IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 116/2018
[2020] NZSC 25

BETWEEN	LODGE REAL ESTATE LIMITED First Appellant
	MONARCH REAL ESTATE LIMITED Second Appellant
	BRIAN KING Third Appellant
	JEREMY O'ROURKE Fourth Appellant
AND	COMMERCE COMMISSION Respondent

Hearing:	21 and 22 August 2019
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	L J Taylor QC and M A Cavanaugh for First and Fourth Appellants D H McLellan QC and M S Anderson for Second and Third Appellants J C L Dixon QC, L C A Farmer and M M Borrowdale for Respondent
Judgment:	2 April 2020

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The appellants must pay costs of $35,000 plus usual disbursements to the respondent.**

REASONS
(Given by O'Regan J)

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Introduction

[1] In September 2013, representatives of a number of Hamilton real estate agencies met to discuss a development that affected all of them. A similar meeting took place in October 2013. The development was the proposal by Trade Me Property, a division of Trade Me Ltd (Trade Me), to change its policies for charging for standard residential listings on its website, trademe.co.nz/property. The Commerce Commission alleged that as a result of these meetings, the agencies entered into a price fixing arrangement in breach of s 30 of the Commerce Act 1986.

[2] The Commission commenced proceedings against the agencies and some of their principals, seeking pecuniary penalties. A number of agencies admitted liability and paid pecuniary penalties. The appellants – Lodge Real Estate Ltd (Lodge), its principal Jeremy O'Rourke, Monarch Real Estate Ltd (Monarch) and its principal Brian King – denied liability.[1]

[3] The Commission's claim against the appellants failed in the High Court.[2] The High Court Judge, Jagose J, found that the agencies which were represented at the September meeting had entered into an arrangement or arrived at an understanding and had given effect to that arrangement or understanding.[3] However, he found that the arrangement or understanding between the agencies did not have the purpose or effect of fixing, controlling or maintaining the price for the services provided by the agencies in competition with each other.[4]

[4] The Commission appealed to the Court of Appeal. The appellants (the respondents in the Court of Appeal) supported the High Court judgment on the ground that the High Court Judge had been wrong to find that they had entered into or given effect to an arrangement or understanding. So the Court of Appeal addressed all aspects of the High Court decision. The Court of Appeal upheld the High Court's finding that the appellants had entered into an arrangement or arrived at an understanding and had given effect to that arrangement or understanding.[5] However, the Court of Appeal concluded that the arrangement or understanding did, in fact, have the purpose of fixing, controlling or maintaining the price of the relevant services.[6] It therefore allowed the appeal and remitted the matter to the High Court for the determination of the pecuniary penalties to be imposed.[7]

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1 Some of the documents filed in the High Court refer to "Lodge Real Estate (Hamilton) Ltd", but that is not the name used in the judgments of the Courts below or the documents filed on behalf of the first appellant in this Court. We will follow the names used in the Courts below.

2 *Commerce Commission v Lodge Real Estate Ltd* [2017] NZHC 1497 [HC judgment].

3 At [193] and [200].

4 At [234].

5 *Commerce Commission v Lodge Real Estate Ltd* [2018] NZCA 523, [2019] 2 NZLR 168 (Asher, Brown and Gilbert JJ) [CA judgment] at [70] and [74].

6 At [93].

7 At [115] and [118].

[5] This Court gave leave to the appellants to appeal to this Court against the Court of Appeal's decision.[8] The approved question was whether the Court of Appeal should have allowed the Commission's appeal to that Court. However, the grant of leave excluded two specific grounds on which leave had been sought.[9]

Issues

[6] The issues before this Court are the same as those before the High Court and Court of Appeal. They are:

(a) Did the appellants enter into an arrangement or arrive at an understanding and give effect to that arrangement or understanding?

(b) If so, did the arrangement or understanding have the purpose, effect or likely effect of fixing, controlling or maintaining the price of services provided by the appellants in competition with each other?

The facts

[7] Both Lodge and Monarch are significant real estate agencies in Hamilton. At the relevant time, they had market shares of approximately 35 per cent and 28 per cent respectively. Monarch is a franchisee of Harcourts while Lodge is a member of the New Zealand Realtors Network (NZRN), a network of geographically separate real estate agencies. The other agencies represented at the meetings in September and October 2013 were Lugton's Ltd (an independent agency) (Lugton's), Online Realty Ltd (a franchisee of Ray White) (Online) and Success Realty Ltd (a franchisee of Bayleys) (Success). Lugton's had about a 23 per cent market share in the Hamilton real estate market while Online and Success had smaller (single figure) percentages of the market. Other real estate agencies in Hamilton that were not represented at the meeting were Eves Realty (a sister company of Success) (Eves) and George Boyes & Company Ltd (a franchisee of LJ Hooker).

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8 *Lodge Real Estate Ltd v Commerce Commission* [2019] NZSC 28.

9 The issues excluded from the grant of leave were: whether the Commerce Commission's pleading accurately described the essence of its claims as found to exist by the High Court Judge; and whether the Court of Appeal's decision to uphold the High Court Judge's ruling that the evidence of James Mellsop, an economist, be excluded (which had been an element of the appellants' cross-appeal to the Court of Appeal).

[8] Lugton's, Success and Online all accepted liability for price fixing and have paid substantial pecuniary penalties.[10]

[9] The Court of Appeal referred to the agencies represented at the meetings (Lodge, Monarch, Lugton's, Success and Online) as "the Hamilton agencies" and we will do likewise.

[10] The Hamilton agencies are competitors in the market for selling residential real estate in the Hamilton area for commission. As part of their services in endeavouring to sell property on behalf of the prospective vendor (to whom we will refer as the customer), the agencies undertake promotional and marketing activities which may be provided by the agency itself (listing in its own publication or on its own website) or by third parties (such as newspapers or third party websites, including Trade Me).

[11] The present case concerns the advertising of listed properties on Trade Me, which was, at the relevant time, the most prominent third party website. Trade Me Ltd is a publicly listed company. It provided an online marketplace and other classified advertising services. It also provided a property listing service to prospective vendors and agencies representing them. Another website, realestate.co.nz (a website collectively owned by real estate agencies) also provided a service of listing properties for sale but this was not as comprehensive as Trade Me, which listed properties for customers of agencies as well as private sale vendors who were not represented by an agency.

[12] Trade Me provided both a standard and premium service. The standard listing service involved an advertisement for the property that is listed for sale appearing on the Trade Me website, usually accompanied by photographs. The premium listing service (referred to as a "feature listing") provided greater prominence on the Trade Me website for an additional fee.

[13] Until 2013, Trade Me provided the standard listing service to real estate agencies on a basis which capped the amount payable by the agency in any month.

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[10] The pecuniary penalties were $1 million (Lugton's), $900,000 (Success) and $1.05 million (Online). As part of their settlement with the Commission, the representatives of each agency present at the 30 September meeting gave evidence for the Commission against the appellants.

Trade Me charged a base monthly amount plus a fee for each listing. But because the cap was set relatively low, all listings after the first five or six were effectively free. Some national real estate agencies and real estate networks had negotiated different deals, but in all cases the cost of standard residential listings on Trade Me was such that it was normal for agencies to absorb the cost. Most agencies had an arrangement with Trade Me that allowed for an automatic upload of real estate listings to the Trade Me website along with the agency's own website and potentially other websites such as realestate.co.nz.

[14] In 2013, Trade Me decided to radically alter its charging policies in a way which it envisaged would lead to substantially increased revenue.

[15] What Trade Me proposed was a fee for each individual standard residential listing of $199 plus GST. It proposed that this fee be paid by the customer. This included a $40 commission payable to the real estate agency but this was not seen as appropriate by most agencies. The effective proposed fee was therefore $159 plus GST per standard listing. This was a proposal made to real estate agencies nationwide, and it provoked an extremely adverse reaction.

[16] The extent of the impact of the proposed new pricing structure is exemplified by the position of both Lodge and Monarch. In Lodge's case, it faced an increase from an annual overall cost for Trade Me standard listings of $8,000–$9,000 to one of around $250,000 if it continued to absorb the cost of standard listings on Trade Me. In Monarch's case, the increase was from approximately $36,000 to almost $250,000. The High Court judgment provides greater detail about the impact of Trade Me's proposal on real estate agencies and their reaction to it.[11] Trade Me's communications with real estate agencies about the proposed price increase encouraged agencies to adopt a new approach to Trade Me listings by passing on the cost to customers rather than absorbing it themselves.

[17] After discussions among representatives of agencies that were members of NZRN, Lodge, through Mr O'Rourke, set up a meeting of Hamilton real estate agencies (Lodge is a member of NZRN). Those contacted included Mr King of

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11 HC judgment, above n 2, at [46]–[82].

Monarch, Simon Lugton of Lugton's, Carl Glasgow of Online and Steven Shale of Success. A meeting was convened at 3.30 pm on 30 September 2013 in Monarch's boardroom. It is at this meeting that the Commission allege the Hamilton agreement was entered into.

[18] The Commission alleges that the Hamilton agreement involved the agencies represented at the 30 September meeting agreeing that from 20 January 2014 they would remove from Trade Me all their standard listings of residential property for sale. After that date, if a customer requested a standard listing on Trade Me, the fee payable to Trade Me would be on-charged to the customer or to the individual real estate agent representing the customer (the salesperson), which the Commission defined in its pleading as "Vendor Funding". (For brevity, we will refer to the fee charged by Trade Me for a standard listing as the "Trade Me listing fee".)

[19] It is important to note that, on the Commission's case, vendor funding contemplated two possibilities in the event the customer wanted a Trade Me standard listing, even though it was no longer a free service. One was that the Trade Me listing fee would be paid by the customer and the other that it would be paid by the salesperson (or, potentially, partially by one and partially by the other).[12] The important thing about it was that it signalled a general policy that the real estate agencies would no longer absorb the Trade Me listing fee, but would have a default setting of on-charging that fee either to the customer or the salesperson.

[20] The Commission's pleading was that the outcome of the Hamilton agreement was that:

(a) the Hamilton agencies fixed, controlled or maintained the price, or components of the price, that customers paid for Trade Me services, online advertising services, real estate advertising services or real estate sales services;

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[12] There was a difference in the treatment of vendor funding in the High Court and Court of Appeal. See the discussion about vendor funding below at [118]–[125].

(b) customers were deprived of prices or components of prices that would have been set under competitive conditions in the absence of the Hamilton agreement for such services; and

(c) customers who had existing listings with Trade Me removed were required to pay more if they wished to continue listing properties on Trade Me.

[21] An important part of the case for the appellants was that the purpose of the 30 September meeting was to discuss moves to enhance the offering of online advertising services by realestate.co.nz. We will come back to the evidence about the meeting later.[13]

[22] There were a number of communications among the Hamilton agencies after the 30 September meeting. Another meeting took place on 16 October 2013. Again, there were further communications after that meeting. By the end of October, Lodge began preparing to withdraw all of its standard listings from Trade Me in mid-January 2014. Lugton's, Online and Monarch did likewise.

[23] Trade Me's new pricing policy did not endure. As a result of the withdrawal of listings and the change to a customer funding model for the Trade Me listing fee by the Hamilton agencies, the number of residential listings in Hamilton on Trade Me declined. Trade Me listings in other regions were also decreasing. Eventually, in response to pressure from real estate agencies, Trade Me announced on 30 July 2014 that it would reintroduce a monthly subscription fee for its standard listing services to real estate agencies with a cap of $999 per month for agencies in the regions and $1,399 per month for agencies in metropolitan areas.

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[13] See below at [175].

The law

[24] The Commission's case against the appellants is based on ss 27 and 30 of the Commerce Act. At the relevant time, those sections (so far as relevant) provided:[14]

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
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> (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> …
>
> **30 Certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition**
>
> (1) Without limiting the generality of section 27, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—
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> (a) supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or
>
> (b) resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.
>
> (2) The reference in subsection (1)(a) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

[14] Section 30 has since been amended by s 8 of the Commerce (Cartels and Other Matters) Amendment Act 2017.

[25] Thus, it is necessary for the Commission to prove that:

(a) the Hamilton agencies entered into an arrangement or arrived at an understanding and/or gave effect to such an arrangement or understanding;[15]

(b) the purpose, effect or likely effect of that arrangement or understanding was to fix, control or maintain or provide for the fixing, controlling or maintaining of the price for goods or services;[16] and

(c) the goods or services were supplied by the parties to the arrangement or understanding (or by any of them) in competition with each other.

[26] The relevant goods or services said to be affected by the arrangement or understanding is the service of providing residential real estate agency services (services to customers seeking to sell residential properties).[17] There was no dispute that the Hamilton agencies were in competition with each other in relation to such services. Accordingly, there is no need for us to say more about the requirement set out above at [25](c).

[27] If the Commission proves those elements, then the arrangement or understanding will be deemed to have the proscribed purpose or effect set out in s 27. That will mean Lodge and Monarch will be liable to pecuniary penalties under s 80(1)(a) of the Commerce Act and Messrs O'Rourke and King will be liable either under s 80(1)(a) as principals or s 80(1)(c) or (e) as parties. The High Court Judge recorded that he was inclined to regard Messrs O'Rourke and King as principals.[18] That view was upheld by the Court of Appeal and is not challenged in the present appeal.[19] So, if they are liable, they are liable under s 80(1)(a).

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15 There is no suggestion that they entered into a contract.

16 For brevity we will condense "purpose, effect or likely effect" to "purpose or effect". All references to the latter should be read as including "likely effect".

17 The Commission argued for a narrower market definition in the High Court, but this is no longer pursued: HC judgment, above n 2, at [201]–[202].

18 HC judgment, above n 2, at [235].

19 CA judgment, above n 5, at [110].

Did the Hamilton agencies enter into an arrangement or arrive at an understanding?

[28] The appellants' argument that the Hamilton agencies did not enter into an arrangement or arrive at an understanding challenges the legal test applied by the High Court and Court of Appeal and also the factual findings made in the Court of Appeal.

The legal test

[29] We will deal with the legal test first.

[30] The allegation against the appellants is that the Hamilton agencies and certain executives of those agencies entered into an arrangement or arrived at an understanding. In the Courts below and in the submissions in this Court, no distinction was drawn between an arrangement or an understanding. They were effectively seen as the same thing. That approach accords with the case law on ss 27 and 30 and their Australian equivalents.[20] It is perhaps surprising that the two terms are treated in this way: in effect it means that one of them could have been omitted without changing the meaning of the sections. It could be argued that an understanding has a less restrictive meaning than arrangement. But no such argument was made in this case and we do not take the point further. For brevity we refer from now on to an arrangement as inclusive of both an arrangement and an understanding.

[31] The starting point for the analysis of this issue is the leading case, the decision of the Court of Appeal in *Giltrap City Ltd v Commerce Commission*.[21] The majority judgment was delivered by Tipping J. He noted that the analysis of the trial Judge, Glazebrook J, of what was required to establish an arrangement for the purposes of s 27 referred to concepts of mutuality, obligation and duty. He then added:[22]

> While the concept of moral obligation is helpful in that it will often reflect the effect of an arrangement or understanding under s 27, the flexible purpose of the section is such that it is best to focus the ultimate inquiry on the concepts of consensus and expectation. A finding that there was a consensus giving rise to an expectation that the parties would act in a certain way necessarily

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20 See Chris Noonan *Competition Law in New Zealand* (Thomson Reuters, Wellington, 2017) at 295–296; and Russell V Miller *Miller's Australian Competition and Consumer Law Annotated* (40th ed, Thomson Reuters, Pyrmont (NSW), 2018) at 355.

21 *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA).

22 At [15].

> involves communication among the parties of the assumption of a moral obligation.

[32] This has been seen as a move away from the often cited test proposed by Diplock LJ in his judgment in *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements*.[23] The provision under consideration in *British Basic Slag* defined "agreement" to include "any agreement or arrangement, whether or not it is or is intended to be enforceable … by legal proceedings". Diplock LJ said when analysing what was required to constitute an "arrangement":[24]

> … it involves mutuality in that each party, assuming he is a reasonable and conscientious man, would regard himself as being in some degree under a duty, whether moral or legal, to conduct himself in a particular way or not to conduct himself in a particular way as the case may be, at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement.

[33] Tipping J referred to the judgment of Willmer LJ in *British Basic Slag*, where Willmer LJ observed:[25]

> … when each of two or more parties intentionally arouses in the others an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so.

[34] Tipping J then summarised the requirement for an arrangement under s 27:

> [17] Before there can be an arrangement under s 27 (or for that matter an understanding) there must be a consensus between those said to have entered into the arrangement. Their minds must have met – they must have agreed – on the subject-matter. The consensus must engender an expectation that at least one person will act or refrain from acting in the manner the consensus envisages. In other words, there must be an expectation that the consensus will be implemented in accordance with its terms.

[35] Later in his judgment, Tipping J made it clear that determining whether the necessary consensus existed must be judged by reference to what reasonable people would infer from the conduct of the person (or persons) whose participation in the consensus is in issue.[26] In *Giltrap*, there was no dispute that an arrangement had been reached at the meeting in which Giltrap's representative was present, but he argued

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23 *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* [1963] 1 WLR 727 (CA). See Noonan, above n 20, at 300.

24 At 746–747.

25 At 739.

26 *Giltrap*, above n 21, at [23].

that he was not part of the consensus that led to that arrangement. Tipping J said that the essential question was, therefore, whether the Giltrap representative "so conducted himself that reasonable people, appraised of all the relevant circumstances, would take the view that he was part of the consensus".[27]

[36] In a separate judgment, McGrath J, although agreeing with the result and being in general agreement with the reasons given by Tipping J, added his own views on some of the issues dealt with by Tipping J. The apparent difference of view between him and the other two Judges related to the focus on consensus and expectation in the judgment of Tipping J. McGrath J commented:[28]

> As those concepts [consensus and expectation] carry the notion of a moral (or non-legal) obligation, that in my view should remain an important touchstone for determining whether there is an arrangement or understanding under s 27.

[37] Having referred to the judgments in *British Basic Slag*, he added:

> [67] The notion of moral obligation is important because it provides a clear distinction between conduct that is collusive and that which is like-minded and parallel, but has an alternative commercial explanation. It is no part of the policy of s 27 to catch even conscious parallelism.

[38] McGrath J analysed some Australian cases, and commented:[29]

> In most cases of apparently collusive behaviour the existence of moral obligations between parties will point strongly to the existence of an arrangement or understanding. It seems to me that in the context of restrictive practices one cannot have an expectation to the necessary degree that another will perform an act unless the first person considers the other legally or morally obliged to do so.

[39] He then concluded his discussion on this topic as follows:[30]

> In my view the concept of moral obligation is likely, in the great majority of cases, to be valuable in deciding whether there is an arrangement, or for that matter an "understanding", in terms of s 27. While an understanding is less formal that an arrangement, it shares the same essential characteristics in this context.

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27 At [23].
28 At [66].
29 At [68].
30 At [70].

[40] The approach of McGrath J perhaps more closely reflects the law in Australia.[31] In *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd*, Lindgren J summarised the position as follows:[32]

> [141] The cases require that at least one party "assume an obligation" or give an "assurance" or "undertaking" that it will act in a certain way. A *mere expectation that as a matter of fact* a party will act in a certain way is not enough, even if it has been engendered by that party. … something more is required.

[41] This summary of the law was adopted by a full bench of the Federal Court in *Rural Press Ltd v Australian Competition and Consumer Commission*.[33] More recently, the Federal Court in *Australian Competition and Consumer Commission v Australian Egg Corp Ltd* observed:[34]

> [95] In order for there to be an arrangement or understanding … there must be a meeting of minds and this involves a commitment to act in a particular way. A mere expectation as distinct from an assumption of obligation, assurance or undertaking to act in a particular way is not sufficient.

High Court

[42] The High Court Judge adopted the formulation focussed on consensus and expectation as explained by Tipping J in *Giltrap*.[35] He concluded that the Hamilton agencies did reach a consensus giving rise to expectations that each would discontinue the practice of absorbing the Trade Me listing fee, that each (other than Success) would withdraw their standard listings from Trade Me by January 2014 and, that from then on, the Trade Me listing fee would be vendor funded.[36] This was the combination of a detailed study of the evidence relating to the meeting on 30 September and the follow-up meeting on 16 October 2013.

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31 Matt Sumpter *New Zealand Competition Law and Policy* (CCH New Zealand, Auckland, 2010) at 107; and Noonan, above n 20, at 301.

32 *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* [1999] FCA 954, (1999) 92 FCR 375.

33 *Rural Press Ltd v Australian Competition and Consumer Commission* [2002] FCAFC 213, (2002) 118 FCR 236 at [79]. See also *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 161, (2005) 159 FCR 452 at [45]; and *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* [2009] HCA 19, (2009) 239 CLR 305 at [48].

34 *Australian Competition and Consumer Commission v Australian Egg Corp Ltd* [2017] FCAFC 152, (2017) 254 FCR 311.

35 HC judgment, above n 2, at [176]–[177].

36 At [193].

[43] The aspect of the High Court decision that was the focus of the criticism of counsel for the appellants was the way the Judge dealt with the concept of moral obligation. The appellants particularly focussed on an observation made by the Judge to the effect that it was irrelevant whether the Hamilton agencies' comprehensions included a sense of reciprocity or moral obligation.[37] We will revert to this later.[38]

Court of Appeal

[44] The Court of Appeal considered the alternative approaches in the majority and minority judgments in *Giltrap*, noting that two leading competition law texts appeared to prefer the latter.[39] The Court of Appeal said it did not see the difference between the two approaches in *Giltrap* as being particularly acute. It considered the difference between the two judgments was one of degree, being the degree of importance attached to the assessment of mutual expectations by considering whether a moral obligation arose.[40]

[45] The Court said it did not consider the New Zealand or United Kingdom cases required a finding of moral obligation as an independent requirement for there to be an arrangement and that such a requirement could pose difficulties.[41] The Court considered that elevating moral obligation to a stand-alone requirement would lead to the analysis of arrangements getting bogged down in moral assessments, which, by their nature, are unpredictable and incapable of precise assessment.[42]

[46] The Court said if required to make a choice, it would choose the approach taken by the majority in *Giltrap* which, while recognising the existence of a moral obligation is a matter that can be taken into account, does not give it prominence in the analysis.[43]

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37 At [188].
38 See below at [106].
39 CA judgment, above n 5, at [60]–[63], citing Sumpter, above n 31, at 104–105; and Noonan, above n 20, at 301.
40 At [64].
41 At [65].
42 At [67].
43 At [67].

[47] The Court concluded as follows:

> [68] We accept that conscious parallelism is not sufficient for there to be an arrangement or understanding under ss 27 and 30. There has to be an element of conditionality in an understanding, that is the parties recognise that they will commit to a course of future conduct on the basis that others are making the same or a similar commitment and act in accordance with that commitment. … A consensus among competitors giving rise to mutual expectations of the same conduct is more than consciously parallel conduct which a competitor believes is likely to be the same as that of other competitors.

Appellants' argument

[48] For the appellants, Mr Taylor QC argued that both the Courts below applied a test which created a risk that conscious parallel behaviour would fall foul of ss 27 and 30, when this was clearly not the intention of the legislature.

[49] Mr Taylor argued that this Court should interpret the majority's approach in *Giltrap* consistently with that set out in the judgment of McGrath J or, if such an interpretation was not open, adopt McGrath J's approach rather than that of the majority. He argued that this would be consistent with leading Australian cases, which have made it clear that a mere expectation that another party or other parties would behave in a certain way is an insufficient basis for a finding of an arrangement.[44] He said that the Australian cases make it clear that there will be no arrangement unless at least one party has assumed an obligation or given an assurance or undertaking that it will act in a certain way, and the expectation that that party will act in a certain way is not enough, even if that expectation has been engendered by the party.

Our approach

[50] There was no dispute that the task of the Court is to assess whether the parties have, by their words or conduct, entered into an arrangement. It is an objective assessment.[45] Assertions by the parties or their representatives as to their subjective intentions will provide little assistance to a defendant where the objective assessment points to an arrangement having been entered into.

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44 See above at [40]–[41].

45 *Giltrap*, above n 21, at [23]; and *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679 (HC) at [81].

[51] There was also no dispute in the present case that mere conscious parallelism does not amount to an arrangement for the purposes of s 27.[46] But Mr Taylor argued that, on one interpretation, the majority's approach in *Giltrap* was broad enough to encompass conscious parallelism.[47] Mr Taylor said if that interpretation were correct, we should not follow *Giltrap*. But his primary submission was that, correctly interpreted, the majority judgment in *Giltrap* required that for an arrangement to exist, the relevant parties had to have made a commitment to each other, in the sense that they became subject to a moral obligation to act in the proscribed manner.

[52] The concern that the majority judgment could bring conscious parallelism within the concept of an arrangement appears to be founded on a concern that a consensus engendering an expectation that one or more parties will behave in accordance with the consensus could arise where the relevant parties have not committed to do that. That would mean that a mere expectation that a party would act in a certain way would, if engendered by that party, be sufficient to found an arrangement.[48]

[53] Like the Court of Appeal, we do not think that concern is well founded.[49] We do not think that the majority judgment in *Giltrap* can be interpreted as suggesting that a consensus leading to a mere expectation of future behaviour, without any commitment from the participants in the consensus to conduct themselves in the manner envisaged by the consensus, can amount to an arrangement. We think that is clear from the observation in the judgment of Tipping J that a finding that there was a consensus giving rise to an expectation that parties would act in a certain way necessarily involves communication among the parties of the assumption of a moral obligation.[50]

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46 Conscious parallelism (sometimes referred to as tacit collusion) is the process by which firms in a concentrated market make decisions on matters such as prices by reference to the position of other market participants based on a well-founded expectation as to how other participants will react without actually colluding.

47 See also Sumpter, above n 31, at 112.

48 Contrary to the observation of Lindgren J in *CC (NSW)*, above n 32, at [141].

49 CA judgment, above n 5, at [68]. See above at [47].

50 *Giltrap*, above n 21, at [15].

[54] Far from endorsing an approach that brings within s 27 conscious parallelism, Tipping J was making it clear that there will be no arrangement unless the expectation that arises from the consensus is such that it can be inferred that the parties to the consensus have assumed a moral obligation to each other. We would substitute "made a commitment" in place of "assumed a moral obligation". Calling such an obligation a "moral obligation" introduces morality into a context where it adds nothing.[51] It seems to us that the essential thing is that a commitment is made: one that is not legally binding but is sufficient to be the basis of an expectation on the part of the other parties that those who made the commitment will act or refrain from acting in the manner the consensus envisages. The reference to "expectation" in the judgment of Tipping J should be read in the sense that the expectation that arises from the consensus is based on such a commitment. That is consistent with the approach of Willmer LJ in *British Basic Slag*.[52] Interpreted in that way, the majority judgment does not differ in any material way from that of McGrath J, as the Court of Appeal noted.[53]

[55] Counsel for the Commission, Mr Dixon QC, accepted that the majority judgment in *Giltrap* should be interpreted in this way. However, he argued that a moral obligation was not something that had to be separately proven. As will be apparent from our rejection of the concept of moral obligation, we agree. But we do not see any particular significance in that, nor do we think McGrath J was suggesting the contrary in his judgment in *Giltrap*. As long as it is accepted (as ultimately it was by Mr Dixon) that a consensus leading to an expectation requires that the consensus involves a commitment to act in a certain way and the expectation flows from that commitment, there is no additional requirement to prove the existence of a moral obligation.

[56] We do not consider that *Giltrap*, interpreted as outlined above, provides for a materially different test for what constitutes an arrangement from that set out in the

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51 An alternative to "moral obligation" is "arrangement binding only in honour", a phrase used in relation to the interpretation of the definition of "arrangement" in what is now s YA 1 of the Income Tax Act 2007: *Commissioner of Inland Revenue v BNZ Investments Ltd* [2002] 1 NZLR 450 (CA) at [45]–[46] per Richardson P, Keith and Tipping JJ. We see that formulation as having the same shortcoming as "moral obligation".

52 See above at [33].

53 CA judgment, above n 5, at [64].

Australian cases relied on by Mr Taylor.[54] It should be noted that the Australian Parliament has extended the reach of the Australian equivalent of s 27, s 45 of the Competition and Consumer Act 2010 (Cth), so that it applies not only to contracts, arrangements or understandings but also to any "concerted practice" that has an anti-competitive purpose or effect.[55] This appears to be a response to the difficulty in proving the existence of an arrangement. No similar change has been made to the New Zealand Act.

[57] If the consensus involved the parties independently deciding to act in a certain way and independently forming an expectation that others will act in a similar way, there would be no arrangement. There is nothing in the majority judgment in *Giltrap* indicating to the contrary.

[58] We summarise the test in this way. If there is a consensus or meeting of minds among competitors involving a commitment from one or more of them to act (or refrain from acting) in a certain way, that will constitute an arrangement (or understanding). The commitment does not need to be legally binding but must be such that it gives rise to an expectation on the part of the other parties that those who made the commitment will act or refrain from acting in the manner the consensus envisages.

The factual findings

[59] The appellants accepted there was a consensus among the Hamilton agencies represented at the September meeting that they would adopt a vendor funding model for the Trade Me listing fee in future. They also accepted that each expected the others to do this. But, they argue that each agency had independently come to this view before the September meeting took place. Vendor funding was the model that Trade Me encouraged them to adopt when Trade Me's new fee structure came into force and there was an obvious commercial incentive to do so. So, while there was

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54 Woodhouse J expressed a similar view in *Commerce Commission v Siemens AG* (2010) 13 TCLR 40 (HC) at [30].

55 Competition and Consumer Act 2010 (Cth), s 45(1)(c). The phrase "concerted practice" is not defined but is intended to capture communication or cooperative behaviour that falls short of the commitment required to establish an arrangement or understanding, but involves more than a person responding independently to market conditions: Australian Competition and Consumer Commission *Guidelines on concerted practices* (31 August 2018) at [1.2] and [3.3]. However, no change was made to s 45AJ, the equivalent of s 30 of the Commerce Act 1986.

both consensus and expectation, there was no conditionality (one party agreeing to do X on condition that the other also did X) and no moral obligation (or, we would say, commitment) on the part of any agency to do so. The appellants said this had been accepted by the High Court Judge, relying on the observation of the High Court Judge referred to earlier.[56]

[60] The appellants argued the Court of Appeal was not entitled to reach a different conclusion on any factual matter from that reached by the High Court Judge unless the Judge's finding was unsupported by the evidence or a finding that no reasonable judge could reach. They argued none of the Judge's findings was in either category and all his findings should therefore have been upheld by the Court of Appeal. They relied on a recent decision of the United Kingdom Supreme Court, *Perry v Raleys Solicitors*, for that proposition.[57] We do not accept this submission. Whatever the law may be in the United Kingdom, this Court has determined that on a general appeal, the parties are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree: deference to the findings of the primary decision-maker is permitted, but not required.[58]

[61] Before we deal with the submissions made to us on the factual issues, we will briefly summarise the decisions of the Courts below.

High Court

[62] The High Court Judge's ultimate finding of fact that the Hamilton agencies entered into an arrangement was in these terms:

> [193] I find the [Hamilton agencies] were part of a consensus giving rise to expectations each would not absorb the cost of Trade Me's proposed per listing fees, and each (other than Success) would withdraw their standard listings from Trade Me by January 2014, subsequent Trade Me listings to be vendor funded. For the purposes of s 27, the [Hamilton agencies] entered into an arrangement, or arrived at an understanding, to those ends.

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56 HC judgment, above n 2, at [188]. See above at [43] and below at [106].

57 *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 WLR 636 at [52].

58 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16]. See also *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [38]–[40], where this Court explained that in assessing whether the decision under appeal was in error, the appellate court must take into account any advantages the trial judge may have had. That applies particularly to a challenge to a credibility finding based on contested oral evidence, a consideration that does not arise in this case.

[63] The Judge directed himself that in determining whether a consensus or meeting of minds had occurred, an objective test was required: what would reasonable people infer from the conduct of the person whose participation in the consensus is at issue?[59] He concluded that, applying that objective test, a reasonable person would infer that each of the Hamilton agencies expected that neither itself nor any of the others would absorb the new Trade Me listing fee and that all, except Success, would withdraw vendor listings from Trade Me by January 2014.[60] In reaching that conclusion, the Judge said he disregarded witnesses' statements and evidence of their own comprehensions or expectations in the wake of the 30 September meeting.[61]

[64] The Judge said there was no sense of conditionality in the statements of position made by those agencies represented at the 30 September meeting.[62] But he added that a sense of reciprocity or moral obligation was irrelevant. This statement was said by the appellants to support their position that there was no arrangement. This was an important aspect of the appellants' case and we discuss it in more detail later.[63]

[65] Having made the observation just mentioned, the Judge recorded the submission on behalf of Lodge and Monarch that the Hamilton agencies had decided in advance of the 30 September meeting to vendor fund the Trade Me listing fee on the introduction of the new fee structure.[64] He considered this was not a complete answer because:[65]

(a) none of the Hamilton agencies had acted on their decision before the 30 September meeting;

(b) some of the Hamilton agencies were aware that there was a risk that other agencies may continue to absorb the Trade Me listing fee;

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59 HC judgment, above n 2, at [178].
60 At [180].
61 At [181].
62 At [188].
63 See below at [106].
64 At [189].
65 At [190].

(c) thus, the decisions of the Hamilton agencies were at least capable of adjustment in light of further information, which came from the 30 September meeting.

[66] The Judge concluded that the independence of the prior decisions of the Hamilton agencies was undermined by the mutuality of their understanding arising from the 30 September meeting.[66]

[67] The Judge considered that it was sufficient to establish a consensus that the Hamilton agencies communicated to each other their intended and common course, leading to a consensus giving rise to expectations of how each would react. He considered that was what objectively established "communication among the parties of the assumption of a moral obligation".[67]

Court of Appeal

[68] The appellants, having succeeded in the High Court, supported the High Court judgment in the Court of Appeal on another ground, namely that the High Court Judge had erred in concluding that an arrangement had been entered into. The Court of Appeal dealt with that issue before addressing the subject of the Commission's appeal, which was whether the alleged arrangement had the purpose or effect of fixing, controlling or maintaining prices. The purpose or effect of the arrangement logically fell to be addressed second.

[69] The Court of Appeal also adopted an objective approach.[68] Having referred to the evidence relating to the 30 September meeting, the Court expressed the view that there was "a good deal of clear evidence indicating an arrangement or understanding".[69]

[70] The Court considered that this conclusion was supported by the evidence of those who had been present at the meeting, particularly Mr Coombes, Mr Lugton and

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66 At [190].
67 At [192], citing *Giltrap*, above n 21, at [15].
68 CA judgment, above n 5, at [35].
69 At [36].

Mr Shale, though the Court acknowledged that inroads had been made into some of this evidence through cross-examination.[70] The Court also considered that the conclusion was supported by exchanges preceding and following the 30 September meeting.[71] It considered that the evidence read as a whole pointed clearly to those who attended the meeting as having reached an understanding that all would move to vendor funding of the Trade Me listing fee in January 2014.[72]

[71] In doing so, it considered the appellants' argument that the decision to cease vendor funding was predictable and sensible given the very significant increase in price proposed by Trade Me and the fact that Trade Me itself expected that agencies would move to vendor funding for standard listings on its site. The appellants argued that this indicated conscious parallelism. The Court accepted that the large increase in Trade Me's listing fee was consistent with inducing conscious parallelism, but considered that was not consistent with the Hamilton agencies all responding at the same time in January 2014 and all in the same way.[73]

[72] The Court addressed the appellants' argument relating the High Court Judge's observation that moral obligation was irrelevant. The Court concluded that that observation could be "more readily understood if it is seen in the context of the Judge answering a suggestion that some of the Hamilton agencies did not subjectively view themselves as taking on an obligation".[74]

[73] The Court of Appeal therefore upheld the High Court Judge's finding that the Hamilton agencies had entered into an arrangement that they would not absorb the cost of the Trade Me listing fee after the introduction of Trade Me's new fee structure, and would (other than Success) withdraw their standard listings from Trade Me by January 2014, with subsequent Trade Me standard listings to be vendor funded.[75]

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70 At [37]–[41].
71 At [42].
72 At [46].
73 At [47].
74 At [50], referring to the HC judgment, above n 2, at [188].
75 At [52].

Appellants' criticisms of the Court of Appeal judgment

[74] Mr Taylor was critical of the Court of Appeal's analysis, particularly where the Court of Appeal took a different view of the facts from the High Court Judge. We have already rejected Mr Taylor's submission that the Court of Appeal was not entitled to reach a different view on a factual matter from the High Court Judge unless the High Court finding was one that no reasonable judge could reach.[76] We now address the specific criticisms made by Mr Taylor of the Court of Appeal's analysis.

(i) Evidence of Mr Coombes

[75] The Court of Appeal relied on evidence given by Mr Coombes of Online to the effect that, at the end of the 30 September meeting, he was left with a clear impression that there was an understanding that all Hamilton agencies would remove their standard listings from Trade Me by early 2014 and, thereafter, if customers wanted a standard Trade Me listing, the customer or salesperson would have to pay for it.[77] The High Court Judge had rejected this evidence as "pure assertion".[78]

[76] In cross-examination, Mr Coombes indicated that the arrangement was that Hamilton agencies would not offer standard Trade Me listings at all, ie if any Trade Me listing was to be offered it would be a feature listing. Then in re-examination, he said he could not remember whether the arrangement was that the Hamilton agencies would move to vendor funding for both standard and feature listings. Mr Taylor argued that the ultimate position taken by Mr Coombes was that the arrangement concerned only feature listings. On our reading of the re-examination of Mr Coombes, we think it is more accurate to say that he became confused about the nature of the arrangement. This may have been partly because Online offers only feature listings. We do, however, accept that the Court of Appeal's reliance on his evidence that there was an arrangement of the kind found by the High Court Judge was problematic.

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76 See above at [60].
77 CA judgment, above n 5, at [37].
78 HC judgment, above n 2, at [185(a)].

(ii) Statements made by Mr Shale

[77] The Court of Appeal also relied on the statement made by Mr Shale in his first interview with the Commission.[79] During that interview he indicated that the purpose of the meeting was to try to reach some sort of consensus on a common approach to Trade Me, so that everyone would be on the same page. However, his evidence at trial was inconsistent with that statement. In fact, at trial he said there was not a consensus or agreement and appeared to backtrack on the statement he had made to the Commission. He said in his evidence at the trial that, although he had told the Commission that the purpose of the meeting was to try to reach a consensus, he no longer recalled it like that. However, he accepted that is what he had told the Commission. Mr Taylor pointed out that it was not put to Mr Shale at the trial that his earlier interview statement was a correct statement of the position, and that the Court of Appeal should not have relied on that statement in preference to his sworn evidence, at least without setting out its reasons for doing so. We accept that submission.

[78] The Court of Appeal also relied on an email sent by Mr Shale on 17 October 2013, the day after the 16 October meeting.[80] In that email, Mr Shale referred to the Hamilton agencies as being "committed to turning off the trademe feed as our individual agreements finished. … We will offer it as a vendor funded option, but will not include in standard packages". Mr Taylor said the fact that this email was sent after the 16 October meeting was overlooked by the Court of Appeal. He said the email was Mr Shale's inference from what had been discussed at the 16 October meeting, a matter that had not been acknowledged by the Court of Appeal. In addition, Mr Shale sought to explain the email in his brief of evidence, referring to it as "a reference to some of the companies stating in the meeting that they would no longer automatically load their listings to Trade Me". He said he meant that the Hamilton agencies had indicated an intention to either use a vendor funded model or not to use Trade Me at all. His evidence in re-examination was that it was not an agreed commitment, but rather everyone had made up their mind beforehand.

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79 CA judgment, above n 5, at [40].
80 At [43].

[79] We accept that the Court of Appeal should have acknowledged these qualifications to Mr Shale's evidence. Nevertheless, the Court was entitled to consider that his explanations did not adequately explain away the clear terms of the email, which unequivocally stated that the Hamilton agencies had made a commitment along the lines found by the High Court Judge to be the nature of the arrangement between them.

(iii) Email of Mr Metcalfe

[80] The Court of Appeal also relied on an email dated 12 October 2013 from Mr Metcalfe of George Boyes, the Hamilton franchisee of LJ Hooker, to Mr O'Rourke.[81] In that email, Mr Metcalfe responded to an invitation from Mr O'Rourke to the 16 October meeting in these terms:

> … I now find it puzzling that you want to include me in this meeting or any agreement around Trade me. Sure you will be worried that I may break ranks and drive Trade me company funded advertising in the future and thus gain market share, at my lesser level of stock volumes this option is affordable for me. Until we play on the same playing field you and the others cannot serious[ly] expect me to support your initiatives.

[81] Mr Taylor strongly objected to the Court of Appeal's reliance on this email for two reasons. The first was that the Court did not acknowledge Mr O'Rourke's reply to Mr Metcalfe, which was as follows:

> The nature of the meeting is around what we can do as an industry to better promote realestate.co.nz. You are welcome to attend and share any ideas but understand if you prefer not to participate.

[82] The second reason was that Mr Metcalfe did not give evidence at the trial due to ill health, so the email was a hearsay statement.[82] The appellants say it had been agreed that the email in question was not admissible to prove the truth of its contents, (that is, that there was, in fact, an "agreement around Trade Me"). But there was no ruling to that effect and some dispute about what had been agreed between counsel about the evidential status of the email.

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81 At [45].

82 Evidence Act 2006, s 4(1) definition of "hearsay statement".

[83] The background to the email was that Mr Metcalfe had spoken to Mr King earlier in October. The Commission's case was that during this call Mr King had told Mr Metcalfe that an agreement in relation to Trade Me had been reached. There was evidence that only Mr King could have conveyed that information to Mr Metcalfe. Mr King denied telling Mr Metcalfe this and maintained that position in cross-examination. The Court of Appeal did not refer to this, and Mr Taylor said this meant the Court had essentially preferred the hearsay and arguably inadmissible evidence of Mr Metcalfe to the sworn evidence of Mr King.

[84] We do not need to resolve the admissibility issue. The end result was that the Commission sought to rely on the email as proof that Mr King had told Mr Metcalfe an agreement among the Hamilton agencies had been reached. But in the face of Mr King's denials of this, we do not consider the email had the probative value attributed to it by the Court of Appeal.

[85] We accept, therefore, that there is some substance to the appellants' criticisms of the above aspects of the Court of Appeal judgment. However, that conclusion assists the appellants only if, on the remaining evidence, the Courts below should have concluded that no arrangement was entered into.

Our assessment

[86] The appellants accepted the findings of fact made by the High Court Judge, and we do not intend to traverse those in detail because they are not contested.

[87] The Commission's case in both the Courts below and this Court was that the evidence of what happened before the 30 September meeting, what happened at that meeting and what happened after it when considered together prove the existence of an arrangement that the Hamilton agencies would not absorb Trade Me listing fees as a default position, as most previously had done, and that all would withdraw listings from Trade Me in January 2014.

[88] The appellants argue that, notwithstanding the attendance of representatives of the Hamilton agencies at the 30 September meeting and the communication of their intentions to each other, no arrangement was entered into. Rather, each agency

decided prior to the meeting not to absorb the Trade Me listing fee after the new Trade Me fee structure took effect and also to discontinue their current Trade Me listings at a time in the future. Thus, the fact that the Hamilton agencies all implemented those steps at about the same time was a result of conscious parallelism, rather than any arrangement between them.

[89] As the High Court Judge pointed out, the fact that each of the Hamilton agencies had reacted strongly to Trade Me's proposed new fee structure and reached the view that they would not absorb the cost was not an answer to the Commission's allegation that an arrangement was entered into between them.[83] The fact that the reaction of the Hamilton agencies was a logical reaction to Trade Me's announcement did not mean the Hamilton agencies had not entered into an arrangement as alleged by the Commission. It is true that Trade Me appeared to wish agencies to promote Trade Me listings on the basis that customers or salespersons would pay for them. What Trade Me had not contemplated was that agencies would, instead, steer customers to realestate.co.nz and away from Trade Me.

[90] While the evidence relied on by Mr Taylor to show that each Hamilton agency made its own decision before the 30 September meeting (at least tentatively) has some force,[84] it does not confront the Commission's case that they entered into an arrangement to this effect at that meeting. As the High Court Judge said, "The independence of the agencies' prior decisions is undermined by the mutuality of their understanding arising from the 30 September 2013 meeting."[85] The reasons given by the High Court Judge that are summarised above at [65] supported that conclusion.

[91] There was evidence that a risk existed that one or more agencies may absorb the Trade Me listing fee as a way of attracting customers and were capable of doing so. In his evidence, Mr Lugton said such a risk existed, although he did not mention this risk in his interview with the Commission and it was not discussed at the meeting. Mr O'Rourke and Mr Lugton both accepted that, despite the significant cost

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83 HC judgment, above n 2, at [190].

84 One of the participants in the 30 September meeting, Mr Singh of Monarch, accepted in evidence that Monarch had not made up its mind before the meeting whether or not to absorb the new Trade Me listing fee. Mr Singh was optimistic Harcourts would be able to negotiate a more favourable rate for the Harcourts group that made absorbing the cost viable.

85 At [190].

implications of Trade Me's new fee structure, their agencies could have absorbed the cost if they had had to. And Mr Couch of Lodge accepted that if another agency had not adopted the vendor funding model for the Trade Me listing fee, Lodge would have had to re-evaluate its position eventually. Karen Worley of Realty Services Ltd (the parent company of Success and Eves) also said that if competitors started absorbing the cost of Trade Me, Success and Eves would have to match them.

[92] As Mr Dixon pointed out, it is not unusual for market participants to decide upon a course of action, only to be shifted from that course by the demands of rivalry with competitors. Collusion prevents that competitive dynamic from eventuating. We agree. The situation in this case is similar in this respect to that in *Commerce Commission v Caltex New Zealand Ltd*.[86] In *Caltex*, each of the petrol retailers wished to discontinue offering free carwashes to purchasers of fuel for $20 or more. Caltex did so unilaterally but lost business and had to resume the offer of a free carwash.[87] It was only when the arrangement was entered into, giving each some assurance that the others would do the same, that the companies involved were able to implement their desired strategy of ceasing the offer of free carwashes. A similar example can be found in the present case. Mr Singh's evidence was that when Trade Me Property was first launched, it was not used by the Harcourts group, of which Monarch is a member. But Harcourts was effectively forced to offer Trade Me listings after receiving pressure from agents who believed they were losing listings to agencies that did.

[93] The High Court Judge relied on evidence of communications prior to the 30 September meeting indicating an intention to enter into an arrangement, which included notes from NZRN conference calls to the effect that the Hamilton agencies would be likely to cease offering agency-funded Trade Me standard listings and would coordinate a response.[88] The notes also record general concern that another real estate group would absorb the cost of Trade Me listings and use it as a competitive advantage.[89]

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86 *Commerce Commission v Caltex New Zealand Ltd* (1999) 9 TCLR 305 (HC) [*Caltex* (substantive)]. See below at [143].

87 At 307.

88 HC judgment, above n 2, at [57]–[62].

89 At [54].

[94] The High Court Judge also referred to an email from Joanne Baylis of realestate.co.nz to her manager after meeting Mr O'Rourke and Mr Shale in which she said "2 of my key Hamilton offices ready to group together and boycott".[90] Ms Baylis said her reference to a "boycott" was "to describe the market's dissatisfaction nationally, with Trade Me's pricing mistake".

[95] We conclude that the evidence of what happened before the 30 September meeting does not lead to a conclusion that all the participants at the meeting had an immutable, individually-determined position prior to that meeting. At best, they had a common reaction to Trade Me's changed fee structure, but they were also concerned about how competitors would respond to this.

[96] The evidence summarised by the High Court Judge indicates that the participants in the 30 September meeting had widely differing versions of what occurred at the meeting, though it was generally accepted that there had been a discussion of the response to Trade Me's price announcement. The part of the meeting where this occurred was described by some as chaotic, perhaps reflecting the anger at the actions of Trade Me. The appellants say that each party to the meeting, having concluded quite independently of the others that it would not absorb the new Trade Me listing fee and would withdraw Trade Me listings, announced this to the meeting in a way which reflected that each had reacted in the same way to the Trade Me announcement. Thus, the argument went, the fact that all agencies acted in essentially the same way and subsequently withdrew the listings from Trade Me at the same time was mere conscious parallelism.

[97] There are a number of reasons to be sceptical of this. As already mentioned, the independent decisions said to have been reached before the meeting were not implemented and were obviously changeable, depending on the competitive response of others. It was acknowledged that, if one agency had broken ranks, others would have had to consider following suit.[91] Second, it did not reflect at least some of the evidence from those who were present at the meeting.

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90 At [82].
91 See above at [91].

[98] As already stated, Mr Coombes was confused as to whether the agreement to vendor fund concerned standard listings or feature listings.[92] But despite this confusion, Mr Coombes was adamant that an agreement was reached to adopt a vendor funding model for Trade Me listings and to remove existing listings in January 2014. When pressed in cross-examination, Mr Coombes maintained that he gave a commitment that he would use vendor funding for Trade Me advertisements and that others had said they would do the same.

[99] Mr Lugton specifically acknowledged that agreement had been reached along the lines found by the High Court Judge. He said there was a "strength of understanding" that all existing listings would be removed from Trade Me by 20 January 2014. Listings were from there on to be vendor funded.

[100] Mr King acknowledged that some people at the meeting might have said "hey that's what [Trade Me] want us to do that's what we'll do". He had put this more damagingly in his interview with the Commission, where he made the same comment, but ended it with "let's do it".

[101] We agree with the High Court Judge's conclusion that there was an apparent meeting of the minds of the representatives of the Hamilton agencies at the meeting, from which arose an expectation that:[93]

(a) none of the Hamilton agencies would continue to offer, as a default option, the absorption of the Trade Me listing fee; and

(b) all of the Hamilton agencies would withdraw their standard listings from Trade Me in January 2014 (other than Success, which already used a vendor funding model).

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92 See above at [76].
93 HC judgment, above n 2, at [180].

[102] The Commission's case also relied on communications that occurred after the 30 September meeting. In particular:

(a) Ms Baylis made a note of a meeting with Mr King in which she recorded that Mr King and the other Hamilton agencies had met and decided "they will all collectively move across [to realestate.co.nz]".

(b) Mr Lugton issued a note to his staff on 17 October 2013 containing the statement all Hamilton agencies "have agreed to stop supporting TradeMe" and "From 20 Jan onwards TradeMe advertising will solely be at the Vendor[']s cost at $159".

(c) Mr Shale said in an email to the Bayleys franchisor on 17 October that "We have 7 residential brands in Hamilton … committed to turning off the trademe feed".[94]

[103] The Commission drew support from the fact that Monarch withdrew its listings from Trade Me in January 2014, even though it could have continued the outgoing Trade Me pricing model until April 2014. Online did likewise, though it was able to load them for free under the subscription plan of its franchisor, Ray White, and still had to pay Ray White for the ability to do so.

[104] The Commission also points to the evidence of both Mr Shale and Mr Coombes that they were contacted by Mr King in mid-January challenging them on why they still had listings on Trade Me. This evidence was, however, disputed by Mr King.

[105] Mr Taylor's response to this is that the conduct of the Hamilton agencies after the 30 September meeting "simply reflected the consequence of what they had each individually decided they would do".

[106] Mr Taylor's reliance on the findings of the High Court Judge is perhaps surprising, given the Judge found, contrary to the appellants' submission, that an

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94 However, this email has to be read subject to the qualifications discussed above at [78].

arrangement had been entered into by the Hamilton agencies. However, Mr Taylor said the High Court Judge's finding was based on a misapplication of *Giltrap*. He relied on the following paragraph in the High Court judgment:

> [188] There was no sense of conditionality objectively to be drawn from any of the 'will not absorb' or 'will withdraw' expressions. Each was an expression of what the individual agency would do, without regard for the others, although a number of the agencies expressed taking comfort from the universality of their competitors' responses, at least in the sense it affirmed the sensibility of their own choice. And some of the agencies had expressly earlier noted risk from divergent approaches. But whether the defendants' comprehensions included a sense of reciprocity or moral obligation between them is irrelevant. The majority judgment in *Giltrap* dictates objective focus be on "the concepts of consensus and expectation".
>
> (footnote omitted)

[107] The statement that moral obligation (or, in our terms, commitment) is irrelevant is wrong. If that was the basis on which the Judge found that there was an arrangement among the Hamilton agencies, that would be a basis for challenging the finding. But we do not think it was: the statement in the paragraph that appears immediately before the Judge's conclusion makes that clear. In that paragraph, the Judge said:

> [192] It is enough to establish consensus here that the defendants communicated to each other their intended and common course. And the consensus gave rise to the defendants' expectations of how they each would act. That is what objectively establishes "communication among the parties of the assumption of a moral obligation".
>
> (footnotes omitted)

[108] That statement makes it clear that the Judge was not treating moral obligation as irrelevant. On the contrary, he concluded (consistently with the majority judgment in *Giltrap*) that a consensus had been reached, and that this gave rise to expectations as to how each agency would act.[95]

[109] Ultimately, the criticisms of the Judge's reasoning can be put to one side because we have reached the same conclusion as the Judge did, having applied the law as we have explained it above, which largely corresponds with the position advocated by Mr Taylor and accepted by Mr Dixon. The consensus reached by the Hamilton agencies involved a commitment from each of them to adopt a vendor funded model

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95 At [193].

for Trade Me listings and to remove existing listings in January 2014. This created an expectation as to the common course of conduct the Hamilton agencies would follow.

Did the Hamilton agencies give effect to the arrangement?

[110] The High Court Judge found that by removing standard listings from Trade Me and moving to vendor funding of such listings, the Hamilton agencies gave effect to the arrangement.[96] The Court of Appeal agreed.[97]

[111] The appellants did not challenge this before us. Rather, their case was that there was no arrangement to which effect could be given. We have already rejected that contention.

Did the arrangement have the proscribed purpose or effect?

[112] The Commission's case is that the arrangement to which the Hamilton agencies were party had the purpose or effect of fixing, controlling or maintaining the price of services provided by the Hamilton agencies in competition with each other.

[113] The High Court Judge concluded that the arrangement did not have this effect and, since it did not have that effect, it could not have had that purpose either.[98] The Judge found that the arrangement was that the agencies would not absorb the Trade Me listing fee, meaning that such fees would be vendor funded.[99] But because the vendor funding model, as he found it to be, allowed each agency a discretion as to how the Trade Me listing fee was funded (including the possibility of absorbing the cost itself), the arrangement did not interfere with the competitive setting of price or constrain the freedom of the Hamilton agencies to charge any price.[100] Each agency was free to absorb the entirety of the cost and charge the customer nothing. For those reasons he concluded that the arrangement did not provide for the fixing, controlling or maintaining of the price of the relevant services.

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96 HC judgment, above n 2, at [200].
97 CA judgment, above n 5, at [72]–[74].
98 HC judgment, above n 2, at [233]–[234].
99 At [215].
100 At [227] and [231].

[114] The Court of Appeal disagreed with the High Court Judge's conclusion that the arrangement had neither the purpose nor effect of price fixing. It disagreed with the Judge's view as to the vendor funding model to which the parties had agreed. And it did not see the existence of this discretion as leading to a conclusion that there was no purpose or effect of fixing, controlling or maintaining the price.[101]

[115] The Court's conclusion was:

> [89] So here the understanding was of a starting point of vendor funding, while recognising that there would be occasions on which the agency may choose to fund. In our view, to find that the knowledge there would be exceptions to the starting point was fatal to there being an anti-competitive effect would defeat the purpose of s 30. The purpose of that section was to deem anti-competitive behaviour in the event of an understanding likely to [affect] price. There can be no doubt that was what transpired in September 2013 between the Hamilton agencies. We agree with Mr Dixon's submission that all of those vendors after January 2014 who chose not to list on Trade Me when faced with having to pay for it, and indeed those who did pay the fee, lost the opportunity to be offered a price which had been set for an agency operating in response to working competitive market forces. We are unable to agree with the Judge's finding that the arrangement or understanding "did not interfere with the competitive setting of price". Plainly the agreement in principle to withdraw from agency-paid Trade Me advertising would affect price; if the vendor did not have a Trade Me advertisement it had lost an allowance or credit that had been previously provided. The price for the real estate agencies' services was correspondingly more.
>
> (footnote omitted)

[116] The Court also expressed its disagreement with the High Court Judge's finding that the arrangement allowed an ability to depart from vendor funding in particular necessary or desirable circumstances. It did not consider that finding was supported by the evidence.[102]

Appellants' argument

[117] Mr Taylor argued that the Court of Appeal's approach was based on three significant errors:

(a) It should not have relied on the overseas cases it cited in support of its conclusion.

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101 CA judgment, above n 5, at [93].
102 At [92], referring to HC judgment, above n 2, at [215].

(b) It failed to undertake an analysis of the effect of the arrangement to determine whether the purpose or effect of the arrangement was that proscribed by s 30. In particular it did not address the fact that, even on the Commission's case, exceptions to the vendor funding model were allowed and that the arrangement related to only a small component of the end price and should have been found to be within what he described as a "de minimis" exception.

(c) It wrongly departed from the High Court's decision that there was no such purpose or effect.

Vendor funding

[118] Before we address those three alleged errors by the Court of Appeal, we discuss the apparent difference of view between the Courts below as to what was meant by "vendor funding".

[119] The High Court Judge summarised the position as follows:[103]

> By 'vendor funding', they meant comparably with other third party advertising, including Trade Me feature listings – in principle, to be paid for by the vendor. But that was not to prevent, in particular necessary or desirable circumstances, the agency and/or the agent bearing some portion or all of that third party expense.

[120] The Judge continued:

> [227] By 'vendor funding', the agencies meant only some portion of the new cost would be borne collectively by vendors – that is, no agency 'was going to company fund it'. That is the persistent theme of the evidence from the Commission agency witnesses who attended the 30 September 2013 meeting. It is also Monarch's Mr King's evidence, under cross-examination from Mr Dixon: "… there can be vendor funding by someone paying a 100%. There can be vendor funding by someone just paying part of it. There can be agent funding." On any individual transaction in the supply of real estate sales services or real estate advertising services, the full range of price setting options remained.

[121] The Court of Appeal saw "vendor funding" as contemplating two possibilities, namely that the Trade Me listing fee would be paid for by the customer or that it would

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[103] HC judgment, above n 2, at [215].

be paid for by the salesperson (or shared between them).[104] That meant that the fact that a salesperson paid the Trade Me listing fee was not inconsistent with vendor funding, as the High Court Judge appeared to believe it was.[105] The Court agreed with the High Court Judge that, while there were references at the September meeting to future listings being vendor funded, that was not regarded as being a policy that had to be implemented on every occasion. However, the arrangement was that generally either the customer would pay the Trade Me listing fee or, if it was not the customer, it would be the salesperson. The agency would not absorb the fee itself.[106]

[122] The Court considered that "payment for Trade Me advertising by an individual agent was part of, and entirely consistent with, the arrangement regarding vendor funding as pleaded by the Commission".[107] The Court found that "the discretion to depart from the arrangement or understanding was limited to the ability for the agency to choose to pay the Trade Me listing fee".[108] The Court considered the High Court Judge "inflated the scope of the discretion to depart from the arrangement that he ultimately found was fatal to the Commerce Commission's claim".[109] The submission for the appellants is that the Court of Appeal erred in narrowing the scope of the discretion.

[123] The Court of Appeal's focus appeared to be on the definition of "vendor funding" as pleaded by the Commission, which was that "the Trade Me Per-Listing Fee would be funded by the Vendor, or the real estate agent". This was a black and white description that did not allow for some sharing of costs between the agency, the salesperson and/or the customer. In contrast to that, the High Court Judge's focus was on what the evidence established, which he considered was a more nuanced position that allowed for the cost-sharing possibility. Although he did not make a finding to this effect, it seems clear that the High Court Judge did not consider that the Commission had proven that the arrangement was to the effect that the Hamilton agencies would implement vendor funding as pleaded by the Commission.

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104 As we have described above at [19].
105 CA judgment, above n 5, at [22]–[23] and [78]; and HC judgment, above n 2, at [227].
106 At [82].
107 At [23].
108 At [78].
109 At [23].

[124] We consider the evidence did support the High Court Judge's finding. Evidence from the Commission's witnesses – Mr Shale, Mr Lugton and Mr Coombes – did not provide a basis for a finding that what was agreed was that the Hamilton agencies would never pay any of the Trade Me listing fee. Rather, the arrangement was that they would not absorb the cost of such listings as they had done hitherto (other than Success, which had not done so).

[125] But we do not think this takes the appellants' case anywhere. The High Court Judge considered vendor funding allowed for cost sharing in appropriate cases.[110] The Court of Appeal considered it did not, but that there was nevertheless room for agencies to depart from the arrangement as to vendor funding (as the Court of Appeal defined it) in individual cases, without breaching the commitment made under the arrangement.[111] In practice, these positions are not materially different.

[126] We now turn to what the appellants say were the three "significant errors" in the Court of Appeal judgment. We will deal with them in the order in which they appear above.[112]

Reliance on overseas cases

[127] The appellants argue that the Court of Appeal placed too much stock on the three overseas decisions it relied upon: *Dole Food Co Inc v European Commission*,[113] *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd*,[114] and *Plymouth Dealers' Assoc of Northern California v United States of America*.[115] The Court of Appeal saw these cases as supporting the proposition that an arrangement to fix or control the starting price or offer price for goods or services may have the purpose or effect of fixing or controlling the overall price.[116]

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110 HC judgment, above n 2, at [215].
111 CA judgment, above n 5, at [82].
112 See above at [117].
113 Case T-588/08 *Dole Food Co Inc v European Commission* ECLI:EU:T:2013:130, [2013] 4 CLMR 31.
114 *CC (NSW)*, above n 32.
115 *Plymouth Dealers' Assoc of Northern California v United States of America* 279 F 2d 128 (9th Cir 1960).
116 CA judgment, above n 5, at [87]. But see Edward Willis "The *Lodge* Case and the Misapplication of the Per Se Cartel Provisions of the Commerce Act 1986" (2019) 50 VUWLR 551 at 563–567.

[128] The Court of Appeal relied on the following passage from the decision of the European Court of Justice in *Dole Food Co*:[117]

> [550] The mere fact that actual prices and quotation prices are not "closely" correlated, as stated in recital 352 to the contested decision, is not sufficient to call in question the probative value of the evidence adduced by the Commission which enabled it to conclude that quotation prices served at least as market signals, trends or indications as to the intended development of banana prices and that they were relevant for the banana trade and the prices obtained.

[129] The Court noted that the approach set out in that paragraph had been adopted in the decision of the United Kingdom Competition Appeals Tribunal in *Balmoral Tanks Ltd v Competition and Markets Authority*.[118]

[130] We see that passage in *Dole Food Co* quoted above as reflecting the Court's assessment of the facts of that case, rather than as a general statement of principle. In *Dole Food Co*, competing suppliers coordinated quotation prices for the banana market in Northern Europe. Prior to announcing quotation prices to the market each week, competitors discussed price setting factors, disclosed price trends and exchanged indicative quotation prices. After reviewing the evidence, the Court of Justice held that although quotation prices did not directly reflect actual prices, "The function of quotation prices is to lift market prices higher even if, ultimately, market prices are lower than announced prices."[119] This was in the context of an allegation that there was a "concerted practice" between competitors, rather than an arrangement as in this case. The decision of the Court of Justice was upheld on appeal.[120]

[131] Next, the Court of Appeal relied on this passage from *Plymouth Dealers'*:[121]

> The test is not what the actual effect is on prices, but whether such agreements interfere with "the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." … The competition between the Plymouth dealers and the fact that the dealers used the fixed uniform list price in most instances only as a starting point, is of no consequence. It *was* an agreed starting point; it had been agreed upon between competitors; it was in

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117 At [83].

118 At [84], citing *Balmoral Tanks Ltd v Competition and Markets Authority* [2017] CAT 23, [2018] Comp AR 61 at [49].

119 *Dole Food Co*, above n 113, at [551].

120 Case C-286/13 P *Dole Food Co Inc v European Commission* ECLI:EU:C:2015:184, [2015] 4 CMLR 16.

121 CA judgment, above n 5, at [85], citing *Plymouth Dealers'*, above n 115, at 132.

> some instances in the record respected and followed; it had to do with, and had its effect upon, price.
>
> (footnote omitted)

[132] In *Plymouth Dealers*', competing car dealerships agreed on a uniform price list. The Ninth Circuit Court of Appeal upheld the conviction for a per se violation of the Sherman Antitrust Act despite the fact the list was not always adhered to. However, there was evidence that the list was in some instances respected and followed, and that the list price was set high "so that the ultimate percentage of gross profit over the factory price could be higher".[122]

[133] Mr Taylor argued that the Court was wrong to rely on *Plymouth Dealers*' because of the different statutory context in the United States, where the categorisation of price fixing as a per se contravention of the Sherman Act is a judicially created construct rather than a statutory provision. We consider that the important distinction is that the arrangement in the present case concerned only a component of the price, not the overall price. Nevertheless, *Plymouth Dealers'* illustrates that an agreement as to the offer price may have the effect of lifting the final price.

[134] Finally, the Court of Appeal relied on the following statement from Lindgren J in *CC (NSW)*:[123]

> [178] Concretes also submits that because the supposed UFT understanding left the Tenderers with a great deal of freedom as to the price which they would charge, it did not have the effect of controlling price competition and therefore did not fall within the terms of s 45A. It seems to me, however, that putting to one side de minimis cases, the degree of control, although relevant to penalty, is not relevant to the issue of contravention.

[135] We accept that the Court of Appeal's reliance on *CC (NSW)* in this context is more problematic. *CC (NSW)* concerned an agreement whereby the successful tenderer would pay a fee of $750,000 to each of the unsuccessful tenderers. On the evidence before him, Lindgren J concluded that the agreement was likely to have the effect of controlling (increasing) the price of the tender.[124] The case does not support the proposition that an arrangement to fix or control the offer price may have the

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122 At 133.
123 CA judgment, above n 5, at [86], citing *CC (NSW)*, above n 32.
124 At [199].

purpose or effect of fixing or controlling the overall price. *CC (NSW)* is, however, relevant in other respects, as will become apparent.

[136] So, we accept there is some substance to the appellants' complaint about the Court of Appeal's reliance on these cases. We do not place the same reliance on them that the Court of Appeal did. *Dole Food Co* and *Plymouth Dealers'* do, however, show that an agreement as to the offer price may have the effect of controlling the final price. But that possibility does not obviate the need for proof on the facts that the effect or likely effect of the arrangement was to fix or control the price within the meaning of s 30(1).

Failure to undertake analysis of effect

[137] Mr Taylor criticised the Court of Appeal for failing to undertake an analysis of the effect of the arrangement, as required by s 30. Section 30 deems an arrangement that has the purpose or effect proscribed by s 30 to be an arrangement that has the effect of substantially lessening competition. So, if conduct comes within s 30, it automatically contravenes s 27. Mr Taylor argued that the Court of Appeal confused the "per se" nature of s 30 as obviating the need to establish that the ingredients of s 30 itself were satisfied. If the Court of Appeal had done that, it would have been in error. But we think it is clear that the Court did not suffer from this confusion and did not make such an error.

[138] The real gravamen of the appellants' criticism of the Court of Appeal appears to be its conclusion that an arrangement to adopt vendor funding as the model, but allow for exceptions, affected the price for the real estate services conducted by the Hamilton agencies. There are two aspects to this. The first is the fact that exceptions were permitted, so that some freedom to depart from the vendor funding model was a feature of the arrangement. The second is the fact that the effect related only to the price for a Trade Me standard listing, which was only a small component of the overall price for the services provided to customers whose properties were sold.[125] We will deal with these in turn.

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[125] The position would have been different in cases in which no sale occurred. In those cases, the advertising charges were one of the few, if not only, charges paid by the customer so the impact of having no standard Trade Me listing or of having to pay for it would have been more significant.

Exceptions permitted

[139] The proscribed purpose or effect in s 30 is the fixing, controlling or maintaining of prices. It was not suggested before us that the arrangement had the purpose or effect of *fixing* the price for real estate services, or of *maintaining* that price (if anything, it was an agreement to change prices from the status quo). So, the focus is on whether the arrangement had the purpose or effect of *controlling* prices.

[140] For the Commission, Mr Dixon argued that if an arrangement interfered with the competitive setting of price by constraining, in some way, the parties' pricing freedom, then it had the effect of controlling price for the purposes of s 30. He referred to the seminal statement of the United States Supreme Court in *United States v Socony-Vacuum Oil Co Inc* when explaining why price fixing was per se unlawful under the Sherman Act.[126] In that case the Court said:[127]

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

[141] A similar approach has been taken in Australia. In *CC (NSW)*, Lindgren J said, when referring to the then Australian equivalent of s 30, s 45A of the Trade Practices Act 1974 (Cth):[128]

> [168] The word "control" is not defined in the [Trade Practices] Act. Its natural or ordinary meaning is "to exercise restraint or direction over" (the *Macquarie Dictionary*) or "to exercise restraint or direction upon the free action of" (the *Oxford English Dictionary*) a person or thing. There are degrees of control and there may be control although the "restraint" or "direction" is not total. An arrangement or understanding has the effect of "controlling price" if it restrains a freedom that would otherwise exist as to a price to be charged.

[142] In that case, Lindgren J held that an agreement between competitors to incorporate a specified "success fee" into their tenders for a contract had the effect of

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126 *United States v Socony-Vacuum Oil Co Inc* 310 US 150 (1940).

127 At 221. See also at 223.

128 *CC (NSW)*, above n 32. This passage was adopted by the Full Federal Court in *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* [2016] FCAFC 42, (2016) 244 FCR 190 at [554].

controlling price even though it "left the Tenderers with a great deal of freedom as to the price which they would charge".[129]

[143] The decision of the High Court in *Caltex* is to similar effect. In that case, three petrol retailers entered into an arrangement to abandon a practice of offering a free carwash to any person making a purchase of $20 or more of petrol. A carwash was worth about $2 at the time. The arrangement did not involve any agreement as to the prices that would be charged for petrol or carwashes. Salmon J found that the arrangement had the effect of controlling the price of petrol sold by the parties to the arrangement because it restrained the free action of the parties in setting the price.[130]

[144] Salmon J adopted the findings made by Elias J in rejecting an application to strike out the Commission's claim against Caltex and the other petrol retailers.[131] In her decision, Elias J found that if the free carwash promotion was an integral part of the price for petrol or carwashes, the arrangement to remove the free carwash had the effect of raising prices to the extent of the previous discount on the price of a carwash. It did not matter that the parties could differentiate their prices on some other basis. She described the argument to the contrary by Caltex's counsel as "misconceived". She also rejected an argument that the removal of the free carwash promotion did not prevent competition on price (in the absence of a further understanding as to pricing) as "sophistry".[132] Her decision was upheld by the Court of Appeal.[133]

[145] These authorities as to what amounts to "controlling" prices are longstanding and we see no reason to depart from them.

[146] What this means is that the Commission was required to prove only that the arrangement had the purpose or effect of restraining a freedom that would otherwise have existed as to the price to be charged by the Hamilton agencies to customers. Equally, that was what the Court of Appeal had to find as proven. Making a finding to that effect was a determination that the arrangement had the purpose or effect that

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129 See above at [134]–[135].
130 *Caltex* (substantive), above n 86, at 311.
131 At 312–313, citing *Commerce Commission v Caltex New Zealand Ltd* [1998] 2 NZLR 78 (HC) [*Caltex* (strike-out)].
132 At 84.
133 *Caltex New Zealand Ltd v Commerce Commission* CA69/98, 3 September 1998.

s 30 proscribes. The Court of Appeal did make such a finding.[134] So we reject Mr Taylor's submission that the Court of Appeal failed to analyse the effect of the arrangement to determine whether it had the effect that s 30 proscribes.

[147] The arrangement to discontinue the practice of absorbing the Trade Me listing fee has many similarities to the arrangement in *Caltex*. As in *Caltex*, the parties committed to discontinuing a free service but without any constraint on the actual price they could charge for the principal product. There is no basis for distinguishing the present case from *Caltex* on this point. It is true that the free carwash (valued at $2) provided a proportionately greater benefit for the purchaser of $20 worth of petrol in *Caltex* than a free Trade Me standard listing provided to a customer whose property sold and who therefore paid full commission. We will deal with that factor later.[135]

[148] As we see it, the fact that in any individual transaction an agency could decide to absorb the Trade Me listing fee does not mean there was complete freedom on the part of agencies in relation to every transaction into which they entered. On the contrary, agencies were restrained by the agreed position of adopting vendor funding as the default option. The agencies could not simply defy the arrangement and adopt an agency funding model as their default option without failing to meet the agreed expectation that founded the arrangement. If an agency decided to absorb the cost of the Trade Me listing fee as a default position or even on a regular basis, it would be cheating on the arrangement. So, although allowed some freedom, the Hamilton agencies were not free to ignore the arrangement to adopt a vendor funding model as agreed.

Small proportion of overall price

[149] The High Court Judge rejected what he called the appellants' "de minimis" argument. The appellants argued the cost of a standard Trade Me listing ($159) was not an integral or materially significant portion of the price for real estate services. The Judge said the availability of Trade Me listings appeared to be materially significant in competition between agencies to secure listings. Control of that aspect

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134 CA judgment, above n 5, at [89].
135 See below at [149]–[161].

of the price, whether as a proportion of advertising costs, as a proportion of overall commission to the agency or simply in dollar terms, would engage s 30. He noted that marketing costs had to be paid whether or not a sale occurred.[136]

[150] The Court of Appeal agreed with the High Court Judge's analysis of this argument.[137] This was on the basis that the price for a standard Trade Me listing would be a significant part of the price paid by a customer to an agency where the property was not sold. Even where the property was sold, the Court of Appeal considered the Trade Me listing fee would still be a significant part of the price of the services provided by the Hamilton agencies.[138] It noted that, for some agencies, the cost of absorbing the Trade Me listing fee for all customers under the new pricing regime would have been in the order of $200,000 per annum, which illustrated the materiality of the Trade Me listing fee as a component of the price charged by the agency.[139] In any event, the Court considered that "price" included any component of a price.[140]

[151] Mr Taylor argued that the arrangement found to have been entered into affected only one component of the price charged by the Hamilton agencies for real estate services, the Trade Me listing fee. That fee was $159 plus GST. That was a small proportion of the overall price for real estate services (Mr Dixon said the average commission in Hamilton was around $15,000). An arrangement with such a limited scope could not have the purpose or effect of controlling the overall price of real estate services, being the services in respect of which the Hamilton agencies competed with each other. Mr Taylor argued this submission was supported by both Australian and New Zealand authorities.

[152] Mr Taylor highlighted the observation made by Lindgren J in *CC (NSW)* that it is not enough for the Commission (the ACCC in that case) to establish that an arrangement had the effect of controlling a component of the price. It was required to establish an effect of controlling the overall price.[141]

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136 HC judgment, above n 2, at [213].
137 CA judgment, above n 5, at [97].
138 At [97]–[98].
139 At [100].
140 At [99].
141 *CC (NSW)*, above n 32, at [184].

[153] The recent Australian case, *ACCC v Olex Australia Pty Ltd*, which was also a case involving an allegation of price fixing, contained a similar observation.[142] In that case, the alleged arrangement was between suppliers of electrical cable. It was alleged there was an arrangement as to the fees to be charged for cable cutting, which, Beach J found, was not a materially significant proportion of the overall price of cut cable. Beach J said:

> [657] Generally, more needs to be shown than merely that a provision has the likely effect of controlling a *component* of the price. It must have the likely effect of controlling the *overall* price, ie be a materially significant proportion of the price. Competition occurs for the total price of the cut cable.

[154] Mr Taylor also relied on *Caltex* for the proposition that where the allegation is that parties have fixed or controlled a component of the price, the Commission must establish that that component was an integral component of the price. Elias J made that clear in her judgment.[143] Salmon J adopted the same approach.[144]

[155] We accept that there will be cases where the component of the overall price that is affected by the arrangement is so insignificant that it cannot have the effect of controlling the overall price, assuming that the overall price is otherwise determined by market forces. In *Olex*, the Court found there was no realistic ability to control the overall price of electrical cable by controlling the price for cutting services.[145] That overall price was dependent on market forces and competitive constraints.[146] So controlling that component of the price of cut cable did not amount to controlling the overall price. In contrast, Salmon J found in *Caltex* that the carwash "did operate as an integral part of petrol pricing or was a discount in relation to petrol", so controlling that component of the price did amount to controlling the overall price.[147] In *CC (NSW)*, Lindgren J also found that the arrangement alleged in that case did, in fact, affect the overall price.[148]

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142 *ACCC v Olex Australia Pty Ltd* [2017] FCA 222, (2017) ATPR ¶42-540.
143 *Caltex* (strike-out), above n 131, at 84.
144 *Caltex* (substantive), above n 86, at 313 and 322–323.
145 *Olex*, above n 142, at [655].
146 At [658].
147 *Caltex* (substantive), above n 86, at 323.
148 *CC (NSW)*, above n 32, at [198].

[156] We agree with Mr Taylor that the Court of Appeal's observation that "price" includes a component of the price was incorrect as a general statement of the law, without qualification.[149] As we see it, the correct position is that price includes a component of the price unless that component is insignificant in competition terms. We do not see this as a mathematical calculation, however. In any event, we do not see the Court of Appeal's observation that price includes a component of the price as founding its decision. The Court made the observation after it had already determined that the arrangement between the Hamilton agencies did have the purpose or effect of controlling the overall price of real estate services. We turn now to consider whether it was correct to do so.

[157] The evidence established that Trade Me listings were a significant factor in competition between the Hamilton agencies, as both the High Court and Court of Appeal found.[150] We accept that the fee of $159 plus GST was a small amount when considered alongside the commission payable by the customer if the property was sold (on average $15,000). But as the Courts below found, it was still significant in competition terms. For customers whose property did not sell, there was no commission to pay but the Trade Me listing fee would still have been payable and would be all or a substantial portion of the amount payable to the agency in that event.

[158] The significance of Trade Me advertising in the competition between agencies for new listings is illustrated by the evidence of Mr Singh of Monarch that was referred to earlier. He said in his Commission interview that Harcourts (Monarch was a Harcourts franchisee) had not initially wanted to offer Trade Me advertising at all, but was effectively forced to do so after its sales team complained that they were losing listings to companies using Trade Me. Mr Singh accepted that this was the case in cross-examination. That evidence related to the period before Trade Me's changed pricing policy, but it indicates that advertising on Trade Me was attractive to customers and an important factor in the competition between agencies for new listings. It indicates that, if one agency had broken ranks and continued to absorb the cost of standard Trade Me listings after the change in Trade Me's pricing policy, other agencies would have risked losing listings if they did not follow suit.

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149 CA judgment, above n 5, at [99].
150 HC judgment, above n 2, at [213]; and CA judgment, above n 5, at [97].

[159] The Court of Appeal considered the strength of the Hamilton agencies' response to Trade Me's pricing change was indicative of how important this aspect of their pricing was to them.[151] The Court also noted that the cost to the Hamilton agencies of absorbing the Trade Me listing fee as a default position was material to them.[152] We agree that this indicates that the Trade Me listing fee component of the price of the services offered by the Hamilton agencies in competition with each other was a significant aspect of the competition between them. The appellants' submission that the Trade Me listing fee was too insignificant to bring an arrangement that had the purpose or effect of controlling it within the ambit of s 30 is hard to reconcile with their extreme reaction to the news of Trade Me's proposed pricing policy change as illustrated by their conduct before and at the September meeting. They say on the one hand that the new Trade Me listing fee was so high that it was a natural reaction for agencies to refuse to absorb it, given the considerable cost to them if they did so, but on the other that the fee was such a small component of the overall price of their services that it should be treated as insufficiently significant in competition terms to bring the agreement to fix or control it within the prohibition in s 30.

[160] The effect of the arrangement in relation to the Trade Me listing fee controlled the overall price of the services provided by the agencies by interfering with the competitive process that would otherwise have applied. We agree with Mr Dixon's submission that there is some similarity between the situation in this case and that in the air cargo cases relating to the arrangement between airlines controlling the level of fuel surcharges charged by airlines but not affecting the setting of the other components of the price for air cargo carriage. For example, in *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd*, the Federal Court concluded that "the increase in overall prices [arising from the arrangement relating to fuel surcharges] permitted the airlines to derive additional revenue and, by agreeing the surcharges, they could do so without competing in relation to that increase".[153] In this case, the Hamilton agencies avoided a significant cost by agreeing a default position that the Trade Me listing fee would not be absorbed, rather than deriving significant revenue (as the airlines did), but the net effect is the same.

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151 CA judgment, above n 5, at [97].
152 At [100].
153 *PT Garuda Indonesia*, above n 128, at [567].

[161] We are satisfied that, although the arrangement related to a mathematically small component of the overall charges by the Hamilton agencies to customers who successfully sold their properties, it was nevertheless a sufficiently significant component of the overall price to bring the arrangement within the ambit of s 30. We note, however, the observation made by Lindgren J in *CC (NSW)* that the degree of control over the overall price retained by the parties to the arrangement may be a relevant factor in determining penalty.[154]

Departing from the High Court's findings of fact

[162] The appellants argue that the factual findings that led the Court of Appeal to conclude that the arrangement contravened s 30 were wrong. They argue that the Court of Appeal should not have departed from the factual findings of the High Court Judge, which led him to conclude the contrary. We have already rejected their argument as to the appropriate appellate approach and will not repeat that discussion here.[155] Putting that to one side, their argument is that the Court of Appeal's factual findings are not supported by the evidence. We have already considered this in relation to the argument about the component of the price. We now consider it in relation to the effect and purpose of the arrangement.

Effect

[163] The High Court Judge found that because there was no restriction on the proportion of the cost of Trade Me to be passed on (or not) to vendors under the vendor funding arrangement as the Judge found it to be, the arrangement or understanding did not have any effect on the competitive setting of price.[156] We accept that the witnesses who attended the 30 September meeting said that nothing was said that restricted an agency's ability to absorb the cost of a Trade Me listing, or to share that cost with the agent or vendor in individual transactions.

[164] But that is not the end of the matter because the case for the Commission, accepted by the Court of Appeal, was that the arrangement affected the competitive

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154 *CC (NSW)*, above n 32, at [178], quoted above at [134].
155 See above at [60].
156 HC judgment, above n 2, at [227] and [232].

process in the setting of the price for Trade Me listings by ruling out a default setting of free Trade Me standard listings for all customers, as had been the status quo before the 30 September meeting, except in relation to Success. The fact that agencies retained a discretion to pay for or share the cost of Trade Me standard listings did not stop that effect on the price setting process from occurring. As Mr Dixon put it, "focussing only on the exercise of a discretion for individual transactions – as the High Court did – ignores the need to step back and consider the overall effect of the agreement in practice".

[165] We agree with that analysis. The evidence established that the agreement had the effect of setting the default offer price for Trade Me advertising. The participating agencies amended their standard marketing plans and directed their staff that the cost of Trade Me listings – $159 plus GST – was to be paid by vendors or individual agents. For example, Lodge admitted that directions were given by Mr O'Rourke to staff that, from 1 January 2014, listings would no longer be automatically uploaded to Trade Me. Listings thereafter needed to be paid for by the vendor or agent. Lodge's general manager, Ms Peel, notified Lodge's administrators and salespeople in late 2013 that upload of new listings would cease from 1 January with all current listings to be removed on 18 January. Lodge updated its Agency Authority and Residential Listing Form accordingly. The other Hamilton agencies each took similar steps.

[166] A Commission officer, Mr Chamberlain, gave evidence about the impact of the arrangement. His evidence was that there were significantly fewer Trade Me standard listings in the first six months after the arrangement was entered into (February to July 2014) than in the same months of 2013 (before the arrangement). The High Court Judge summarised Mr Chamberlain's evidence in the following table:[157]

Agency	**1 Feb 2013–31 Jul 2013**	**1 Feb 2014–31 Jul 2014**
Lodge	781	55
Lugton's	547	46
Monarch	717	79
Online	293	150
Success	102	46

[157] HC judgment, above n 2, at [173]. See also CA judgment, above n 5, at [72].

[167] In total, there were 376 Trade Me standard listings in the relevant period of 2014, compared to 2,440 in the same period of 2013. The Commission argues this drop in the number of listings showed that the effect of the adoption by the Hamilton agencies of a default setting of vendor funding of such listings was an increase in the price of Trade Me standard listings.

[168] Mr Dixon submitted that, in light of the directions given by the agencies to their staff (referred to above at [165]), it appeared the overwhelming majority of the 376 vendors who chose to have a Trade Me standard listing in the 2014 period must have paid the fee themselves at the full rate of $159. That may be so but there was little evidence to verify it. In fact, there was only limited evidence about who had paid for the 2014 Trade Me standard listings. Lodge had 12 listings in February 2014. Mr O'Rourke said it paid for seven of those and partly paid for one. Three of these appear to have been relistings of properties where the original listing predated the implementation of the arrangement. There was evidence Lodge paid for some listings in August 2014, but the Commission did not rely on this given its case was that the arrangement concluded at the end of June. We do not think much can be deduced from such a limited sample. But we accept the appellants' point that in the absence of evidence, the conclusion the Commission asks us to draw cannot be safely drawn.

[169] A stronger argument for the Commission was that those who declined to pay the Trade Me listing fee and therefore did not have a Trade Me standard listing of their property were deprived of the opportunity to be offered a price that had been set by an agency under workably competitive market forces. In effect, they got a lesser service than may have been available to them for the same price if the agreed vendor funding model had not been adopted by the Hamilton agencies. The small number of listings indicated in the table above suggests that there were many in this category. In fact, Mr Taylor said that the number of Trade Me standard listings in the relevant period was even lower than the 376 indicated in the table above, because the 150 listings attributed to Online were, in fact, feature listings and that some of the listings attributed to other agencies may have been feature listings too. Even if 376 is an overstatement of the number of Trade Me standard listings, the fact is that most customers of the Hamilton agencies did not have a Trade Me standard listing as part of the package of services offered to them by the Hamilton agencies.

[170] We agree, therefore, with the Court of Appeal that the arrangement to adopt a vendor funding model for the Trade Me listing fee did, contrary to the view of the High Court Judge, interfere with the competitive setting of price for the services offered by the Hamilton agencies. The fact that exceptions were permitted to the default option did not mean that the arrangement did not have that effect.

[171] The fact that the cost of Trade Me standard listings was going to be substantially greater after Trade Me's new policy came into effect meant that offering a free Trade Me listing would have had greater significance. It was a field of potential competition between agencies in the quest for new listings. The arrangement between agencies effectively prevented that potential competition from developing.

Purpose

[172] We now consider whether the purpose of the arrangement was to control price. There is considerable debate about whether the assessment of purpose is an entirely objective exercise or whether subjective evidence of purpose may also be brought into consideration.[158] In this case the parties have both relied primarily on subjective evidence, but on our analysis we do not see it as necessary to resolve the objective/subjective debate, which we leave for consideration in a case where there has been argument on the point.

[173] Under s 2(5)(a) of the Commerce Act, an arrangement is deemed to have a particular purpose if the arrangement either has the relevant purpose or has purposes that include the relevant purpose, and the relevant purpose is a substantial purpose.[159]

[174] The Court of Appeal found that the purpose of the 30 September meeting "was to eliminate [the risk that unless all the Hamilton agencies adopted the vendor funding model, individual agencies could lose listings to an agency or agencies that offered free Trade Me standard listings] by reaching a consensus as to how the Hamilton

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158 See the conflicting judgments of William Young J and Glazebrook J in *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA). See also Paul G Scott "The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law" (2011) 19 Wai L Rev 168; Sumpter, above n 31, at 116–123; Noonan, above n 20, at 312–323; and *Todd Pohokura Ltd v Shell Exploration NZ Ltd* [2015] NZCA 71 at [256].

159 "Substantial" is defined in s 2(1A) of the Commerce Act as meaning "real or of substance".

agencies would respond to the change to Trade Me's fee structure".[160] In relation to the purpose of the arrangement, the Court concluded:

> [93] We conclude that the Judge erred in finding that the agencies gave effect to the arrangement or understanding by withdrawing the listings and moving to vendor funding, but that this did not have the purpose of fixing the price or elements of it. Plainly an agreement in principle along these lines would have that purpose.

[175] The appellants took issue with the Court of Appeal's finding about the purpose of the 30 September meeting. They said the purpose of the meeting was to discuss the promotion of the realestate.co.nz website. In support of this they pointed to the evidence of Mr Lugton, Mr Shale, Mr King, Mr Coombs and Mr O'Rourke, who all said that was their understanding of the purpose of the meeting. We accept that is what they said, but they were discussing their subjective understanding of the purpose of the 30 September meeting, not that of the arrangement that the Hamilton agencies entered into.

[176] And the evidence just mentioned was not the only evidence of purpose. On the Commission's case, the advent of the substantially increased Trade Me listing fee opened up a potential field of competition between agencies that had not existed before. Given the new price level, there was potential for some agencies to absorb the cost of such listings in whole or in part as a way of attracting listings. There was evidence of concern about this. In particular:

(a) Notes from a 2 September 2013 NZRN board conference call record that some principals were concerned another company would absorb the cost and use it as a competitive advantage. The notes also stated that "we need to ensure we don't create the situation where one group … are charging for Trade Me listings but another company is not". And further: "[Mr O'Rourke] expressed that we should become proactive with the companies in our areas to open dialogue and ensure a joint approach."

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160 CA judgment, above n 5, at [69].

(b) Mr Lugton's evidence that: "There was a risk however that, unless we all took the same approach at the same time, one of the agencies would continue to pay for Trade Me listings as a way of attracting vendors and then the other agencies would have to make similar offers to their vendors."[161]

[177] Mr Coombes, Mr Shale, Mr Lugton and Mr O'Rourke all gave evidence that the purpose of the meeting was not limited to discussion of realestate.co.nz. In particular:

(a) Mr Coombes said that he "understood the purpose of the meeting was to discuss Trade Me's pricing changes and possible steps that could be taken in response to it, including the promotion of realestate.co.nz".

(b) Mr Shale said that "[Mr O'Rourke] explained to me over the phone that the purpose of the meeting was to discuss what we might do in response to the Trade Me pricing model change." There was also Mr Shale's statement to the Commission that his impression was that the purpose of the meeting was "to try to reach some sort of consensus on a common approach to Trade Me, so that everyone would be on the same page".[162]

(c) Mr Lugton said that he "understood the purpose of the meeting was to discuss the change in Trade Me pricing, and to brainstorm ideas for raising the profile of realestate.co.nz so that it could become a stronger alternative to using trademe.co.nz".

(d) Mr O'Rourke produced a handwritten note from the 30 September meeting headed "Trade Me Meeting".

[178] Ultimately the positions of the parties are not necessarily irreconcilable. We accept that part of the rationale for the 30 September meeting was to discuss how to

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[161] We acknowledge Mr Taylor's point that Mr Lugton said the risk of one agency absorbing the cost was not discussed at the meeting, it was not a risk he identified at the time he made his decision and he did not mention it to the Commission in his interview.

[162] We accept Mr Taylor's point that Mr Shale appeared to retract that statement in his evidence-in-chief and it was not put to him in cross-examination: see above at [77].

promote realestate.co.nz. But that was not the only purpose. It went hand in hand with the purpose to establish a concerted approach to Trade Me listings that protected the Hamilton agencies from the risk that one would steal a march on the others by offering to absorb the Trade Me listing fee as a default setting, forcing the others to respond or risk the loss of listings. We consider the latter was a substantial purpose of the arrangement controlling the price Hamilton agencies charged for their services by restricting the field of competition between them on that element of the price.

Result

[179] We uphold the decision of the Court of Appeal. The appeal is dismissed.

Costs

[180] The appellants must pay costs of $35,000 plus usual disbursements to the respondent.

Solicitors:
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