IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA678/2017
[2018] NZCA 523

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

Hearing:	25, 26 and 27 September 2018 (further submissions received 23 October 2018)
Court:	Asher, Brown and Gilbert JJ
Counsel:	J C L Dixon QC, L C A Farmer and A L McConachy for Appellant L J Taylor QC and M A Cavanaugh for First and Fourth Respondents D H McLellan QC, M S Anderson and J H Whitehead for Second and Third Respondents
Judgment:	23 November 2018 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The cross-appeal is dismissed.

C There is a declaration that the respondents' conduct contravened s 27 of the Commerce Act 1986, applying s 30 of that Act.

D **The case is remitted back to the High Court for the assessment of pecuniary penalties.**

E **The respondents are jointly and severally liable to pay the appellant one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.**

REASONS OF THE COURT

(Given by Asher J)

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Introduction

[1] The respondents have been found to be not liable for penalties arising from an alleged arrangement or understanding prohibited under ss 27 and 30 of the Commerce Act 1986 (the Act). In a High Court decision delivered on

2 November 2017 Jagose J dismissed the appellant Commerce Commission's claims, holding that although there was an arrangement or understanding between the respondents, it did not have the purpose or effect of fixing, controlling, or maintaining the price for goods or services, or any related discount, allowance, rebate or credit.[1] The Commerce Commission has appealed.

[2] Significantly, the respondents have sought to support the judgment on grounds other than on which it was based, challenging the finding that there was an arrangement or understanding. The respondents have also cross-appealed against the Judge's refusal to admit the evidence of an expert economist the respondents wished to call, James Mellsop, who offered a counterfactual analysis of likely pricing in the absence of the alleged arrangement or understanding.[2]

A brief history

[3] The first and second respondents, Lodge Real Estate Ltd (Lodge) and Monarch Real Estate Ltd (Monarch), are significant real estate agency companies in Hamilton. The other two respondents, Jeremy O'Rourke and Brian King, are directors of those two companies respectively. At the relevant time Lodge had approximately 35 per cent of the Hamilton real estate agency market share, and Monarch (associated with Harcourts) 28 per cent. Other significant Hamilton real estate agencies that play a part in the narrative are Lugton's Ltd (Lugton's), Success Realty Limited (Success) (associated with Bayleys Real Estate) and Online Realty Limited (Online) (associated with Ray White). We will refer to the first and second respondents and these other agencies collectively as the "Hamilton agencies".

[4] These various agencies are all involved in selling residential real estate in the Hamilton area for commission. They will list properties for sale on the basis of contracts, whereby they receive commission at agreed levels in the event of sale. As part of the services provided in endeavouring to sell the property on behalf of the vendor, there could be expenses incurred for the promotion and marketing of the

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1 *Commerce Commission v Lodge Real Estate Ltd* [2017] NZHC 1497 at [234].
2 At [236]–[238].

property. The property could be listed for sale in the agency's own publications and website, in relevant newspapers and magazines, and on specialist property websites.

[5] Trademe.co.nz/property (Trade Me) was the most prominent of those websites in 2013. It carried on business as an online marketplace and classified advertising platform, and provided a standalone property listing service to vendors and to real estate agencies representing them. This was known as Trade Me Property (also referred to as Trade Me). In 2013 Trade Me was providing a standard listing service to real estate agencies at a capped monthly subscription fee. There was a base fee and a fee for each listing, with a cap of $999 per month per agency office.[3] There were some variations of this.[4] The majority of real estate agencies absorbed this cost and offered standard Trade Me listings to vendors for no additional charge.

[6] In mid-2013 Trade Me decided on a new fee structure for standard residential property listings. Instead of the previous subscription fee model, it proposed a single fee for each standard residential listing of $199, $40 of which was to be commission payable to the real estate agency. The $40 commission was later dropped so the proposed fee was $159. This was a New Zealand-wide proposal, and provoked a New Zealand-wide reaction amongst real estate agencies.

[7] The reaction of the Hamilton real estate agencies to the change to Trade Me's pricing structure was of dismay and concern, and is recorded in detail in the judgment appealed from.[5] Individually they faced substantial increases in costs. For instance, Lodge faced an increase from an annual Trade Me cost of $8,000–$9,000 to one of $200,000–$220,000. Monarch faced an increase of $36,000 to nearly $225,000. Following the Trade Me announcement, and a concerned reaction on the part of Hamilton real estate agencies, the general manager of the New Zealand Realtors Network (NZRN), Vaughan Borcovsky, began to organise a meeting of local real estate agencies. Lodge is Hamilton's only member of NZRN.

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3 Trade Me also offered various "premium" or "feature" listing options at extra cost. However, the focus of this appeal is on standard listing services.

4 For example, some national agencies negotiated arrangements with Trade Me under which each franchisee paid a discounted base fee.

5 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [46]–[82].

[8] As a director of Lodge based in Hamilton, Mr O'Rourke contacted owners of other Hamilton real estate agencies to set up a meeting. Those agents included Simon Lugton of Lugton's, Mr King of Monarch, Carl Glasgow of Online and Stephen Shale of Success. The meeting was to be held at 3.30 pm on Monday 30 September 2013 in the boardroom of Monarch. There was some limited email correspondence prior to the meeting, which we refer to later.

[9] The meeting was the subject of detailed analysis in the High Court judgment.[6] The Commerce Commission alleged that this meeting led to the "Hamilton Agreement". In its second amended statement of claim it pleaded:

> 46 At the 30 September Meeting, Lodge (including Mr O'Rourke), Monarch (including Mr King), Lugton's, Online and Success agreed:
>
> (a) they would, no later than 20 January 2014, remove from Trade Me all of their listings of residential property for sale; and
>
> (b) if, after that date, Vendors requested that their residential property be listed for sale on Trade Me, the Trade Me Per-Listing Fee would be funded by the Vendor, or the real estate agent (**Vendor Funded** or **Vendor Funding**);
>
> (**Hamilton Agreement**).
>
> *Particulars*
>
> (i) *The Hamilton Agreement was an oral agreement reached at the meeting, which was held in Monarch's boardroom.*
>
> …

[10] As to the result of that agreement, the Commerce Commission pleaded:

> 59. As a result of the Hamilton Agreement, or any component part of the Hamilton Agreement:
>
> (a) Lodge, Lugton's, Monarch, Online and Success fixed, controlled or maintained the price, or components of the price, Vendors paid for Trade Me Services, Online Advertising Services, Real Estate Advertising Services or Real Estate Sales Services.
>
> (b) Vendors were deprived of prices, or components of prices, that would have been set under competitive conditions in the absence of the Hamilton Agreement for Trade Me Services,

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6 At [92]–[134].

Online Advertising Services, Real Estate Advertising Services or Real Estate Sales Services.

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

[11] We will return to details of this meeting. What is clear is that following the meeting it was the general intention of the various parties to cease using Trade Me for their listings of residential property for sale in January 2014, and advertise primarily on an industry-owned website, realestate.co.nz. All Trade Me listings after January 2014 were to be vendor funded. That is, the Hamilton agencies would no longer absorb the cost of advertising on Trade Me, and the cost of Trade Me advertising would be met by either the vendor or the individual agent. We express this in neutral language at this point of the judgment, as the exact nature of what was discussed and, if anything, agreed or understood, was a central issue at the trial and is central to both the appeal and notice to support the judgment on other grounds.

[12] Following the 30 September 2013 meeting there were various communications between the parties, and a further meeting of Hamilton real estate agencies on 16 October 2013. This was followed by further exchanges of emails. In late-October Lodge began preparing for the withdrawal of all its listings from Trade Me in mid-January 2014. Lugton's also arranged to withdraw in mid-January 2014, as did Online and Monarch.

[13] The effect of Trade Me's change in policy was therefore that in the six months after January 2014 there were far fewer residential listings on Trade Me than in the same period the preceding year. In response to pressure from the real estate industry, six months later on 30 July 2014, Trade Me announced the reintroduction of a monthly subscription fee for its standard listing service to real estate agencies capped at $999 per month for agency offices in the regions, and $1,399 in metropolitan areas.

[14] The actions of the Hamilton agencies between September 2013 and January 2014 as summarised led to the Commerce Commission issuing these

proceedings, claiming breaches of ss 27 and 30 of the Act, and seeking pecuniary penalties.[7]

[15] Section 27(1) and (2) of the Act provide:

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
>
> (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.
>
> …

[16] Section 30 of the Act in turn under the heading "Price Fixing" provided:[8]

> **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—
>
> (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.

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7 The proceedings were initially brought against Lodge, Lugton's, Monarch, Online, Success and Mr King and Mr O'Rourke. Success, Lugton's and Online admitted liability and gave evidence for the Commission against the remaining respondents.

8 Section 30 was replaced on 15 August 2017 by s 8 of the Commerce (Cartels and Other Matters) Amendment Act 2017.

> (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.

The High Court judgment

[17] Jagose J found that the 2013 events, focussing on the 30 September 2013 meeting, led to a consensus giving rise to expectations that each of the Hamilton agencies would not absorb the cost of Trade Me's proposed per listing fees and that each (other than Success) would withdraw their standard listings from Trade Me by January 2014, subsequent Trade Me listings to be vendor funded. He found that for the purposes of s 27 the respondents had entered into an arrangement or arrived at an understanding to those ends.[9]

[18] He also found that by withdrawing the standard listings from Trade Me in January 2014 and moving to vendor funding of standard listings, the Hamilton agencies were acting in accordance with their arrangement or understanding and giving effect to it.[10] He found that the agencies were in competition with each other for the supply of both real estate sale services and real estate advertising services to prospective vendors of residential property in Hamilton.[11]

[19] Nevertheless, despite these findings in favour of the Commerce Commission, it failed in its claims. The Judge in his last finding held:[12]

> (d) the arrangement or understanding between the defendants did not have the purpose or effect of fixing, controlling, or maintaining (or providing for the fixing, controlling, or maintaining) of the price for, or any discount, allowance, rebate, or credit in relation to, real estate sales or advertising services supplied by the defendants in competition with each other.

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9 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [11(a)] and [193]. Success had already been charging vendors a fee in respect of standard Trade Me listings prior to the announcement of the change to Trade Me's pricing structure. Therefore it did not remove its listings from Trade Me in January 2014.

10 At [11(b)] and [200].

11 At [11(c)] and [208].

12 At [11(d)] and [234].

[20] The Judge referred to evidence to the effect that, notwithstanding the general position that Trade Me advertising was to be vendor funded, the agencies retained the freedom to choose to fund a vendor's Trade Me advertisement "in particular necessary or desirable circumstances".[13] Therefore, the Judge found, "[o]n any individual transaction in the supply of real estate sales services or real estate advertising services, the full range of price setting options remained."[14] He concluded:

> [231] The defendants' refusal to absorb the cost of Trade Me's new fees says nothing about the price of their services to vendors. Nothing in the arrangement or understanding reached between the defendants constrains any freedom to charge any price to any individual vendor on any individual transaction, including by absorbing part or all of the cost of the residential property's standard listing on Trade Me.

[21] Therefore, the arrangement between the Hamilton agencies did not have the purpose or effect of fixing, controlling or maintaining (or providing for the fixing, controlling or maintaining) the price of real estate sales or advertising services supplied by the agencies.[15]

[22] Whilst the Judge clearly found that there was an arrangement between the Hamilton agencies that future Trade Me listings would be vendor funded, we note a degree of confusion in the judgment as to the meaning and scope of vendor funding. As we have set out above, at [46(b)] of its second amended statement of claim the Commerce Commission defined "vendor funding" as Trade Me standard listings being "funded by the Vendor, or the real estate agent".[16] The Judge recorded that definition of vendor funding when he set out the Commission's allegations in the early stages of his judgment.[17] However, later in his judgment the Judge appeared to treat funding by an individual agent, rather than by the vendor, as a departure from the arrangement or understanding. For example:

> [215] As I have found, the defendants' concurrence was as to the cost of Trade Me's new 'per listing' fees, if to be absorbed by each agency. The agencies would not absorb them, as they generally had done in the past for Trade Me's subscription fees, and would move to vendor funding of Trade Me's 'per listing' fees. By 'vendor funding', they meant comparably with other third party advertising, including Trade Me feature listings — in

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13 At [215].
14 At [227].
15 At [234].
16 See above at [9].
17 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [14(a)(ii)].

> 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.* Each of the Commission's agency witnesses who attended the 30 September 2013 meeting confirmed that position.
>
> (Emphasis added.)

[23] In our view, 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. By treating funding by individual agents as inconsistent with the arrangement, along with payment by the agencies in certain circumstances, the Judge inflated the scope of the discretion to depart from the arrangement that he ultimately found was fatal to the Commerce Commission's claim.[18] Before embarking on our own analysis of any of the issues, we wish to clarify that, unlike the Judge, we treat "vendor funding" as encompassing payment of the Trade Me listing fee by the real estate agent, as pleaded by the Commission.

The issues

[24] The issues on appeal follow these findings. There are two central points:

(1) First, did the respondents enter into and give effect to an arrangement or understanding as found by Jagose J? As a subsidiary point, was the arrangement or understanding found by the High Court pleaded by the Commission? These are the findings contested by the respondents, and raised by the respondents in supporting the decision on other grounds.

(2) Second, was the High Court right to find that the arrangement or understanding did not have the purpose, effect or likely effect of fixing, controlling or maintaining price for the purposes of s 30?

[25] There are also other related issues. The first is whether the High Court erred by ruling that the case of *Giltrap City Ltd v Commerce Commission* did not require the Commission to prove the assumption of a moral obligation as an element of proving

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[18] See also [227].

an arrangement or understanding.[19] The respondents say if not, *Giltrap* should be overturned to require proof of a moral obligation. They say that if the correct test is applied, the respondents did not make or enter an arrangement or understanding on the facts of the case. The second subsidiary issue comprises two points:

(a) Whether the High Court erred in finding that the relevant services provided by the Hamilton agencies were "real estate sales services" and "real estate advertising services".

(b) Whether the High Court erred in finding there is no "de minimis" qualification to s 30 in the sense of any mathematically insignificant amount of the price. If so, did the arrangement or understanding (if proved) have a mathematically significant effect on the overall price for the services provided by the Hamilton agencies in competition with each other?

[26] A final issue is the cross-appeal. It is a discrete point; whether the High Court erred in not admitting the expert evidence of James Mellsop, sought to be adduced by the respondents.

The respondents' challenge — was there an arrangement or understanding?

[27] The respondents submit that the Judge erred in determining that an arrangement or understanding had been reached, and erred in determining that Lodge and Monarch gave effect to the arrangement or understanding. They say that there was no evidence to support the arrangement as pleaded by the Commission to pass on or not absorb the cost of the Trade Me listings. They assert that "[a]ll of the evidence at trial was to the contrary". This is chronologically the first issue that arises in this appeal, and although it is raised by the respondents in supporting the judgment on other grounds, we deal with it first, because it is the platform from which the second issue (the effect of the arrangement or understanding) arises.

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

[28] Mr Taylor QC for Lodge and Mr O'Rourke submitted that there is compelling evidence that all the agencies at the meeting had decided beforehand to no longer absorb the Trade Me fee. Those previously formed views and intentions were expressed at the meeting. The Hamilton agencies all predicted that their competitors would do the same. However, there was no consensus between them, or any expectation or obligation, that all would act in the same way. There was no arrangement or understanding, but rather "conscious parallelism".[20] That is, like-minded behaviour with a clear commercial explanation, rather than co-ordinated action.

[29] Mr Taylor submitted that none of the witnesses who gave evidence for the Commission about the meeting of 30 September 2013 could, under cross-examination, refer to any statements, let alone agreement, on the terms of the arrangement alleged by the Commerce Commission. No attendee at that meeting assumed any legal, moral or other obligation as to how it would act, and each considered itself free to decide what to do about Trade Me's new price structure. He focused in particular on the lack of any moral obligation, and said the Judge erred by rejecting moral obligation as part of the test.

[30] Mr Taylor supported these submissions by detailed reference to evidence. His submissions in this regard were strongly contested by Mr Dixon for the Commerce Commission. If, contrary to the Judge's findings, there was no arrangement or understanding entered into by Lodge, Monarch and the other Hamilton agencies, then that would mean that the Commerce Commission failed to prove its claim at the first hurdle.

The Judge's consideration of the facts

[31] In approaching the competing submissions we begin by referring to what the Judge decided. After considering the facts in great detail he set out his analysis.[21] It was his very clear finding that an arrangement or understanding was agreed as a response to the change to Trade Me's fee structure.[22] He found, applying an objective

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20 At [67].
21 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [175]–[200].
22 At [193].

test, that a reasonable observer would infer that each of the Hamilton agencies formed an expectation or understanding that neither itself nor any others would absorb the cost of Trade Me's new fees, and all (except Success) would withdraw their respective vendor's standard listings from Trade Me by January 2014.[23] Subsequent Trade Me listings would be vendor funded. He stated "[t]here was an apparent meeting of the defendants' minds on those subjects."[24] He found:

> [183] The consensus was as to agencies' non-absorption of the cost of Trade Me's future per listing fees, with the consequence any subsequent Trade Me listings would be vendor funded. …

[32] The Judge found that the details of the withdrawal decision were worked out at the further meeting on 16 October 2013.[25]

[33] The Judge also found that the agencies decided together to promote realestate.co.nz, an industry-owned website, as the comprehensive source of online Hamilton real estate listings.[26]

[34] He concluded:

> [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".
>
> [193] I find the defendants 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 defendants entered into an arrangement, or arrived at an understanding, to those ends.
>
> (Footnote omitted.)

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23 At [180].
24 At [180].
25 At [187].
26 At [184].

Our analysis

[35] In examining the evidence and determining whether there was an arrangement or understanding, we adopt an objective approach.[27]

[36] There are no minutes or formal record of what was discussed at the meeting on 30 September 2013. Mr O'Rourke of Lodge, Mr Coombes of Online, Mr Lugton of Lugton's, Mr Shale of Success, and Mr King and Mr Singh of Monarch gave detailed evidence about what happened at the meeting. There was extensive cross-examination. The evidence was subjected to further analysis before us. We have read and considered this evidence. We consider that there was a good deal of clear evidence indicating an arrangement or understanding, as was found by the Judge.

[37] Mr Coombes, a director and 50 per cent shareholder of Online, asserted that at the end of the meeting he was left with the clear impression that there was an understanding reached by all present that:

> (a) We would all remove our standard listings from Trade Me by early 2014. (While I do not recall agreement being reached on an exact date in January, there was a consensus that everyone would pull their listings from Trade Me around that time); and
>
> (b) If any vendors wanted to list on Trade Me after that date, they would need to pay for it (or the salesperson would have to pay for it).

[38] Under cross-examination Mr Coombes was adamant that everyone in the room on 30 September 2013 made a commitment on this basis. We note the following passages:

> Q. But was anybody in that room giving you any sort of commitment that they would do it?
>
> A. I believe so but that's my opinion.
>
> Q. Yes.
>
> A. My opinion is that we were all going to take our properties off Trade Me but that's my opinion and I'm being straight up with you.

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[27] *Giltrap City Ltd v Commerce Commission*, above n 19, at [73].

Q. And when you say that you believe somebody gave a commitment to do it in January.

A. Mmm.

Q. *Do you recall who gave that commitment?*

A. *Well my opinion is that we all gave it but I could be wrong.*

…

Q. *But what I'm putting to you is you never gave an assurance to anybody in that room, "We're going to pass on 100% of that cost." Did you?*

A. *Well I'm pretty sure we did.*

(Emphasis added.)

[39] Mr Lugton, the managing director of Lugton's, also talked of all the attendees at the meeting agreeing to withdraw from Trade Me and implement vendor funding by 20 January 2014. There was this exchange under cross-examination by Mr Taylor:

Q. And if you had wanted to go to the market and say, "Look, everybody else in the market is being charged $159 by Trade Me, we want to discount that and we'll absorb part of the cost." There was nothing agreed at that meeting that restricted you from doing that was there?

A. The inference I took out of the meeting is that there was going to be — that cost was going to be passed to the vendors. So it's not a matter of slicing it up. It's one or other.

Q. Well it's not one or other is it Mr Lugton because you could go out and agree to pass on part of it, all of it or share it, couldn't you?

A. *Well it wouldn't be in the spirit of what the understanding we had in the meeting.*

(Emphasis added.)

[40] Other witnesses were more reluctant to accept that there was any arrangement. For instance, Mr Shale, a director and shareholder of Realty Services Ltd, which owned Success, said that parties reached their conclusions as to the way forward with Trade Me independently and there "wasn't a consensus or an agreement". However, this was a departure from Mr Shale's statements in his interview with the Commission, in which he said that the purpose of the meeting was to try and reach a consensus on a common approach to the change to Trade Me's fee structure.

[41] We acknowledge that inroads were made to the evidence of a consensus during the course of extensive and skilful cross-examination of the Commission's witnesses by Mr Taylor. However, in our view on the facts the Judge properly concluded that there was a "consensus" and that "the defendants communicated to each other their intended and common course" and this consensus "gave rise to the defendants' expectations of how each would act".[28]

[42] This conclusion is supported by some of the exchanges that preceded and followed the meeting of 30 September 2013. Prior to the meeting, on 4 September 2013, Mr Borcovsky of NZRN, of which Lodge was a member, sent a note of a conference call held on Monday 2 September 2013 to the NZRN board. It read:

> 6. Subsequent to the Conference Call
>
> • [Mr O'Rourke] has communicated that he has contacted each residential principal in Hamilton and they *agreed in principle* to;
>
> 1. Only vendor funding for Trade Me listings
>
> 2. Advertise realestate.co.nz in their weekly newspaper advertising
>
> 3. Individual social media campaigns to promote realestate.co.nz
>
> *He will meet to confirm this will happen in the next two weeks.*
>
> …
>
> (Emphasis added.)

[43] Following the meeting there was an email dated 17 October 2013 from Mr Shale of Success to industry associates, saying:

> We have made significant progress on this one locally. We have 7 Residential brands in Hamilton — Harcourts, Lugtons, Lodge (NZ Independent Realtors), Ray White, Eves and Bayleys committed to turning off the trademe feed as our individual agreements finished. LJ Hooker will probably do the same, but may then pay for their listing to go on. We will offer it as a vendor funded option, but will not include in standard packages — favouring bayleys.co.nz, realestate.co.nz and nzherald etc.

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28 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [192].

[44] There is an email of 29 October 2013 from Garry Stark of Property Suite to Ann Peel, Group Operations Manager of Lodge, about how to remove listings from Trade Me, and an email from Ms Peel to Mr O'Rourke of 7 January 2014 advising how they had changed their marketing form to make Trade Me an additional vendor-pays option. There is an email from Mr King of Monarch of 15 January 2014 to all branch managers and agents recording that all future Trade Me advertising would be vendor paid or agent (salespersons) paid. There is a further email of Mr King of 20 January 2014 to all agents advising that the subscription to Trade Me was cancelled the previous week. This was "NOT a boycott of TradeMe but is in response to their new impending pricing structure". Trade Me would still be available as a "user pays option".

[45] There was also an email from another competitor, Mr Greig Metcalfe of L J Hooker, declining to participate in a meeting in October and saying:

> … 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.

[46] We reject Mr Taylor's submission that there was nothing in the evidence to prove that an obligation was assumed at the meeting to act in a prescribed manner and restrict the agencies' freedom to act. In our assessment the evidence, read as a whole, points clearly to those who attended the meeting reaching an understanding that all would move to vendor funding of Trade Me advertising in January 2014.

[47] Mr Taylor emphasised the amount of the increase of the Trade Me price, and the fact that Trade Me expected that agencies would move to vendor funding. Given the size of the increase, it was entirely predictable and sensible that the Hamilton agencies chose to pass on the cost to vendors. He put this forward as indicating conscious parallelism. We are unable to see how Trade Me's intentions are relevant, and while an increase in fee is consistent with inducing conscious parallelism, it is not consistent with the Hamilton agencies responding at the same time in January 2014, and in the same way. We note in particular that Monarch's contract with Trade Me would have permitted it to continue operating under the subscription model until

1 April 2014. Yet Monarch chose to cancel that agreement early, in January 2014, in accordance with the Hamilton agencies' arrangement that they would all withdraw and move to vendor funding at that time.

[48] We have not overlooked the references made by Mr Taylor to aspects of the Judge's findings that would appear to contradict his finding of a consensus. For instance, the Judge said:

> [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.)

[49] We have found it difficult to interpret this paragraph. On the one hand, it appears to be saying that there were unconditional expressions by each of the Hamilton agencies of their intention to withdraw from Trade Me, without regard for the intentions of the others. On the other hand, it goes on to say that some present expressed taking comfort from the fact their competitors were doing the same, and were aware of the risk of divergent approaches. There is a tension if not a contradiction between this and other paragraphs we have quoted, where the Judge made clear findings of a mutual understanding and expectations and an intended and common course.[29] Our own examination of the evidence, while it supports the Judge's findings in this section of the judgment, does not support the first sentence, and the first half of the second sentence, of [188] when read alone.

[50] In our view paragraph [188] can 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. He says two paragraphs later:

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[29] At [192]–[193].

> [190] … None of the agencies acted on their decisions in advance of the 30 September 2013 meeting. At least some of the agencies were aware a decision to vendor fund Trade Me listings risked others' decisions to continue to absorb that cost. The agencies' decisions were thus at least capable of adjustment in light of further information. The further information came from the 30 September 2013 meeting. The independence of the agencies' prior decisions is undermined by the mutuality of their understanding arising from the 30 September 2013 meeting.

[51] Therefore, we consider the Judge clearly found that the evidence established that an arrangement or understanding was reached at the 30 September 2013 meeting.

Conclusion on arrangement and understanding on the evidence

[52] We uphold the Judge's finding that the defendants entered into an arrangement or arrived at an understanding that "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, with subsequent Trade Me listings to be vendor funded".[30] This seems to us to be the correct conclusion to draw from the evidence.

The Giltrap *decision*

What the Judge said

[53] The Judge followed *Giltrap*[31] in finding there was a consensus and "an expectation that the consensus will be implemented according to its terms".[32] Mr Taylor submitted that the Judge erred in his interpretation of the test laid out in *Giltrap*. He submitted specifically that an error was made when the Judge found:[33]

> [W]hether the defendants' comprehensions included a sense of reciprocity or moral obligation between them is irrelevant. The majority judgment in *Giltrap* dictates objective focus to be on "the concepts of consensus and expectation".

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30 At [193].
31 *Giltrap City Ltd v Commerce Commission*, above n 19, at [17].
32 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [176] and [191]–[192].
33 At [188] (footnote omitted).

[54] Mr Taylor submitted that, properly understood, the test in *Giltrap* requires an assumption of a moral obligation to act in a way that restricts the behaviour of the parties. Alternatively, if *Giltrap* does not impose such a requirement, this Court should depart from *Giltrap*.

Moral obligation

[55] Mr Taylor in his submissions appeared to assume that the Judge was disregarding the notion of moral obligation entirely at [188]. We do not agree with that interpretation of what he said. The Judge's statements at [188] were at the end of the part of the judgment where he considered the evidence for the agencies indicating that it was a mere coincidence that they all moved to the decision to withdraw from Trade Me around the same time. As we have set out, we see the Judge's statements in [188] as a rejection of a subjective approach where the perceptions of individuals as to their obligations takes the forefront, rather than objective analysis. We do not see it as a complete rejection of the relevance of moral obligation. Indeed, he later referred to "communication among the parties of the assumption of a moral obligation", quoting from and applying *Giltrap*.[34]

[56] In approaching the question of what constitutes an arrangement or understanding in this context it must be recognised that there are two opposite ends of a spectrum of conduct. At one end, there is parallel conduct by competitors where their prices are set independently but competitive pressure results in similar price and quality offerings. Because each firm acts with knowledge of its rivals' offerings, this is sometimes referred to as conscious parallelism. At the other end, there is an enforceable contract between two or more parties requiring them to act in a certain anti-competitive way. In between there can be varying levels of consensus and understanding, which can create challenges when s 30 is applied.

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[34] At [192].

[57] In *Re Basic British Slag Ltd* Diplock LJ held that it is:[35]

> … sufficient to constitute an arrangement between A and B, if (i) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way, (ii) such representation is communicated to B, who has knowledge that A so expected and intended, and (iii) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way.

He said further:[36]

> … 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.

[58] In New Zealand Jeffries J expressed the position in this way in *Commerce Commission v Wellington Branch NZ Institute of Driving Instructors*:[37]

> Arrangements and understandings result from an apprehension shared by two or more persons that there will be accord among them as to future acts in a specified area.

[59] In *Commerce Commission v Caltex New Zealand Ltd* Salmon J said in relation to mutuality:[38]

> It is necessary for the plaintiff to establish a mutuality of understanding. If, for example, the advice given by Mr Crum just prompted the other companies to follow his lead without any of them giving any indication to Caltex that they were intending to do so, there would not be an understanding.

[60] The majority (Gault P and Tipping J) in *Giltrap* stated:[39]

> [15] We do not consider it appropriate to be tied in any determinative way to the concepts of mutuality, obligation and duty. 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

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35 *Re Basic British Slag Ltd* [1963] 1 WLR 727 (CA) at 747, quoted in *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 (HC) at 662.

36 At 746–747.

37 *Commerce Commission v Wellington Branch NZ Institute of Driving Instructors* (1990) 4 TCLR 19 (HC) at 24.

38 *Commerce Commission v Caltex New Zealand Ltd* (1999) 9 TCLR 305 (HC) at 320.

39 *Giltrap City Ltd v Commerce Commission*, above n 19.

> expectation. A finding that there was a consensus giving rise to an expectation that the parties would act in a certain way necessarily involves communication among the parties of the assumption of a moral obligation.
>
> [16] … It is also helpful to note Willmer LJ's use of the concept of expectation in the following passage from his judgment in *Basic Slag* at p 734:
>
> > "… 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."
>
> [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. …

[61] In his submissions Mr Taylor relied on the separate judgment of McGrath J in *Giltrap* where he differed from the majority and said:

> [66] Paragraph [15] of the judgment of Gault P and Tipping J favours focusing the ultimate inquiry to determine whether there is an arrangement or understanding on the concepts of consensus and expectation. As those concepts themselves 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. …
>
> [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.

[62] He also relied on the statement of Lockhart J in *Trade Practices Commission v Email Ltd*:[40]

> … there is a fundamental distinction between a hope or prediction of future behaviour on the one hand and the expectation of certain behaviour on the other; that is behaviour which, as a result of communication between the parties, the party restricted is at least morally bound to adopt.

[63] The two leading New Zealand texts on competition law both appear to prefer the minority approach of McGrath J.[41] The authors of those texts suggest that the majority approach in *Giltrap* would inappropriately capture conscious parallelism.

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40 *Trade Practices Commission v Email Ltd* (1980) 43 FLR 383 (FCA) at 397.

41 Matt Sumpter *New Zealand Competition Law and Policy* (CCH New Zealand Ltd, Auckland, 2010) at 104–105; and Chris Noonan *Competition Law in New Zealand* (Thomson Reuters, Wellington, 2017) at 301.

Mr Taylor in his submissions effectively asked us to prefer the approach of McGrath J to that of the majority. There was reference to the Australian position, although this was not the subject of analysis in the High Court. We record that we do not see in the Australian cases any elevation of moral obligation to a pre-requisite or requirement, although it has been said that something more than a "mere expectation" is required.[42]

[64] We must observe that we do not see the difference between the two approaches as being particularly acute. McGrath J referred to the notion of a moral (or non-legal) obligation as being an "important touchstone" for determining whether there is an arrangement or understanding.[43] He stated that the notion of moral obligation is "important" but did not suggest that it is a prerequisite or the determinative element. Equally the majority do not put to one side moral obligation and indeed specifically observe that a finding that there was a consensus giving rise to an expectation the parties would act in a certain way "necessarily involves communication among the parties of the assumption of a moral obligation".[44] We see the difference between the two judgments as being one of degree; the degree of importance attached to the assessment of mutual expectations by considering whether a moral obligation arose, and no more.

[65] We do not see in any of the New Zealand or United Kingdom cases a determination that a finding of a moral obligation is an independent requirement for there to be an arrangement or understanding. Such a requirement could pose difficulties. Indeed, Glazebrook J in her decision on liability in *Giltrap*, which was upheld on appeal, having earlier referred to moral obligation, observed:[45]

> As a matter of policy, a person should be held to be a party to an arrangement if they give the appearance of agreeing to be a party (even by silence) and thereby deliberately encourage others to enter into an arrangement, even if they themselves have no intention of abiding by it. This is especially the case where they consider it would give them a competitive advantage if others enter into the arrangement.

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42 See *Rural Press Ltd v Australian Competition and Consumer Commission* [2002] FCAFC 213, (2002) 118 FCR 236 at [79], approving *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* [1999] FCA 954, (1999) 92 FCR 375 (FCA) at 408.

43 *Giltrap City Ltd v Commerce Commission*, above n 19, at [66].

44 At [15].

45 *Commerce Commission v Giltrap City Ltd* (2001) 10 TCLR 190 (HC) at [62].

[66] Clearly a subjective view of a party as to whether or not there is a moral obligation cannot be determinative. But further, making a decision on whether objectively there is a moral obligation can in itself be problematic. Is the moral obligation assessed from the point of view of hypothetical commercial parties in the abstract, or are these parties assumed to have the particular relationships and understandings of the actual parties? If the former is the test there is a danger of unreality in the exercise, and if the latter, it is very difficult to assess moral obligation and understand all the complex commercial and interpersonal factors that may be relevant.

[67] We have concerns that if moral obligation is elevated to a stand-alone requirement, the analysis of arrangements and understandings would get bogged down in moral assessments, which are by their nature unpredictable, and in a commercial context, incapable of precise assessment. If a preference is required, we prefer the approach of the majority in *Giltrap's* focus on consensus and expectation which, while recognising the existence of a moral obligation as a matter that can be taken into account, does not give it prominence in the analysis. Courts are accustomed to making objective assessments of consensus. As the majority stated:[46]

> [23] Section 27 is concerned with and designed to cover contracts in the strict sense, as well as arrangements and understandings. It is therefore appropriate and in accordance with the policy and purpose of the section to adopt the same approach to proof of arrangements and understandings as that taken with contracts and analogous issues. The existence of the necessary consensus is therefore to be judged by reference to what reasonable people would infer from the conduct of the person whose participation in the consensus is in issue. …

Conclusion on arrangement or understanding

[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. That is what the Judge found in this case. A consensus among competitors giving rise to mutual expectations

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46 *Giltrap City Ltd v Commerce Commission*, above n 19.

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.

[69] The language the Judge used plainly showed that he found there was consensus and mutual expectations between the Hamilton agencies arising from the 30 September 2013 meeting.[47] We respectfully agree with those findings. None of the Hamilton agencies acted on their intentions to shift to vendor funding prior to the meeting on 30 September 2013. Whilst we accept that many of the agencies could not afford to absorb the increased costs and were likely to shift to vendor funding, there is clear evidence that multiple parties appreciated the risk that, unless everyone shifted to vendor funding, they may lose listings to other agencies. We consider that the purpose of the 30 September 2013 meeting was to eliminate that risk by reaching a consensus as to how the Hamilton agencies would respond to the change to Trade Me's fee structure. Following the meeting there were mutual expectations that all those present would withdraw their listings from Trade Me in early-2014 and commence vendor funding. It is far from clear to us that, absent that mutual understanding, all of the agencies would have shifted to vendor funding in any event. We therefore reject Mr Taylor's submission that all that occurred was conscious parallelism.

[70] We do not consider that the Judge made any error of law on this issue, and indeed it is our view that he correctly adopted and applied the approach of the majority in *Giltrap* in finding that the parties formed an arrangement or understanding in terms of s 30.

Giving effect to the arrangement or understanding

[71] The Judge stated:

> [200] I find, by withdrawing agencies' standard listings from Trade Me, and moving to vendor funding of Trade Me standard listings, being actions in accordance with their arrangement or understanding, the defendants gave effect to it.

[72] We agree. The evidence shows a very clear change to the way in which the real estate agencies acted in relation to Trade Me listings. Monarch, Lodge, Lugton's

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47 At [192]–[193].

and Online all withdrew their Trade Me listings in January 2014. As the Judge noted, in the six months after January 2014, the agencies had far fewer residential listings on Trade Me than in the same period the preceding year:[48]

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

[73] This table relates to only one aspect of the understanding, the withdrawal from Trade Me, but given that it was withdrawal from providing Trade Me advertisements paid for by the real estate agencies, it was a significant change. The other aspect of the arrangement, which related specifically to price, was the understanding that if there was to be any advertising on Trade Me it was to be vendor funded. As we have set out, there is clear evidence that the Hamilton agencies shifted to vendor funding following January 2014.

[74] Because of the expressions of purpose that can be drawn from the evidence we have referred to, and the actions of withdrawing from Trade Me and moving to vendor funding, we agree with the Judge that the respondents gave effect to the arrangement or understanding. We therefore reject Mr Taylor's submission that the Hamilton agencies did not enter into or give effect to any arrangement or understanding under s 30 of the Act.

The appellant's appeal — the finding of no fixing, controlling or maintaining of the price

The Judge's reasoning

[75] It was the conclusion of the Judge on this point that proved fatal to the Commerce Commission's claim in the High Court. The Judge found that, because the

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48 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [173].

arrangement or understanding between the Hamilton agencies did not have the effect of fixing, controlling, or maintaining (or providing for the fixing, controlling or maintaining) the price for real estate sales or advertising services, that cannot have been its purpose.[49]

[76] The Judge stated:

> [214] Mr Dixon submits "price was controlled because there was a restraint on the competitive setting of it — the price charged to the vendor would include the whole of the Trade Me listing fee". I disagree.
>
> [215] As I have found, the defendants' concurrence was as to the cost of Trade Me's new 'per listing' fees, if to be absorbed by each agency. The agencies would not absorb them, as they generally had done in the past for Trade Me's subscription fees, and would move to vendor funding of Trade Me's 'per listing' fees. 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.* Each of the Commission's agency witnesses who attended the 30 September 2013 meeting confirmed that position.
>
> (Footnotes omitted and emphasis added.)

[77] In other words, because there was a discretionary aspect to the arrangement, the Judge formed the view that "[t]he arrangement or understanding does not interfere with the competitive setting of price".[50] The Judge went on to hold that nothing in the arrangement or understanding constrained any freedom to charge any price, including by the agency absorbing part or all of the cost[51] and the arrangement or understanding did not provide for steps to be taken to directly fix, control, or maintain the price.[52] He concluded:

> [233] As the arrangement or understanding between the defendants is not effective to fix, control, or maintain the price of real estate sales or advertising services to vendors, objectively that cannot be its purpose. That is so, in any event, by reason of the arrangement or understanding I have found, which did not have price control as its target.

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49 At [11(d)] and [233]–[234].
50 At [227].
51 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [231].
52 At [232].

Analysis

[78] As we have set out above, we consider that the Judge inflated the scope of the discretion he identified by treating funding by the individual agent as a departure from the arrangement to vendor fund.[53] Funding by an individual agent was consistent with, and part of, the definition of vendor funding in the arrangement as pleaded by the Commerce Commission. In our view, 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. In essence, the point that we must determine is whether the discretion for the agency to pay all or part of the Trade Me fee was sufficient to warrant the dismissal of the claim.

[79] We do not propose going through all of the evidence referred to in submissions or by the Judge. Some of the statements referred to indicated that on occasions the real estate agency would still pay the cost of a Trade Me listing. Others indicated the contrary. There was this statement by Mr Coombes under cross-examination:

> … as from January or in the New Year there would be no standard Trade Me listings. The standard listings, realestate.co, and feature listings Trade Me which would be vendor funded and generally I offered or paid for by the vendor, the agent or sometimes Online.

[80] Mr Lugton said under cross-examination:

> Q. But there was certainly no agreement that you would only, between each of these parties that they could only pass on 100% and couldn't negotiate around that figure correct?
>
> A. There was no discussion around that. Oh I took the inference that we were talking 100%.

[81] Under re-examination he said:

> Q. What do you mean by the inference that you drew?
>
> A. People saying things like, "Oh yeah we won't be supporting Trade Me. We're — you know this needs to be, this needs to be vendor funded," echoed around the room.

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[53] See above at [22]–[23].

[82] It is clear to us that at the meeting of 30 September 2013 there were references to any listings henceforth being vendor funded, and this is what the Judge found earlier in his judgment.[54] However, equally, we agree with the Judge that this was not regarded as being a policy that had to be implemented on every occasion. It could be inferred that there would be situations which would arise where an agency would have to fund in whole or in part, presumably to maintain a listing. But, generally, the understanding was that either the vendor would fund, or if it was not the vendor it would be the individual real estate agent (and not the agency itself).

[83] We are unable to agree with the Judge that the existence of this discretion meant that there was no purpose or likely effect of fixing, controlling or maintaining the price. There is no necessity for there to be an agreement or understanding that an absolute position as to price must be maintained for there to be anti-competitive conduct. Collusion on a start or offer price can be enough. Thus in *Dole Food Company Inc v European Commission* the General Court (EU) found that there was collusion by banana importers for "quotation prices" that were announced to buyers on a weekly basis.[55] This amounted to price fixing. The Court had to deal with the fact that the actual prices did not in fact always correspond to the quotation prices in respect of which there had been price fixing. It was held:

> [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.

[84] This approach was adopted in the United Kingdom decision of *Balmoral Tanks Ltd v Competition and Markets Authority*.[56] Referring to *Dole* it said:

> [49] The General Court in *Dole* agreed with the Commission's analysis that the bilateral pre-pricing communications decreased uncertainty surrounding the future decisions of the undertakings concerned on quotation prices, which constitute announced prices and that concertation on such prices may constitute an infringement by object.

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54 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [193].
55 Case T-588/08 *Dole Food Company Inc v European Commission* [ECLI: EU: T: 2013: 2130].
56 *Balmoral Tanks Ltd v Competition and Markets Authority* [2017] CAT 23 (UK).

In that case it was held that "a cartel member who disregards what is agreed for its own ends is still liable for the infringement".[57]

[85] This willingness to find a sufficient arrangement or understanding despite discretion as to the end price is also consistent with the approach taken by the United States Court of Appeal (9th Circuit) in *Plymouth Dealers' Association of Northern California v United States*:[58]

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

[86] We agree with the position as summarised by the Australian Federal Court in *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd.*[59]

> 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.

[87] It is not necessary that an arrangement or understanding under s 30 be absolute in its requirement for adherence. The consensus will almost always be loose and not legally enforceable, and slippage will be commonplace. An arrangement or understanding to seek or offer a particular price is enough. This is because a starting position as to price will have the purpose and effect of fixing, controlling or maintaining the actual price.

[88] By way of example, if the retailers of motor vehicles in a street all agreed on an asking price for a certain model, aware that this was the asking price only and the end price after negotiation could be quite different, that would have an

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57 At [125].

58 *Plymouth Dealers' Association of Northern California v United States* 279 F 2d 128 (9th Circuit, 1960) at 132 (footnotes omitted).

59 *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd*, above n 42, at 178.

anti-competitive effect in the way discussed in *Plymouth Dealers' Association*. The starting point for one side of a negotiation about price would undoubtedly affect the end price, even if it may be possible or even likely the end price would be different from the starting point.

[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 effect 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".[60] 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.

[90] Thus we accept Mr Dixon's submission for the Commerce Commission that the High Court failed to take account of the impact of the arrangement or understanding on the agencies' "offer price", by which he meant the starting position of vendor funding. This is similar to parties reaching a position on the asking price for a given retail item. The fact that the end price can be up to the discretion of the individual vendor does not mean that there is not an agreement that will have an effect on price. Obviously the starting position of any vendor as to price will have some effect on the ultimate agreement on price. This is all that is required.

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60 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [227].

[91] In reality arrangements and understandings not amounting to a contract will generally be poorly defined. There are few cases where anti-competitive behaviour is clearly documented, or indeed the subject of precise articulation. Often, because an agreement or understanding will not be a contract, there will be room for parties to exercise discretion. All that is needed is an arrangement or understanding that will be likely to interfere with the competitive setting of price. That understanding does not need to be precise and to cover all possible eventualities, or indeed relate directly to the ultimate price. If an understood ability to depart from the agreement or understanding was fatal to the application of s 30, then the application of s 30 could be easily avoided by the provision of some reserved right of departure. That would be contrary to the purpose of s 30.

[92] We add that the Judge's reference to an ability to depart from vendor funding in "particular necessary or desirable circumstances" is not, in our view, supported by the evidence.[61] While there could be exceptions, this was not stated by any witness to be the criterion for an exception.

[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. This is made quite clear by the evidence, which shows the agencies agreeing in principle to all withdrawing from Trade Me in January 2014 and moving to vendor funding, with the result that the agencies generally no longer paid for Trade Me standard listings. Accepting the arrangement was a starting position, and there was room for exceptions, the arrangement or understanding would still plainly affect price adversely for customers.

The "de minimis" argument

[94] The Judge rejected a submission from Mr Taylor that the Trade Me fee was not a sufficiently significant proportion of the price of the services provided by the Hamilton agencies to have the effect of fixing or controlling the overall price.

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61 At [215].

Mr Taylor relied on the decision in *Australian Competition and Consumer Commission v Olex Australia Pty Ltd*[62] and this proposition from that case:[63]

> 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.

[95] He submitted that the Trade Me fee of $159 was not an integral or materially significant portion of the price for real estate services. In support of that submission, Mr Taylor argued that the Judge had erred by finding that the agencies competed for the supply of "real estate advertising services" as a component of overall real estate sales services. Mr Taylor submitted that this disaggregation of services was artificial and contrary to commercial reality. The relevant bundle of services provided by the competing agencies was the marketing and sale of real estate. The cost of a Trade Me advertisement was an immaterial portion of the overall price of that service, and therefore any agreement concerning that cost could not have a fixing or controlling effect.

[96] The Judge rejected this "de minimis" argument. He stated:

> [213] I do not accept there is a *de minimis* qualification to s 30, at least not in the sense of any mathematically insignificant amount of the price. The availability of Trade Me standard listings appeared to be 'materially significant' in competition between agencies to secure vendors' business. Control of that aspect of the price — whether as a proportion of marketing costs and/or commission paid by the vendor, or simply in its dollar terms — would engage s 30. And, of course, marketing costs were incurred regardless of sale; commission is not a relevant denominator.

[97] We respectfully agree with this analysis. It is plain that when a contract is entered into between a person wishing to sell a residential property and a real estate agency, that contract is entered into prior to any sale, and obligations are entered into between the vendor and real estate agency as to the payment of marketing and advertising expenses and commission. If no sale was achieved by the real estate agency, the $159 Trade Me fee would be a significant part of the price. It may be the only disbursement. Even if a sale were achieved, the Trade Me fee would still be a

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62 *Australian Competition and Consumer Commission v Olex Australia Pty Ltd* [2017] FCA 222, [2017] ATPR 42-540 at [652]–[653].

63 At [657] (original emphasis).

relevant expense. The strong reaction by the Hamilton agencies to the change of policy by Trade Me indicates its importance to them as a part of the price of their services.

[98] We do not place weight on the Judge's break-down of the services provided by the Hamilton agencies into "real estate sale services" and "real estate advertising services". We are satisfied, for the reasons given immediately above, that the cost of advertising on Trade Me was a significant part of the price of the services provided by the Hamilton agencies.

[99] Moreover under s 30, the price also extends to the component parts of a price. The provision of free advertising prior to January 2014 can be seen as the provision of an allowance or discount. The move to vendor funding can be seen as the removal of that discount or allowance, or alternatively as an addition to the price.

[100] In any event, it is to be noted that for several of the real estate agencies, the change of policy by Trade Me meant, if the real agencies continued to fund the Trade Me advertisements, additional costs of about $200,000 per annum. We appreciate that this was in respect of all the transactions, and not just an individual transaction, but it is a further indication of the materiality of this component of the price. So was the strong reaction of the Hamilton real estate agencies, which we have outlined, when the change became known.

The pleading point

[101] Mr Taylor argued that the Commerce Commission could not succeed, as the understanding as found by the Judge did not correspond to the Commission's pleading. This was part of the respondents' support of the judgment on other grounds.

[102] As we have set out, the pleading was:

> 46 At the 30 September Meeting, Lodge (including Mr O'Rourke), Monarch (including Mr King), Lugton's, Online and Success agreed:
>
> (a) they would, no later than 20 January 2014, remove from Trade Me all of their listings of residential property for sale; and

(b) if, after that date, Vendors requested that their residential property be listed for sale on Trade Me, the Trade Me Per-Listing Fee would be funded by the Vendor, or the real estate agent (**Vendor Funded** or **Vendor Funding**);

(**Hamilton Agreement**).

Particulars

(i) *The Hamilton Agreement was an oral agreement reached at the meeting, which was held in Monarch's boardroom.*

…

[103] Mr Taylor argued that this pleading did not correspond with the arrangement found by Jagose J in that the pleading does not acknowledge the agencies' discretion to depart from that position and choose to fund part or all of the fee themselves.

[104] In considering pleading arguments such as this, we accept the approach originally set out by Barker J in *Commerce Commission v Qantas Airways Ltd (No 2)* that there are no special rules of pleading in anti-trust cases and the normal rules of court apply.[64]

[105] It is significant that the Judge in articulating the understanding did not suggest that it failed to correspond to the pleading. We can see why that was so, as in a general sense the arrangement or understanding that he found to exist did correspond to the pleading. The understanding was that the parties would withdraw their existing standard listings from Trade Me and that they would no longer absorb the cost of those listings, and if there was to be a listing, would seek to have the vendor or an individual agent pay the fee. It was not necessary as a matter of general pleading practice for all the terms of the understanding to be set out. In our assessment, the essence of the Commerce Commission's claims, as found to exist by the Judge, was accurately described in the amended statement of claim.

[106] It is an indication that the pleading was adequate that the Judge, in reaching his summary finding at [11(a)] of the judgment, did so in terms similar to those of the pleading. He found that the understanding was that "the defendants … would withdraw their standard listings from Trade Me by January 2014, subsequent

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64 *Commerce Commission v Qantas Airways Ltd (No 2)* (1992) 4 TCLR 444 (HC) at 447.

Trade Me listings to be vendor funded". This corresponds closely to the pleading at [46] of the second amended statement of claim.[65]

[107] We would also add that the evidence in our view quite clearly shows that the parties did reach the view that the basic position would be vendor funding. Mr Lugton, when asked about an agency absorbing any of the Trade Me fees, observed that "[i]t wouldn't be in the spirit of the understanding that we had."

[108] Mr Coombes, when repeatedly pressed on the nature of the agreement, maintained that there was a commitment to vendor fund in most if not all cases:

> Q. But you weren't giving any commitment or assurance to anybody else that we're going to move to this Vendor Funded Model that Trade Me's putting up did you?
>
> A. I think we did. Ray White Hamilton did.
>
> …
>
> Q. But what I'm putting to you is you never gave an assurance to anybody in that room, "We're going to pass on 100% of that cost." Did you?
>
> A. Well I'm pretty sure we did.

[109] We invited Mr Dixon to seek an amendment to the statement of claim should he consider that appropriate, although his primary position was that the pleading was adequate. He has done so. However, given the conclusion that we have reached on this pleading point, we do not need to deal with that application. The pleading is adequate.

The third and fourth appellants

[110] Although the Judge did not need to determine the point, he was inclined to find that Messrs King and O'Rourke were liable and should be regarded as principals. That specific finding has not been challenged. We uphold it.

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[65] Reproduced above at [101].

The cross-appeal — expert evidence

[111] At the hearing in the High Court the respondents sought to adduce the evidence of James Mellsop, an economist. He had been asked by counsel for the respondents to provide his views "on the competitive effects of the alleged behaviour". He had prepared an extensive brief in which he concluded that he would have expected the Hamilton agencies to have independently passed on the Trade Me price increases to vendors under a competitive counter-factual. In other words, his evidence was to the effect that following the Trade Me change of policy, agencies would independently decide to vendor fund Trade Me listings. The Commerce Commission objected to the admission of such evidence, but obtained its own expert economic evidence as the response if necessary.

[112] The Judge decided to exclude that evidence. His reasons were as follows:[66]

> (a) in principle, s 30 type conduct does not avail of a competition analysis. Constraints on price-setting are deemed in breach of s 27. That the same price may have arisen in the counterfactual (*ie*, absent constraint) does not respond to the presence of constraint in the factual. The proposed evidence was irrelevant, and therefore inadmissible;[67] and
>
> (b) Mr Taylor conceded, if the Commission's pleaded 'vendor funding' meant the agencies were to bear none of the Trade Me standard listing price, the expert evidence was not substantially helpful. That, of course, was the Commission's case, with the result the evidence was also inadmissible.[68]

[113] We respectfully agree with both of these reasons. To have evidence on what would have happened but for the alleged arrangement and understanding would be to remove the benefits of s 30 and commit to an analysis of actual competitive effects. It was not substantially helpful under s 25(1) of the Evidence Act 2006.

[114] We conclude therefore that the Judge's decision to not admit the affidavit of Mr Mellsop was correct.

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66 *Commerce Commission v Lodge Real Estate Ltd*, above n 1, at [238].
67 Evidence Act 2006, s 7(2).
68 Section 25(1).

Result

[115] The appeal is allowed.

[116] The cross-appeal is dismissed.

[117] There is a declaration that the respondents' conduct contravened s 27, applying s 30 of the Act.

[118] The case is remitted back to the High Court for the assessment of pecuniary penalties.

Costs

[119] The respondents are jointly and severally liable to pay the appellant one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

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