to counsel for the co-operative way in which they approached this matter (though it is regrettable that the process should have been as drawn out as it was).

The terms of the order: two schedules

[13] The parties agreed that the tailored discovery order should be in two parts. The first part, which they generally referred to as "Schedule 1", will contain general provisions, dealing with matters such as the time for Viagogo to provide discovery, key word searching, privilege and confidentiality. The second part, referred to as "Schedule A", will contain definitions and categories.

[14] At the hearing counsel agreed that, subject only to the issues that I deal with below, I should make a tailored discovery order against Viagogo in the following terms:

(a) Schedule 1, as attached to the Commission's supplementary submissions dated 22 April 2021.

(b) Schedule A, as attached to the Commission's (further) supplementary submissions dated 8 June 2011.

[15] Submissions at the hearing were made by reference to those two schedules. Any further references in this judgment to Schedule 1 or Schedule A are references to the two schedules I have just identified.

Should Schedule 1 record the Commission's reservation of its position?

[16] Clauses 11 and 12 of Schedule 1 provide:

> 11. Notwithstanding the terms of this tailored discovery order, each of the parties retain the right to make an application to the High Court regarding the scope of discovery provided, <u>any further discovery to be provided</u>, claims to privilege and/or confidentially, and/or how the terms of the order are implemented in practice.
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> 12. <u>The Commission specifically reserves its position on the adequacy of Viagogo's discovery until once it has seen the management reporting Viagogo provides in response to category 1(d).</u>

[17] Viagogo objected to the underlined words. At the hearing Mr Lloyd, senior counsel for Viagogo, did not press the objection to the words in cl 11. But he said the reservation of the Commission's position set out in cl 12 was unnecessary. He said cl 11 was sufficient to make clear that each party retained the right to apply (under r 8.19) for further discovery.

[18] Mr Flanagan, for the Commission, responded that the point of cl 12 was to reflect the compromise that the parties were trying to reach in category 1(d) (which I discuss in a moment).[1] He said the management reports described in category 1(d) were a "proxy" for other (likely more numerous) documents that the Commission regarded as relevant. He said cl 12 made clear the basis upon which the Commission

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[1] As will be apparent from the next section of this judgment, the parties have not reached a final compromise on category 1(d). But the Commission has agreed that (subject to retaining the right to make a further application) category 1(d) should be confined to reports to and from Viagogo management.

was agreeing to this compromise: namely, that the Commission wanted to see those management reports in order to be satisfied that Viagogo's discovery was adequate.

[19] I can understand why the Commission wants to make clear the basis upon which it is agreeing that category 1(d) can be limited to management reports. But it does not need cl 12 to achieve that clarity. The Commission's position is now adequately recorded in this judgment.[2] Clause 12 will not be in the order I make.

What should be the terms of category 1(d) in Schedule A?

[20] Category 1 in Schedule A describes marketing materials. In broad terms, categories 1(a), (b) and (c) (on which the parties are agreed) describe documents that will tend to show how Viagogo's website and other marketing materials were presented to buyers of tickets. Category 1(d), on which the parties are apart, is different. It describes documents that are internal to Viagogo.

[21] The Commission sought category 1(d) in the following terms:[3]

> The following documents relating to Viagogo's marketing during the period 18 July 2016 to 30 June 2020:
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> …
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> (d) all reports to and from Viagogo management regarding:
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> (i) Viagogo's marketing to Consumers, with that material to:
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> a. include all quarterly reports provided to the Head of Product; and
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> b. exclude information relating to Viagogo's activities in markets other than New Zealand (including aggregated information), where the report includes New Zealand-specific information of that kind; and
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> c. exclude all financial information; and
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> (ii) the appearance of the webpages referred to at paragraph [20] of the Statement of Claim.

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2 That the Commission has made its position clear may or may not be relevant to any subsequent application for further discovery. That will be a matter for whoever hears such an application.

3 This wording differs slightly from the Commission's proposal in Schedule A. The wording was a result of further discussions between counsel during the hearing.

[22] Mr Flanagan submitted that in this proceeding the Commission challenged how Viagogo presents its operations to New Zealand consumers. Viagogo's marketing material was therefore plainly relevant. He submitted that this material includes "what it says to consumers, how those statements have come to be made, and why it has chosen to say those things" (my underlining). The underlined words were the essential basis on which Mr Flanagan said Viagogo's internal material, such as the reports to management described in category 1(d), could be relevant. Mr Flanagan relied on *Todd Petroleum Mining Co Ltd v Vector Gas Trading Ltd*,[4] which he said was an example of "internal" documents being ordered to be discovered.

[23] Mr Lloyd accepted that "what [Viagogo] says to consumers" was relevant, but he disputed the relevance of the material described in the underlined words in the previous paragraph. The essential issue in the proceeding was whether Viagogo's conduct towards consumers was misleading or deceptive. That required an objective assessment of what Viagogo had said to consumers. Viagogo's subjective views on its statements to consumers, including its reasons for making those statements, were irrelevant to that enquiry. He emphasised that the Commission did not make any allegation that Viagogo intended to mislead consumers.

[24] Viagogo's primary position, therefore, was that the tailored discovery order should not include category 1(d) at all, because Viagogo's internal management reports on marketing are not relevant. If I did not accept that position, Viagogo's fall-back was that category 1(d) should simply refer to "all quarterly reports provided to the Head of Product (excluding all financial information)".

[25] I accept Mr Lloyd's submission that Viagogo's subjective views on its statements to consumers, including its reasons for making those statements, are irrelevant to the issues in this proceeding. The leading case on s 9 is the Supreme Court's decision in *Red Eagle Corp Ltd v Ellis*.[5] The Court said that the section proscribes conduct that, *examined objectively*, is misleading or deceptive. The question is whether a reasonable person in the consumer's position would likely have been misled or deceived. It is not necessary to show that the defendant had any

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4 *Todd Petroleum Mining Co Ltd v Vector Gas Trading Ltd* [2017] NZHC 1129.
5 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.

intention to mislead or deceive (and the Commission has not made such an allegation against Viagogo).[6] This approach clearly applies to all the provisions of the FTA that the Commission alleges were breached.

[26] The case on which Mr Flanagan relied is distinguishable. In *Todd Petroleum* the issue against which the relevance of documents was being assessed was the state of competition in the gas market in New Zealand. Each side filed, for the purpose of a discovery application, affidavits from experts as to how the state of competition in that market would be assessed. One expert opined that it would be sufficient to look at publicly available information. The other expert disagreed, opining that the plaintiffs' internal analyses on the state of the market should also be taken into account in such an assessment. In the light of those competing positions Dobson J held that the internal analyses should be discovered.

[27] The present case is quite different. There can be no dispute as to how to assess whether conduct is in breach of s 9. The law is quite clear that the assessment is objective.

[28] This is, however, not quite the end of the matter in relation to category 1(d). In *Red Eagle* the Supreme Court also noted that "the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity [for the conduct to mislead or deceive] existed".[7] Viagogo's internal reports on its marketing to consumers are likely to reveal something about how consumers have reacted to that marketing. A comparison of reports over different time periods may thereby indicate how consumers' reactions have changed as the marketing has changed. At the hearing I said to Mr Lloyd that it appeared to me that such reports were therefore relevant. Mr Lloyd resisted this, saying that it made no sense to assume that an effective marketing campaign is a misleading campaign. But no such assumption is involved. Evidence of consumer reactions will assist in determining whether or not Viagogo's conduct had the capacity to mislead or deceive.

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6 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].
7 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].

[29] This does not justify a category as widely drawn as the Commission's 1(d). But it does justify discovery of Viagogo's fall-back category, namely "all quarterly reports provided to the Head of Product (excluding all financial information)". The tailored discovery order will include that category.

Which categories should be subject to a relevance test?

[30] Viagogo proposes that some of the categories be subject to a relevance test. The test would be modelled on the relevance test for standard discovery in r 8.7. For those categories, Viagogo would only have to discover documents that meet the relevance test.

[31] The Commission accepts that it is appropriate for some categories of documents to be subject to a relevance test. The Commission merely disagrees with Viagogo as to which categories should be subject to that test.

[32] The descriptions of some of the categories of documents are so narrow that it is highly likely that all, or almost all, documents falling within those descriptions will be relevant. For those categories, the time and cost involved in applying a relevance test (which would involve a review of each document) would be disproportionate. This is reflected in the parties' approach. For many of the categories it is common ground that they should not be subject to a relevance test.

[33] Conversely, there are other categories that have broad descriptions, such that it is less certain that documents falling within the categories will be relevant. The parties agree that a relevance test is proportionate for those categories.

[34] The parties merely disagree about which categories fall into which camp. By the end of the hearing there were only a few categories still in issue.[8]

[35] First, category 5 described communications between Viagogo and consumers falling under various "enquiry source topics". The parties agreed that several sub-categories in category 5(b) should be subject to the relevance test. The dispute was

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[8] Mr Lloyd said that if I was of the view (which I am) that a relevance test was only necessary if categories were not inherently relevant, the test was not necessary for categories 4, 7 and 8.

about which of the sub-categories in category 5(a) should also be subject to that test. I have concluded that the following additional sub-categories should be subject to the relevance test, as the enquiry topics are broad:[9]

(a) (xv) – "What are the Viagogo Terms and Conditions".

(b) (xviii) – "Issues with tickets received".

(c) (xx) – "What is Viagogo?".

[36] Mr Lloyd raised concerns with some other enquiry topics, in part on the basis that they captured enquiries from both sellers and buyers. But the opening words of category 5(a) only capture communications between Viagogo and buyers ("Consumers").

[37] Secondly, category 6 captures all records of telephone communications between Viagogo and buyers from June 2016 to December 2020. Mr Flanagan said it was inherently likely these would be complaints by buyers, and therefore likely they would all be relevant to matters in issue. I agree that they are likely to be complaints. But they are not necessarily going to be complaints about the matters that the Commission has put in issue in this proceeding. A relevance test should be applied.

By what date should Viagogo have to provide discovery?

[38] The Commission seeks discovery within 12 weeks of the date of the order. Viagogo says it requires 12 months. At the hearing, Mr Lloyd said that if I did not allow 12 months, I should at least allow six to nine months.

[39] Viagogo filed affidavit evidence to support its claim that it required 12 months. This evidence primarily consisted of estimates, based on preliminary keyword searches, of the number of documents falling within the proposed categories. This suggested there were at least 100,000 documents in categories 1(b), 3, 4 and 7, at least

[9] Mr Flanagan accepted (xv) and (xx) during the hearing. I record them here for clarity.

35,000 in category 5, and several thousand telephone calls (category 6). Mr Lloyd then provided an estimate of the time it would take to review that many documents.

[40] I accept that Viagogo will have to discover a significant number of documents. But its suggestion that it requires six months, let alone nine or 12 months, to complete discovery is not reasonable:

(a) I view Viagogo's estimates of document numbers as very preliminary indeed, and likely to fall considerably with more refined searches. For example, Viagogo estimates that there are over 92,000 documents falling within category 7, which carries what seems to me to be a rather narrow description: records of training (including training materials) presented or provided to Viagogo's customer service personnel, over a five year period, relating to two specific terms in Viagogo's terms and conditions.

(b) Viagogo's estimate of the time needed to review the documents assumes that it will have to review every document for relevance. That is not the case.

[41] The categories of tailored discovery in the order that I make in this judgment are quite narrowly drawn. Viagogo has engaged a highly competent and experienced team of lawyers for this proceeding. It is reasonable to assume that Viagogo will engage external IT or paralegal support to assist it in completing discovery.

[42] In all of these circumstances I consider the Commission's 12-week timeframe to be a reasonable one.

Result

[43] I order Viagogo to provide tailored discovery by 6 September 2021, in accordance with Schedule 1 and Schedule A,[10] subject to the following:

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[10] Of, respectively, the Commission's supplementary submissions dated 22 April 2021 and supplementary submissions dated 8 June 2011.

Schedule 1

(a) The date in cl 2 is to be 6 September 2021.

(b) Clause 12 is to be omitted.

Schedule A

(c) Clause 1(d) is to read "all quarterly reports provided to the Head of Product (excluding all financial information)".

(d) The following enquiry topics are to be moved from cl 5(a) to cl 5(b) (so as to be subject to the relevance test): (xv) – "What are the Viagogo Terms and Conditions"; (xviii) – "Issues with tickets received"; (xx) – "What is Viagogo?".

(e) Clause 6 is to be subject to the relevance test.

[44] If the parties cannot agree costs, they may file memoranda of not more than two pages each (excluding annexures or schedules). The Commission first, by 28 June 2021; then Viagogo, by 2 July 2021.

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Campbell J