



**Supreme Court of New Zealand
Te Kōti Mana Nui**

2 APRIL 2020

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

LODGE REAL ESTATE LTD v COMMERCE COMMISSION

(SC 116/2018) [2020] NZSC 25

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Background

In late 2013, representatives of a number of Hamilton real estate agencies met twice to discuss a proposal by Trade Me to change its pricing policy for standard residential property listings on its site, trademe.co.nz/property. The effect of Trade Me’s proposal was to dramatically increase the cost of listing a property on Trade Me. At the time, most Hamilton real estate agencies uploaded all property listings to Trade Me and absorbed the cost of doing so themselves.

The Commerce Commission (the 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. At the relevant time, s 30(1) prohibited competitors from entering into a contract, arrangement or understanding with the purpose, effect or likely effect of fixing, controlling or maintaining the price of goods or services.

The Commission’s case was that the agencies represented at the two meetings agreed that they would withdraw their standard listings from Trade Me by 20 January 2014. Listings on Trade Me after this date were to be paid for by the vendor or the individual agent but not by the agency itself.

A number of Hamilton real estate agencies admitted liability and paid penalties to the Commission. The appellants – Lodge Real Estate Ltd, its principal Jeremy O'Rourke, Monarch Real Estate Ltd and its principal Brian King – denied liability.

The Courts below

The Commission's claim against the appellants failed in the High Court. The High Court Judge found that the Hamilton agencies had entered into an arrangement or arrived at an understanding. But he found that the arrangement or understanding did not have the purpose or effect of fixing, controlling or maintaining the price of the real estate services the agencies provided in competition with each other. This was because the Judge found that the arrangement or understanding did not prevent the agencies from absorbing the Trade Me listing fee themselves to obtain a particular property listing.

The Commission successfully appealed to the Court of Appeal. The Court of Appeal agreed that the Hamilton agencies had reached an arrangement or understanding. But it considered that the arrangement or understanding did have the purpose and effect of controlling price. Even though the agency could choose to absorb the Trade Me fee to obtain a particular listing, the arrangement or understanding still affected price adversely for vendors.

The appellants were granted leave to appeal to the Supreme Court. The appeal raised two issues:

- (a) Did the appellants enter into an arrangement or arrive at an understanding?
- (b) If so, did the arrangement or understanding have the purpose, effect or likely effect of fixing, controlling or maintaining the price of real estate services provided by the appellants in competition with each other?

The Supreme Court's decision

The Supreme Court has unanimously dismissed the appeal.

On the first issue of whether there was an arrangement or understanding, the Court held that the correct test is whether there is a consensus or meeting of the minds among competitors involving a commitment from one or more of them to act (or not act) in a certain way. The Court considered that the test was satisfied in the present case.

On the second issue, the Court found that the arrangement had the effect of controlling price. The Trade Me listing fee was a significant aspect of the competition between the agencies. Although an agency could decide to absorb the Trade Me fee in any individual transaction, the default

position under the agreement was that the Hamilton agencies would offer Trade Me standard listings only on the basis that the listing fee would be payable by the vendor (or agent). The increase in Trade Me's prices meant that Trade Me listings became a potential field of competition between the agencies. The arrangement controlled price by preventing that competition from developing.

The Court also considered that the arrangement had a substantial purpose of controlling the price the Hamilton agencies charged for their services. This was achieved by restricting the field of competition between them in relation to the Trade Me listing fee.

Contact person:

Kieron McCarron, Supreme Court Registrar 021 688 740