



A landmark Supreme Court decision has confirmed key aspects of the price fixing prohibition in New Zealand.

CONDUCT

In 2013, Trade Me changed the way it charged real estate agencies to list properties for sale, which increased annual listing costs.

In response, representatives of a number of Hamilton based real estate agencies met and (the Court found) agreed that their default position would be to on-charge the listing fee.

The Commerce Commission alleged that this constituted an agreement to control prices in breach of the Commerce Act and commenced proceedings against two of the agencies involved.

4 KEY FINDINGS FROM *LODGE REAL ESTATE LIMITED v CC*



ONE

An arrangement or understanding does not require some form of “moral” obligation. It requires:

- a consensus or **meeting of minds** involving a **commitment** from one or more parties **to act** (or refrain from acting) **in a certain way**; and
- that commitment 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.



TWO

A breach occurs when an arrangement between competitors has the purpose or effect of restraining a freedom that would otherwise have existed as to the price to be charged.



THREE

Where there is an agreement in relation to the ‘default’ charging methodology (as there was here) it does not matter that a party has some freedom to charge a different price in a particular transaction.



FOUR

Fixing a component of an overall price will amount to price fixing unless that component is insignificant in competition terms. That is not a simple question of arithmetic – a small component of the overall price in percentage terms can still be significant in competition terms, as was the case here (the listing fee being ~1% of the average commission payable for a sale). Relevant considerations include whether:

- one party “breaking rank” (i.e. by not controlling the relevant component) would increase that party’s competitiveness;
- fixing the relevant component allows the parties to avoid a cost that is material to them (or, as in other cases referenced by the Court, derive more revenue); and/or
- fixing the relevant component interferes with the competitive process that would otherwise apply.

The Court also noted that the strength of the Hamilton agencies’ reaction to the change indicated it was a significant component.

KEY CONTACTS

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