IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-003052
[2016] NZHC 1493

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	BAYLEY CORPORATION LIMITED Defendant

Hearing: 10 June 2016

Appearances: J C L Dixon and L C A Farmer for Plaintiff
T D Smith and R M Dixon for Defendant

Judgment: 1 July 2016

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 1 July 2016 at 4.00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date……..

Introducton

[1] Bayley Corporation Limited is a real estate company that operates through franchisees throughout New Zealand. It has admitted conduct constituting a breach of s 27, via s 30, of the Commerce Act 1986. Specifically, between 29 August 2013 and 1 August 2014 Bayley entered into and gave effect to an anti-competitive price fixing agreement with four other real estate companies (the PPL agreement).[1] The Commerce Commission and Bayley have agreed to recommend to the Court that it would be appropriate for a penalty of $2.2m to be imposed in respect of this conduct.

[2] The Commission seeks a declaration that Bayley's conduct contravened s 27, via s 30, and the imposition of a recommended penalty. Bayley seeks to have payment of the penalty deferred. There is no objection from the Commission to that request.

The anti-competitive conduct

[3] The price fixing agreement related to the use of the Trade Me website to advertise real estate listings. Prior to 2013 Trade Me operated a subscription-based model for standard listing of residential real estate by real estate companies. Under this model real estate companies were charged a capped subscription fee which was a base price with a further charge for each standard listing up to a finite number of listings. Once that number was reached the price was capped with no charge for further listings.

[4] In 2013 Trade Me advised its customers, including Bayley, of its intention to change the pricing model to charge a fee of approximately $159 for each standard listing with no cap on the fee charged for a set number of listings (the per-listing pricing model). This change was discussed at a meeting of representatives of Bayley, Harcourts, Barfoot & Thompson, L J Hooker and Ray White in August 2013. These companies own 50 per cent of Property Page (NZ) Ltd (PPL), the company that operates the realestate.co.nz website. The remaining 50 per cent of PPL is owned by other real estate agents in New Zealand.

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[1] Of this group only Bayley has accepted that the conduct was unlawful.

[5] The practice at the time among real estate companies, including Bayley, varied as to how the subscription price previously charged by Trade Me was funded in terms of the extent to which the real estate company absorbed the cost of listing on Trade Me. Under the PPL agreement, however, the per-listing fee was to be funded by the vendors or the real estate agent or sales consultant i.e. Bayley and the other parties to the agreement agreed not to absorb the cost or any part of the cost of the Trade Me per-listing fee. Nor would they enter into new agreements for preferential listing rates with Trade Me. The result was that these companies had agreed not to compete with one another on the fees that Trade Me proposed for standard listings. This precluded offering a discounted price to customers for listings on Trade Me.

[6] The real estate companies obtained legal advice which was to the effect that there was no obstacle to the PPL agreement in terms of legal liability. The advice did not, however, refer to s 30 of the Commerce Act.

[7] When Bayley's existing contract with Trade Me under the subscription pricing model expired at the end of January 2014 it began to implement the PPL agreement. This had the effect of fixing, controlling or maintaining the prices that vendors paid to have these agents list their properties on Trade Me and substantially lessened competition in the real estate market in New Zealand.

[8] The Commerce Commission began investigating almost immediately and, from an early stage, Bayley cooperated. However, in accordance with its general approach to costing Bayley continued to charge its vendor customers on a per listing basis after April 2014.

[9] Later in the year Trade Me announced its intention to revise its pricing model with effect from 1 August 2014 by introducing a revised subscription-based pricing model (the revised subscription pricing model). The PPL agreement ended on 1 August 2014 when Bayley became aware of Trade Me introducing its revised subscription pricing model. Even after that, however, more than 80 per cent of Bayley's offices continued to operate on a per-listing pricing model with the remainder adopting the revised subscription pricing model or a variation on it.

Penalty framework

[10] The penalty being sought is one that has been agreed on by the Commission and Bayley as appropriate and is advanced as a recommendation to the Court. The imposition of a penalty recommended by the parties has been recognised as providing an effective and prompt resolution of penalty proceedings and has a significant public benefit. A full Court observed that the agreed penalty procedure was in the interests of both the parties and the community because it avoided complex and lengthy litigation.[2] The approach has been accepted and adopted consistently in subsequent cases.[3]

[11] When a court is asked to impose a penalty that is recommended by the parties it is for the Court to consider whether the proposed penalty is within the range appropriate for the conduct rather than embark on its own inquiry as to what the appropriate figure would be. The maximum penalty for each breach of the Act is the greater of $10m or either three times the commercial gain obtained by Bayley (if it can be readily ascertained) or 10 per cent of Bayley's turnover from trading within New Zealand (if the commercial gain cannot be readily ascertained).[4] In this case, although there was potential for commercial gain, such gain is not readily ascertainable. The parties are agreed on the maximum penalty available on the basis of financial information provided by Bayley.[5]

Starting point

[12] The main objective in imposing a penalty for a breach of s 30 is general and specific deterrence.[6] In determining an appropriate starting point, relevant factors include the nature and seriousness of the contravening conduct, whether the conduct was deliberate, the duration of the contravening conduct, the seniority of the

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2 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC) at 773.

3 See e.g. *Commerce Commission v Alston Holdings SA* HC Auckland, [2009] NZCCLR 22 (HC) at [18]; *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [38]; *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21].

4 Commerce Act 1986, s 80.

5 An order has been made prohibiting public access to the agreed facts, which contain confidential financial information, without the permission of the Court.

6 *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TLLR 270 (HC) at [3].

employees or officers involved, the extent of any benefit derived from the conduct, the extent of any loss or damage resulting from the conduct, the defendant's role in the conduct, the market share or degree of market power held by the defendant and the defendant's size and resources.

Nature of the market

[13] The market in this case is the market that exists throughout New Zealand for real estate sales services in relation to residential property listings.

Nature and seriousness of the contravening conduct

[14] The conduct is properly regarded as serious for the following reasons. First, the parties to the PPL agreement were the five largest and most influential real estate companies in New Zealand. They control a substantial share of the overall market for real estate services. Secondly, the PPL agreement had the potential to affect a large number of transactions for residential properties. Thirdly, the PPL agreement was entered into by staff who occupied positions at the highest level. In Bayley's case this was the managing director and the general manager of its master franchisor. Fourthly, the conduct affected ordinary New Zealanders in the buying and selling of houses. For many, that would be a very significant financial decision.

[15] In this case there is another factor that the parties consider relevant to the assessment of the seriousness of the contravening conduct. PPL sought legal advice on its proposed course and was told that there was no clear obstacle from a legal liability perspective. The Commission accepts that the taking of legal advice is a factor to be taken into account in setting a penalty at the lower end of the applicable range in any given case, but characterises it as an absence of an aggravating factor rather than a mitigating factor that should attract a discount. Mr Dixon, for the Commission, relied on the decision in *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* where the Federal Court found that:[7]

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[7] *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* [2003] FCA 193, (2003) 201 ALR 636 at [309].

> The fact that legal advice was obtained by one of the parties is also of little consequence. It illustrates that risk was appreciated. However, legal advice is obtained for the benefit of the company and only for the benefit of the company. It is not a discounting factor. If legal advice is wrong, that is a matter between the company and the legal adviser.

[16] Mr Dixon relied on the fact that this statement has been followed in *New Zealand in Commerce Commission v Telecom Corporation of New Zealand (Data Tails)* in which the Court of Appeal upheld the High Court Judge's view that no weight could be given to the complexity and uncertainty of the law.[8] More specifically, in *Commerce Commission v New Zealand Bus Ltd (No 2)* Miller J considered that:[9]

> Favourable legal advice is not necessarily a mitigating factor. It may show only that the acquirer reached its decision on reasonable grounds, so excluding careless or calculated breach; if so, it is better characterised as the absence of an aggravating factor. Even that conclusion depends on the content of the advice, whether it was given with knowledge of facts later found to establish breach and whether it was followed. Advice that equivocates may illustrate only that the transaction lies in what Mr Goddard described as the "grey area" where the transaction may contravene s 47. In such a case, the acquirer opts to buy without clearance or authorisation at its own risk.

[17] Bayley sought to distinguish the *Universal Music* case on the basis that it involved specific competition law advice sought on a particular transaction compared with this case in which general legal advice was sought and the risk of contravening conduct was simply missed. Mr Smith, for Bayley, relied on the approach taken in *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* (decided in the slightly different context of the Overseas Investment Act 2005) in which Edwards J considered that the "complete reliance on legal advice" put the defendant's culpability at the lower end of the range.[10] Mr Dixon pointed out that neither *Universal Music* nor *New Zealand Bus* were referred to (presumably not cited to the Judge).

[18] I do not consider that there is a justification for distinguishing the different types of legal advice in the way Mr Smith invites. Most certainly, a party who has

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8 *Commerce Commission v Telecom Corporation of New Zealand*, above n 6; *Telecom Corporation of New Zealand v Commerce Commission* [2012] NZCA 344.

9 *Commerce Commission v New Zealand Bus Ltd (No 2)* [2006] 3 NZCCLR 854 (HC) at [29].

10 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558.

proceeded in good faith on the basis of incorrect legal advice is unlikely to be characterised as having acted recklessly or in deliberate breach of the law. But that simply avoids any suggestion of an aggravating factor. In terms of setting a starting point, the inquiry is the nature of the contravening conduct which is to be determined without reference to any legal advice that might have been obtained. That is a matter between the party and its legal counsel.

Duration of contravening conduct

[19] Bayley implemented the PPL agreement for a period of about six months. It adopted Trade Me's new per-listing fee from 1 February 2014 and it is common ground that the PPL agreement ended on 1 August 2014 when Bayley became aware of Trade Me's revised subscription pricing model.

[20] In a more general sense the Commission asserts that the impact of the PPL agreement is likely to persist because the status quo is now (as a result of the agreement) a vendor-funded arrangement eroding the potential uncertainty (and competitive aspect) of how each real estate agency would respond to changes by Trade Me in its listing model. Bayley does not accept this assertion and says that there is no basis for drawing the inferences the Commission invites and that it is not possible to say what the competitive price will have been in the absence of the agreement.

[21] I accept the Commission's view on this point. The possibility of competition was removed altogether for the period of the agreement and that situation meant that a new status quo existed when the revised model was introduced. This meant that the scope for competition after the agreement came to an end was open to influence.

Potential commercial gain

[22] Although Bayley did not actually recover any greater amount from vendors than it was charged by Trade Me, it accepts that there was potential for commercial gain to it in that it was relieved of the need to compete on this aspect of its services.

[23] In terms of harm the Commission identifies the fact that vendors who agreed to pay the full fee that Bayley passed on to them may well have paid more for the standard listing than they would have done without the PPL agreement and note on this point that prior to the PPL agreement Bayley had operated on the basis of its vendor clients funding advertising costs. The Commission also contended that the significantly lower number of listings that Bayley placed on Trade Me between 1 February and 31 July 2014 compared to the same period the previous year suggests that some vendors may have elected not to list on Trade Me because of having to pay the full fee for a standard listing.

The involvement of senior employees or officers

[24] The Bayley representatives who participated in settling the agreement were senior executives. Its managing director and general manager of its master franchisor both attended the meeting at which the PPL agreement was entered into and the latter took an active role in giving effect to the agreement. In addition, at least three employees were involved in the contravening conduct. Nevertheless, it is accepted that all of the parties to the agreement played similar roles in reaching the agreement and there was no "ringleader" among them.

Deliberateness of the conduct

[25] Clearly the conduct was deliberate in the sense of Bayley knowingly and intentionally entering into the agreement to pass on the cost of the Trade Me listings to its vendors. The Commission points out that, whilst Bayley's general approach even prior to the agreement was to pass on a notional fee for listings, the PPL removed the competition that Bayley would have faced in the market in relation to this approach. Notwithstanding Bayley's preferred general approach Bayley's officers were still able to decide whether or not to impose the additional fee on vendors and, if so, at what level.

Comparable cases

[26] The most comparable case is the recently determined *Commerce Commission v Unique Realty Ltd*.[11] That case also involved an anti-competitive agreement entered into in response to Trade Me's change in its pricing model. The agreement was reached between 11 real estate agents operating in the Manawatu region. They collectively agreed that they would no longer absorb the cost of Trade Me listings but passed on the whole of the increased fee to vendor clients.

[27] Unique Realty was the third largest agent involved in the Manawatu agreement with a market share of approximately 19 per cent (higher than Bayley's market share). Its conduct was comparable in that it was not an instigator or ringleader, the agreement was in force for approximately six months and had the same effect on the Manawatu region as the PPL agreement had more widely in New Zealand of eliminating an aspect of competition between the agents thereby conferring potential for commercial gain. The Court accepted a starting point in the range of $1.5 – $1.8m as appropriate and a discount of 25 – 30 per cent to reflect Unique Realty's early admission of responsibility. The penalty finally imposed was $1.25m.

[28] The decisions in *Commerce Commission v PGG Wrightson Ltd* and *Commerce Commission v Rural Livestock Ltd* are also of assistance.[12] They involved arrangements between livestock companies and saleyard owners regarding fees to be charged for cattle movements, following the introduction of a scheme to track the movements of cattle and deer in New Zealand. Rural, one of the smaller companies, had a 6.8 per cent share of the market (comparable to Bayley's share) and a substantially smaller turnover than the other companies. It was not a ringleader and did not take a key role in the arrangements that were agreed on. A starting point of $1.6m – $2m was regarded as appropriate, with a discount of 25 per cent for Rural's acceptance of responsibility. The appropriate range for the final penalty was found to be $1.2m – $1.5m, though the penalty actually imposed was substantially adjusted to reflect Rural's financial circumstances.

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

12 *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360; *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361.

[29] In comparison, PGG Wrightson, which was involved in the same agreements, played a much more significant role, was a much larger company, its senior managers who were involved should have been aware of the relevant competition laws and there was internal legal advice advising that the arrangements could constitute price fixing. Moreover, PGG Wrightson was the initiator of the contravening conduct. A starting point in the range of $3.4m – $4.3m was regarded as appropriate, with a 25 per cent discount for PGG Wrightson's acceptance of responsibility. The end penalty was $2.7m.

Starting point

[30] The Commission identified a figure in the range of $3.9 – $4.4m as an appropriate starting point. Bayley identified a slightly lower range of $3.6 – $4.1m and I consider that range better reflects where the conduct sits in comparison to the comparable cases, particularly *PGG Wrightson*.

Mitigating factors

[31] Both parties are agreed that a reduction of 45 per cent would be appropriate to reflect the combined effect of a number of factors. The first of these was Bayley's cooperation. In April 2014 Bayley indicated its intention to cooperate and entered into a formal cooperating agreement in October 2014. Under this it made staff available for interviews, procured those staff to make themselves available as witnesses and permitted the Commission to use material provided to it on a without prejudice basis in related proceedings.

[32] Secondly, Bayley made admissions of liability through an agreed statement of facts and the admission of the first and second causes of action in the Commission's statement of claim. These admissions were made at the earliest opportunity.

[33] Thirdly, Bayley had no history of contravening conduct and, as a result of this proceeding, has introduced an internal compliance training programme for its management team.

[34] Although discrete discounts are not sought the 45 per cent discount is, on the Commission's view, broadly made up of 25 per cent to acknowledge Bayley's early admissions and a further 20 per cent to recognise the formal cooperation agreement and ongoing cooperation undertaken by Bayley. A discount at this level is within the range taken in cases in which comparable mitigating conduct was found.[13]

[35] A discount of 45 per cent would result in a final penalty range of $1.98 m – $2.25m.

Deferred payment of penalty

[36] Although Bayley has agreed to the penalty that is sought to be imposed it seeks to have terms attached to the penalty under which payment would be deferred. This is a course that has previously been recognised as within the scope of the Court's discretion.[14] Specifically, it has been accepted in previous cases that the Court has the discretion to direct that penalty payments be spread over time. For example, in *Commerce Commission v Thai Airways*, Allan J directed that the penalty be paid in instalments over 18 months because the defendant was experiencing adverse trading conditions and had recently embarked on a fleet replenishment programme.[15]

[37] In this case Bayley has provided evidence from its managing director, making out the grounds on which Bayley seeks to have payment of the penalty deferred until 31 December 2016 on the basis that interest is payable over that period. That evidence canvasses Bayley's commitment to certain transactions between May and October 2016 which require substantial capital.

[38] The Commission does not object to deferment of the penalty payment as sought.

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13 See e.g. *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 April 2011; *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010; *Commerce Commission v British Airways PLC* HC Auckland CIV-2008-404-8347, 5 April 2011.

14 Commerce Act 1986, s 80(1); *Commerce Commission v Cargolux Airlines International SA* HC Auckland CIV-2008-404-8355, 5 April 2011.

15 *Commerce Commission v Thai Airways International Public Company Ltd* [2013] NZHC 844 at [60].

Result

[39] I am satisfied that the recommended penalty of $2.2m is appropriate to fulfil the objective of deterrence and reflect the nature of the contravening conduct and mitigating factors. I also accept that the grounds are made out for the deferral of payment of the penalty.

[40] I therefore:

(a) make a declaration that Bayley's conduct contravened s 27, via s 30, of the Commerce Act;

(b) impose the recommended penalty of $2.2m;

(c) direct that payment of the penalty be made on or before 31 December 2016 together with interest at the rate prescribed by the Judicature Act 1908 calculated from the date 20 working days after the judgment is delivered until the penalty is paid in full.

[41] By consent, costs will lie where they fall.

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P Courtney J