IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 116/2018
[2019] NZSC Trans 18

NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

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

Coram: Winkelmannn CJ
Glazebrook J
O'Regan J
Ellen France J
Williams J

Appearances: L J Taylor QC and M A Cavanaugh for the First and Fourth Appellants
D H McLellan QC and M S Anderson for the Second and Third Appellants
J C L Dixon QC, L C A Farmer and M M Borrowdale

for the Respondent

CIVIL APPEAL

MR TAYLOR QC:

May it please the Court, I appear with Mr Cavanaugh for the first and fourth appellants.

WINKELMANN CJ:

Tēnā kōrua, Mr Taylor.

MR McLELLAN QC:

If the Court pleases, McLellan with Anderson for the second and third appellants.

WINKELMANN CJ:

Tēnā kōrua.

MR DIXON QC:

May it please the Court, Dixon, Farmer and Ms Borrowdale for the Commerce Commission.

WINKELMANN CJ:

Tēnā koutou.

Now, Mr Taylor.

MR TAYLOR QC:

Thank you, Your Honour.

Before I start, just a couple of housekeeping matters.

WINKELMANN CJ:

Yes.

MR TAYLOR QC:

There are representatives of the Commission seated in the front row and Ms Julia Whitehead in the front row with Your Honour's leave would like to take notes during the hearing.

WINKELMANN CJ:

Yes, she may.

MR TAYLOR QC:

And there are representatives of the Commission as well, Your Honour.

WINKELMANN CJ:

Yes.

MR TAYLOR QC:

I propose to go to my written submissions, I don't have a summary…

WINKELMANN CJ:

Outline. Yes. Look, can you tell us how you and Mr McLellan are going to divide up?

MR TAYLOR QC:

Yes. In reality we're not going to divide it at all. As the Court is aware, we have provided a joint submission and I will address the submissions and also the reply to the submissions by the respondents. But Mr McLellan does reserve the right to make submissions on anything that he either doesn't agree with or is specific to his clients, with Your Honour's leave.

WINKELMANN CJ:

Yes.

MR TAYLOR QC:

But we are hoping that that won't be necessary.

WINKELMANN CJ:

So have you discussed with counsel for the Commerce Commission dividing the time, or are you confident about the time?

MR TAYLOR QC:

I'm far from confident about the time, Your Honour, but what I have discussed with my learned friend is that I will be aiming to, one, address my submissions hopefully during the course of the morning and perhaps into the afternoon. I will also be endeavouring to address the main points by way of response to my learned friend's submissions, and I'll be proposing to hand up a synopsis of that hopefully in the morning adjournment to my learned friend and to the Court once I come to those.

WINKELMANN CJ:

Synopsis of what, sorry?

MR TAYLOR QC:

Just of the response to the points that are raised in the respondent's submissions. And I indicated to my learned friend I was hopeful that we would achieve that by about three, 3.30, so that he gets on his feet today, hopefully allowing me whatever time is necessary tomorrow for a brief response of any matters not covered in the course of my submissions today. So that's the estimate and hopefully that's achievable.

One of the problems, one might say, with this appeal, at least in one sense, is that the Court of Appeal has made quite different findings of fact to that of the High Court Judge, and in preparing for this hearing it has become readily apparent that it will simply not be possible in the time available to go through the transcript to address the evidence that supports the findings of fact by the Judge. So what I have done – and the registrar has copies – is to provide a bundle of references to the transcript under each heading in respect of which I will want to address the Court. Those references have been chosen because they support, we say, the findings of fact by the Judge and the submissions we are to make. They are direct quotes from the transcript but it would simply be impossible to go through the transcript under each heading and take the Court to them. So that is what they are, they don't purport to be anything

more than that, but hopefully it's a convenient way of the Court assessing what evidence we say there was which supports the various findings of fact by the Judge, and hopefully that will streamline the hearing because rather than taking you laboriously through the transcript, reference can be made directly and easily to these references from the transcript.

So unless there is any other matters, Your Honour, I propose to address the Court.

WINKELMANN CJ:
Go ahead, start.

MR TAYLOR QC:
In going to my written submissions I propose to not go to the summary at the commencement of the submissions and start instead with the factual background, which I have described at paragraph 7 of the submissions. And starting with that paragraph what we have, the proceeding centres on a meeting between representatives of the Hamilton real estate agents on 30th September following notification of Trade Me's upcoming changes to its fee structure, and the basic background to that is that Trade Me started on a scheme which it called the Agent Yield Project, by which it proposed to get the agents off their current practice, which was to absorb the cost of Trade Me standard listings. And that was a deliberate design and it was designed in a way that the price that they were proposing would make it unattractive, to say the least, for real estate agents to continue to absorb the price or the cost of the Trade Me listings. Now in making that submission I am not in any way suggesting that what Trade Me were doing was unlawful in any way or even other than commercial. But what they were finding was that because of the capping of the subscription cost for Trade Me listings the agencies, because the cost was so low, were generally speaking, absorbing the cost. Now that was not the case in every case in Hamilton because Mr Shale of Success, who was one of the real estate agencies, had a practice of charging, I think the figure was a fee of $30 per listing, and that was based on his assessment of the average cost of listings based on the subscription price from Trade Me for that agency.215

WINKELMANN CJ:

Was he the top of the market, Success was the top end of the market?

MR TAYLOR QC:

That's correct, Your Honour. Success was a Bayleys franchise, but it's clear from the evidence and clear from Mr Shale's evidence that his particular agency, although having a small share of the market overall, relatively small share, specialised in what would be described as high end properties.

So at paragraph 9 I say, and I've just covered it really, in 2012 as part of a push to increase revenue, Trade Me proposed to implement a new fee structure for its property listings which it deemed or dubbed the Agent Yield Project, so I've really already covered that paragraph of the submission.

Now the way in which Trade Me approached that was not to simply go out and announce publicly and worldwide, or nationwide, "this is what we're doing". What it did was adopt a deliberate strategy where it went to each of the major franchises, Harcourts, Bayleys, all of those franchises, and it put together a package of what it was going to, what it was proposing to do. In that package there is an example, if I take the Court to it – one of the examples of that package is a Trade Me presentation. There's two examples. The first is 301.1241, which is under volume 301, and the second, which I will take you to because it's relevant to Lodge Real Estate, is at 301.1349, which if you go to the Table of Contents is again under the heading Volume 301 and is August 2013.

GLAZEBROOK J:

Can you just give the number again, the page number?

MR TAYLOR QC:

Yes. 301.1349.

And what you'll see from that package, and it's similar to the other package that I've also referred to, is that it was a carefully designed presentation which was designed to persuade the real estate agents to pass on the cost of the

new Trade Me price. And if we go, for instance, to 1360, or if we start at 1359, or perhaps we should just start at the beginning.

O'REGAN J:
That's a radical proposition.

MR TAYLOR QC:
Yes. But what they are doing first is saying, "Look, this is how we see the market moving. You spend a lot of money at the moment on newspaper advertising but digital advertising is the way of the future," and they in the first line at 1354, they're endeavouring to get that point across, as indeed they do in the second slide at 1355.

They then go on to say Trade Me is far and away the most popular property website, because at that time there were two websites essentially that were providing this online service for advertising. The first was Trade Me, the second was realestate.co. Now realestate.co was a company that was owned by the real estate industry through a company called PPL, and it provided precisely the same sort of service but certainly at this point in time it did not have the same public recognition that Trade Me had at the time. So these parts of the slide were designed to impress the real estate agents, and NZ Realtors in this case, that Trade Me was the go-to website and that was why it was important that, or that was why there was benefit to the vendors and the real estate agencies in continuing to use them. And those messages carry through right through to 1362, and then the conclusion that it doesn't add up, and what didn't add up, at least in Trade Me's submission or presentation, was that you've got all these sellers that want their property on Trade Me, Trade Me was the go-to website for anybody that was wanting to buy, but the marketing budgets spent on Trade Me property were way below or down 10% of the overall marketing cost that they assessed.

So then it comes to the message, changes to the pricing structure, and that's at 1364, and it starts off by saying, "Here's our new price structure, it's more transparent because you know the cost of each listing," and of course up until then for all of the agencies that were on subscription models it was difficult to ascertain the precise cost of the Trade Me listings unless you added up every

listing and then divided that by the monthly subscription fee, which is in fact of course what Mr Shale did when he worked out his $30 per listing that he used to on-charge to his vendors. So it starts with the message, "It's transparent because you know the cost of each listing. This helps you with your disclosure requirements and makes it more clear-cut when presenting the cost to vendors." Now the disclosure requirements were that if you are going to be charging a cost and you added any sort of commission or profit, as it were, any add-on to that cost, then that had to be disclosed. So they are saying, "we've got a proposal for you, this will tell you exactly what your cost is, and you'll be able to comply easily in respect of each listing".

WINKELMANN CJ:
And this is the proposal that did include a commission, it did include a commission?

MR TAYLOR QC:
It did include.

WINKELMANN CJ:
Which was later dropped because it would give, create a disclosure obligation?

MR TAYLOR QC:
Yes, and that was the immediate reaction of all of the agencies or all of the Bayley, all of the franchise heads, that TM spoke to.

Then they say, "Everyone has the same headline price for base listings and premium products and it's flexible to apply. You decide how or if you want to apply the discount, it makes it easier to identify your costs for vendor funding and for disclosure purposes." So what they're saying is, "this is what we're going to do, we've set this price, this is going to be the price to you, it's up to you whether you discount it or not". So even though they're promoting a vendor funded package they're saying, "it's up to you as to how you deal with it, whether you provide a discount". And obviously they say one of the advantages of this is that you can reduce your marketing costs with Trade Me if you vendor fund and you could also earn commission income, and that's

where the commission that your Honour has just referred to comes in. But the point here is that at that time the cost of the subscription model was so infinitesimally small compared to, one, turnover of the agencies or, two, profit of the agencies or, three, the cost and hassle of trying to on-charge it, that most agencies, except Success in this case, regarded it as so small as not being of significance in pricing of the agency's services. And the classic example of that in the case of Lodge is that at the time it was $6 a listing, 6000 a year, compared with an overall commission of 4% on the sale of a property and the other costs of the advertising package. There's no question that at the time this package was being promoted, the cost of the Trade Me listings was so small as to not be of any significance to the agencies. So then a headline and a net price and then it goes on to disclose what the prices are going to be and when it's going to happen.

And if we go through to 1374, it says, "vendor fund where possible". So it's saying, "where possible when the market permits or when it's opportune for you to do so, we want you to vendor fund", and as part of selling that message they are saying, "look, we've gone and we've spoken to vendors and vendors are happy to pay for a reasonable price, 72% of vendors are willing to pay an average of $385 for their agent to market their property on Trade Me, 85% indicate a $200 difference in market is unlikely or very unlikely to or definitely will not change their decision on which agent they should choose". Now that's an important message because I think it's accepted by everybody here that the agents compete for listings, that is the area in which they compete, that is the area where by their provision of their bundle of services, their commission rates, their skill and expertise, that's what they're selling and what they have to do is achieve listings, and I think the evidence of Mr O'Rourke was that, at least in the case of Lodge, almost all of the listings were exclusive in the sense, in what we would call a sole agency listing, and there's also evidence that among the agents, some of the agencies, there was what was called a conjunctional arrangement whereby if there was an exclusive listing, for instance with Lodge, but a vendor was introduced by another agency, they reached a sharing arrangement as to how they would deal with that in terms of commission. Nobody's suggesting that there was anything problematic about that, it's obviously pro-competitive in one sense, but certainly it's not

any part of the Commission's case here that those conjunctional arrangements were in place.

So the message is you can vendor fund where possible, and of course from Trade Me's perspective if they were ever going to increase their revenue, the best way they could achieve that was to push the real estate agencies to a vendor funded model. Because otherwise if they continued to absorb the cost, as they had been doing up to then, any increase in the cost would go to the real estate agent's pocket, and that wouldn't enable Trade Me to increase its revenue in the way that it wanted to and what this project was designed to do.

O'REGAN J:
It didn't achieve it though, did it? Because people just stopped advertising on Trade Me.

MR TAYLOR QC:
Correct. And I'm not going to take you to the evidence but it's an interesting read to read the Board papers of Trade Me and the graphs which started to become apparent as soon as a franchise went off its existing system onto the new system there was an immediate fall-off, and that was becoming dramatic to the extent that whereas at the start realestate.co had a small percentage of the market, within three months of all of them going on, which was in April 2014, within three months realestate.co in terms of its share of the advertising market was well in excess of 50%, and that trend was an ongoing trend, and that was a trend not confined to Hamilton or Auckland, that was a nationwide trend. And in the Board papers themselves you'll see that Ray White I think was the last franchise that was going to come on to the new system and when they saw what was happening and knew that Ray White were going to be coming into the new system with the vendor funding arrangement, they had to do something about it, and they did something about that by basically going back to the drawing board and coming up with a subscription model again, albeit at an increased price. But that's absolutely right, what happened here was a disaster essentially for Trade Me.

One of the ironies in a way of this case is that Trade Me was the one that originally complained to the Commerce Commission, but they complained not about price fixing, they complained about boycotting. Their concern was that the agencies were getting together and deciding to boycott Trade Me. Now the Commerce Commission commenced its investigation on that basis and very quickly came to the conclusion that there was no unlawful boycott, and just for the records it's clear if one reads the boycott provisions in the Act that agents getting together and deciding that they weren't going to offer Trade Me wouldn't come within the definition of an unlawful boycott under the Act. But it's not a matter that the Court needs to be too concerned with because it's clear that the Commerce Commission reached that conclusion very early on on the piece and then embarked on this price fixing investigation. It's interesting too that throughout that investigation the Commerce Commission was keeping Trade Me informed of what was happening in that investigation and where they were going with it. So there's a huge irony because if one looks at what Trade Me was trying to do, it was trying to convince every real estate agent in the country that they should vendor fund where possible so that if there was price fixing of the nature which is claimed in this case, that would have served Trade Me's purposes brilliantly. But we say there was no price fixing in this case, there was no price fixing arrangement.

The other marketing package is again in volume 301 at 301.1241. It's generally the same but there are differences in it. But the point that I was making is that the strategy that Trade Me entered into was not to go to individual agencies, its strategy was to go to the major franchises and to NZ Realtors, which was a group of independent real estate agents, a national group, and say, "look, we'll persuade you that this is a good idea, you then go and persuade your members or your franchisers that it's a good idea too". So what they were doing was going to the industry heads and saying, "this is what we want to do, this is why it's a good idea, this is why essentially we want you to sell it for us". Now, back to my submissions.

WINKELMANN CJ:

So are you going to tell us what is meant by a "vendor funded model"?

MR TAYLOR QC:

Yes, yes. Well, that's one of the critical issues. I'm just – if I so go back to my submissions, and I think I went off script at about paragraph 10.

Paragraph 11, all I've indicated there is the extent of the change from the point of view of the individual agencies that were facing it, and again when I cross-examined Mr McGee on this issue I said to him, "Well, look, surely one of the ways in which Trade Me could have achieved this purpose was the sort of frog in the boiling water, you know, you just put it up a little bit and then gradually increase it over time," and he said, "Well, that was a strategy that we considered but we didn't think it would achieve our end because we thought if we did that the agencies would just continue to absorb the cost. So we deliberately set this price in a way which we thought would make it inevitable that the agencies would move to a fully vendor funded model."

I've in those paragraphs just looked at the individual cost relative to the previous cost in respect of each of the agencies, and at paragraph 15 I say, "What was meant by and understood as a vendor funded model is important to the Commission's case. The Commission defined vendor funding of the Trade Me fee in its pleading as funding of that fee by the vendor or real estate agent, it would be passed on 100% or no company money applied to it." So, and it's important to realise that in the High Court that was the Commission's case, that this was an arrangement to pass on 100% of the fee, and I've referred in the submissions to the transcript of the argument relating to whether or not we could produce evidence, economic evidence, of what would have happened absent any agreement in respect of these proposed price increases, and the Judge said, "Well, I'm not going to allow you to do that because their case is that you pass on, the agreement was to pass on 100%, that was their case, and in those circumstances if that agreement is proved, to pass on 100%, then it doesn't help me to know what would have happened absent the agreement". And that was the rationale and the basis for the Court refusing to allow that economic evidence. And that, as this Court has indicated, is not in issue in this appeal because leave has been refused to appeal on that issue.

10.33.57

The agencies – so this is very important – at paragraph 15: "The agencies, however, meant and understood 'vendor funding' to mean that no agency was going to fully company fund it so that the fee would be met by the company, vendor and/or salesperson. The High Court and the Court of Appeal reached very different conclusions as to the meaning of 'vendor funding', which I will come to further below." But if your Honours just go to that bundle of references from the transcript and go to tab 2, that tab actually – slightly – it's been not quite tabulated correctly, because if you go to the last page on the previous – oh, apparently yours is correct, mine has got the meaning of "vendor funding" in the earlier tab. But if I could just confirm that yours starts with the meaning of "vendor funding", and what we have done there is to take all of the extracts from the cross-examination, not just of the Commission's agency witnesses but also cross-examination of the appellants' witnesses to back up, which we say clearly supports and backs up the analysis by the Judge where he goes to some of that evidence and says in his conclusion the consistent theme was that vendor funding meant to the vendors that it would be funded in whole or in part by the agency, by the vendor, or by the agents. And what he concluded from that, we say absolutely correctly, was that if that was the meaning of the arrangement then the agencies had complete and unfettered discretion, "freedom", as he put it, to price in any way they thought fit, and that was the finding of the Judge and that finding was absolutely available to him on the evidence.

WINKELMANN CJ:

Could you just re-state – sorry, Mr Taylor – could you re-state from what you say the Judge's finding was?

MR TAYLOR QC:

Yes. In essence the Judge's finding was that the agreement, what the parties meant by "vendor funding", was that in any transaction and on any occasion they were free to fund the TM listing in whole or in part themselves. And what he said they understood to mean by "vendor funding" was somebody pays for it, it could be the vendor, it could by the agency, it could be the company, or

all or some of them in any individual transaction, and that's what he held to be the meaning of “vendor funding”, and that’s clear –

O’REGAN J:

He wasn’t completely consistent about that though, was he?

MR TAYLOR QC:

Well, he was, Sir, and I’ll come to that, because it seems to be a major plank of the Court of Appeal’s decision where they say, “Oh, look, he’s unclear or he’s confused or he seems to have over-estimated the extent of the discretion”, that's how the Court of Appeal puts it, and it puts it at paragraphs 22 and 23 of its judgment, and then it puts it again at paragraph 78 of its judgment and we say, look – and it’s probably appropriate that I come to that now because in my submission the Court of Appeal in making those statements has no basis for doing so. What they’re saying is, “Look, the Judge who sat through this four-week hearing and started off his judgment by reciting what the Commission meant by “vendor funding” somehow got confused as to what they meant”. And in my submission there’s just no basis for that. The only basis that seems to be put forward by the Court of Appeal is the use by the Judge of the conjunction “and/or” when he/s talking about funding by the vendor, by the agent or by the company. But it’s absolutely clear in my submission in context that all he’s saying is the vendor funding or the funding of the Trade Me listing fee could come from the agency and/or the vendor and/or the agent. That's all he’s saying, and to suggest, as the Court does in both of those paragraphs, in those three paragraphs, is in my submission without any foundation whatsoever. There was no confusion by the Judge as to what the case was, and the case was that the agreement was that 100% of the Trade Me listing costs would be passed on to the vendor and/or the agent or the agent, that was their case. But even the Commission on its case as understood would be saying 100% would be transferred, would be passed on to the vendor and/or the agent, because it’s clearly contemplated that there could be a situation where, for instance, an agent would go to a vendor and say, “Look, I’ll pay 50% of that cost, you pay the other 50%”. So if you're trying to articulate what the concept is, the use of that conjunction “and/or” is perfectly appropriate.

GLAZEBROOK J:

And when you say “agent” you're talking about individual agents, are you?

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

That’s fine, I was just double-checking.

MR TAYLOR QC:

And what his Honour’s finding is, no, one, there was no agreement to pass on 100% of the cost to the agents or the vendor. What the agreement was, when one looks at the context, and we’ll come to whether there was an agreement obviously, but using his Honour’s finding, he’s saying that’s not what they mean, vendor funding to them was not that 100% of the cost be transferred to the vendor or the agent or the vendor and/or the agent. Vendor funding to them meant that the cost of that could be paid in whole or in part by the vendor, by the agent, or by the company. And of course what we see from the evidence of Lodge, that is of the very few listings which they entered or listed, 55 in all, in February after they went onto this new model, 70% of those were funded by the company, in other words by Lodge.

WILLIAMS J:

As to 100%, or in part?

MR TAYLOR QC:

Sorry?

WILLIAMS J:

In part or the whole fee?

MR TAYLOR QC:

Some in part – and I’ll actually just, it might be quicker if I go to that straight away. Seventy-seven percent I think was in part…

WINKELMANN CJ:

That's 77% of the 75% or…

WILLIAMS J:

Of the 70% I think.

O'REGAN J:

You'd better get the figures, I think.

MR TAYLOR QC:

I'll get the figures right.

WILLIAMS J:

It's a lot of sevens.

MR TAYLOR QC:

Yes. The summary is at – oh…

WINKELMANN CJ:

So your case is that the Commission's case was always that a hundred percent of the cost would be borne, would be passed on either to the vendor or the agent?

MR TAYLOR QC:

Yes.

WINKELMANN CJ:

And you say the Judge found, no, that wasn't so, what was obviously agreed was that they could come up with any kind of price in combination?

MR TAYLOR QC:

Yes, that's correct, and had complete freedom to do so, because that's what vendor funding meant to them. It was –

WILLIAMS J:

So the change was the change from a hundred percent agency funding?

MR TAYLOR QC:

Yes, yes.

WILLIAMS J:

To more discretion, you say?

MR TAYLOR QC:

Yes, complete discretion, we would say, and it's – yes.

O'REGAN J:

Well, that must have involved a finding that they had agreed they wouldn't uniformly fund every listing through the agency?

MR TAYLOR QC:

Could you just repeat that, your Honour?

O'REGAN J:

They started from a point where most of them were funding every listing themselves and they were now changing, agreeing to change, to a system where sometimes it would be the agency, sometimes it would be the vendor, sometimes it would be the agent and sometimes it would be a bit of all of them?

MR TAYLOR QC:

Yes.

O'REGAN J:

But they were going to stop 100% funding of every listing?

MR TAYLOR QC:

Yes, that's right. Because what they were all saying at this meeting is, "we can't absorb this cost, we're not going to absorb this cost or we can't absorb it, we think what Trade Me's doing is terrible". That paragraph of the evidence is at paragraph 138 of Mr O'Rourke's brief of evidence, and what he says – and this was information that was obtained in response to a section 92 notice that was issued by the Commerce Commission. And the only evidence of who

paid what following the alleged arrangement was this evidence, and what he's said was –

GLAZEBROOK J:

Have we got the page number?

MR TAYLOR QC:

It's 203.0614 and it's at page 459 of his brief of evidence, paragraph 138. And what he says there, "In February 2014, of 12 listings Lodge paid the whole Trade Me fee for seven and part of the fee for one", and the total listings were 55. And in August there were nine listings and, "Lodge paid the whole fee for five and part of the fee for two". So in fact what happened was not what the Commission says happened. In fact what happened, at least in Lodge's case, was that they paid the whole or part of the fee in those two periods that were the subject of the Commission's section 92 statement. Now Mr O'Rourke was not cross-examined on this evidence, nor was there any evidence brought from the Commission to try and double-guess it in any way, although they attempt to double-guess it in their submission. But in my submission the only evidence as to who paid what subsequent to the introduction of the new structure is this evidence, there's no evidence called by the Commission as to what proportion, if any, of these listing costs were paid by other vendors. What the Commission otherwise asks you to do is to assume that they paid the whole cost, that there's –

GLAZEBROOK J:

What I was just going to ask you, just to check your submission. Your submission is that this evidence is actually, it's not contrary to the arrangement, it's actually in accordance with the arrangement which – and I know we're assuming there's an arrangement for this purpose…

MR TAYLOR QC:

Assuming there's an arrangement, yes.

GLAZEBROOK J:

So assuming there's an arrangement for this purpose you're saying it was that you are perfectly free to totally agency fund?

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

And so this was totally in accordance with what the arrangement was, which was that there was total freedom to decide the combination…

MR TAYLOR QC:

Correct, and entirely consistent with what the Judge found on the facts. Because the Judge when he's dealing with this, he starts off at paragraph 215, he does a summary, and then he goes through all the evidence and then he comes, at approximately I think 233 or thereabouts, he comes to his conclusions as to what was meant by "vendor funding". And then he specifically refers to this evidence as saying, "Well, this evidence bears out my interpretation of what the parties meant when they talked about vendor funding".

GLAZEBROOK J:

And why is your arrangement, assuming it is an arrangement, not contrary to the law? You're coming to that, I assume, but I was just wanting you to deal with it, wanting to just flag it. I think that was probably what Justice O'Regan was also asking.

MR TAYLOR QC:

Yes. And it's not contrary to the law for the very reason found by the Judge, that there is nothing in that arrangement that controls in any way the price for the services to be provided by the real estate agencies because, as he found, if that is the arrangement they had complete freedom to price in any way they liked, and therefore there is no control of the price. And of course for section 30 to apply the Commission must prove that there is a provision of the agreement as found by the Court which had the effect or the likely effect of controlling the price. He said, no, complete freedom to price any way they thought fit.

One of the fascinating things about the Court of Appeal judgment is that even it acknowledges at – I'll just have to go to the Court of Appeal judgment – but

it says, “We acknowledge that there might be occasions or there could be occasions where, in the words of the Court of Appeal, the parties would depart from the arrangement by paying the whole or part of the cost themselves”, and they say, “presumably when it was necessary to do so in order to obtain a listing”. So what they’ve done is re-characterised the arrangement, say it was something different, but acknowledging that the parties could depart from it when necessary, presumably to obtain a listing. Now I’ll find –

O’REGAN J:

Whereabouts is that in the Court of Appeal decision?

MR TAYLOR QC:

Yes, I’ll find that. Paragraph 82. No – yes, it’s at 82: “However, equally we agree with the Judge that this was not regarded as being a policy that had to be implemented on every occasion”, whatever that may mean. “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.” The slight irony in that statement is that the only area in which the agents complete with each other is in order to maintain or obtain a listing, that is the primary area in which they compete. And the Court of Appeal is acknowledging what the Judge has found, that, okay, they did have a discretion to do that, to fund in whole or in part, to gain a listing.

O’REGAN J:

But they had still agreed they wouldn't do it in every case though, hadn't they? They’d agreed to stop a hundred percent funding of a hundred percent of listings.

MR TAYLOR QC:

Well, there’s no evidence of any agreement like that.

O’REGAN J:

Well, that's what the Judge must have found though. Because he said the area of freedom was that you could do it partly this way, partly that way, partly the other way…

MR TAYLOR QC:

Yes.

O'REGAN J:

But you weren't free to just continue what you were doing before, of absorbing the cost on every listing.

MR TAYLOR QC:

Yes, if you accept that there was an arrangement then –

O'REGAN J:

Well, I know that's an issue, I'm not pre-judging that.

MR TAYLOR QC:

Yes.

WILLIAMS J:

Well, you already at the start of your submissions you're saying that that arrangement was aided and abetted by Trade Me.

MR TAYLOR QC:

Oh, certainly it was.

WILLIAMS J:

In fact if Trade Me had called all the agencies' leaders together and said, "Let's do it this way", they'd be a party to it.

MR TAYLOR QC:

Yes, exactly. Instead of that they just went to all of the competitors individually.

WILLIAMS J:

Individuals. But that might be your example of parallelism.

MR TAYLOR QC:

Correct, yes. And this is why a lot of time in the trial was spent on establishing beyond doubt that each of the parties before they even entered

into this, even went to this meeting, had made their individual decisions that they would go to some form of vendor funding model.

WILLIAMS J:

Yes.

MR TAYLOR QC:

And that's, there's no, I'm not going to back away from that at all. We say that this is classically an example of conscious parallelism in terms of what they were doing.

O'REGAN J:

But just assuming it isn't, for a moment, on your version of the agreement you're saying that competitors getting together to say, "We will all on a particular day stop our practice of a hundred percent absorbing this cost", is not illegal, is that what you're saying?

MR TAYLOR QC:

Yes, it is, even in that situation. I don't say I need to go that far, but even in that situation all they are saying is, "We are not going to continue to fund this a hundred percent of the time", that's all they're doing. They're saying, "We're not going to, we can't afford to, we're not willing to", all of those unilateral statements that they were making in the course of this meeting. But that does not control price because it is entirely up to each one of them when and if they decide to absorb part or all of the cost by them in any individual transaction in –

O'REGAN J:

And if somebody had absorbed that for every client they would have been breaking the deal, wouldn't they, if there was a deal?

MR TAYLOR QC:

Yes, if there was a deal. If somebody had done that, yes, but if that was the deal…

WINKELMANN CJ:

It's a pretty strange agreement to reach.

MR TAYLOR QC:

Well, it's very strange agreement.

O'REGAN J:

Well, it's what the Judge found they did reach though.

MR TAYLOR QC:

Well, it is what it is, it's exactly what was happening. Nobody was giving a commitment that they wouldn't fund a hundred percent of the time. They were basically saying, "We're not going to", or, "I'm not going to", and obvious of that proposition is that, "Somebody else is going to have to pay", as Mr Coombes put it, and who that somebody else is is the agent, the vendor, or the agency itself. And the Judge is saying, "Look, there was no restriction on them in determining on a case-by-case basis in any individual transaction what that was going to be", so therefore there was no provision of the arrangement which had the effect of controlling price.

WINKELMANN CJ:

So your case is that prior to the meeting they'd all reached the commercial realisation and decision that they could no longer continue with the existing funding model which was that they just regarded as something that they absorbed?

MR TAYLOR QC:

Yes.

WINKELMANN CJ:

Rather, the cost of it was going to be in play in their dealings with people?

MR TAYLOR QC:

Yes, correct.

ELLEN FRANCE J:

Just in terms of your argument about the meaning of "vendor funding", what do you say is the significance of Mr Coombes' reference to the – just for my understanding – the payment for the feature address?

MR TAYLOR QC:

Oh, yes.

ELLEN FRANCE J:

I just don't quite understand how that fits in with your argument.

MR TAYLOR QC:

Yes. Really it's on a slightly different point. But the Commission saying, "Look, the arrangement that all of these people reached was that they were all going to set the offer price and they were going to offer Trade Me listings in this way. What Mr Coombes' evidence was, and it was unequivocal once in cross-examination, was that, "No, that's not what we decided to do. We decided we would not offer standard listing at all." And the reason they decided, that is Online decided, not to offer them at all, was that they believed they had a better deal with Trade Me in respect of feature listings. Now feature listings are the big photos with a photo of the property rather than the tiny little brief description of the property. But going into the meeting – and I've covered this again in these excerpts where I call it the "Coombes version" of the agreement – going into the meeting him and his partner were aware that they had a better price than the others or believe they had a better price for feature listings. They also say, or Mr Coombes says in his evidence, they had lost complete faith with Trade Me and they wanted to send them a message, and the message that he sends is to withdraw the listing. But what he says is that the agreement of the meeting as a whole was that nobody would offer standard listings and they would only offer feature listing to be vendor funded. So that was his clear evidence, and I actually took him to the settlement agreement that he had where he said the agreement was to vendor fund Trade Me listing and he said, "No, no, that's wrong, the agreement only related to feature listings". And my learned friends in their submissions both in the High Court and certainly in this Court say, "Look, he was just confused or he didn't understand what he was saying".

WINKELMANN CJ:

So his evidence in trial in contradiction of his statement as the basis of the settlement was that the agreement was – can you just take me through that again?

MR TAYLOR QC:

His evidence at trial was that the agreement was that they would not, none of the parties would offer standard listings, they would only offer feature listings, and those were to be vendor funded, and by "vendor funded" he meant paid by the vendor, by the agent or the agency.

GLAZEBROOK J:

Do you want to take us to your excerpts specifically on that so we can see where you…

MR TAYLOR QC:

Yes. Right, it's at tab 7 and it's my cross-examination of Mr Coombes. So I'm saying, "Yes, so long before you had this meeting with the group on the 30th of September you and Mr Glasgow had already decided that there was no way you were going to absorb the price increase, is that correct?" "Correct", he says. "And if you were going to absorb it presumably, or did you decide at that time or subsequently that if vendors wanted to use Trade Me standard listings they'd have to pay for it themselves is that?" And he says, "No, no, not standard listings. When we made the change we were not going to do any standard listings." So this is not me putting words in his mouth, he's correcting me the first time when this is raised. "So when did you decide that you weren't going to do any standard listings?" He says, "I can't honestly answer that but it was in that time. It was between the advice from Trade Me, was through our zone meeting and the meeting we had with our fellow realtors." So he says, "This was a decision that we had made before we even went into this meeting." "So you're saying it was before you went into the meeting?" "Well, I think, I'm not sure whether we'd actually made that, we were going to stop, but we were very upset about the pricing structure and obviously so, we weren't happy campers." And then, "It was your understanding or belief, wasn't it, that the other agencies in town were likely paying a very substantially higher sum for Trade Me feature listings?"

"Correct, yeah." "And you and Mr Glasgow agreed, didn't you, that you didn't want that to be disclosed in any way at this meeting that was coming up?" "Correct, because that was a Ray White initiative and we weren't in a position to expose the corporation." So what he's saying is, "We've got this up our sleeve, this is what we have decided to do, we're certainly not going to disclose any price that we're going to vendor fund at because we've got this perceived advantage". And the rest of the transcript references that I take you to simply reinforce that basic understanding. And he says, "This was the arrangement that the meeting reached as a whole."

WINKELMANN CJ:

Well, where does he say that?

GLAZEBROOK J:

Yes, I was wondering as well.

MR TAYLOR QC:

Oh, I see.

GLAZEBROOK J:

Is that earlier under tab 2?

11.04.45

MR TAYLOR QC:

I think it's through here as well. If we go over the page he says, "But you already decided in your own mind that you weren't going to list Trade Me, you weren't even going to offer standard listings?" and he says, "No, no." "You weren't going to?" and he says, "No, that's correct, they had gone." "Yes, so there'd be no reason for you to discuss at the meeting we're going to pass on a hundred percent of the cost, would there, you wouldn't have said that at the meeting?" "No."

GLAZEBROOK J:

Well, what about with the feature address though, because he does say over the page that they have been vendor funded?

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

So where does he – you say he meant vendor funded in the way that you are…

MR TAYLOR QC:

Oh, where he says that it means –

GLAZEBROOK J:

What vendor funding means to him, yes.

MR TAYLOR QC:

Oh, right. That's in the section on the meaning of "vendor funding".

GLAZEBROOK J:

That's section 2?

MR TAYLOR QC:

Yes.

WINKELMANN CJ:

So later on in that part you were just showing, he says, "So the option with us that if they stay on Trade Me we could offer them a feature and that they either paid for it, the agent paid for it, or we paid for it"?

MR TAYLOR QC:

Correct, yes. And again, that's not me putting words in his mouth, that's what he comes up with.

GLAZEBROOK J:

Sorry, where…

WINKELMANN CJ:

That's in that same block, just towards the bottom. As Mr Taylor says, it's not in response to a leading question.

MR TAYLOR QC:

And he reiterated that, as I recall it in re-examination as well. Perhaps if we just go to the section 2 on the meaning of "vendor funding". Yes, if we go to that we have re-examination by Mr Dixon of Mr Coombes, and he says, "You talked about how if somebody went on Trade Me with Online you would give them a feature listing but they'd have to pay for it, is that right?" and he says, "Somebody has to pay for it, somebody had to pay for it." "So in respect to a feature listing it was either…" and the answer is, "The agent," question, "The agent, the vendor, the vendor or the company? Did you do that?" "We did." "How often?" "In the very early stage in the January/February period there were a few that insisted that they wanted to be on realestate, Trade Me, so we gave them a feature ad." And of course this is what the Judge described as the common theme by all of the witnesses, and that's why on the meaning of the vendor funding I've cited extracts from the evidence of all of the witnesses, not just the evidence that's cited by the Judge in support of his statement, but it was the common theme, it was the common theme.

ELLEN FRANCE J:

Although I'm right, aren't I, that it's Mr Coombes who focuses on the feature address aspect?

MR TAYLOR QC:

He is the only one.

ELLEN FRANCE J:

The other witnesses don't describe it in that way?

MR TAYLOR QC:

He is the only one that features on the – and his assertion was that that's what he understood "the meeting" to have agreed to. And that's made clear when I took him to his actual statement in the settlement agreement as what the agreement was, and he says, "No, no, you have to change that, you should have inserted there, 'Feature listings would be vendor funded.'"

GLAZEBROOK J:

So he says he thought that's what they were talking about, that's the only thing they were talking about, the other agents probably weren't just talking about that?

MR TAYLOR QC:

Well, the other agents weren't talking about that at all, they were all talking about standard listings. But this is the point, there's no, there was no, nobody gave evidence that the arrangement reached was that feature listings only were to be offered and they were to be offered on a fully vendor funded basis. And just to be clear, the Commission's case, the whole of the case was on standard listings. The price fixing arrangement is said to be in respect of standard listings, there's no talk about feature listings because that's not what the parties were talking about at the meeting.

GLAZEBROOK J:

And actually if it's anything like print address those costs were usually passed on in any event. Anything more than standard address were usually passed on?

MR TAYLOR QC:

Yes, correct.

GLAZEBROOK J:

I'm presuming it's fairly similar in this situation, I don't know.

MR TAYLOR QC:

Yes, and I think such evidence as there was that feature address would almost invariably have been vendor funded, wholly or in part.

GLAZEBROOK J:

Yes, that's what my experience is with agents.

MR TAYLOR QC:

Yes, yes, exactly. But what's also of interest is that in the evidence-in-chief, particularly of Mr O'Rourke and I think Mr King and Mr Singh, they all give

evidence that it was a common practice, even though you were vendor funding, to bundle these services up and discount them, that's how they would compete essentially. But the Commission's case essentially was, well, the agreement was to pass on a hundred percent to only the agent or the vendor and therefore any bundling up of these services or discounting as a bundle or package would have been in breach of the arrangement as they understand it. And while we're talking about breach of the arrangement "as they understand it", what we got in the Court of Appeal for the first time is this whole idea that what the parties did was sit down and agree an offer price but that they could depart from that offer price when they saw fit, in terms of what the Court of Appeal was saying in the reference I just took you to, when they were campaigning, when they were competing for a listing they might pay part or all of the cost. And the way the Commission described that was to say this was just a residual discretion that they had, that the parties had agreed that they would 100% fund but they had, they reserved to themselves a residual discretion. Well, there's not one single piece of evidence where anybody was talking about reserving a discretion to themselves, not one single piece of evidence, and the reason for that is that in the course of the High Court hearing this idea of setting the offer price with a residual discretion was neither pleaded, argued or submitted to the Court or considered by the Court. So when the Court of Appeal says in this case, "Oh, we think the Judge was confused and he over-estimated the extent of the discussion," the Judge doesn't use that word "discretion" at all. What he says is the effect of this agreement was that they had complete freedom, not a residual discretion or a discretion to depart from the arrangement when it suited, but complete freedom to price in any way they saw fit on any transaction.

WINKELMANN CJ:

So that wasn't put to any witness in cross-examination?

MR TAYLOR QC:

No. It's never, it's not a single part of the cross-examination. There was no discretion, there was no cross-examination of the witnesses about what the extent of this discretion was, because the case was never put on that basis. The case was always put on the basis that the agreement was to pass on 100% of the cost.

But what I do want to make clear is that it is not part of the appellant's case that the existence of an understanding or arrangement is somehow enforceable or legally enforceable, and therefore the parties are essentially at liberty to cheat because there's no way that that cheating can be remedied by the other parties to the arrangement. And that's nicely stated by one of the Australian Judges in a reference I'll take you to when I find it, but he says, "Look, the fact that these guys have set the price," I think it was Justice Perram in the *ACCC v Air New Zealand Limited* (2014) 319 ALR 388 case, "The fact that these guys have set a fixed surcharge but competed in respect of that surcharge or may have competed that surcharge away, doesn't save them because an outbreak of cheating doesn't change the fact that they have reached a price-fixing arrangement in respect of that component of the price, and that's a proposition with which I totally agree because in essence people can cheat and may well cheat, but the mischief that the Act is aimed at is the agreement which controls the price, recognising that people may cheat on that arrangement. But to say that they have a discretion or the parties have reserved to themselves a discretion to cheat is, in my submission, a nonsense. It's not what the parties were doing in this case and it's irrelevant in considering whether or not the agreement as found to have been reached had the effect of controlling price.

GLAZEBROOK J:

You could have such an agreement, couldn't you, that there was a discretion not to? But you're just saying that was never pleaded, never put to any of the witnesses, so that if there was a discretion it was a discretion to cheat then in terms of the agreement that was being put forward, is that the submission?

MR TAYLOR QC:

Correct, yes, it is.

WINKELMANN CJ:

And the discretion would have to be confined, if it was to be agreed at all, wouldn't it? Because if you have an agreement but then you have a discretion not to comply with it, well, then that's not really an agreement to do the thing, is it? I mean, this is a defined discretion. So where does the Court of Appeal

– can you just take, I was just looking, trying to find again the part in the Court of Appeal which says, describes "discretion".

MR TAYLOR QC:

It's at…

O'REGAN J:

82.

MR TAYLOR QC:

Just give me a moment. It's at paragraph 22 and 23 and paragraph 78. Yes, so it's 22 and 23, and then they repeat it at 78 – and just think a lot of, the Judge has just got this wrong, has misunderstood what the plaintiff's case was, and he's therefore overstated. The Judge, "Inflated the scope of the discretion," to depart from the arrangement.

WINKELMANN CJ:

I mean, it was quite an unusual finding to say that there's an agreement that they be vendor funded but then say, "Vendor funded means any of the above."

MR TAYLOR QC:

Well, I would say that there was no agreement to that effect. But if there was an agreement the Judge is finding that's what it was, because he's saying when they're talking – in one sense vendor funding is simply the obverse of fully funded. It's if you're not going to fully fund then there's going to be vendor funding in some form or another. And what the Judge found was, well, vendor funding in this sense and the way the real estate agents thought about it was that it was a complete freedom to absorb part or all of the cost or to pass on part or all of it or, in other words, no restriction. So he's saying there's no provision in this agreement, "As I've found to exist," which restricts in any way their freedom to price any way they like on any occasion.

WINKELMANN CJ:

So he's saying, his definition of "vendor funding" is effectively an agreement to depart from the total cost absorption model, that's all it is.

MR TAYLOR QC:

Yes. If there was an arrangement, accepting for the moment that there was, the arrangement was that, "We will not continue to absorb this in every case," that's all it was, "We won't continue to absorb this cost in every case but there's nothing in that arrangement that says, that restricts in any way our freedom to price it any way we think fit." So if because of…

GLAZEBROOK J:

So if there's an agreement the only thing it is is to say, "We'll depart from previous practice of a hundred percent but that isn't unlawful because it doesn't restrict the freedom to price however they want"?

MR TAYLOR QC:

Exactly. And as the Judge says, it says nothing about price, that agreement says nothing about price for the services being offered.

GLAZEBROOK J:

Well, except to the extent that the price will be higher, given that they're not absorbing a cost.

MR TAYLOR QC:

Well, yes, I suppose that's, in some –

WINKELMANN CJ:

Well, in some cases it would.

O'REGAN J:

Or the service would be lower because they're not giving a Trade Me listing.

MR TAYLOR QC:

Yes, yes. But if you look at that in context, if for instance you look at the *Commerce Commission v Caltex* (1999) 9 TCLR 305 (HC) approach of Justice Elias, what Her Honour was talking about there was that you had an agreement where you had agreed to completely, one, the provision of the free car washes in that case was an integral part of the price, and what you were doing was agreeing to take that away in every case basically, it was basic. So

the Court was then able to say, "Well, one, it's an integral part of the price, because you've agreed to remove it in every single case, which is effectively what the agreement was, the effect of that is to increase the price by the value of that agreement." Now that bears no relation to the facts of this case where there's no agreement to increase the price across the board, there's no –

WINKELMANN CJ:

Well, I was going to say your case is that the Judge was finding – this is not your case – but the Judge was finding that really all they agreed was that they were going to be negotiating the price in every case effectively.

MR TAYLOR QC:

Correct, yes.

WINKELMANN CJ:

It was all up in the air.

MR TAYLOR QC:

So if you've got a complete discretion to fix price any way you like, including actually a discretion to absorb the costs 99.9% of the cases, if we take what we were discussing before, that complete discretion, that complete freedom, cannot control the price, there's nothing in that arrangement that controls the price, and yet to establish breach of section 30 it must be shown that the arrangement, a provision of that arrangement, had the effect or likely effect of controlling price.

ELLEN FRANCE J:

But on your approach if there's any discretion at all you never get into the price fixing scenario.

MR TAYLOR QC:

Correct. If that is genuinely the case, absolutely. Because if there's a discretion to – well, one, I don't have to go that far but –

ELLEN FRANCE J:

No, no…

MR TAYLOR QC:

But in principle I would go that far. Because if the reservation of a discretion is genuine then the agreement doesn't control price.

WILLIAMS J:

It depends on how wide the discretion is.

WINKELMANN CJ:

Well, that can't – exactly, it depends on how constrained that discretion is, it must be so, you can't…

MR TAYLOR QC:

Yes, well, if it's an unrestrained discretion, I'm saying. I mean…

WILLIAMS J:

Because the offshore cases that I looked at that you referred to really seem to be the effect if there's play at the margins that's not going to undermine the proposition that there's an underlying agreement, because this isn't a contract then things are going to be loose at the edges.

MR TAYLOR QC:

Yes.

WILLIAMS J:

But what you say really is that this was right at the core, this freedom was at the core, not at the edges.

MR TAYLOR QC:

Yes, exactly so, exactly.

WINKELMANN CJ:

On the Judge's finding.

MR TAYLOR QC:

Yes, exactly.

WILLIAMS J:

And it was combined with, first of all, the creation of this freedom, you say, combined with the partner policy of going head-to-head with Trade Me through realestate.co.

MR TAYLOR QC:

Yes.

WILLIAMS J:

Which ended up working, so it seemed.

MR TAYLOR QC:

Yes, absolutely it did, yes.

WILLIAMS J:

So you say it wasn't a solo policy, it would only have worked if they could go head-to-head with Trade Me and beat them?

MR TAYLOR QC:

No, I wouldn't go that far, because if they did go to a vendor funded model and therefore offered it at cost then the vendors themselves would make a decision, "Do I want to pay that cost when I've got realestate.co which I can get for free?"

WILLIAMS J:

Yes.

MR TAYLOR QC:

So I think in essence the problem that was being faced by Trade Me in terms of what was happening to their market share was contributed to by two things: one, that they'd set the price so high that all the research that they had done didn't work for them because the vendors were saying, "Well, I've got realestate.co and I don't have to pay anything for that, or maybe I only have to pay $5 for it, so why would I pay 180?" So they were voting with their feet. The second thing that they totally underestimated was a competitive response by realestate.co, and the evidence is that the real estate agents were going

up and down the country on a realestate.co “roadshow” they called it, and the Hamilton agents were going and saying, “Right, we’ve got to raise the profile of realestate.co in the market and we’re going to do that by going to the newspapers, going to the radio, coming up with an advertising campaign to achieve that so that we can say to our customers, ‘Here’s a really viable alternative,’ and we’re doing that.” It’s not directed at price fixing, it’s directed straight at Trade Me and saying –

WINKELMANN CJ:
And because they were extremely angry really.

MR TAYLOR QC:
And they were extremely angry.

WILLIAMS J:
On the other hand, that strategy was more likely to work if the attractiveness of Trade Me to their customers was significantly reduced through passing on cost to them.

MR TAYLOR QC:
Yes.

WILLIAMS J:
But, you see, that counts against you. That makes it more sensible to think that there was an arrangement to pass it on.

MR TAYLOR QC:
Only if the agreement – yes. There’s no doubt that the commercial incentive on the real estate agents was to pass it on wherever they could or wherever they wanted to, at least in part. And there's no doubt that their reason for departing from the previous model is, “It’s just too expensive. Why would I take $250,000 off my bottom line?” which is what the decision would have to be to avoid this price fixing arrangement. Because essentially what the Commission is saying here, “If you agree that you're not going to absorb the cost in every occasion then every time you do is just cheating on that arrangement, it’s not reservation of a discretion, it’s just cheating.” But what

has to be established by the Commission is a provision of the arrangement or understanding which has the effect of controlling price, and here in my submission the Judge got it absolutely right, he said, “There’s nothing in this agreement that restrains the freedom to price in any way they think fit.”

WINKELMANN CJ:

So the Court of Appeal, you're saying, was proceeding on the basis that the High Court Judge had made a finding. When they say at paragraph 89 they’re saying that the High Court Judge did find vendor funding in the sense of it would be passed on to the vendor. But you're saying that he didn’t find that…

MR TAYLOR QC:

No, and in fact –

WINKELMANN CJ:

It was actually the nature of the agreement he found?

MR TAYLOR QC:

Yes, and in fact if we go, I think it’s to paragraph 214 of the judgment, he records my learned friend’s submission that the agreement was that the whole of the price, the whole of the price, would be passed on to the vendor or the agent, and he says, “I disagree.” Then in paragraph 215 he does a brief summary of what he then goes on to discuss in detail right through to, I think, paragraph 277. And in all of that, in all of that analysis he is saying, “The Commission’s case, they simply haven't proved, because that's not what this agreement was at all.” And what the Court of Appeal seems to be wanting to do is to say, “Well, he got that wrong because somehow he misunderstood what the Commission’s case was and therefore he misunderstood the extent of the discretion.” But the Judge never talks about a limited discretion, a discretion, or cheating. In fact the only time he mentions cheating I think is in that transcript where we were discussing whether or not we could introduce the economic evidence, that's the only place where he talks about cheating. What he does instead, he doesn’t talk about there being a limited or residual or any other sort of discretion, he just says there was complete freedom, and in my submission that finding is unassailable.

O'REGAN J:

But there wasn't complete freedom to 100% vendor fund in 100% of cases, was there?

MR TAYLOR QC:

Yes.

O'REGAN J:

So that's not right then, is it?

MR TAYLOR QC:

Well – I'm sorry?

O'REGAN J:

There wasn't – they had agreed they wouldn't keep vendor funding for every deal, so that had restricted their freedom. It's wrong to say there was 100% freedom, there wasn't.

WINKELMANN CJ:

I think he meant agency funding in every deal.

MR TAYLOR QC:

Agency funding, yes.

O'REGAN J:

Funding, yes. I mean, isn't that all the Court of Appeal is saying here?

MR TAYLOR QC:

We say there was no discussion of that at all, but –

O'REGAN J:

Yes, but just for a minute we're pretending there was an agreement, I'll indulge you on that, so let's…

MR TAYLOR QC:

Yes, and the agreement is that, "We won't absorb it –

O'REGAN J:

And you accepted that the agreement was that everyone would stop 100% agency funding of Trade Me advertisements.

MR TAYLOR QC:

Yes.

O'REGAN J:

So that restricted their freedom as to how they would price, didn't it?

MR TAYLOR QC:

Well, I would say it doesn't, because they still retain the freedom, if they think fit, to 100% fund.

O'REGAN J:

No. If they did it in every case they would be cheating, wouldn't they? So they had agreed they wouldn't do it, and that meant they either charged people for it in most cases or they didn't offer a Trade Me ad, which meant they were charging the same price for a lesser service, which is still price fixing.

WINKELMANN CJ:

We might want to come back to it after the morning adjournment.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.48 AM

WINKELMANN CJ:

Mr Taylor.

MR TAYLOR QC:

Thank you. I'll come back to Your Honour's question.

WINKELMANN CJ:

Are you shelving it for the moment?

MR TAYLOR QC:

No, I'll come back to it now, I should say.

WINKELMANN CJ:

Oh, coming it to it now. Good.

MR TAYLOR QC:

As I understood Your Honour, Your Honour was saying, "Look, if the agreement was that we would not continue to absorb this cost 100% of the time then if any one of them did absorb it 100% of the time then that would be a breach of the agreement," and if your first premise was correct then your second premise is also correct, because if one did fund it 100% of the time it would be in breach. But if that person funded it 99% of the time, it wouldn't be in breach, and in that situation any controlling effect of the agreement is so miniscule or de minimis as to not have any controlling effect, because there must be some practical controlling effect, and really that's what the Judge saying. And I've been corrected by my learned friends that I said the Judge doesn't use the word "discretion" at all in the judgment, apparently he does once but precedes it with the word "full" discretion, in other words, complete freedom.

GLAZEBROOK J:

Just looking at paragraph 215, and it effectively says they meant in principle to be funded by the vendor, compared with other third-party advertising, which is what we were talking about before in terms of larger features or big billboards or any of those things.

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

But, “Not to prevent in particular necessary or desirable circumstances,” which does suggest something more constrained in terms of discretion than the 99% that you’ve just been indicating, which I now will have lost…

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

There’s another paragraph later, which I have lost I’m afraid, it might have been 227 I think you referred us to…

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

Where he says, “The full range of price-setting options remain.”

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

But whether in light of 214 that means you could vendor – well, let’s call it “agency fund” in 99% of the cases, I’m not sure is encompassed in that wording of 215 and 227.

MR TAYLOR QC:

No, and the Court of Appeal seized on that wording in 215 and in fact they decided at a later part of the judgment that in their view on the evidence there was no evidence to support that finding by the Judge…

WINKELMANN CJ:

What finding by the Judge?

O’REGAN J:

215.

MR TAYLOR QC:

That the agreement was in principle but from time to time when necessary or desirable. They actually say, "Well, we can't find any evidence to support that finding by the Judge." But in my submission the error in that approach is that when you look at what the Judge is actually doing he's attempting to summarise in 215 essentially in one sentence what he then goes on to find by reference to the evidence, right down to paragraph 227 or, yes, at 227, where he says – so when you look at the pattern of the judgment, 215 he's really trying to say, "Look, this is where I've got to and I'm trying to summarise it in one sentence, but then I go on to look at all the evidence, determine what the parties meant by "vendor funding" and I reach my conclusion at 227 –

GLAZEBROOK J:

So this is sort of the intro, giving you a teaser, "Here's my detailed reasoning and 227's my conclusion"?

MR TAYLOR QC:

Correct.

Let me just see if I can find that passage in the Court of Appeal judgment. Yes, it's at paragraph 92 where they say, "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."

WINKELMANN CJ:

So what paragraph was that?

MR TAYLOR QC:

That's paragraph 92 of the Court of Appeal decision. And it's got to be the case that when the Court is using the word "vendor funding" there they're using it in the sense used by the Commission, 100% passed on to the vendor or the agent. Because otherwise that statement doesn't make any sense at all and certainly is unsupported by the factual evidence. And it's this problem that we face that in the High Court this idea of a residual discretion to depart from the agreement to 100% vendor fund was never argued or put and it was never the subject of cross-examination. But what the Court of Appeal seems

to do is to say, “Well, we think ‘vendor fund’ had the meaning alleged by the Commission and therefore we can’t find anything in the evidence to support the Judge’s finding that there was “a particular necessary or desirable circumstances’ to depart from the agreement,” it’s not what the Judge found. He wasn’t saying, “You're departing from the agreement,” he’s saying, “The agreement is that you’ve got complete freedom subject to the *de minimis* exception we discussed before to price it any way you think fit.”

WINKELMANN CJ:

It’s a rather peculiar agreement for the Judge to find though, isn’t it, an agreement that they won’t, they will no longer absorb the costs? Your characterisation of the agreement, the Judge found, he found an agreement that they would not in 100% of the circumstances absorb the Court costs, rather they would negotiate the cost?

MR TAYLOR QC:

He would say, essentially his finding was there was nothing in the arrangement which prevented them from negotiating the price or absorbing the price in whole or in part, in any individual transaction. So –

WINKELMANN CJ:

Aren’t you then rather characterising the Judge not as finding an agreement that there will not – he’s not finding that they agreed there would no longer be a hundred percent funding.

MR TAYLOR QC:

Correct.

WINKELMANN CJ:

He’s rather finding that there’s no rule governing it.

MR TAYLOR QC:

Correct, that's exactly right. Because what the Judge is doing, and he does it at 214 of the judgment, he says, “This was the proposition. The proposition was that the agreement was to pass on 100 percent of the cost, the whole of the cost,” he says, “the whole of the cost,” and then he says, “I disagree.” And

then from 215 through to 227 he goes through the evidence and he says, "This is why I disagree with that proposition," and he's saying, "It's not a question of reserving to themselves a discretion, it's saying, 'All we have agreed is that in future we can fund it in whole or in part on any individual transaction, that's all we've agreed to do. At worst we've said we're not going to do it, we're not going to absorb the cost on every transaction.'"

WILLIAMS J:

I guess the problem with that is what would be the point in meeting to agree that?

MR TAYLOR QC:

Well, there isn't, there is no point.

WILLIAMS J:

Yes, "Do what you like."

MR TAYLOR QC:

Exactly, and that's precisely what was happening in this meeting.

WILLIAMS J:

Well, so that –

GLAZEBROOK J:

And is that why you say there's no agreement is it, we're getting on to the no agreement?

MR TAYLOR QC:

No, there's two aspects to it. The first is was there an agreement or an understanding within the meaning of the Act, that's the *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) Australian cases issue.

GLAZEBROOK J:

Yes.

MR TAYLOR QC:

If so, what were the terms of that agreement, what did they agree? Then, given what they've agreed, is there a provision of that agreement or understanding which has the effect or likely effect of controlling price? So there's three legs to it that have to be –

WILLIAMS J:

My question is really the agreement you describe doesn't have a lot of common sense about it, and that might undermine the proposition that it was an agreement at all on those terms…

MR TAYLOR QC:

Yes.

WILLIAMS J:

So that may mean either they were on different terms and you're wrong or, as you prefer, there wasn't one.

MR TAYLOR QC:

Correct.

WILLIAMS J:

But it's hard to see that proposition as justifying a whole lot of real estate agents getting together to decide they can do what they want.

MR TAYLOR QC:

Yes, exactly.

WINKELMANN CJ:

Well, is your point they're actually getting together for another reason?

MR TAYLOR QC:

Correct. And all of the evidence is, all of the evidence, is that there was this free-for-all, as I described it, that was rejected by one of the witnesses, but the Judge describes it as the tumult of the first part of the meeting when everybody's arriving, they're all coming, we say, to discuss promoting

realestate.co, and what's fascinating is that when you look at what happens following that meeting they all go off to talk to the radio people, they go off to talk to the *Waikato Times*, they go off to do all these things, then they meet again to determine when they're going to commence the campaign, so on the 16th of October. So all of the evidence points to what they were really there for was to talk about promoting realestate.co, and that's what they were doing and that was the only real outcome of this meeting. Beyond that there were a whole lot of people saying, "We hate what Trade Me's doing, we think this is extortion," that's what Mr Coombes described it as, "they're ramping up these prices, we don't like what they're doing, we're not going to," or, "I'm not going to continue to do it, I can't afford to continue to do it." So all of these, we say, unilateral statements –

O'REGAN J:

Yes, but they all knew that, they didn't have to meet to say that.

MR TAYLOR QC:

No, they weren't meeting to say that.

O'REGAN J:

So it suggests they were meeting for some other reason, doesn't it?

MR TAYLOR QC:

Yes – well, no, I'm not just suggesting. The evidence is, in my submission, that they were meeting to promote realestate.co, because that's what Mr –

O'REGAN J:

But in order to promote realestate.co they had to change their policy in relation to Trade Me.

MR TAYLOR QC:

No, they didn't.

O'REGAN J:

Well, if they kept vendor funding Trade Me they wouldn't have been helping realestate.co.

MR TAYLOR QC:

Well, with respect, what they were doing, what the evidence is that they were doing, what Mr O'Rourke's evidence was, was that that they needed, if they weren't going to support Trade Me, then they needed to have a viable alternative, one that they could say to their vendors, "Here's a good online system, this is going to have every ad in the country that's done by a real estate agent on it, and we need to raise its profile, and that's our way of responding to what Trade Me is proposing."

O'REGAN J:

Yes, but part of that response had to be to stop using Trade Me or to make sure that everybody stopped using Trade Me and started using realestate –

MR TAYLOR QC:

No, no.

O'REGAN J:

– and the way they did that was to agree not to fund Trade Me.

MR TAYLOR QC:

Sorry?

O'REGAN J:

The way they did that was to agree that they would stop the agency funding of address on Trade Me, of listings on Trade Me.

MR TAYLOR QC:

Well, in my submission both of those premises aren't correct. The first one is if people vendor funded the likelihood was that the vendors would vote with their feet. So the effect of the introduction of vendor funding would be that, most likely anyway, that a lot of vendors would simply say, "We don't want it." But it wasn't a necessary part of Mr O'Rourke's objective, which was to raise the profile of realestate.co, that's what he says, "I called the meeting –

O'REGAN J:

Well, the Trade Me research showed that 80% of vendors would have paid, and then when actually they got offered realestate.co as an alternative hardly any of them did.

MR TAYLOR QC:

Yes. And anybody could have –

O'REGAN J:

And the reason for that was because there was no longer a free listing on Trade Me. So of course you go to the alternative.

MR TAYLOR QC:

But what I'm saying is, that was not a necessary part of what Mr O'Rourke was doing when he called that meeting. Because what he was calling the meeting to do is to say, "Let's support realestate.co, let's promote realestate.co," and the evidence also is that at the meeting on the 16th of October they were discussing how they were going to implement that plan to promote realestate.co and in the context of that meeting he said, "Well, I'm going to withdraw all my listings because the less listings there are on in January the better impact we're going to have when we start this campaign in late January on the 22nd of January." So that was the context of it all. But it wasn't a necessary part of that objective at all that they persuade anybody or anyone to go to a vendor funded model, it wasn't part of his objective. He was going to go to a vendor funded model, he expected that everybody else would as well, and the only thing that came out of that meeting is that his expectation was confirmed by the sentiments expressed by the people at that meeting but it's not a necessary part of the promotion of realestate.co., it's obviously going to help but it's not a necessary part.

O'REGAN J:

Well, it's what the Judge found though, wasn't it, that they agreed to stop –

MR TAYLOR QC:

No.

O'REGAN J:

– they agreed to stop agency funding of Trade Me?

MR TAYLOR QC:

They would not continue to absorb the cost all of the time, that's what the Judge found, not stop it, that they wouldn't continue to absorb it a hundred percent of the time, that's what the Judge found, and that's all he could find if he's going to find –

O'REGAN J:

Well, he says, "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."

MR TAYLOR QC:

Yes, and by that he's saying no agency was going to company fund it 100% of the time.

O'REGAN J:

Well, he doesn't say that. He just says no agency was going to company fund it.

MR TAYLOR QC:

Well, he's actually, he's referring to one statement in the evidence where it's not company funded and that means in context that's what he found, that that means it wasn't going to be company funded 100% of the time. But he then goes on to say immediately that there was nothing in that agreement, that says nothing about how they priced in any individual circumstance, and that was what the compelling evidence was, that for all of them vendor funding meant in whole or in part by the vendor, the agency or the agent.

Now I'll come back to my written submissions but I think I'll move –

WINKELMANN CJ:

So what we're at, the issue we've just been discussing is if there was an agreement what were its terms?

MR TAYLOR QC:

Yes. And the Judge found its terms were, the arrangement was that they would vendor fund, by which they meant that the price of the Trade Me lists would be, or the cost of the Trade Me listings, would be borne in whole or in part by the vendor, by the agency or the agent.

WINKELMANN CJ:

In other words, was in play for the first time?

MR TAYLOR QC:

Yes.

WINKELMANN CJ:

But now, what are you taking us to now?

MR TAYLOR QC:

Well, I think, I was going to take you to the High Court judgment and the Court of Appeal judgment, but I think we've already done that. And if I come then to paragraph 33 of the submissions I say that the issues in this appeal broadly fall into three categories: one, whether the parties reached an arrangement or understanding for the purposes of the Act, including whether there must be at least a moral obligation to act in a prescribed manner; secondly, if there was an arrangement or understanding did it have the effect, likely effect or purpose of fixing or controlling prices for the agencies' services? So there has to be a provision of the arrangement or the understanding that has that effect. And then I say was there any proper basis upon which the Court of Appeal could interfere with a High Court Judge's findings on the evidence that the parties retained complete freedom to price in any way they thought fit, and therefore the agreement to move to a vendor funded model did not have the requisite effect of controlling the overall price.

WINKELMANN CJ:

So have we dealt with (b)?

MR TAYLOR QC:

Well, yes in the sense that we – (a) actually includes two propositions: was an arrangement or understanding within the meaning of the Act? In other words, were there commitments made where they agreed to a common course of conduct or a common design? If so, what were the terms of that arrangement, what was the understanding that was reached in respect of that arrangement? And that is the meaning of vendor funding. And then, okay, once you determine what the terms of that arrangement were, what is the evidence that it had the effect or a practical or likely effect on controlling the price for the services provided by the agencies in competition with each other. And the Court of Appeal said, "Well, when you're looking at what the services are that they provide in competition with each other you look at the bundle of services that they provide, in other words, real estate agency services. Because it's an absolute requirement that the agreement has to have the effect of controlling the overall price for those services that they supply in competition with each other.

Just before I go onto that, I did mention that there was a statement by Justice Perram in the *Air New Zealand* case, and that's at paragraph 616 of the judgment where he says, "It is true, as Garuda submitted, that at later times there was some evidence that some airlines would discount their cargo rates to overcome the effect of the surcharge. That however is not an answer to the Commission's case about what happened on the 23rd of July," that is when they agreed to a fixed surcharge. "Cartel conduct does not cease to be such merely because there is a subsequent outbreak of cheating among the carteliers." So he's really saying, "Well, if the agreement was that you fix this surcharge and that's what you were all going to do, then you don't fix that by saying, 'Actually what happened in practice was that everybody went and competed that surcharge away,'" and I don't have any problem with that as a proposition at all.

WINKELMANN CJ:

So are we now going to go on to whether or not there was an agreement?

MR TAYLOR QC:

Yes, we are.

WINKELMANN CJ:

So how are you going for time?

MR TAYLOR QC:

Very badly, but hopefully we'll…

WINKELMANN CJ:

Let us focus then.

MR TAYLOR QC:

Yes. I'm not complaining, because it's very, very useful to have this discussion as we go through, as Your Honour's know.

WINKELMANN CJ:

Well, we'll be complaining if we run out of time though.

MR TAYLOR QC:

Yes. All right. Right, *Giltrap* and moral obligation.

WINKELMANN CJ:

So you're going to tell us what we're legally looking for and then you're going to take us to the evidence?

MR TAYLOR QC:

Yes, yes…

WINKELMANN CJ:

Because we are interested in your – well, you have raised an appeal, whether or not Justice Jagose was correct to make a finding that there was any kind of agreement about this…

MR TAYLOR QC:

Yes.

WINKELMANN CJ:

And whether it was simply just…

MR TAYLOR QC:

Unilateral statements.

WINKELMANN CJ:

Well, parallel conduct.

MR TAYLOR QC:

Yes. And really what –

WINKELMANN CJ:

So you take it through in the way you want to.

MR TAYLOR QC:

Yes.

Well, if we go to paragraph 39, well, you start with *Giltrap*, which is the Court of Appeal decision, and we say that a review of *Giltrap* demonstrates that there must be at least the assumption of a mutual obligation that is morally binding. And we say that the majority decision in that case did not take issue with Her Honour Justice Glazebrook's assessment at first instance of the test generally being properly based on previous articulations of the appropriate test. Justice Glazebrook had identified a need for mutuality which need only be morally binding, Her Honour observed that this mutuality would appear to be an objective standard rather than an inquiry into the subjective intention of the parties and did that by reference to United Kingdom and Australian authorities.

Now at paragraph 215 to 217 of the judgment in the Court of Appeal, Justices Gault and Tipping referred to that and they also referred to the English Court of Appeal decision in *British Basic Slag Limited v Registrar of Restrictive Trading Agreements* (1963) LR 4 RP 116; [1963] 2 ALL ER 807 (UK)(CA). And what they said at –

ELLEN FRANCE J:

Sorry, it must be 15, mustn't it, rather, paragraph 15 and 17?

MR TAYLOR QC:

Oh, sorry, 15 and 17, sorry, yes. So what they say is, "We do not consider it appropriate to be tied in any determinative way," this is at paragraph 15, "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 the arrangement or understanding, the flexible purpose of the section is such that it is best to focus the ultimate inquiry on the concepts of consensus and expectation," and this is important, it then says, "A finding that there was a consensus, in other words an agreement, 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." So the Court in my submission is not dispensing with the need for a moral obligation or commitment or assurance or undertaking to exist, it's saying, "If you look at what the consensus was which gave rise to an expectation, then that will necessarily involve the communication or assumption of a moral obligation." And the reason the Court is saying that is demonstrated, in my submission, by reference to the reference at paragraph 16 to Lord Justice Wilmer's statement in *Basic Slag* that, "When each of two or more parties intentionally arouses in the other 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." And that is expanded upon by Lord Justice Diplock, and I'll take you to the reference in his decision, and that's at page 746 and 747 of the decision in *Basic Slag* – sorry?

ELLEN FRANCE J:

Volume 3 of the appellant's bundle.

MR TAYLOR QC:

Volume 3, tab…

ELLEN FRANCE J:

Tab 15.

MR TAYLOR QC:

15.

WILLIAMS J:

743 did you say?

MR TAYLOR QC:

746 and 747, dealing with Lord Justice Diplock's analysis. And if we go to the bottom of page 746, Lord Justice Diplock is discussing the concept of "arrangement" and he says, "It involves a meeting of the minds because under section 6(1) it has to be an arrangement between two or more persons and it must be an arrangement under which restrictions are accepted by two or more parties." So it's saying the arrangement has to contain within it restrictions on two or more parties –

O'REGAN J:

But that's the British section, it's not in our section, is it?

MR TAYLOR QC:

Well, *Basic Slag* is specifically cited with approval both by the majority in *Giltrap* and by Her Honour Justice Glazebrook at first instance and, indeed, has been referred to by the Courts and other –

O'REGAN J:

No, I'm just saying that you're taking us to something which is based on a British section. This isn't general comment, this is just about what the second says.

MR TAYLOR QC:

Yes. But then it says, and it's this part which, in my submission, is what this is all about, "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," and in my submission there is nothing in what the majority in *Giltrap* are saying which departs from that proposition.

And then what I do want to take you to, because in my submission it's significant, is we go to page 747 where Lord Justice Diplock is discussing this idea, and he says, "I think that I am only expressing the same concept in

slightly different terms if I say without attempting an exhaustive definition, for there are many ways in which arrangements may be made, that it is sufficient to constitute an arrangement between A and B if, (1) A makes a representation as to his future conduct with the expectation and intention," expectation and intention, "that such conduct on his part will operate as an inducement to B to act in a particular way, (2), that that representation is communicated to B, who has knowledge that A so expected and intended and, (3), that 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." And in my submission what Lord Justice Diplock is saying is that if you have those combined factors of representations being made with that intention and that expectation and reciprocated, then you have an arrangement which carries with it at least a moral obligation to comply or to act in a particular way. And in my submission the Court of Appeal in the majority in *Giltrap* were not departing from that concept in any way, because what they say is there must be a consensus, an agreement, which gives rise to an expectation, so it's the consensus that must give rise to the expectation. And "consensus" in this sense is not simply like-mindedness, it is an agreement, "If I do this, if you do this, I'll do this, and I will if you will," that's what, in my submission, Lord Justice Diplock is talking about and that, in my submission, is an essential ingredient of any arrangement for the purposes of this –

O'REGAN J:

But isn't the Court of Appeal just saying in *Giltrap* that if there has been a consensus giving rise to expectations then by definition you must have a moral obligation, you don't need to prove it separately?

MR TAYLOR QC:

Well, you don't have to prove it separately, but you have to prove whether in the circumstances there was that type of consensus that, "I will if you will, I make a commitment that if you do this I will do that, or I will give you an assurance –

O'REGAN J:

But nobody's disputing that.

MR TAYLOR QC:

Well, the problem then is, we say, or –

WINKELMANN CJ:

Well, can you take us to the part of the Court of Appeal judgment you say where they wrong, the particular pinpoint part?

MR TAYLOR QC:

Yes. Because they say –

O'REGAN J:

Are we talking about the Court of Appeal in this case or *Giltrap*?

WINKELMANN CJ:

This case.

MR TAYLOR QC:

Well, I –

WINKELMANN CJ:

I meant this case.

MR TAYLOR QC:

Yes, I understand that.

WINKELMANN CJ:

Because you're saying that the Court of Appeal was right in *Giltrap* and the Court of Appeal here got it wrong?

MR TAYLOR QC:

Yes. Because the Court of Appeal here essentially said, "Look we don't think that the moral obligation, the assumption of a moral obligation, arising out of the circumstances of the arrangement or the evidence of what took place, we don't think it's a necessary element, it's a desirable element but it's not a necessary one."

O'REGAN J:

Where are you referring to in the Court of Appeal judgment?

MR TAYLOR QC:

At…

WINKELMANN CJ:

He's just waiting for his junior to give it to him, I think.

MR TAYLOR QC:

Sorry?

WINKELMANN CJ:

I thought you might be waiting for your junior to refer to the part.

MR TAYLOR QC:

No, not at all. It's really at paragraph 65 to 67, particularly 65, "We do not see in any of the New Zealand cases 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 in her decision in *Giltrap,* having referred to "moral obligation", observed that, 'As a matter of policy, a person should be held to be a party to an arrangement if they give the appearance,'" and again I have absolutely no problem with that proposition, because what the Court was finding both at first instance and in the Court of Appeal was that you judge whether or not that moral obligation has been assumed or an undertaking given not just by reference to what persons say, and in that case you had Mr McKenzie, who sits there during this meeting, throughout the meeting, goes away, gives the unanimous agreement document to his salesman, but then comes along to Court and says, "I never intended to agree, to abide by this, it was never my intention." And the Court is saying in those circumstances that's not going to be good enough, "Because we will assess, based on all the evidence, objectively whether or not you gave that assurance, and if by silence you sit there and say nothing, in the circumstances then that amounts to an assumption of that moral obligation or an assurance that you will act in accordance with the agreement," and that's, and there's nothing wrong with –

O'REGAN J:

I just don't see why "moral obligation" is such a big deal. The Court of Appeal in *Giltrap* said, if the consensus has led everyone to have expectations about how they're going to behave, that necessarily means they have assumed a moral obligation. It's just one just follows like night follows day.

MR TAYLOR QC:

Well, if the consensus is what gives rise to that, but what we're saying in this case is that all you had was unilateral statements of intention which didn't carry with them any intentional inducement or assurance or anything of that nature.

O'REGAN J:

Well, that's just saying that there wasn't a basis for expectations.

MR TAYLOR QC:

Well, no, because what essentially the Judge found was because they all expressed their intention then anybody in the room could infer from that –

WINKELMANN CJ:

Would have an expectation from that.

MR TAYLOR QC:

We have an expectation that they will act in a certain way.

WINKELMANN CJ:

So is your submission that what the Court of Appeal has, by focusing on the word "moral", which I think is being used very simply as a counterpoint to "legal"…

MR TAYLOR QC:

I agree entirely.

WINKELMANN CJ:

That they have actually placed out of their analysis the essential requirement that there be an obligation, either legal or moral, and that an expectation

created by the fact that everyone's acting in a certain way does not meet the threshold of his obligation.

MR TAYLOR QC:

Absolutely.

O'REGAN J:

But the Court of Appeal said there had to be a "consensus" of an expectation. That does get you over the line, doesn't it?

MR TAYLOR QC:

Well, no, it doesn't, because you can have like-mindedness, you can everybody thinking the same thing or even everybody saying the same thing.

O'REGAN J:

Yes, but I mean honestly, let's be realistic about it…

MR TAYLOR QC:

Well, I'm trying to be realistic about it.

O'REGAN J:

If you're in a room and everybody has expressed their intention and everybody's got an expectation they're going to act in accordance with it, you'd have to be in a dream world to say there wasn't a consensus.

MR TAYLOR QC:

Well, with respect, Your Honour, if that is right I lose. But in my submission that is plainly wrong, and I say it's plainly wrong because what the Act is directed at is agreements that are entered into between people where they each commit to each other to act in a prescribed way.

O'REGAN J:

It's understanding, understandings, not agreements.

MR TAYLOR QC:

Yes. Sorry?

O'REGAN J:

Understandings, not agreements. The Act says, "Agreement, arrangement or understanding."

MR TAYLOR QC:

Yes.

O'REGAN J:

It doesn't require agreements.

MR TAYLOR QC:

Well, it says, "Contract, arrangement or understanding." But certainly on my reading of all of the cases on this, the Australian cases, the New Zealand cases, in terms of whether or not this commitment or assurance, or at least moral obligation to act in a certain way, is an essential requirement, it's an essential requirement for both an arrangement and an understanding. The cases seem to say that the only real difference is that for an arrangement you would have to have, it must be overt, whereas an understanding can be tacit in the sense of you could have a tacit understanding. But –

WINKELMANN CJ:

Is your point it's missing the mutuality, mutuality, conditionality, obligation, it's a sense that there's somehow a deal going on?

MR TAYLOR QC:

Yes. And –

ELLEN FRANCE J:

Well, is it that or the absence of an expectation as to future conduct? That's what I'm not sure about.

MR TAYLOR QC:

Yes. Well, certainly in the way the Australian Courts have adopted it, they say a mere expectation that a person may, as a matter of fact, act in a certain way, is not sufficient, and in my submission that is absolutely right, that is what the Court in *Basic Slag* is saying and in my submission that's also what

the Court of Appeal and the majority in *Giltrap* are saying. Because they say, "Look, at least for the purposes of this case where the question is whether or not somebody has by silence indicated their intention to be bound, at least for the purposes of this case let's just focus on those ideas of consensus and expectation. But by "consensus" they're meaning an arrangement or an understanding that people are committed to which restricts their ability to price freely in this case. And in this case I say on the evidence that element of moral obligation, and Her Honour is, in my submission, completely right, moral obligation in this sense is just saying there's a difference between a legally enforceable one and an obligation that is morally, you are morally bound to. But it absolutely incorporates and it's an essential ingredient that there is that undertaking one to the other, "This is how I will act because this is how you are going to act and that's what we are agreeing to do."

O'REGAN J:

But that's exactly what the Court of Appeal said in *Giltrap*. I just don't see why we're arguing about that.

MR TAYLOR QC:

Well, we're arguing about it because on the evidence there was no such assurance –

O'REGAN J:

Well, that's a different argument, we're just dealing with the legal test at the moment.

MR TAYLOR QC:

Yes, well…

O'REGAN J:

So are you accepting that if there is a consensus among the people in the room that leads all of them to have expectations about how the others will price, that that is a contract, arrangement or understanding?

MR TAYLOR QC:

Only if when you say “expectation” it’s an expectation that arises out of that consensus or agreement.

O’REGAN J:

Well, yes, I do mean that, and that's exactly what the Court of Appeal said.

WINKELMANN CJ:

I don’t want to be perverse, but I think you aren’t actually saying that, Mr Taylor, you're saying it has to go beyond an expectation because there can be an understanding in the room, you understand that everyone’s saying, “We’re all going to act in this way,” and that's your expectation.

MR TAYLOR QC:

Yes.

WINKELMANN CJ:

But there has to be something operating in that room which also goes further and carries with it an obligation, and that's your point, because otherwise…

MR TAYLOR QC:

Yes, that’s is absolutely my point.

WILLIAMS J:

The problem is that the word “expectation” has two meanings. One is “rationally prediction, rationally predict”, that a rational response to this market driver is going to be this…

MR TAYLOR QC:

Yes.

WILLIAMS J:

“And that’s what I’m going to do and all my mates are going to do that too”…

MR TAYLOR QC:

Yes.

WILLIAMS J:

And the other kind expectation which is the closing of ranks because there's an obligation. It's the second, not the first. I mean, it's not that difficult, is it?

MR TAYLOR QC:

No.

WILLIAMS J:

But it's quite difficult on facts.

MR TAYLOR QC:

Yes, exactly.

WILLIAMS J:

But in principle it's…

GLAZEBROOK J:

But paragraph 67 does lead to the view that they are just talking about an expectation, not in the sense that you're talking about…

MR TAYLOR QC:

Correct.

GLAZEBROOK J:

So, because they're saying you – well, it's actually a bit different to see what they're saying…

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

Because if you say consensus and expectation, expectation in the sense of, "I expect that everybody will do the same as me because I've agreed to do it," then they're stating the right test.

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

But if they're meaning expectation in the sense of, "I expect everybody else will do that because it would be totally economically irrational," which would be your point, "to do anything else"…

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

So it's not because, "I've got a mutual agreement," it's just, "I can't imagine why anybody would do anything else"?

MR TAYLOR QC:

Yes. And again it's very nicely put by, I think, Justice Lindgren in – I'll find the case – but he says it's not enough that there arises a factual expectation that somebody will act in a certain way, even if that expectation is engendered by things said at the meeting, it's not enough for that. There has to carry with it this undertaking or assurance, each one to the other in this situation, that they will act in a restricted way, that they will act in a way that is, in the words of the majority in *Giltrap*, "Prescribed by the Act." And in my submission it's not a matter of separately proving anything. What it is is that that element of assurance undertaking assumption of a moral obligation, or we can just say assumption of an obligation, whether legal or moral, is an essential element of an agreement that offends the Act, because otherwise you can have an agreement by accident, you can have an agreement simply by being in the same room where a whole lot of people say to you, "This is what I think, I can't afford to absorb this, no way I'm going to absorb this, you go, it's exactly what I think as well." But that doesn't give rise to an arrangement or an understanding within the meaning of the Act, and that's the essence of the point. And in a way –

WINKELMANN CJ:

What case is that from, Justice Lindgren?

MR TAYLOR QC:

Oh, I'm sorry, I got the case wrong. I got the Judge right. It's the *Australian Competition and Consumer Commission v Commerce Commission (NSW) Pty Limited (and Others)* (1999) FCA 954, it's at tab 6 of volume 1 of the authorities, and it is at paragraph 141, and all I'm saying, and it was very well encapsulated by Her Honour, is that it is an essential requirement, otherwise the whole thrust of the mischief that the Act is aimed at is agreements or arrangements between people which restrict their ability or their freedom to compete. And it doesn't matter that it's not legally enforceable, the cases are absolutely clear on that, and that's obvious, but what it does require is this commitment one to the other, and it's not enough if a whole lot of people say, "What Trade Me are doing is outrageous, no way I can afford to absorb this." And perhaps the line or the line which is perhaps difficult to draw in some cases but in my submission not in this case, is in the cross-examination of Mr Lugton, and if we go to tab 1 of the bundle of references and if we go to page 4 under that tab 1, and I put the question to Mr Lugton, "Yes, and then you go on to say the consensus for the meeting was that none of the agencies wanted to bear the cost of Trade Me listings, and that's really reflecting what we've just discussed, that people we saying, 'No way we can absorb this,' correct?" and he says, "Correct." "And then you say, 'And so the agencies agreed on a vendor model going forward,' do you see that?" "Well, that's the only alternative, isn't it?" "Well, that's right, isn't it, because if you're not going to absorb it and Trade Me is proposing a vendor funded model, then it's obvious that part or all of the Trade Me costs is going to have to be vendor funded, correct?" "That's correct." "So rather than there being some agreement or some sort of moral obligation imposed on you, the inference that you drew from the meeting was that nobody wants to absorb this. Pretty obvious to me they're going to go to a vended funded model, correct?" and he says, "Yes, that's exactly what happens.

But the next bit is in my submission where we have to draw the line, where the Court has to draw the line, because I said, "So you certainly you didn't feel under any restriction?" I'm sorry, just in the bottom section, "But in terms of what was discussed at the meeting, the resistance and the expressions of not being able to absorb it, it was simply an inference you drew that people at the

meeting looked like they would or intended to go to vendor funding, is that correct?" He says, "Correct." "Certainly you didn't feel under any restriction as to what you could do in the future as a result of that discussion, did you?" "No, we were our own businesses, we can make our own decisions." "And you felt perfectly free to do that after the meeting, after you left the meeting?" "Yeah, and you can change your mind." And I said, "But certainly you didn't feel under any moral obligation or other sort of obligation that, say, 'I must act in this way, I must pass on all of the costs that Trade Me is going to impose,' did you?" And he says, "I never arrived at that point because I wanted to act that way." And what I'm saying is that that was the same for everybody in that room, because they'd all made their independent decisions before they even entered into the room, "I'm going to move to a vendor funded model." They heard people in the room making statements which indicated that they had a similar intention, that these were unilateral statements that were made by those people saying, "I will not, I cannot absorb," and that is precisely what the Judge found at paragraph 183 of the judgment.

ELLEN FRANCE J:

I can't quite work out your numbering, but in the middle of this passage he does say there was a plan about, "How were going to do it."

MR TAYLOR QC:

Yes. And then, and when he's asked in re-examination about what the plan was, the plan he says was to withdraw the listings.

ELLEN FRANCE J:

Right.

MR TAYLOR QC:

So he says that – he was asked that in re-examination, I may have to come back to you with the precise page reference, but that's what he says.

WINKELMANN CJ:

Well, that's down the bottom of page 5, isn't it, of your excerpts, and over to the top of the next page?

GLAZEBROOK J:

Co-ordinated withdrawal of the listings in January, is that what you were looking for?

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

It's page 6.

WINKELMANN CJ:

Yes, bottom of page 5, top of page 6.

MR TAYLOR QC:

Yes, it's at page 276 of the transcript, and the question is – this is Mr Dixon – and he said, "You said there was a plan about how this was to be enacted. What was that?" and he says, "Well, that was to co-ordinate a withdrawal of the listings in mid-January."

ELLEN FRANCE J:

But that goes on to say, "When did you make the decision to withdraw? I believe that was discussed at the meeting?"

MR TAYLOR QC:

Yes, and I'll come to that in the submissions. But he accepted in cross-examination that that discussion could have taken place at the 16th October meeting.

ELLEN FRANCE J:

Oh, yes, yes.

MR TAYLOR QC:

And, indeed, Mr Shale said in his evidence that this agreement was reached in the 30th September meeting but he accepted in cross-examination that he merged the two and, fascinatingly for Mr Shale, his evidence was, "I said when this was raised that there was no way I was going to withdraw these

listings," he said that this was a client care issue from his perspective and he said he made that clear at the meeting. So he never agreed to withdraw the listings.

WINKELMANN CJ:

But in any case withdrawing the listings was found not to be a problem.

MR TAYLOR QC:

No, and I don't think it was ever asserted by the Commission that it was. It's nice to have been it's not an essential part. But clearly when you read the High Court – well, no, the Court of Appeal judgment, they seem to say that one flowed from the other, and I'll be making submissions by way of response to the submissions by the Commission that actually that's not what the Judge found. The Judge found on the balance of probabilities that that discussion about withdrawal most likely occurred at the 16th or on the balance of probabilities occurred on the 16th, the following meeting. And that makes sense, one, Mr O'Rourke in his evidence was completely frank about that. He said, "Look, this is the context in which withdrawal came up, I'd made a decision to do that, I conveyed that decision at the meeting when we were talking about when is the best time to start this campaign promoting realestate.co and he said, 'Well, I'm going to be withdrawing my listings,' and given that they had 35% of the market there are going to be less listings, and there'll be less listings anyway because January's a quiet period so therefore the best time to do all this is on the 22nd of January."

But the point really comes, kicks in, in my submission, at paragraph 183 of the judgment where His Honour says, "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 –

GLAZEBROOK J:

I think I might be on the wrong paragraph.

MR TAYLOR QC:

Oh, sorry, I am. It's 188. My apologies.

Now that, in my submission, is an essential and important finding of fact by the Judge, because it's that lack of conditionality, that lack of assurance, that lack of mutual commitment, that distinguishes what happened in this meeting from an arrangement or an understanding within the meaning of the Act. But the Court of Appeal dealt with that statement at paragraph 49 of its decision…

WINKELMANN CJ:

So that's critical, his treatment of *Giltrap* there. Is he saying there's no mutuality or conditionality?

MR TAYLOR QC:

He's saying that all of these statements were unilateral, unconditional, not dependent on what the others would do.

WINKELMANN CJ:

So he's, as I read it, and just tell me if I'm wrong, he said there's not this mutuality, conditionality, obligation…

MR TAYLOR QC:

Yes.

WINKELMANN CJ:

But the *Giltrap* decision says you don't need to focus on it.

MR TAYLOR QC:

That's what he said, he –

WINKELMANN CJ:

So it's concepts of consensus and expectation, as the Court of Appeal says –

MR TAYLOR QC:

Correct.

WINKELMANN CJ:

– and therefore he says at 193 there was a consensus giving rise to expectations?

MR TAYLOR QC:

Yes, and he says that consensus was essential like-mindedness that was expressed by the expressions of intention. Because he then goes on to say in, I think, he then goes on to say that it was enough that they expressed their intentions at the meeting, that's all that's required, and that's at paragraph 192, he says, "It is enough to establish a consensus here that the defendants communicated to each other their intended and common course," and what I'm saying is –

GLAZEBROOK J:

Paragraph 190 did you say?

MR TAYLOR QC:

192.

GLAZEBROOK J:

Sorry, I'm still on the Court of Appeal.

MR TAYLOR QC:

And in my submission that indicates a misunderstanding by the Judge as to what the Court of Appeal in *Giltrap* were talking about in terms of a consensus giving rise to an expectation. He is saying, "If you express an intention, even though it's a unilateral expression of intention without any commitment or reciprocality, simply expressing that means that there's a consensus which gives rise to an expectation because," he says, "that's enough." And he says earlier, I think, "But whether the defendant," yes, it's at 188 again, "But whether the defendant's comprehensions included a sense of reciprocity or moral obligation between them is irrelevant. The majority judgment in *Giltrap* dictates objective focus beyond the concepts of consensus and expectation."

WINKELMANN CJ:

So you could see a situation, couldn't you, where people, you don't really want people within the same industry getting together to discuss how they're going to behave in a competitive situation because they all get together and, you know, they're careful not to use the words of agreement but they're all saying, "And this how I'm going to behave from here on in"?

MR TAYLOR QC:

No, yes, yes. And in fact one of the academic articles that my learned friends refer to is a speech that was made at a conference by a Professor Fisse, and he says, "Well, heavens, if you have to have this moral expectation or commitment you can drive a horse and cart through it because you could all go to your lawyers and your lawyers would tell you, 'Look, just go to the meeting, don't say a word, don't commit to anything, make a note that you've not committed to anything.'" Well, in my submission, that is an unprincipled approach to whether or not this requirement for commitment or assurance is a necessary part of an arrangement because one has to be able to trust the Courts to see where there's a nod and a wink and where there isn't, and –

GLAZEBROOK J:

But will – but that's part of the objective view of looking at it, so there will be some situations where objectively if people go along to the meeting say, "I'm cutting my prices by $5," and everybody else says, "Oh, well, I'm independently cutting my prices by $5," that you would find a mutuality in a reciprocal agreement.

MR TAYLOR QC:

Yes, correct, because objectively – yes, you would, and that is the answer to that sort of proposition because the Court is going to determine objectively whether or not there was in the situation of this meeting and of this discussion that sort of communication.

WINKELMANNN CJ:

And on the facts of this case you say all they were doing was communicating the commercially inevitable step they were taking which was that they couldn't carry on funding this themselves?

MR TAYLOR QC:

Yes.

WILLIAMS J:

But the Judge does say at the end of 192 there is a moral obligation. He seems to be suggesting there was nodding and winking.

MR TAYLOR QC:

Well, I don't think he was. I think –

WILLIAMS J:

Well, he used the word "obligation".

MR TAYLOR QC:

Yes, but I think in doing that he's using the words "consensus" and "expectation" absent any of that. He's not making a finding that there was a moral obligation, and the important thing is that he says, "Look, the subjective intentions of the parties or what they perceived is irrelevant because it's a purely objective test." Well, that simply cannot be right because if you're going to make an objective assessment of whether in the circumstances the parties did commit themselves in this way with the assurance or commitment or undertaking or moral obligation, you have to do that on the basis of all of the circumstances, including the parties' perceptions of what we're saying and what they gleaned or understood from what was said. And so it cannot be right to say no evidence can be given as to what those perceptions were, whether they felt they were under a moral obligation. All of that is relevant and highly probative evidence that was important to establish in this case. All of them said, "No, we didn't assume that sort of," well, just about all of them said, "We didn't assume that moral obligation or make that sort of commitment." They all agreed that these were just people saying, ranting, raving, in the tumult of the first five minutes of the meeting. We don't –

O'REGAN J:

But has there ever been a price-fixing case where the parties to the cartel haven't said that?

MR TAYLOR QC:

Well…

O'REGAN J:

Of course they say that. I mean what would you expect them to say?

MR TAYLOR QC:

Well, people can – yes. People, you would expect them to say that's how it happened if they had in fact given assurances of that nature, but if they haven't given assurances of that nature and it's clear from the evidence that they haven't given assurances of that nature, that's what the Court has to determine. Yes, you can say, "Well, they might always say that," and the Court might or might not believe them, but here there's no suggestion anywhere in the evidence that the Court disbelieved what they were saying on this and his conclusion, His Honour's conclusion at 188 that there was no sense of conditionality is an acceptance of that evidence.

O'REGAN J:

Well, except at 192 he says that they reached a common course. So it wasn't a whole lot of individual ones. It was a common course.

MR TAYLOR QC:

Well, the only commonality was the –

O'REGAN J:

And that was a consensus, ie, an agreement.

MR TAYLOR QC:

Well, in my submission it's not.

O'REGAN J:

And that gave rise to expectations that the others would do the same.

MR TAYLOR QC:

No, and that's –

O'REGAN J:

Well, that's what he says in 192.

MR TAYLOR QC:

Well, in saying that he gets it wrong because what the Court of Appeal and the majority and the minority in *Giltrap* are saying is that it is the consensus that gives rise to the expectation, but consensus in that sense means a morally obliging or committal –

O'REGAN J:

And the finding of fact by the Judge was, and in 192 is, using exactly the words of *Giltrap*, the consensus gave rise to the defendants' expectations of how each other would act. That's what he says, and then he says and that establishes that the communication among them led to a moral obligation.

MR TAYLOR QC:

And he's wrong on both propositions because, one, he missed –

O'REGAN J:

Well, are you accepting that he applied the right test then?

MR TAYLOR QC:

No, I'm not, because –

O'REGAN J:

Well, he's used the words of *Giltrap*.

MR TAYLOR QC:

Yes, I know he's used the words of *Giltrap* but it's clear he misunderstood the effect of those words in *Giltrap* because his prior finding that there was no sense of conditionality in these statements, none of them were dependent on what others would do, is in my submission fatal to a finding that in this meeting and these statements the parties assumed obligations one to the other to act in a proscribed way. It's not the consensus or agreement or understanding that gives rise to that expectation. It is simply people stating as a matter of fact what their views or intentions are, and that's – it's important

because the Court of Appeal seeks to overcome that finding of fact that there was no sense of conditionality and they do that at paragraph 47 –

WINKELMANNN CJ:

So just before you move on, what you're saying is that he's just articulating conscious parallelism?

MR TAYLOR QC:

Correct.

WINKELMANNN CJ:

So what does the Court of Appeal do?

MR TAYLOR QC:

The Court of Appeal says at paragraph 49, "We have found it difficult," and they are talking about paragraph 188 of the decision that I've just taken Your Honours to, and they say, "We have found it difficult to interpret this paragraph." Well, it's very clear what it's saying so it's not a matter of interpretation.

WINKELMANNN CJ:

Sorry, what paragraph are you on?

MR TAYLOR QC:

Paragraph 49, sorry, of – did I say 47? Paragraph 49 of the Court of Appeal decision.

So they say, "We have found it difficult to interpret this paragraph." On the one hand, it appears to say that there were – these were unconditional expressions by each of them, of agencies, of their intention to withdraw from Trade Me without regard for the intention of others. On the other hand, it goes on to say that some present expressed taking comfort from the fact that their competitors were doing the same, and were aware of the risk of divergent approaches.

Well, where there the – there's several of them that said, "Look, we heard what these guys were saying and that certainly gave us some comfort," but in my submission that's not an arrangement or an understanding within the meaning of the Act.

Then they say, "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." Well, what he's doing is he's saying there's a whole lot of articulated like-mindedness in the room which indicates that they are all thinking or expressing an intention to do the same thing, and frankly it's obvious that that's what they would have done and as the witnesses say, well, what they were saying would have come in as no surprise to you and they go, "Course not." But then they say our own –

O'REGAN J:
But that's not a mutual understanding, what you've just described.

MR TAYLOR QC:
No.

O'REGAN J:
That's just a whole lot of individual understandings.

MR TAYLOR QC:
Correct, and that's what the Judge has found. He's saying there's no conditionality, there's no sense of conditionality –

O'REGAN J:
Well, it isn't what he found at 192.

WINKELMANNN CJ:
So this is why the Court of Appeal is struggling.

MR TAYLOR QC:
Well, my submission, what he found at 19 –

WINKELMANNN CJ:

The Court of Appeal is clearly enough struggling here, aren't they, because he does seem to find one thing and then he quotes *Giltrap* with the other?

MR TAYLOR QC:

Yes, but in my submission his quotes of *Giltrap* and the other, this emphasis on consensus and expectation, indicate that he misunderstood what the Court of Appeal was saying in *Giltrap* in terms of the meaning of the word "consensus" because it's the consensus, the agreement, the reciprocal acceptance of an obligation to act in a proscribed way, which gives rise to the expectation, and if you've got that you're in trouble, but given his finding here for which there was full evidence, in my submission that finding that there was no sense of conditionality is fatal to a finding that there was an arrangement or an understanding within the meaning of the Act.

WILLIAMS J:

Right, so –

O'REGAN J:

But I'm sure Mr Dixon is going to say the finding of 192 is fatal to your case.

MR TAYLOR QC:

Well, what I'm trying to submit is that it's not and the difficulty –

WINKELMANNN CJ:

I suppose you could say –

GLAZEBROOK J:

But you're saying he just misunderstood *Giltrap* and that's why he made the findings at 192 and 193.

MR TAYLOR QC:

Correct, correct.

GLAZEBROOK J:

In fact, if he had properly understood *Giltrap* based on 18 – so you're saying 188 is the correct finding and the one that he made –

MR TAYLOR QC:

Yes, yes.

GLAZEBROOK J:

– and the one that is not only available on the evidence but is quite clear on the evidence?

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

And he had obviously misunderstood *Giltrap* if he thought that sufficed for the sort of commonality that *Giltrap* was talking about?

MR TAYLOR QC:

Correct, correct, and –

WINKELMANNN CJ:

So can I just – I was about to say it seems to me that perhaps one explanation, and I'm not sure this is right, but when he quotes *Giltrap* he thinks he's bringing to bear *Giltrap* as he's defined it at 188 which doesn't require a finding of a moral obligation?

MR TAYLOR QC:

Correct.

WINKELMANNN CJ:

Which seems peculiar because he uses the word "moral obligation" –

MR TAYLOR QC:

Yes.

WINKELMANNN CJ:

– but that is what he thinks about *Giltrap*?

MR TAYLOR QC:

Yes.

WILLIAMS J:

Or he may think that conscious unilateralism is sufficient in itself to create a moral obligation?

MR TAYLOR QC:

Yes. In my submission, that's what he does because that's reflected in the other paragraph of a judgment that I referred to earlier where he says it is enough that they communicate to each other their intention, and I am saying no, it's not enough. And this problem is recognised by the Court of Appeal because the Court of Appeal, you'll recall, says there does have to be an element of conditionality, but they get around this paragraph by saying at paragraph 49, "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," and what I've endeavoured to do at tab 2 of those extracts from the evidence is to say, well, the Court of Appeal can't have read the evidence very carefully because all of this evidence supports the Judge's finding that there was no sense of conditionality.

WINKELMANNN CJ:

Right, so we'll take the luncheon adjournment and we're going to have to…

MR TAYLOR QC:

We're going to have to move quickly, I appreciate that.

WINKELMANNN CJ:

Yes, but this is an important part of your argument, I suppose the next part too, isn't it?

MR TAYLOR QC:

Yes.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.16 PM

WINKELMANNN CJ:

Mr Taylor.

MR TAYLOR QC:

Thank you, Your Honour. I think I left off just before the adjournment dealing with the way in which the Court of Appeal dealt with the finding of fact that all of the expressions that we won't absorb or can't absorb –

WINKELMANNN CJ:

At 49?

MR TAYLOR QC:

Yes, at 49 of the Court of Appeal decision, and they deal with that by saying, "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," and all I want to say about that is that if one goes to tab 2 of the references from the transcript that I handed up, sorry, tab 1, those are all the statements in the cross-examination of the Commission's witnesses and the defendant's witnesses which, in my submission, wholly support that finding by the Judge that there was no sense of conditionality in any of the statements of that were made, and what I do want to say is that the inference that must be taken from paragraph 49 of the Court of Appeal decision that they have reached a different conclusion on the, by, than the Judge on the evidence without specifying what evidence they are relying upon, it's saying that they can't find anything to support that finding, is an error by the Court of Appeal, and in my submission this is very much a case where an appeal Court should not interfere with the findings of fact by the Judge unless there was no evidence to support those findings of fact or

the Judge's findings of fact on the evidence were demonstrably unreasonable, and in my submission that is absolutely not the case here, and for authority –

WINKELMANNN CJ:

Is that right or are you just saying because they haven't given up, haven't set up, are you saying that as a general proposition because it doesn't seem to be right?

MR TAYLOR QC:

Yes.

WINKELMANNN CJ:

Or are you saying because they haven't set out their own factual findings that it's, the approach has to, we have to proceed on –

MR TAYLOR QC:

I am saying that where there is evidence that supports the findings of fact which referring to tab 1 in my submission is demonstrably the case here, that these were unconditional, unilateral statements of intention –

WINKELMANNN CJ:

Is it tab 1 or 2?

MR TAYLOR QC:

– where there was ample evidence to support that finding then the appeal Court should not interfere unless it is satisfied either that there was no evidence to support the finding or that the Court of Appeal's – that the High Court Judge's findings of fact were unreasonable based on whatever the evidence was, and I cite for that proposition the very recent decision of the English Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5 –

GLAZEBROOK J:

But it's totally against the *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 authority though, isn't it? I mean I can understand the submission that says, well, they say our own examination of the evidence

without saying anything more doesn't explain or give any reasons why that's the case. It's just an assertion.

MR TAYLOR QC:

Yes, yes.

GLAZEBROOK J:

But to say that if they did, if they had come to that view and explained it on the evidence they would have been entitled and the appellant would have been entitled, wouldn't it, to have judgment in its favour ?

MR TAYLOR QC:

Well –

WINKELMANNN CJ:

Because you're inviting us to do that – well, possibly. You're inviting us to do that on the factual findings that are against you so – and that is *Austin, Nichols*, says that we have to do that.

MR TAYLOR QC:

Yes.

WINKELMANNN CJ:

But is your – I mean are you advancing a narrower proposition because it seems to be a difficult proposition for you to advance? Generally, this Court and the Court of Appeal on appeal could not overturn a factual finding unless there was no evidence or it was an unreasonable finding on the evidence because that –

MR TAYLOR QC:

Yes, well, the reason I cite that proposition is that that's precisely what the Supreme Court in the United Kingdom has said in –

GLAZEBROOK J:

Well, yes, because they have a different view like in Canada in terms of what an appellate function is on fact.

MR TAYLOR QC:

Yes, yes.

GLAZEBROOK J:

We're a bit on the outer possibly in the common law world on that.

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

But nevertheless we are there.

MR TAYLOR QC:

Yes, but I suppose even on, even adopting the *Austin, Nichols* approach what the Court says there is that the onus is really on the person challenging the finder of fact –

GLAZEBROOK J:

Absolutely, and we've said that recently in a case to say you can't just come along and say you do it all.

MR TAYLOR QC:

Yes, yes.

GLAZEBROOK J:

You know, you go for it. You have to actually say why it's wrong, yes.

MR TAYLOR QC:

Yes, exactly, exactly, and what I'm saying here is that where there is ample evidence to support that finding of fact then the Court, in my submission, can't be satisfied that the finding of fact is wrong so that it should substitute its own opinion as to the facts. In circumstances where the Judge has clearly accepted and believed the evidence of all of the witnesses on that and has had the advantage of seeing and hearing all of those witnesses, in those circumstances where there is all that evidence, the Court should not, in my submission, interfere unless it is persuaded that the Judge's finding of fact is

so clearly wrong that it should substitute its own decision, and that is the proposition essentially that is stated by the Supreme Court in the United Kingdom. It's also the approach that was adopted by the Australian Federal Court on Appeal in the *ACCC v Colgate-Palmolive Pty Ltd (No 4) (Cussons)* [2017] 353 ALR 460 (FCA) case and that's not in the – it is in the respondent's –

WINKELMANNN CJ:

Sorry, I was thinking about something, this judgment. You're still advancing an argument that this Court should abandon its longstanding appellate test on appeal in relation to factual findings and substitute a new one, is that your argument, because it seems to me a hard road for you to walk when you could just walk a much easier road –

MR TAYLOR QC:

Yes.

WINKELMANNN CJ:

– and which is that if they're going to overturn a factual finding then they have to set out their own factual finding.

MR TAYLOR QC:

Yes, and they have to set out the evidence that they rely upon to reach a contrary conclusion, and in my submission it's clear from this statement in paragraph 49 that they chose to deal with it by saying, "Well, we couldn't find any evidence that supported the Judge's findings of fact in the first sentence, and the second half of the second sentence," and what I'm submitting to Your Honours is that if we look at the tabulation, particularly in tab 1 of the evidence, all of the evidence supports that conclusion by the Judge and –

WILLIAMS J:

Is there any evidence supporting the opposite conclusion?

MR TAYLOR QC:

Not that I'm aware of except perhaps the briefs of evidence-in-chief of the Commission agency witnesses where they don't say anything express about it

but they make a sort of general proposition that there was this talk at the beginning and out of that came this agreement. So in that sense there's an assertion that there is an agreement.

WILLIAMS J:

Didn't they say, "To which we felt bound," or words to that effect?

MR TAYLOR QC:

No, no, it doesn't. It just says there was this agreement to vendor fund within the meaning as pleaded by the Commerce Commission. So in that sense there's evidence but what I'm submitting is that when that evidence was tested it completely unravelled and what became very, very clear was that this wasn't a case of commitments being given or assurances being given, this was people just expostulating, stating their views, opinions and intentions in a purely unconditional and unilateral way.

GLAZEBROOK J:

And I suppose you'd say that that last sentence is wrong anyway because there was a whole lot of evidence that if they were going to come to a different finding they needed to either say they didn't believe or alternatively say it was self-serving and they were going to discount it.

MR TAYLOR QC:

Correct, correct, yes. Yes, exactly.

GLAZEBROOK J:

Well, actually probably it's both of them are the same thing. I don't believe it because it was self-serving and I discount it.

MR TAYLOR QC:

Yes, yes, and, of course, it's not self-serving for the three Commission witnesses because all of them have settled. They're all –

GLAZEBROOK J:

No, no, I understand that.

MR TAYLOR QC:

Yes, and it's perhaps an answer in a sense to what Justice O'Regan was saying before, and in my submission it's reflected in the way the Commerce Commission approaches this case. Their opening submission in the Court of Appeal and their opening submission before this Court and the written submissions is, look, this is cookie cutter stuff. This is clearly price fixing. This is what happens all the time when there's a price shock and this is no different to any other case, and in my submission that's the approach that's been adopted by the Commission throughout and what it begs is a proper analysis of the evidence of what happened at that meeting, in what context it happened, what was said and what was done.

WINKELMANNN CJ:

Okay, so in fact on your analysis the Court of Appeal's finding is inconsistent with even the high level of appellate intervention? It's just wrong?

MR TAYLOR QC:

Yes, yes, it is, and it's certainly unsupported.

ELLEN FRANCE J:

I'm just not sure it's quite right to say it's completely unsupported in that you do have, for example, Mr Coombes coming back. I know you've got your point about the feature ads and so on.

MR TAYLOR QC:

Yes.

ELLEN FRANCE J:

But he does come back to talking about an understanding that we'd all agreed.

MR TAYLOR QC:

Yes.

ELLEN FRANCE J:

And when he's asked, you know, if anyone wanted to be on it after that, he says, well, some or other knows but we pulled ours and other people pulled theirs, and that was in fact largely what happened, or at least there's evidence that numbers moved away from Trade Me.

MR TAYLOR QC:

Yes.

ELLEN FRANCE J:

So I'm just not sure you can say there's no evidence the other way.

MR TAYLOR QC:

Well, perhaps not but there's no evidence on this point. If it – except – I mean, no, I have to accept Your Honour's right in respect of what Mr Coombes says but as the Judge says when he analyses that evidence, he says Mr Coombes' statement were conclusory in nature. He would say, "Ah, yes, this is what we agreed," but when I press him on that and say, "Well, look, how did this agreement come about? Who said it? Did you say it? Did anybody say, 'I agree with you. I think that's a great idea, Dennis,'" he refused to answer. He simply refused to answer, and the strength of evidence is belittled by the fact that according to him the agreement was not to fix the price or set the offer price for standard listings. His evidence was that the agreement of everybody in the room was we won't offer them at all and we will only offer feature listings. So his evidence really has to be looked at with the utmost scepticism because he had a strong view or a strong opinion that it was completely misconceived, and he, for what it's worth, in questions that were put to him confirmed this whole tumult idea that this was a whole lot of people making statements, expressing their views and expressing their intentions, and he said, "I would have put my twopence-halfpenny's worth in as well.

GLAZEBROOK J:

Did I understand you correctly in any event to say that the idea of the 31st of January withdrawal is actually a red herring because there's nothing wrong with that?

MR TAYLOR QC:

Yes, yes.

GLAZEBROOK J:

So any agreement on that is neither here nor there?

MR TAYLOR QC:

No, it's neither here nor there. The only significance that it has is that the way in which the Court of Appeal seemed to read the agreement was first the withdrawal agreement then the agreement that we'll all offer, we'll all go to vendor funding, and what I'm saying is that it actually didn't happen that way at all and the Judge found that it didn't happen that way at all. He said there might have been some discussion about withdrawal at the 30th September meeting but the details of that arrangement as he found to exist on the balance of probabilities occurred at the later meeting in the context of what Mr O'Rourke described in his evidence discussing how and when we're going to commence this promotion campaign.

GLAZEBROOK J:

Well, is it a bit inconsistent anyway to say we're all going to withdraw but we'll make it vendor funding, because if you're withdrawing – I suppose they're withdrawing in respect of their arrangements.

MR TAYLOR QC:

They're not withdrawing. What they're actually doing by the withdrawal is that they've got existing listings on there.

GLAZEBROOK J:

Yes, I understand that.

MR TAYLOR QC:

And they are withdrawing those existing listings, so that by the time the campaign starts there's going to be very few listings on Trade Me and there's going to be a lot more on realestate.co because of all of their –

GLAZEBROOK J:

But all I'm saying really if you say it's vendor funded –

MR TAYLOR QC:

Yes.

GLAZEBROOK J:

– in a way it's a bit inconsistent to say we're actually not going to put any listings up there anyway.

MR TAYLOR QC:

No –

GLAZEBROOK J:

We're going to promote our platform rather than the other platform.

MR TAYLOR QC:

Correct, correct. Yes.

GLAZEBROOK J:

So it's not really a vendor financing at all.

MR TAYLOR QC:

No, no, exactly.

GLAZEBROOK J:

In the factual situation of this.

MR TAYLOR QC:

Yes, yes, correct.

GLAZEBROOK J:

Because in the factual situation it's, well, we're going to put you all onto our platform.

MR TAYLOR QC:

Yes, yes, that's correct, that's correct. Now I am concerned about timing and I do want to finish at 3.30 and because of that I would, with Your Honour's leave –

WINKELMANNN CJ:

Are you at some point going to deal with the post-meeting documents that are referred to by the Court of Appeal?

MR TAYLOR QC:

Yes, yes.

ELLEN FRANCE J:

And indeed the email, isn't it, beforehand?

WINKELMANNN CJ:

Mmm, pre-meeting email, mmm.

ELLEN FRANCE J:

Oh sorry Mr O'Rourke's contacted each principal in Hamilton and they agreed in principle to.

MR TAYLOR QC:

Yes, yes. What I've done and I've reduced into writing what I call a synopsis of the appellant's reply submissions and it's in reply to the submissions that have been lodged by my learned friend. The registrar has copies of those. I do seek leave to introduce those because what I propose to do is not address those submissions today, give them to the Court and my learned friend so that the Court is aware of what they say and it addresses that issue in particular and then hopefully I will get half an hour or so at the end of play tomorrow to speak to those submissions because the way things are going we are not going to get there or I'm not going to get there today otherwise and what I've given to the registrar is in addition to that is two things, one is some extracts from the Australian legislation because my learned friends make something of a point to say well the test as applied in Australia has become too hard, so their legislature has changed it. That's one aspect and the other document

that I am handing up is an extract from *Halsbury's* on the Canadian position as to what is required for an agreement. So I will take the Court briefly to those two latter documents but leave it to the Court to read the synopsis of reply submissions overnight with the Court's leave.

Can I then – I have to move on quickly and in terms of the written submissions I think I've said as much as I can say about why I say the Judge got it wrong in terms of applying the test in *Giltrap* but I say well look even if I'm wrong in that and he's applied it absolutely correctly, I submit that the proper approach is the approach adopted in the Australian cases which I refer to at paragraphs 54 to 65 of my submissions and I'm not going to read those but what I'm going to say is, what I say at paragraph 62 of those submissions that, "for parties to reach an understanding or arrangement within the Act, it is not enough to expect from the matters discussed that others intend to or are likely to act in a certain way. There must be an assurance or undertaking to act in a way which carries with it at least a moral obligation to act in a way that restricts the ability of the parties to the arrangement to act freely." That is consistent with the authority cited above, the Australian authorities that I've referred to and it is submitted the correct interpretation of *Giltrap* and the Court of Appeal, when addressing the Australian authorities say this at paragraph 63, "There was reference to the Australian position, although this was not the subject of analysis in the High Court", that's correct, all of these cases were cited to the High Court but none of them were referred to by the High Court. We say if they had been perhaps the Judge wouldn't have made the mistake that we say he did in applying the legal test correctly.

And then they say, "We record that we do not see in the Australian cases any elevation of moral obligation to a prerequisite or requirement, although it has been said that something more than a mere expectation is required." And what I would invite the Court to do is try and find a recent case in the Australian Courts since *Rural Press Ltd v ACCC* (2002) ATPR 41-883; 118 FCR 236 where the Courts haven't said consistently that there must be this assurance, undertaking or assumption of an obligation for there to be an arrangement or an understanding within the meaning of the Act in Australia because all of the cases say the same thing and the only time it looked like it

might even get close to going to the High Court was in the *Rural Press* case which summarises all of the authorities and where Justice Gleeson, and it's at tab 28 of the bundle, volume 4, and what it is, is a transcript of the application for leave to appeal and one of the grounds of the application for leave to appeal was that the Federal Court on appeal had wrongly applied that test but Justice Gleeson, in the course of that transcript –

O'REGAN J:

I should just point out the High Court of Australia wouldn't let you refer to this authority in an Australian Court because it's only a leave.

MR TAYLOR QC:

No well I'm not really referring to it as authority for anything except just, I think it was Justice Gleeson at that stage does make a very succinct analogy which in my submission is helpful and confirming the understanding of the Australian High Courts as to what is meant by a consensus or a meeting of the minds and –

WINKELMANNN CJ:

Well what are you referring to it for then? You are referring to it to shows in some sort of elucidatory way of you?

MR TAYLOR QC:

Just in an elucidatory way because my learned friends say in their submissions oh well it's never been looked at in the High Court but the reason I'm submitting it hasn't been looked at in the High Court is that the High Court actually seems to agree that the approach adopted by the Federal Court both at first instance and on appeal in numerous cases is correct and what the Judge does is, just let me – he does at page 12, oh it's at tab 28 in volume 4 and it's page 12. There's no page numbers but if we go in the bundle I think 12 pages in at the top of the twelfth page.

WINKELMANNN CJ:

What are the words?

MR TAYLOR QC:

Sorry six pages in because they're double sided.

WINKELMANNN CJ:

What are the words that appear at the top, “Mr Douglas”?

MR TAYLOR QC:

No it starts at the top of the top of the twelfth page.

WINKELMANNN CJ:

With what words?

O’REGAN J:

“There has to be a meeting of minds” is it?

MR TAYLOR QC:

Yes and he says, “If you open the door of a cage and all the mice leap in and head for the cheese, that does not mean they have an understanding but the current findings are such, are they not, that it is difficult to see that the question of law that you want to agitate arises.” But it’s a nice analogy because it’s saying look it’s enough that everybody acts in a likeminded way or even expresses an intention in a likeminded way, there has to be this meeting of the minds and in that context he is addressing that in the context of the universal approach by the Federal Court.

O’REGAN J:

I hope you don’t cite as authority in other Courts what we say as being considered.

MR TAYLOR QC:

I don’t want to be taken as citing it as authority but just seemed like a nice example of what we’re talking about here.

WINKELMANNN CJ:

Of course mice wouldn’t leap in to follow cheese because they don’t like cheese.

MR TAYLOR QC:

Now my learned friends will probably say to that well the mice don't talk to each other before they jump in the cage. Now I'll come back to my submissions and I think – I just want to comment briefly on the assertion by my learned friends in their submissions that the approach in Australia, well the approach in Canada and the US and in the UK supports their argument that there's no need for moral obligation or something like it and in one sense the cases they refer to which in the US are the *American Tobacco Co. v United States* 328 US 781(1946) and the *W Penn Allegheny Health System Inc v UPMC* 627 F 3d 85 (3rd Cir 2010) case don't talk about or mention moral obligation but what in my submission is clear from those cases is that there was evidence which strongly supported the findings by the Courts in those cases, that there was an agreement or a conspiracy to an agreed course of action and they didn't need to discuss the question of moral obligation, that's one that arises of British Flag and the Court of Appeal in *Giltrap* in New Zealand but in my submission the US approach is not materially different to the approach that is adopted in New Zealand.

In respect of the Canadian position, my learned friends rely on a judgment of the Canadian Supreme Court in a decision in the *Atlantic Sugar Refineries Co Ltd v Attorney General* [1980] 2 SCR 644 and this is at paragraph 2.27 of their submissions and what they do is they cite a passage from the dissenting judgment in that case, the judgment of Justice Estey in which he is discussing the difference between conscious parallelism and an agreement or an arrangement and what he says in that context is the quote that they refer to where – that my learned friend's refer to at that paragraph where he makes a very broad statement of principle about what is required under the Canadian position. What's interesting is that the majority of the Court in that case found that what happened in this case was conscious – well was parallelism, not an agreement but in my submission it's wrong to simply pick out one tiny little statement in the dissenting judgment in this case and say that's the position in Canada and what I've done in one of the documents that I've handed is to simply say from *Halsbury's Laws of Canada* what its description of the requirements for an agreement under the Canadian legislation are and that's under the heading "Existence of an Agreement" and in my submission what's

recorded there is not materially different to what I say is the requirement both in Australia and New Zealand.

The other case that I think is referred to – they then also rely the UK position or the UK and European position and in particular they rely on a decision of the English Court of Appeal in *Argos Ltd v Office of Fair Trading* [2006] EWCA CIV 1318 and the difficulty with that is that in the UK the test or the criteria is quite different because under the European system which the Treaty, the European Treaty and under the UK legislation, the legislation has what is called a concerted practice. So in other words the legislation talks about agreements and concerted practices and there is whole body of law that has been developed based on this concept of a concerted practice and it's described as a form of co-ordination which, short of an agreement properly so called, knowingly substitutes practical co-operation between the undertakings for the risks of competition, and under that legislation you can either have a concerted undertaking which has the object of interfering with competition or which, if that object can't be established, requires that it have the effect of distorting, restricting or limiting competition. So the UK position actually has a wholly different test and in my submission it's of no assistance to this Court to go to *Argos* and say, "Oh, well, we should adopt that position here," because what you are dealing with is quite different legislation and very materially different concepts.

The third thing I want to say is, well, my learned friends say, look, the Australian position reflected in these Federal Court cases is so unhelpful, makes it so hard for the Commission to prove these cases that the legislature has interfered and it's changed the legislation to overcome these difficulties, and again in my submission that submission is not complete because if we go to the Australian legislation, and it was introduced in April 2019 so it's relatively recent, and what happens was that before that legislation was introduced the concept of a concerted practice was introduced in respect of banking only. There was then an inquiry into petrol pricing and the result of that inquiry was because there had been cases that held that petrol pricing, it simply hadn't been proved that there was this moral commitment or agreement or understanding of the kind required under the Act, and so the

result of that was a report and that report recommended that the concerted undertaking provision not be confined just to the banking industry but should become a general provision, but the way in which that was introduced was in section 41(1)(c) which is at page 254 of the bundle of references to the legislation that I've just handed up, and what 45(1)(c) did was to introduce a provision that a corporation must not engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect of substantially lessening competition. So the cartel provision was introduced but with a substantial lessening of competition. So it's equivalent in that respect to section 27 of our Act which talks about agreements, arrangements or understandings which substantially lessen competition.

WINKELMANNN CJ:

What section is that in the materials you've handed up?

O'REGAN J:

45. It's on the very last page.

MR TAYLOR QC:

It's section 45(1)(c) and it's on the last page. The page numbers of the legislation are at the bottom left corner. So it's at page 254. But what's important –

O'REGAN J:

So is there a concerted practice addition to their price fixing clause as well?

MR TAYLOR QC:

No, no, this is the point, and just what I was going to come to, Your Honour, because if we go to page 245, what we're looking for is 45AG, AJ I should say, right at the bottom and this is the per se provision, this is the equivalent of section 30 and it says, "The Corporation contravenes this section if the Corporation makes a contract or arrangement or arrives in understanding. So in other words they have retained that very similar wording to the wording that applies in the New Zealand legislation to a contract arrangement or understanding which contains a cartel provision and if we go to the definition of a cartel provision, that's at page 236, section 45AD and a cartel provision is

one that has the purpose, effect, conditions set out in subsection (2) and the purpose, effect, condition is the fixing, controlling or maintaining of the price.

So fully accept that there were changes to the legislation but quite clearly, a deliberate decision by the legislature not to extend that concerted practice, idea or regime to the per se provisions of the Act. So rather than those changes reflecting a desire to get rid of that approach to contracts, arrangements or understandings, the legislative changes make it clear that the test as it was remains for the purposes of these cartel provisions.

Now I think that's all I – no one further thing that I do want to take you to and that's the academic literature and in particular the article that is referred to by my learned friend in the *Brent Fisse Australian Cartel Biopsies (Competition Law Conference, Sydney, 5 March 2018)* and if I can just find that, it's at tab 28 of the respondent's additional authorities and it's cited for the proposition that if you adopt this approach you can run a horse and cart through the legislation and if you have to have this moral obligation then it's going to have these terrible effects and that is something that the author of that paper says because he says at paragraph 7 that, "The need for a commitment or assurance invites rort as he puts it.

And then to support that proposition, he then supports – he refers to another article that was written jointly by him and others which say that, "Liability could be avoided by the obvious tactic of discussing prices but studiously stopping short of making any commitment. This is a glaring loophole", as he puts it, "in the law." Well I don't agree with that. The Australian legislature doesn't agree with that and the Australian Courts don't agree with that and if we're looking for where the balance should lie, it should not lie in making it easy for the Commission to prove the arrangement or understanding. If there is doubt, that doubt should fall in favour of the persons accused of entering into or arriving at that understanding, and this sort of reverse reasoning to justify some sort of stricter approach in my submission is completely unprincipled and it can't be and shouldn't be relied upon by this Court. What's more interesting is that he refers to the US approach and in particular a decision of the US Supreme Court in *Monsanto* which says that what's required is

conscious commitment to a common scheme, and then further on in that article, at paragraph 17 of the article, he advocates a test in line with the test that I took you to earlier of Lord Justice Diplock and he says that's where the balance should lie and he says what's required, or should be required, is a representation as to future conduct with the expectation and intention that such conduct on his part will induce B to act in a particular way. So we come back full circle because I don't have any problem with that approach to determining whether there is that necessary element of obligation, commitment or assurance. So in my submission, apart from the unprincipled statement that it invites rort and therefore there's a reason for construing it more narrowly, I would have no problem with the approach adopted by Lord Justice Diplock in determining whether that necessary intention and knowledge to commit yourself or induce somebody else to act is present in this case, and I say it is not.

Now it's five past three. I really am concerned about timing but I am going to try and run through the balance of my submissions.

WINKELMANNN CJ:
Well, how long are you going to be in reply?

MR TAYLOR QC:
Well, given that most of what I want to say in reply is in that document that I handed up, I don't need more than half an hour in reply. I hopefully won't be more than half an hour in reply, and that would be simply to speak to those submissions.

So, the only problem with the electronic system is that it can be slightly cumbersome. At paragraph 68, I deal with this issue of conditionality. I think I've already covered that.

The analysis of the facts, all I'll ask you to do is to read those submissions and why we say that the Courts, Court of Appeal's analysis of the facts and the limited extracts from the evidence that they relied upon simply don't overcome the volume of evidence which supports the propositions which we say the Judge relied upon in making those important statements or findings of fact.

WINKELMANNN CJ:

Well, I come back to – are you going to take us to those documents that they rely upon in the email?

MR TAYLOR QC:

Yes, I've covered those in that reply submission and what –

WINKELMANNN CJ:

So you can't – going to cover it tomorrow?

MR TAYLOR QC:

Yes, yes, and it's covered, it's deal with in the first part of that synopsis under the heading, "No Preconceived Plan or Agreement in Principle to Vendor Funding," because it's absolutely accepted that there are those statements or statements that are attributed to Mr O'Rourke in the meetings and what has been more to mind is that is a board meeting of the New Zealand Realtors and that is an organisation that has independence, realty real estate agents, in other words not part of a franchise, throughout the country. So they are not, when they are meeting, competitors. They are not competing with each other because they're all in different geographical markets and that has to be borne in mind. The other thing that has to be borne in mind is that the drafter of those minutes, Mr Borkowski was also the secretary I think for PPL, the PPL Board which is owned by Realestate.co, so he was covering a few bases in terms of preparation of those minutes. The minutes say what they say but they are fully explained by Mr O'Rourke in his evidence and his explanation is supported to some extent by Mr Borkowski because for instance there's a reference in the minutes to joint action. Mr O'Rourke says absolutely I wanted to promote joint action of promoting Realestate.co. He says the way that appears in those minutes is wrong, Mr Borkowski accepted that there was probably a formatting error in where that statement is made, so it gives the wrong impression.

On the other statements that are attributed to Mr O'Rourke, Mr O'Rourke absolutely denies that there was any sort of prior agreement or agreement in principle to vendor fund and he was cross-examined at length on that, he denied it and there is other evidence that points to there being no such

agreement in principle, including that two of the Commission's witnesses said in their opening briefs of evidence, there was no such agreement, we had no such discussion with Mr O'Rourke.

Mr Coombes didn't say anything about it because the problem with Mr Coombes was he wasn't the decisionmaker within his organisation, he was the rural auctioneer and that's covered in the cross-examination right at the start of his cross-examination. So he didn't know really what was going on, apart from the fact that he came to this meeting on the 30th of September. So he says nothing, Mr O'Rourke says there was never such agreement, the other persons who gave evidence said there was no such agreement in principle. There is no finding by the Judge that those persons are not to be believed and so the explanation for those statements is simply a miscommunication of some sort between Mr Borkowski in a telephone call and Mr O'Rourke and that's, in my submission, the only plausible explanation.

The Judge didn't make a finding to that effect, the closest he got to a finding on that issue was to say these statements that are attributed in the minutes to Mr O'Rourke are difficult to gainsay but he makes no finding saying I don't believe Mr O'Rourke on this point nor do I believe the other witnesses who have all said there was no such agreement in principle. So this idea of a preconceived –

WILLIAMS J:
Difficult to gainsay is a subtle signal though isn't it?

MR TAYLOR QC:
Yes it is but in view of the consistent evidence by all the other witnesses who gave evidence on the topic that there no such agreement, they've got no – there's no advantage to them in putting that forward. There is in Mr O'Rourke obviously but not on the other witnesses because they've all settled with the Commission and paid their fines and are now giving evidence on behalf of the Commission but if they, in their evidence-in-chief say we didn't have any such agreement, I certainly don't have to cross-examine him on that and I certainly wouldn't want to cross-examine him on that and if that evidence is believed, then it is inconsistent with any prior agreement in principle. So my learned

friend hammers it in his submissions but really he is making the same submission that he made to the High Court and the Court of Appeal on that point and really he didn't get a finding of fact from the High Court that supported that submission.

WINKELMANNN CJ:

So we've dealt with, in terms of your issues we've dealt with –

MR TAYLOR QC:

The only other one, there's two statements, one, the Court of Appeal relied on a statement by Mr Shale but the statement they rely upon is in an interview that he did with the Commission. Mr Shale, in his evidence-in-chief, said, "I know that's what I said in my evidence to the Commission but it's not how I recall it." So that's what he says in his evidence-in-chief. He's saying, "I might have said that then but it's not how I recall it." I don't have to cross-examine him on that. Obviously he's accepting that he was wrong or, at least, on his current view of life, he didn't mean what he says or what he appears to have said then. But the Court of Appeal relies upon that as being evidence that – to reach a different finding to the finding of the Judge.

WINKELMANNN CJ:

What? Relies on the interview?

MR TAYLOR QC:

Yes, the interview note.

WINKELMANNN CJ:

Even though he corrected it in his evidence-in-chief?

MR TAYLOR QC:

Correct, yes.

O'REGAN J:

Where do they do that?

MR TAYLOR QC:

Paragraph 40 of their decision. The other thing that they rely upon is an email sent by Mr Metcalfe who was the principal of another small agency in Hamilton and one with whom Mr O'Rourke at least didn't have a very good relationship, but he sends an email after the 30th September meeting at a time when Mr O'Rourke had invited him to the next meeting on the 16th of October which was to discuss the promotion of realestate.co, and Mr Metcalfe responds to that and says, "Oh, well, it's great that you're inviting me now but, you know, I might just – I'm not going to go ahead with your cosy agreement. I might fund this myself because I'm so small I can afford to do it and take some market share," and the allegation, the Court of Appeal relied upon that email as evidence of there being an agreement reached at the 30th September meeting that 100% or the parties had agreed to vendor fund, and the problem with that is, and again it's addressed in the synopsis of written submissions at the end, is that that email was in evidence expressly on the basis that it was not evidence as to the truth of its contents. It was simply evidence that it had been sent, and the Court of Appeal doesn't even refer to the response that was sent back to that email by Mr O'Rourke where he says, "Don't know what you're talking about. The purpose of this meeting is to discuss promoting realestate.co." So they seize on this email which wasn't admissible as evidence of the truth of its contents –

O'REGAN J:

Well, once it's admitted, it's admitted for all purposes, isn't it?

MR TAYLOR QC:

Well, in my –

WINKELMANNN CJ:

Was there some special agreement or what was it?

MR TAYLOR QC:

Well, there was. It was objected to. It was objected to and then the – and I've actually set out the sequence of what happened in that synopsis at paragraphs 15 onward and in particular at paragraph 16.1 because the Commission says, "Oh, well, we were the ones that wanted that email in

there." That's simply not correct. What happened is they said, "We're filing a will-say statement from Mr Metcalfe. He's going to come along and give evidence. Here's his email." They also put it in the evidence of Mr Shale. When it was made clear by the Commission that Mr Metcalfe wouldn't be giving evidence, that was formally objected to as being admissible as evidence of the truth of its contents, but in the end it was accepted that it wouldn't be admitted for that purpose. It was going to be used to cross-examine Mr King, and Mr King is the person that is alleged to have had the discussion with Mr Metcalfe and told him that there was this agreement, and Mr King was cross-examined at length on that and absolutely denied that he had any conversation of that kind with Mr Metcalfe. He didn't deny speaking to him but he said, "I wasn't conveying that to him." So again –

WINKELMANNN CJ:
Is the basis of its admission recorded anywhere, if it's on this limited basis?

MR TAYLOR QC:
The objection is recorded but how it was dealt with isn't recorded because in the end the Judge didn't have to rule upon it because counsel agreed that that was the basis on which it would go in.

WINKELMANNN CJ:
Well, mmm.

O'REGAN J:
Was the Court of Appeal told?

GLAZEBROOK J:
It's difficult –

MR TAYLOR QC:
Sorry?

O'REGAN J:
Was the Court of Appeal told that this was the basis it was admitted?

MR TAYLOR QC:

I – yes, it was, yes, it was. Yes.

WINKELMANNN CJ:

And was that common ground between you?

MR TAYLOR QC:

Yes. I don't think that's resisted at all.

MR DIXON QC:

Well I think there's a difference between us on an aspect of that which I can come to.

WINKELMANNN CJ:

Yes but Mr Dixon, do you dispute it was admitted for only limited purposes?

MR DIXON QC:

I don't dispute that, I dispute my learned friend's characterisation of those purposes, there's an objective around hearsay and I'll explain that in due course.

GLAZEBROOK J:

It's difficult – Mr Metcalfe wasn't at the earlier meeting, so it's difficult to see how it could – what he says about it could actually be evidence of anything other than what somebody else had said to him about it.

MR TAYLOR QC:

Yes or the statement that he is making is simply one saying I'm going to rattle your cage, I'm going to threaten you with doing something other than vendor funding in this.

GLAZEBROOK J:

Well yes but it can't be I know there's an agreement because I was there and heard it.

MR TAYLOR QC:

No.

GLAZEBROOK J:

He has to have been told about it by somebody, right?

MR TAYLOR QC:

Correct, yes, yes. So he wasn't at either of the meetings, he's not coming to this other one either.

ELLEN FRANCE J:

Sorry, just in terms of the reliance on what Mr Shale said in the transcript, what he says in his evidence-in-chief, in his brief is, "I cannot now recall it like that but I accept that is what I said and understood at the time of the interview." Was he asked quite what he meant by "understood"?

MR TAYLOR QC:

"Understood", no he wasn't, no. I rightly or wrongly left that alone but in my submission and when he's giving his evidence in Court and he says, "I don't recall it that way, I accept that's what I said", he's really saying I don't think that's how it happened at all. But what I'm really pointing to is that the evidence that was picked out by the Court of Appeal to support its conclusion simply was not sufficient evidence in light of all of the other evidence that the Judge had before him to support a different finding and it's a classic example in my submission of the Court of Appeal really trying to put themselves in the position of the Judge without having heard the evidence and without having heard the witnesses or assessed all of the evidence.

WINKELMANNN CJ:

Did the Judge deal with all of those elements of evidence? He dealt with the formatting issue didn't he I think.

MR TAYLOR QC:

Yes he did, yes and he recorded and he deals with that at I think about paragraph 165 of his –

WINKELMANNN CJ:

Well it would be quite helpful to have the sort of pinpoint references where he deals with each of those. Your junior might be able to identify that.

MR TAYLOR QC:

He deals with it, just a moment, he deals with it at paragraphs 55 to 60 of his decision.

GLAZEBROOK J:

And where are the paragraphs that you were referring to in the Court of Appeal decision? You might have told us but I'm not sure I put them down.

MR TAYLOR QC:

Yes, 40 for Shale, 42 for the prior exchanges and 45 for the Metcalfe email. The other aspect of the Shale, at paragraph 43 they rely on this email from Mr Shale in which he says all of the Hamilton brands are committed to turning off the automatic fee and that email is written the day after the 16th October meeting. So that's the meeting where we say and the Judge found as well, it's the probabilities, this discussion about withdrawal of the listing took place and I cross-examined Mr Shale on that aspect as to what he meant by cutting off the automatic fee and all it's doing is saying if in a situation where under the subscription model you are funding every single listing on Trade Me and the evidence was that several of the agencies had an automatic uplift, in other words you put a listing on and it automatically went to Trade Me, it automatically went to the website, it automatically went all over the place but that's what they had. Mr Shale said they had a separate system where they had a tick box system but what he meant by cutting off the automatic fee was, if you're going to go to some sort of vendor funding then you can't have an automatic fee, you have to make an individual decision in each case as to whether you're going to vendor fund it in whole or in part or a decision that you're not going to vendor fund any of it.

O'REGAN J:

You mean agency fund?

MR TAYLOR QC:

Agency fund, yes, yes I do, yes. So the point he's making there is I've just come out of this meeting where we've been discussing all this, withdrawal of the listings, vendor funding coming in, everybody is committed, in other words my assessment is that everybody is committed to cutting off the automatic fee, in other words going to some form of vendor funding but he also says in cross-examination in some of the transcript references that are before you that at the 30th of September meeting there was no discussion as to the form of vendor funding, what it would mean. He also said in re-examination that there was no consensus, no agreement, no I will if you will and that was in re-examination, not cross-examination. So in essence, in my submission the Court of Appeal's reliance on these limited extracts from the evidence simply isn't sufficient and doesn't support their findings.

I'm going to skip through. Can I just make it clear that in this folder that I've handed up, I've only referred to the excerpts from the transcript but in the submissions themselves where statements are made in respect of these findings of fact we've also referred to the briefs of evidence to the extent that they rely on those aspects of the evidence.

WINKELMANNN CJ:

Sorry what did you just say Mr Taylor?

MR TAYLOR QC:

I was just making it clear Your Honour that this bundle is only from the transcript but in the submissions where I have made a submission for instance that the evidence is supported or the findings of fact by the Judge are supported by the evidence, I refer also to the briefs of evidence of the various witnesses, not just what they said in cross-examination or re-examination.

So then we come to this question of the meaning of vendor funding and again at tab 2 of that bundle I have taken all the extracts from the cross-examination as to what the parties perceive the meaning of vendor funding to be and I say that that evidence strongly and clearly supports the finding by the Judge as to what the parties meant by vendor funding and those are all of the findings that he makes at 214 through to 227 of his judgment. So I've referred in those

extracts to some of the evidence that he refers but also other extracts from the evidence that His Honour didn't expressly refer to but which still support the proposition.

So at paragraph – and I'm really jumping ahead now, at paragraph 102 of my submission I say all of that is to say that Justice Jagose found an understanding to vendor fund the TM fee, the Trade Me fee where vendor fund meant only that the cost of TM standard listings would not continue to be fully funded by the company and would instead be funded amongst agency salesperson and vendor, as determined by individual circumstances and in light of market conditions. In other words the parties were free to set price in any way they thought fit in response to competitive conditions.

WINKELMANNN CJ:
What paragraph is that?

MR TAYLOR QC:
That's a summary of what I say those findings by Justice Jagose are at paragraphs 215 through to 227, 102 of my submission and I expressly reject the findings by the Court of Appeal in paragraphs 22 and 23 and 78 of its judgment that the Judge was somehow confused as to the meaning of vendor funding. In my submission, I've read those passages numerous times, I still don't understand what the Court of Appeal is getting at but there was no confusion by the Judge as to what the Commission meant.

O'REGAN J:
The Court of Appeal did say that he had given a different definition of vendor funding earlier in his judgment.

MR TAYLOR QC:
No they said that he recited in his judgment the pleading by the Commission. That's what they actually say at paragraph 22.

O'REGAN J:
Oh so that was the pleading rather than his summary?

MR TAYLOR QC:

Yes he cites the pleading, he cites the pleading and says this is what their case was and of course if we go to that transcript of the argument that we had about admitting the economic evidence, it is very clear from that that my learned friend has been pinned down to what his case is and the Judge says well if it is your case that it is to be placed on 100% to the vendor or the agent, then I don't need to hear this economic evidence because if that was what the agreement was, then I would say that's price fixing and it would be in the sense that the Commission is now trying to run it to say there's some agreement to set the offer price, if the agreement was to 100% vendor fund or agency fund but he expressly.

GLAZEBROOK J:

Why would it clearly be price if it was 100 rather than 50%? I understand your argument that they were totally free to do what they wanted but I don't quite understand why it makes a difference if it's 100 or something less.

MR TAYLOR QC:

It could be but the point is that that was the Commission's case.

GLAZEBROOK J:

Okay, that's the only point.

MR TAYLOR QC:

And I accept that if you fix it in some way, even if it's by reference to a formula or even if you said we will only pass on the full cost, whatever that cost may be, then you've got an argument for saying well there is this sort of interference with the competitive setting of the offer price.

O'REGAN J:

Yes I think the point that the Court of Appeal was making as I remember it was that they were saying the vendor funding always included the possibility of the agent paying, whereas the Judge seemed to be saying that would be an exception to vendor funding because it was the agent. That's what the Court of Appeal was criticising wasn't it?

MR TAYLOR QC:

And what I don't understand is how they draw that conclusion because the Judge – my understanding of the reason they drew that conclusion was that the Judge on occasion talks about the vendor and/or the agent and they seem to be saying well when he's talking about that it seems to indicate that he's just misunderstood what the Commission's case is but in my submission he's not – there's no possibility that he misunderstood what their case was and that's demonstrated by the fact that he expressly cites from the pleading which is that the agreement was to vendor fund by passing it on to the vendor or the agent.

O'REGAN J:

But at paragraph 215 the Judge describes payment by the agent as being an exception to vendor funding, whereas on the Commission's case it was part of vendor funding.

MR TAYLOR QC:

Can I just go to paragraph 215?

O'REGAN J:

I'm just looking at paragraph 22 of the Court of Appeal decision which quotes it.

MR TAYLOR QC:

Yes, yes, but –

GLAZEBROOK J:

But I thought the Commission's case was "vendor funding" meant totally vendor funding.

MR TAYLOR QC:

No.

O'REGAN J:

No. It allowed for agents as well.

GLAZEBROOK J:

It **(inaudible 15:30:05)** vendor agent?

MR TAYLOR QC:

No, no. It –

GLAZEBROOK J:

Or the actual agent?

MR TAYLOR QC:

Yes, it was basically saying –

O'REGAN J:

Yes. The agent but not the agency.

GLAZEBROOK J:

Okay, no, I understand.

MR TAYLOR QC:

Yes, it's 100% by the vendor –

GLAZEBROOK J:

By somebody else?

MR TAYLOR QC:

Yes, and if we go to paragraph 215, yes, and I agree with – I agree that that's what the Court of Appeal seems to be seizing on but when you read the rest of the judgment, what he's trying to do here is summarise in a sentence what he then goes on to find over the next 20 or so paragraphs, and what he's trying to say is, "Look, in principle it's going to be paid by the vendor." That's probably what they contemplated, that it would be paid 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 the third party expense," and really what he's saying there is that there was nothing in the agreement to stop the vendor and/or the agency and/or the agent sharing part

or all of that cost. Now, it may be clumsily expressed but it simply cannot be, when you read the rest of the decision, which he is trying to perhaps –

O'REGAN J:

Well, he says, he actually says in that paragraph, "By 'vendor funding' they," being the agencies, "meant comparably with other third party advertising, including Trade Me feature listings – in principle, to be paid for by the vendor." He doesn't say "by the vendor or the listing agent". He just says "by the vendor".

MR TAYLOR QC:

No, but if you look at what the evidence was about the other forms of advertising, it would be paid by the vendor, the agency or the agent.

O'REGAN J:

No, well, he obviously realises that because the next sentence says that. The Court of Appeal seemed to think that he had treated the payment by an agent as being an exception when in fact it was part of the vendor funding model. I don't know what significance that has in the overall scheme of things but that seems to be the criticism they're making, doesn't it?

MR TAYLOR QC:

It seems to be the criticism but in my submission it's a forlorn criticism because there's no – there's just nothing to suggest that the Judge made that kind of fundamental misunderstanding of what was meant by "vendor funding" because –

WINKELMANNN CJ:

Is the point though that it doesn't matter whether he's got the Commission's definition of "vendor funding" right or wrong?

MR TAYLOR QC:

No.

WINKELMANNN CJ:

The point is that he's found that on his view of this arrangement the departure allowed them to make, to have any combination which was outside the Commission's definition of "vendor funding" anyway so…

MR TAYLOR QC:

Yes. Correct, correct, and really what he's saying, and it's covered in all that evidence about the meaning of "vendor funding" that I've referred to in that bundle and also in the submissions in the briefs of evidence of the witnesses, that that's what it meant. It could be any – it could mean that the vendor, the agent or the agency could share part or all. In other words, that's what "vendor funding" meant to the parties, and Your Honour's quite right that it doesn't really matter if he's expressed it poorly here because that arrangement that there was complete freedom to absorb part or all of it in respect of any transaction defeats the allegation of the Commerce Commission as to what the arrangement was.

WILLIAMS J:

Well, the problem is that "agent" is a transitional party.

MR TAYLOR QC:

Yes.

WILLIAMS J:

It could fit in one or the other because the agent sometimes will side with the vendor in order to keep the vendor on the hook.

MR TAYLOR QC:

Yes.

WILLIAMS J:

And, of course, is a part of the agency. So it's not that big a deal whether in the second sentence in that paragraph the Judge drops him in one category or the other because he fitted in one category or the other.

MR TAYLOR QC:

Correct, correct, yes.

O'REGAN J:

Well, it is in the sense that the Judge said that the base agreement was vendor only and there was then exceptions allowed for both agent and agency which he says is such a broad range of exceptions from the agreed deal that the deal's not really a deal at all. Whereas if you treat the vendor and agent as being the deal, the only exception then is where the agency itself pays, and the evidence was that hardly ever happened.

MR TAYLOR QC:

Well no the evidence wasn't that actually. The only evidence on that was the evidence of Mr O'Rourke who said out of 55 listings, 70% of them were funded in whole or in part by us.

WILLIAMS J:

I don't think there were 55, are you talking about the August and –

WINKELMANNN CJ:

It's 12 plus nine, it was 21.

MR TAYLOR QC:

There were 55 listings over the – there's 55 standard and feature listings, is that right? And there's only – yes.

WILLIAMS J:

Oh right, so there was that 17 or 19 standard listings?

MR TAYLOR QC:

There were 12 standard listings of which seven –

WILLIAMS J:

Plus nine, so 21 all up. In those two months that the section 92 statement related to?

MR TAYLOR QC:

Yes correct, yes. So the percentages are really just working off – and I think the Judge used percentages didn't he? No. Well he did in our submissions but the numbers are there, they're not contested by anybody and there was no cross-examination on them.

WINKELMANNN CJ:

You've dealt with your 33C already have you?

MR TAYLOR QC:

The sorry?

WINKELMANNN CJ:

Well I'm looking at the issues you intended to address which are set out at your 33 aren't they?

MR TAYLOR QC:

Yes.

WINKELMANNN CJ:

I'm wondering what you've got left to do?

MR TAYLOR QC:

Probably very little. Can I just briefly deal with this, the Court of Appeal's reliance on these overseas authorities, again the problem with reliance on those authorities is in the *Dole Food and Dole Germany v Commission* [2013] T-588/08 EU:T:2013:130 case, that is a decision under the UK legislation and actually when you read the *Dole* case it is all about concerted practice and then an incredibly detailed analysis of all the evidence of how the market worked, what effect this proposed pricing arrangement or quotation arrangement had. There was evidence from customers, there was evidence from everyone under the sun and conclusions reached on that and both decisions that are included involve extremely detailed analysis but in the context of the UK legislation or the European legislation of concerted practice, restricting or interfering or limiting competition which is what the test is under that legislation.

But in those cases, both in the *Cole* case and the *Plymouth Dealer's Association of Northern California v United States* 279 F 2d 128 (9th Cir 1960) cases, what you had was exchanges of information as to pricing which the Courts found in both cases was intended to be relied upon by those parties and used by those parties in the case of *Plymouth Dealers* to set an artificial level within which competition would occur and that's the *Plymouth Dealers* case because what happened there was you had all of these dealings buy off the Plymouth manufacturer, so the cost price to them was all the same. So what they did was, the manufacturer came out with a recommended retail price, that wasn't good enough for them, they by this process of exchanging information, agreed to set a higher price than the recommended retail price and then they would go along to their customers and say hey this is great, this is what the price is but we've got a deal for you, we'll trade your car in for X and Y and it will still be a really good deal.

So what is happening in that case is that you've got an agreement to set prices or the offer price at an artificial level in order increase or create expectations within the market that allow you to negotiate something less but still get an increased profit margin. So I've got no problem with the findings in those cases but I say they bear no relation to the facts of this case because there was no discussion, no agreement, no formula, nothing about what the offer price would be and those cases therefore don't support the proposition that the Court of Appeal appears to be relying on them for in this case because the facts of this case are completely divorced from the facts of those cases.

WINKELMANNN CJ:
Where is that in the Court of Appeal judgment?

MR TAYLOR QC:
Just give me a moment Your Honour, 83 and 84 and the other case they rely upon is the Balmoral case. It's actually a case that's worth reading because it's quite a good explanation of what the concerted practice regime is all about there but it's a very good exposition of that and not nearly as much reading as if you have to read the two Dole cases that are relied upon because they go to

hundreds of paragraphs and analysing the market and how the setting of quotation prices in that case influenced the market expectations of the players et cetera, et cetera. So – but the *Balmoral Tanks Ltd v Competition and Markets Authority* [2017] CAT 23 (UK) case was a little bit unfortunate for Mr Joyce, I think his name was who had gone to a meeting of cartel members who were endeavouring to persuade him as the new player in the market, they were endeavouring to persuade him to join the cartel and he made it absolutely plain that there was no way he was going to join that cartel but in the course of that discussion they talked about current and historic prices that had been – he had bid for and what happened following that meeting is that one of the cartel members went out and said to one of his buddies, "We've just had this meeting with Mr Joyce, this is what he's told us and therefore when you put your bid in on this you should put it in at this level." And again there's a very detailed analysis of the evidence by the Court and how it fits in to the concerted practice regime and the Court found that because effectively he had indicated the range within which he was likely to bid and that had been relied upon by one of the other cartel members, that was a concerted practice and it was a concerted practice that the Court held met the criteria under the UK legislation in the sense that it restricted or I think the wording is, "Interfered with, restricts or limits competition in the market."

ELLEN FRANCE J:

In *Balmoral* and in *Dole* they both, the Court say you don't need to show any actual effect on competition, is that a feature of the concerted practice?

MR TAYLOR QC:

Yes it is and it's probably similar to the controlling effect or likely effect test here for controlling because they say look you don't have to prove that it actually had the effect as long as you can prove that it likely had the effect. So that's the test but they also say that because the Act talks about has the object or effect and they say if you can prove that the agreement or the concerted practice had that object, doesn't matter whether it had that effect or not, yes. Can I just say on the purpose –

WINKELMANNN CJ:

So what's the concerted practice, what is the intent of that?

MR TAYLOR QC:

The concerted practice is that it doesn't require an agreement or an arrangement or an understanding, you look at whether there is a concerted practice and the way the Courts have interpreted it there is to say, when you're reading all this it really strictly precludes the parties to the concerted practice discussing their intentions, pricing intentions.

WILLIAMS J:

Specifically includes did you say?

MR TAYLOR QC:

Precludes.

WILLIAMS J:

Precludes.

MR TAYLOR QC:

Precludes, and that's – perhaps the easiest way to get a summary of that is the *Balmoral* case, and at paragraph 39 of that it says, "One key aspect of the concept of a concerted practice is that in a properly functioning competitive market, competitors should not know how their competitors are likely to behave. A" –

WILLIAMS J:

So the mere discussion is enough?

MR TAYLOR QC:

Yes, exactly, and that's precisely what the Judge found in this case. At paragraph 192 of his judgment he says it's enough that you went and expressed or communicated your intentions, and I'm saying, well, actually that's why you have a completely different regime in the UK and Europe because they've –

WILLIAMS J:

So the word "concerted" just means "in concert"?

MR TAYLOR QC:

In concert, yes.

WILLIAMS J:

A practice that everyone adopts?

MR TAYLOR QC:

Yes.

WILLIAMS J:

Whether there's an agreement or not?

MR TAYLOR QC:

Yes, correct, and in fact the other quote that I took you to I think from the *Dole* case was that it's that a concerted practice is something falling short of an agreement. So – but the other point is in –

WILLIAMS J:

Might be an understanding though.

MR TAYLOR QC:

Sorry?

WILLIAMS J:

Might be an understanding though.

MR TAYLOR QC:

Well, interestingly if that was the case you would think in Australia when they changed the legislation that they would've also changed the per se provision which requires an agreement, arrangement or understanding which has a well understood meaning, but they didn't. They introduced a concerted practice provision, and the reason they did that was, it seemed to be accepted I think in the report that gave rise to it that price signalling can in fact be fine in a competitive market. It's not necessarily, it's not necessarily a bad thing, and that's why in the Australian legislation they introduced this idea of concerted practice which must be proved to have had substantially less competition.

But the real point here is that if we look at *Balmoral* there's another reference, I think. At paragraph 40 in *Balmoral* the Court says, "It is not enough to prove that the parties concerted together, there must be conduct on the market pursuant to those collusive practices, a relationship of cause and effect between the concerted practice and the lessening, et cetera, competition, and they also cite –

WINKELMANNN CJ:
Well, that's what I'm asking you about. What is the –

MR TAYLOR QC:
Yes.

WINKELMANNN CJ:
They've concerted together. What do they describe as concerting together?

MR TAYLOR QC:
Well, their definition of it is the definition I took you to before.

WINKELMANNN CJ:
So it's simply that they discussed prices?

MR TAYLOR QC:
No, no, because what they say is that a concerted practice is one – it's something that falls short of an agreement but it is done where the parties knowingly substitute co-operation with each other for the risks of competition, and then the saving grace in a sense is that when you're looking at whether there was that effect the Court as in *Balmoral* said you've got to look at what the actual effects of the concerted practice were in the market to see whether there was that relationship of cause and effect. And…

WILLIAMS J:
Well, that sounds pretty close to adopting a practice that is considered to be binding in order to avoid the market.

MR TAYLOR QC:

No, because, and the *Balmoral* case is a clearly classic example of it, the evidence was that Mr Joyce in that case had actually said, "I don't want to be a part of any of this," but in the course of that discussion he talked about what his bidding practice had been, and they said the fact that one of the parties' competitors used that information, took it out and rang up one of his buddies and said, "This is what Joyce said. You make sure that your next bid is at this level" –

WINKELMANNN CJ:

Is the difference that they're actually substituting on this analysis one risk for another, so they're substituting something which is not an arrangement which creates obligations but some sort of concert that they've somehow cooked up, and so there's nothing morally or legally binding –

MR TAYLOR QC:

No.

WINKELMANNN CJ:

– but they're substituting this kind of, dodgy kind of a dealing for – they're prepared to take the risk of the dodgy dealing.

MR TAYLOR QC:

Yes.

WINKELMANNN CJ:

Instead of the risk of competition in the market, whereas in the New Zealand model they're taking – they're substituting some sort of obligation, some sort of deal, moral or legal for the risk of a market.

MR TAYLOR QC:

Yes, correct, correct.

WILLIAMS J:

But that means that merely discussing price, if what you're discussing is not generally known to your competitors, is enough, if it's going to give them an

advantage that allows them to avoid the chill winds of the market, that's enough.

MR TAYLOR QC:

Well it's enough without there being any commitment to that process.

WILLIAMS J:

Yes I understand that but that's the point because you said mere discussion wasn't enough, except in answer to the Chief Justice you gave me the impression that in some circumstances, perhaps many, mere discussion will be enough.

MR TAYLOR QC:

Yes and what I was saying is it's not enough under the New Zealand test of an arrangement, a contract arrangement or an understanding.

WILLIAMS J:

Oh I see.

MR TAYLOR QC:

It's not enough but for a concerted practice it often will be, it may be. The fact that they exchange those intentions and, you know, again the article 101 is cited by the Court in *Balmoral* and it says that, "All agreements, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition." And again in *Balmoral* they say well, at paragraph 44 I think, they say, "The strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices and here that's what they were doing, they were discussing prices. In this case there was no discussion of prices.

WINKELMANNN CJ:

And ultimately it comes down to a factual finding. So if you have a situation where Mr Joyce say goes into a room with his competitors and offers information which is unusual for him to give to his competitors, and then the

competitors go out and use that in a way which tends to fix prices or alter the competition.

MR TAYLOR QC:

Yes or interfere with competition.

WINKELMANNN CJ:

The Court is open to say well really what Mr Joyce is going into that room and doing is he's doing something which he has some expectation will help the both of them together alter the market but it's really a hint, hint, nudge, nudge thing, he's taking the risk it won't and substituting that risk for the risk of competition.

MR TAYLOR QC:

Yes, although when you read the decision, the disadvantage that Mr Joyce had was that there was a tape recording of the whole discussion and he was very adamant that look I was throwing them that information because I didn't think it was important as what I had previously done, had no intention of helping them out or whatever and didn't know they were going to go and do this but the Court said sorry we don't – well not that we don't accept that but the fact that you discussed it in those circumstances is sufficient.

WILLIAMS J:

Bad luck.

MR TAYLOR QC:

Yes and I'm saying that wouldn't be sufficient, applying their test of agreement, arrangement or understanding. One other thing, I do ask the Court to look at this question of purpose because the Court of Appeal again makes a very damaging, very damaging finding that the purpose of this arrangement was to avoid the risk that some people may continue to absorb the vendor funding, the Trade Me listing price and they make that finding without referring to any evidence at all and what I say in my submissions is that I refer to the only evidence that was given by one of the people at that meeting, that one of the reasons they did this was because or they made this decision or they reached this arrangement at the meeting was because of that

particular risk but when he was cross-examined on that, he said it wasn't a risk that he identified at a time and it wasn't a risk that was discussed at the meeting. So again the Court of Appeal makes this very damaging finding of purpose but provides no evidence to support it and what I do do when I address that issue in these synopsis of reply submissions is to say all of the evidence was that the purpose of this meeting, and it was accepted by all of them, that the purpose of this meeting was to promote realestate.co. It wasn't to price fix, and the Judge expressly finds that at 233 of his decision where he says price fixing was not the target in this case, and he also says right at the beginning of his decision they mete to discuss promotion of Trade Me, and then finally he says, "Because I've found in this case that the agreement couldn't have the restrictive effect following *ANZCO*, it couldn't have been the purpose." So there's three findings by the Judge that price fixing or avoidance of that risk was not the target, not the purpose of the parties in reaching this arrangement.

O'REGAN J:
But appeal Courts sometimes overrule.

MR TAYLOR QC:
Sorry?

O'REGAN J:
Appeal Courts sometimes overrule High Court Judges, don't they?

MR TAYLOR QC:
Well, if they're going to overrule they need to point to some evidence that supports the finding.

O'REGAN J:
Well, if there was an agreement, if there was an agreement to limit the scope of the pricing, which is what they had already found, what other purpose would it have had? I mean it's just – it just follows on from there, and I know you contest those things –

MR TAYLOR QC:

Yes.

O'REGAN J:

– but once they've got to where they have on the effect of the agreement, it'd be pretty odd to say the effect was inadvertent, wouldn't it?

MR TAYLOR QC:

Well, the finding was that the specific purpose of this agreement was to avoid the risk that some people might vendor fund, might –

O'REGAN J:

But the purpose of the meeting and the purpose of the agreement are two different things, aren't they?

MR TAYLOR QC:

I understand that. I understand that, but –

O'REGAN J:

So the fact that the Judge said the purpose of the meeting was to deal with the other website doesn't mean that at that meeting an agreement was reached that had the purpose of fixing prices. I mean the two findings are not necessarily inconsistent, are they?

MR TAYLOR QC:

Well, the finding at 233 is, in my submission, because he makes the express finding that price fixing was not the target of the arrangement. That's…

O'REGAN J:

Well, again, that's a pretty equivocal finding, isn't it?

MR TAYLOR QC:

Well, yes, but –

O'REGAN J:

It's not actually – and, you know, that was – it's not surprising that the two Courts have taken different views on this because they took different views on what was agreed. So probably the real focus of your argument, as it has been, is what actually was, if anything, agreed?

MR TAYLOR QC:

Yes, that's certainly true but I would still maintain the position that if you're going to make it an express finding, that this was the purpose of the arrangement to avoid the risk that somebody might go off and - dare I say it - absorb part of the or all of the fee, if you're going to make that sort of express finding it's –

O'REGAN J:

Well, what evidence are you suggesting there would have been?

MR TAYLOR QC:

Well, there would have been some evidence that that was a risk that was discussed or even thought about.

O'REGAN J:

But it's something – you infer it from the circumstances. That's how you do that in competition law cases.

MR TAYLOR QC:

Well, you don't ignore the evidence of the parties as to what their intention of purpose was.

O'REGAN J:

But it can't be controlling, can it? The parties' evidence can't be controlling.

MR TAYLOR QC:

No, of course it can't be. Of course it can't be.

O'REGAN J:

Because you're looking at an agreement and what its purpose was, not what the parties' purpose was but what the agreement's purpose was.

MR TAYLOR QC:

Yes, but –

O'REGAN J:

They're two different things.

MR TAYLOR QC:

Well, yes, of course that's right and that's the effect of the law as I understand it but what you cannot do is say the subjective purpose of these parties was to do, to avoid this risk, which is when that is contrary, when that's not supported by any of the evidence.

O'REGAN J:

But the Court didn't say that. It's just said the purpose of the agreement was that. Didn't say anything about their subjective purpose.

MR TAYLOR QC:

Well, what I'm saying, Your Honour, is that the Court has to take into account the subjective evidence of purpose.

O'REGAN J:

Possibly, but it doesn't weigh much in competition law cases for obvious reasons. I mean –

MR TAYLOR QC:

Well, and –

WINKELMANNN CJ:

So your point is, Mr Taylor, so we're –

MR TAYLOR QC:

The objective assessment definitely overrides those expressions of subjective purpose but to make a finding that is that specific as to their purpose, especially when you look at things like penalty as to what the purpose of the arrangement was one would expect there to be at least some evidence that supports it.

WINKELMANNN CJ:

So your point simply is that the Court of Appeal, setting aside the Judge's factual finding, had to set out a proper factual basis?

MR TAYLOR QC:

Correct.

WINKELMANNN CJ:

And Justice O'Regan says, well, they might think it just flowed from their previous findings, but you're arguing that they needed to set a proper factual basis and there isn't that approach?

MR TAYLOR QC:

Yes.

WILLIAMS J:

The impression given when I read the judgment was in fact the Court of Appeal said that conclusion defies common sense. The High Court Judge's conclusion on that point is not a sensible interpretation of these circumstances, given the way this rolled out?

MR TAYLOR QC:

Yes, given their analysis of the facts, I suppose, yes, mmm.

WINKELMANNN CJ:

Well on the High Court Judge's findings, because of his quite – because of the findings he made, it does seem there is – it almost looks illogical as he goes along that they've reached one agreement but then they didn't, they reached

an agreement to this effect but then it's so permissive that it's almost not an agreement.

MR TAYLOR QC:

Yes, exactly, exactly and it comes back to what Justice Williams said earlier, that the arrangement as found is not an arrangement that you would enter into if you were trying to price fix.

WILLIAMS J:

Well it's not an arrangement you'd need.

MR TAYLOR QC:

No, exactly.

WILLIAMS J:

Because the arrangement is do what you like.

MR TAYLOR QC:

Yes exactly, exactly but that's what he found was the arrangement and we say that's perfectly open to him on the evidence.

O'REGAN J:

Can you just give me a Court of Appeal reference where that finding on purpose that you're contesting is?

MR TAYLOR QC:

Paragraph 69.

O'REGAN J:

Paragraph 69, thank you.

WINKELMANNN CJ:

Right, so that completes your submissions Mr Taylor?

MR TAYLOR QC:

Yes thank you Your Honour.

WINKELMANNN CJ:

For now.

MR TAYLOR QC:

Yes.

WINKELMANNN CJ:

So we'll take the adjournment. Mr Dixon, you think you're fine for tomorrow?

MR DIXON QC:

Yes.

WINKELMANNN CJ:

Sounds like you will have most the day except half an hour.

MR DIXON QC:

Yes thank you Your Honour.

WINKELMANNN CJ:

Mr McLellan might have something I suppose.

MR McLELLAN QC:

No, you'll be pleased to hear Your Honour I adopt my friend's submissions and have no additional submissions to make.

WINKELMANNN CJ:

Do we need to start early Mr Dixon?

MR DIXON QC:

Might be useful to do so if the Court wants to. I actually do have quite a lot to go through. With respect my learned friend has painted a picture that I thought was pretty incomplete and needs a lot of supplementing so Your Honours understand the full scope of this case, so I do propose to go through quite a bit of the evidence. So if we had more time, that would probably give him time to do the bit he hasn't already done which is 10 pages of written submissions.

O'REGAN J:

Well I think if we read those overnight, we probably won't need much on this.

WINKELMANNN CJ:

Part way through the hearing my computer broke down, I didn't want to break, so I can't look at my diary but I think, I have it in my mind I have some meetings in the morning but unless you hear otherwise we'll start at 9.30 and I'll try and get a message through from the registrar tonight.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON THURSDAY 22 AUGUST 2019 AT 09.33 AM

WINKELMANNN CJ:
Morena Mr Dixon.

MR DIXON QC:
Morning Your Honour, may it please the Court I propose to begin this morning by setting out our position on some of the key aspects of this case that arose from the discussion yesterday. Essentially I want to set out our stall on some of the points that Your Honour has raised with Mr Taylor. I propose to do so by way of introduction, I don't propose to go into the detail of it in this overview but I just want to let you know where we stand. I'm then going to go into some of the facts of this case and then from there into my substantive submissions and I think it's best to do it in that order because the substantive submissions really rely upon the facts and the context of all of the evidence.

So the first point is that the Commission submits that there was undoubtedly an arrangement or understanding on the facts and evidence of this case, when one considers all of the evidence in context and by that I mean the events leading up to the meeting, as established by the contemporaneous documents, including the note that we went to yesterday which records Mr O'Rourke as saying that he had spoken with the agencies in Hamilton and had reached an agreement in principle to vendor fund and that they would need to confirm that and there are some other documents I'm going to take you to as well.

We also rely upon obviously on events at the meeting itself which was designed to uncover, as one person put it, each of the agencies' intentions, the admissions by the agencies as to what they conveyed to each other, that's another quote, at the meeting, which included their intention to vendor fund the new fee and how during that meeting they reached a consensus, to use Mr King's word for the appellant Monarch. They made a commitment to each other and they worked out a plan to put the agreement into place and I'll give you the evidential cites for that when we go through the facts.

We also rely upon the events following the meeting and they are really in two forms, they are statements of the defendants or the agencies I should say, as established by the contemporaneous documents. That includes an admission by Mr King that all of the business owners in Hamilton have met and decided they will all collectively move across from Trade Me to Realestate.co.nz.

WINKELMANNN CJ:
Well that's a different kind of agreement though isn't it?

MR DIXON QC:
It's not in fact Your Honour and I'll explain how that's not and I will explain – one of the points I will explain is how the withdrawal of listings and vendor funding go hand in hand, they are two sides of the same coin, directed at the same object.

There is a memo from Mr Lugton stating, "All Hamilton real estate agencies have agreed to stop supporting Trademe", same point and an email, which we also touched on yesterday from Mr Shale to his network saying that the Hamilton agencies were committed to turning off the Trade Me fee. That's turning off the automatic fee, that is a precursor to vendor funding.

And then finally there are the actions that the defendant agencies themselves took to give effect to the understanding, including the simultaneous move to vendor funding when in reality that was not a commercially reasonable step for many of them to take.

We say that that evidence plainly establishes that there was a consensus that the agents' minds had met, they'd agreed and that consensus created an expectation that they would proceed to vendor funding and we say that's borne out by what they did. I will address in the course of my submission the Lodge evidence of seven out of 12 listings or whatever which in my submission has been misconstrued and cannot be looked at in isolation from all of the other evidence which is strongly the other way.

So we say because we've established a consensus and an expectation that the Commission met the *Giltrap* test and we say the *Giltrap* test is a correct

and workable approach to determining whether there is an arrangement or understanding under section 30. We say it's consistent with the Privy Council's opinion in *Apple Fields Ltd v NZ Apple and Pear Marketing Board* [1991] 1 NZLR 257 (PC) which I will take you to and thus accords with nearly 30 years of settled New Zealand law. We also say it accords with the law in the US where our law came from, Europe and the UK and Canada. We say that by requiring proof of a consensus the *Giltrap* cannot and does not capture merely parallel pricing conduct and has not led to problematic outcomes.

So we say the appellants are misguided in asking this Court to overturn *Giltrap* and introduce proof of the assumption of a moral obligation as a separate requirement to establish an arrangement or understand. We accept it may well be a useful indicator that any assurance or undertaken or evidence of that will be but it is not an element to be separately proved and I'll explain the difficulties that arise when one does that.

We submit that the High Court understood the *Giltrap* test. In particular His Honour understood what the consensus meant, what the word means and that is apparent from his judgment. He uses the terms, "Meeting of the minds", he refers to the agencies deciding together to do things. He talks about a common decision or a common cause and he talks about the mutuality of their understanding. So my submission His Honour understood that and my learned friend's submissions based on paragraph, I think it's 192, of the High Court's judgment is wrong and I will take you through that in more detail.

WINKELMANNN CJ:
Sorry, what paragraph is wrong?

MR DIXON QC:
192. So I think my learned friend was saying, is it, that 192 establishes that the High Court misunderstood the *Giltrap* test.

WILLIAMS J:
This is the 188 versus 192 point?

MR DIXON QC:

Correct. It's the –

WINKELMANNN CJ:

Well, can you just answer my question? I'm sorry, I'm asking you to repeat what are you saying about the paragraph.

MR DIXON QC:

I'm saying that Mr Taylor says that 192 proves the High Court misunderstood the *Giltrap* test and I'm saying it doesn't.

GLAZEBROOK J:

It might be worth just slowing down slightly because you probably realise we're having trouble getting the argument down which isn't a good idea. I know you're going to go in more detail later but it's certainly better for me if I can get it down and I've certainly missed about half of it, I'm sure.

MR DIXON QC:

All right. Well, my apologies. I will do that. So I'm simply saying at this point that we met the *Giltrap* test. The High Court understood the *Giltrap* test and found that the Commission had met the *Giltrap* test. We say he was right to do so, and we say that the Court of Appeal was right to uphold that decision. Now in upholding that decision, the Court of Appeal set out some of the evidence, all the evidence, upon which it relied. It's entitled to do that. It did express a difficulty with one and a half sentences of the High Court judgment on this point. That's paragraph 188. But they agreed with what the High Court found. So this is a different situation to where the Court of Appeal is reaching a different factual finding and overturning the High Court. All the Court of Appeal was doing is saying, well, we agree with you. We just think there's some other evidence that points to that, and we have difficulty understanding what you mean in one paragraph given what you said in other paragraphs.

In our submissions on this aspect, that there was an arrangement or understanding, we say the following four points. First, it was not inevitable that the agencies would in fact vendor fund the new fee. Although that may

have been their very strong preference, it's not inevitable it would have happened. I will talk the second point. I will talk about how the withdrawal of listings and vendor funding go hand in –

WILLIAMS J:

So when you say "vendor fund" you mean 100% vendor fund? What exactly do you mean?

MR DIXON QC:

I mean the general rule that it will be funded by the vendor.

WILLIAMS J:

100%?

MR DIXON QC:

The general rule that it'll be funded by the vendor 100% but that there will be exceptions to that where it'll be funded by the agent or the agency.

WINKELMANNN CJ:

What are you saying? It was not inevitable they do what?

GLAZEBROOK J:

Well, it was about my question yesterday in terms of the point about the agent or the agency and the vendor funding and what exactly the case was. Now this seems to be a different case again, that it's only exceptionally that it would be the agent and the agency.

MR DIXON QC:

No, perhaps I'll back up and I'll make two submissions. The first is all I'm really saying here is there's a submission made by the defendants that there wasn't a need for an agreement here because they were always all independently going to vendor fund. That was the only course that was available to them. This was an incredible expense. They couldn't afford it. They wouldn't have ever vendor funded, and the only point I'm making about that is I submit the evidence establishes that that's not correct, as a matter of

evidence and as a matter of common sense. So that's the point I'm really just making here.

WINKELMANNN CJ:

So what – so I just ask you clarify this. What Mr Taylor said was that it was always inevitable that they would shift off the position, that they would just absorb it. That's what he said.

MR DIXON QC:

Correct, and I dispute that.

WILLIAMS J:

But that's not the same as always inevitable vendor fund. That's their point is really always inevitable the status quo was going to change.

MR DIXON QC:

Yes, so –

WILLIAMS J:

And evidence is it did.

MR DIXON QC:

And I disagree with the proposition that it was always inevitable that the status quo would change.

WILLIAMS J:

From 100 absorption?

GLAZEBROOK J:

Well, okay, so it would – it was always – so you disagree that it was inevitable that they would have moved from 100% agency funding?

MR DIXON QC:

To something else.

GLAZEBROOK J:

So you say it wasn't inevitable that they would have moved from 100% agency funding to something else?

MR DIXON QC:

Correct.

GLAZEBROOK J:

Right. So what's the second part of that proposition?

MR DIXON QC:

So the – to answer the question of what do we say was a – I think you're really asking me what do we say was agreed at the meeting.

GLAZEBROOK J:

No, no, I'm not really because it's just a slightly difficult submission when you go from 6000 to 200,000 if you continued to 100% agency fund to say that it wasn't inevitable that they would have swallowed the 200,000.

MR DIXON QC:

Correct. I think it's inevitable they would have tried. It's not inevitable that they would have been able to do so. Would you like me – I can explain that. I'm happy to –

GLAZEBROOK J:

No, no, that's fine. I just want to get the submission.

MR DIXON QC:

Yes.

GLAZEBROOK J:

All right, so the submission is that it wasn't inevitable that they would have moved from 100% agency funding. They may have tried but they mightn't have succeeded.

MR DIXON QC:

Correct. So bear in mind in *Caltex*, for example, it's a good example of this, all of the fuel companies wanted to stop offering the free car wash. One of them, I think it was Caltex, had tried to do so, had gone out and done it by itself, removed the car wash, had lost money and it had to put the car wash back in. Now there's no doubt in that case that they all wanted to remove it, that it was uneconomic, that it was in their best interest to do so but they didn't because the forces of competition prevented them from doing so until they could reach an agreement and then they reached an agreement and then they all withdrew at the same time and then they were able to get away with it successfully.

GLAZEBROOK J:

And you say there's evidence of that nature in this case?

MR DIXON QC:

Correct.

GLAZEBROOK J:

All right, that's fine.

MR DIXON QC:

And I'm going to take you to that.

WILLIAMS J:

So anyway, you were in your first of four points.

MR DIXON QC:

So first of four points is not inevitable vendor fund. Second is –

GLAZEBROOK J:

Can you just, sorry, I need to just make sure I've got this down.

MR DIXON QC:

That's all right.

GLAZEBROOK J:

I think the – you need to deal with the submission, which I'm sure you will, in terms of the difference between what Mr Taylor says was vendor fund and what you say is vendor fund in the sense that they're not saying it was inevitable that they would – it was all – I think they probably accept, and actually that's what they argue, that it was always inevitable they were going to move away from 100% agency funding but they're not saying that they would be moving to 100% agent or vendor funding, and I'm sorry, that horrible term "vendor funding" seems to mean a whole lot of different things that it doesn't in ordinary English. They say that it was always going to depend on the circumstances whether the agency funded, agent funded, or actual true vendor funded.

MR DIXON QC:

Correct. As I –

GLAZEBROOK J:

Are you going to deal with that?

MR DIXON QC:

I am.

GLAZEBROOK J:

As part of this or is that…

MR DIXON QC:

I am about to – I can get to it, but I'll – let me just – I'll just do it now, just because we're on the subject. As I understand my learned friend's argument, he says, first, the agencies reached no arrangement or understanding at the meeting. Second, he says, well, if they did reach an arrangement or understanding at the meeting as the High Court found then the arrangement or understanding was as the High Court found it. That is to say that they would move to vendor funding and that vendor funding meant what the High Court says it meant, which is in principle or as a general rule it will be borne by the person selling the house, I've used that expression, the seller, but in particular necessary or desirable circumstances it will be borne by the agent

or the agency. That's what my learned friends – and that's a factual finding and he says from that that that's not price fixing.

What we said at trial was that there was an arrangement or understanding and it was that they would vendor fund and we say that meant funded by the seller or the agent.

GLAZEBROOK J:

And in terms of that did you have a percentage in terms of what it would be? It just didn't matter one way or the other? That's fine, thank you.

MR DIXON QC:

No.

WINKELMANNN CJ:

So it's not the agency?

MR DIXON QC:

Not the agency, but we expressly left open in a discussion with the Court that of course consistent with any understanding there's always room at the margins. I think Your Honour referred to that yesterday that there's always play at the margins in an understanding and that's what the cases say.

WINKELMANNN CJ:

Yes, but you're not giving evidence. What were you saying the agreement was? You're not giving evidence. What were you saying the agreement was?

MR DIXON QC:

We were saying –

WINKELMANNN CJ:

Are you saying they agreed to leave room at the margins?

MR DIXON QC:

We say the agreement was that their – that they would – the seller would pay or the agent would pay and that was their primary intent, but we left open the possibility –

GLAZEBROOK J:

Well, in, well…

WINKELMANNN CJ:

Can I just repeat my question? Were you saying that was the agreement or was that your argument, because are you – there's a difference. Are you saying they agreed this was the rule, the vendor – the agency would not fund? Or are you saying they agreed the agency would not fund except in some circumstance?

MR DIXON QC:

It's a difficult to question to answer and the reason it's a difficult question to answer is because of the nature of an understanding as not being a very well-defined thing. So what I would say is we said what they had in mind was that it would be borne by the seller or the agent, but that is not to say that had they contemplated there might be an occasion where they would fund it themselves, and nobody is saying that that wouldn't occur. We're simply saying that was – they didn't turn their minds to that but had they done so that would have been contemplated because that's the nature of an arrangement or understanding. It's not well defined.

GLAZEBROOK J:

Well, I'm not sure that you have a nature or understanding on anything to say, well, objectively you look at what they would have thought had they done it? I mean you don't do that with a contract except in the very constrained circumstances of implied terms. I'm not sure why you'd do that with an understanding.

MR DIXON QC:

Well, I think what we're talking about is something at the real margins here. What we are saying is that what they contemplated was vendor funding and that vendor funding meant funding by the seller or the agent.

WINKELMANNN CJ:

So are you really saying they agreed, look, basically they agreed, that's it, 100%, but in application there was non-compliance?

MR DIXON QC:

There's always room for play at the margins.

WINKELMANNN CJ:

So they didn't agree that? They didn't agree that. It's just an application. I mean what was the agreement because it's your – it's the Commerce Commission that bore the burden of showing that there was an understanding, an arrangement or agreement.

MR DIXON QC:

Yes.

WINKELMANNN CJ:

And the extent of – and its nature is critical as to whether or not it had the prohibited effect.

MR DIXON QC:

Correct.

WINKELMANNN CJ:

So I'm trying to understand from you what the – because what we're doing is defining what the Commerce Commission said the agreement was.

MR DIXON QC:

Yes. So what we pleaded, perhaps that's the easiest –

WINKELMANNN CJ:

Yes. Well, what paragraph is it in your pleadings?

MR DIXON QC:

46 of our pleading. That is tab 3 of volume 101. It's on page 101.0010. it's paragraph 46 of the second amended statement of claim. We say that they agreed they would no longer – sorry – that no later than 20 January they would remove their listings and then if after that vendors wanted to be on Trade Me –

GLAZEBROOK J:

So at 46? Right.

MR DIXON QC:

I'm sorry. Yes, paragraph 46. The fee would be funded by the vendor or the real estate agent, and that's what we defined as vendor funding. That's what we say they had in mind.

WILLIAMS J:

There you use the term "agreement". In the submissions you were just making you used the term "understanding" really because basically you say the edges around an understanding are a little greyer than the edges around an agreement which is much more like a contract.

MR DIXON QC:

Well, the statutory term is contract, arrangement or understanding.

WILLIAMS J:

I understand, yes. But you've used "agreement".

MR DIXON QC:

We used "agreement" as a defined term because it's easier than saying the Hamilton arrangement or understanding, but it is defined to be –

WILLIAMS J:

So my point is "understanding" is an – when you used the word "understanding" two or three minutes ago you meant this agreement?

MR DIXON QC:

Correct. The Hamilton agreement is the understanding at issue in this case.

WINKELMANNN CJ:

Are you saying that your statement of claim defines agreement to include arrangement?

MR DIXON QC:

Yes. It's arrangement or – that is the arrangement or understanding.

GLAZEBROOK J:

Where does it say that? I'm trying to find it.

MR DIXON QC:

In the causes of action. For example, by their conduct they contravene section 27 via 30.

GLAZEBROOK J:

To be honest, it doesn't worry me really. I would have thought it would encompass agreement, but did you say you specifically defined, sorry, understanding? Did you say it was specifically defined under the statement of claim in –

MR DIXON QC:

No, we said that the agreement breached the Act because it was a contract arrangement or understanding.

GLAZEBROOK J:

Yes, where do you say that, sorry?

MR DIXON QC:

In 60 I think it was. It's by reference to the statute.

GLAZEBROOK J:

Well, you don't really say because it was a – you don't actually say there. You just say it breached the statute which an agreement would. So you haven't picked – you haven't defined it as including "understanding".

MR DIXON QC:

Well, no, because it's a, you know, it can be a contract, arrangement or understanding and I think we have to pick which one it – well, those terms.

GLAZEBROOK J:

Well, no, no, I'm not sure you do either –

MR DIXON QC:

No, no.

GLAZEBROOK J:

– but I think perhaps my colleagues don't agree.

MR DIXON QC:

Yes.

WINKELMANNN CJ:

Well, I don't know. You did allege it.

WILLIAMS J:

Well, no, my point is really the way you're putting it allows you a bit of wriggle room. I don't mean that pejoratively at all. I took you to say that because it's an understanding you're not going to have every detail pinned down and particularly they're not going to discuss the exceptions that would be inevitable but didn't need to be talking about it because it was an understanding, not a contract.

MR DIXON QC:

That's exactly right.

WILLIAMS J:

All right, that's what I thought you said.

MR DIXON QC:

That's exactly what I'm saying, and that was the point I was probably inartfully trying to make before that we pleaded it this way, the Court, the High Court found that actually there was this further exception that sometimes the agencies would bear it but the Court of Appeal and the High Court really did not see that as a departure from our pleading, and the reason, for example, the Court of Appeal didn't see it as a departure from our pleading is because as they found with an understanding there'll always be some play at the margins as to what's involved.

WILLIAMS J:

They cast that as a discretion which – or perhaps the High Court Judge did. I don't recall – which looked as if it had in fact been contemplated and so the appellants say, well, there's just no evidence of that contemplation. Your response is, well, maybe the Courts if they meant that misdescribed what was actually going on.

MR DIXON QC:

I think the appellants say that there was, it was contemplated that it might be borne by the agencies. They just resile against the word "discretion".

WILLIAMS J:

Yes.

MR DIXON QC:

Which is what the Court of Appeal, how the Court of Appeal described it.

WILLIAMS J:

Yes, yes.

MR DIXON QC:

I will circle back to this point, perhaps put it in a bit more context as we go through the argument.

WILLIAMS J:

You were at point 1.

MR DIXON QC:

Yes. So point one was – point two on this was –

GLAZEBROOK J:

Sorry, I was the one who –

MR DIXON QC:

No, no, no.

GLAZEBROOK J:

But I just wanted to understand the bounds of that and make sure we were talking about the same thing.

MR DIXON QC:

Yes.

GLAZEBROOK J:

And I think if we talk seller funded I think that's a very good idea when we're talking about the actual payment.

MR DIXON QC:

Okay, yes, and one of the things you'll have to be wary of is that you'll see that a lot in the evidence that when they – when the agencies are talking about vendor funding they actually do mean the seller and nobody else, and you'll see that on a number of occasions we –

GLAZEBROOK J:

We can – you can take us to it –

MR DIXON QC:

There's a bunch of those but I don't need to take you through it but – point two was actually the point I had touched on earlier that the withdrawal of listings

and vendor funding go hand in hand. They're both directed at the same thing which is to decrease the relevance of Trade Me. I'll explain that.

GLAZEBROOK J:

Although it's price fixing we're looking at, not decreasing the relevance of Trade Me, and boycott, if you like, has not been pursued.

MR DIXON QC:

Correct. Perhaps I will explain this, so, because I think there's a little bit of uncertainty about this. So before the change all listings were already on realestate.co. So it's not a matter of putting more listings on realestate.co. They were all there. They were also all on Trade Me. The real difference between the two platforms in terms of listings was that Trade Me also had private sales. Realestate.co, which is owned by the real estate agencies, doesn't list private sales. So in terms of their stock, that's the only difference.

WINKELMANNN CJ:

Are the private sales a significant part of Trade Me's real estate offering?

MR DIXON QC:

My recollection is it was 15% of the listings but I'm going back a couple of years. But we can track it down. But say it's, let's call it, it's in Mr McGee's evidence, I think, 10 to 15%. But the real difference between realestate.co and Trade Me was in views by buyers. They used this expression, "buyer eyes". So 10 times as many people looked at a property on a Trade Me as looked at it on realestate.co. So the goal here was how do we shift buyers from realestate.co? How do we make Trade Me less useful to them? And we'll see some evidence around this, but the idea that they ultimately came up with was withdraw the listings so the stock on Trade Me is incomplete. Buyers can't find all the houses for sale on Trade Me so they've got to look elsewhere, and then if anyone, any vendor wants to be on Trade Me because they want those 10 times buyer eyes, then they'll have to pay for it, and in that context it makes little sense for an agency to continue to absorb all of the cost of listings because it would defeat the goal of making Trade Me less relevant. So they withdrew and vendor funded, and bear in mind if they hadn't vendor funded then this may well have been a boycott because then they would have

absolutely been not providing that to their customers and agreeing not to do so. But because they were still prepared to list people who paid for it, it's much less likely to be a boycott. So that's the point I want to make about that because yesterday I think Mr Taylor was saying well those two things aren't linked and in my submission they plainly are.

The third point I'd make about that is that it's, to the extent that my learned friend suggests that really well there couldn't have been an agreement here because this is something they wanted to do anyway and it made commercial sense for them to do so, that in no way stops this from being an agreement and in fact I think if you look at all of the cartel cases, they're all doing something they wanted to do. I mean the airlines and the fuel surcharges cases plainly wanted to recover the increased costs of fuel, that's why they reached an agreement around it. Same thing in the freight forwarding cases, same thing in the livestock series of cases. All of these are new costs that they want to get rid of or an unsustainable discount as in *Giltrap* for Caltex.

WINKELMANNN CJ:
I think Mr Taylor's point was not that they wanted to do it but rather that it was inevitable because of their enormous size and in fact that was how Trade Me really presented it to them, you can vendor fund this.

MR DIXON QC:
Right, well again that doesn't stop there being an agreement, right.

WINKELMANNN CJ:
Even though it was going to happen anyway?

MR DIXON QC:
Even though they were going to try and do it anyway, that doesn't stop you agreeing.

WILLIAMS J:
Yes but you need more than just that.

MR DIXON QC:

Correct but trader A can go, “I want to increase my prices by 10% and I'm going to try and do that, I'm genuinely going to go out there, maybe it works, maybe it doesn’t but I'm going to do it.” But he can still go to trader B and say, “Look, hey I'm going to increase my prices by 10%, how about you do so as well. Will you agree to do that?” And if trader B agrees, “Yes I’ll do that.” That’s an arrangement of understanding, even though trader A was going to do it.

GLAZEBROOK J:

I don’t think Mr Taylor was arguing against that, so I don’t know that you need to go into great detail on that. That was the inevitability point he was arguing and the fact that it had already been decided and there wasn’t a mutuality and that’s the point you’ve got to meet. Don’t bother meeting points that he’s not making and that are absolutely clear. You are absolutely right and I'm sure Mr Taylor would totally agree with you on all of the points you’ve just made.

MR DIXON QC:

Okay, thank you. So our second point is that having established the arrangement or understanding, we say that arrangement or understanding fixed, controlled or maintained prices and we say that controlling a price is a restraint upon the freedom that would otherwise exist as to the price to be charged and that’s the law in numerous cases in New Zealand and in Australia, that’s how people have – the Judges have seen it. Restraining of freedom that would otherwise exist as the price to be charged and that absent de minimis cases, the degree of control is irrelevant to liability. If there is an interference with how price is set, that’s a controlling of a price.

GLAZEBROOK J:

So just to be clear, I'm assuming if the only thing was we’ll go off 100% agency funding and there's total discretion as to what we replace that with, you would say that was still price fixing I'm assuming.

MR DIXON QC:

Correct, because there's been an – that you’ve taken away one of your price setting options. You had the option –

GLAZEBROOK J:

Well the only thing you've taken away was 100% agency funding.

MR DIXON QC:

Correct.

GLAZEBROOK J:

And that's enough you say.

MR DIXON QC:

That's enough.

GLAZEBROOK J:

Subject to *de minimis*.

MR DIXON QC:

Correct.

WINKELMANNN CJ:

Well that's not a price setting option actually, that's a control but it doesn't stop you arriving at that price in the individual case, so how is that a restraint on pricing?

MR DIXON QC:

Because – well let's say Monarch and Lodge and Lugtons are in a room and they say, "We've got to stop giving this for free to all of our customers, let's agree that none of us are going to be able to advertise, anyone who comes to us gets this for free, we're taking away that option." So there is no longer the option for those three cartelists to give it away for free because they've agreed not to do so. They can give it away for free on an individual case, to an individual person.

WINKELMANNN CJ:

So they've agreed not to advertise they're going to give it away for free.

MR DIXON QC:

Advertise or offer to everybody it's free.

WINKELMANNN CJ:

Yes.

MR DIXON QC:

It's the same, it's analytically the same as Caltex. The thing about Caltex, we have for $20 of petrol you get a free car wash, and all of the service stations got together and said, "Well, we will no longer give away for free to all of our customers a free car wash. For any customer who's over $20 in petrol, we're no longer going to give it away for free." In that case, counsel said, well, that doesn't tell you anything. That's no constraint because they can continue on doing – they can compete any other way from there, and Justice –

WINKELMANNN CJ:

Well, they were agreeing not to give it away for free. They weren't agreeing to negotiate. They weren't – it's a different thing, and you might be right but it just seems to me that this is not price fixing in the sense of what will be done in the individual case.

WILLIAMS J:

I wonder whether the analogue is not quite right because the better analogue would be we're no longer going to have 100% car wash free across the industry. Each site can choose what it wants to do.

MR DIXON QC:

That's what the agreement is in Caltex.

WINKELMANNN CJ:

No, it would be more like the analogue will be every time a customer comes in we can decide whether or not we're going to give them a free car wash. That's the analogue.

MR DIXON QC:

I think that's functionally right, but –

WILLIAMS J:

So, and that was held to be…

MR DIXON QC:

Price fixing.

WILLIAMS J:

Price fixing.

GLAZEBROOK J:

Well, that wasn't what was said in that case. They decided that none of them were going to provide a free car wash and that was it.

MR DIXON QC:

Correct, but –

GLAZEBROOK J:

They didn't say some of us could and some of us couldn't. They said, "Absolutely nobody is going to do it. We're stopping it."

WINKELMANNN CJ:

And they didn't say, "We're going to look at each customer and decide how good a customer they are based on how much petrol they buy a week and decide whether or not to give them a free car wash."

MR DIXON QC:

Well, there was no provision as to what would happen in the future. So therefore it was unfettered as to what they would do in the future other than they wouldn't have a global approach of free car wash for everybody.

GLAZEBROOK J:

Well, maybe you need to take us to the case to – because if you're saying it's an analogue maybe we need to look at it more closely than we have.

MR DIXON QC:

Right, so –

GLAZEBROOK J:

But if you want to – you don't have to do it now. You don't need to do it now.

O'REGAN J:

General points first and then go back to it.

MR DIXON QC:

Okay.

O'REGAN J:

We just seem to be getting in your way, I think.

MR DIXON QC:

Well, I'm sorry, I've probably –

WINKELMANNN CJ:

You don't need to apologise, Mr Dixon.

MR DIXON QC:

So I was answering Your Honour, Justice Glazebrook's, question. Do I think that at a minimum that is price fixing? The answer to that is yes.

GLAZEBROOK J:

No, I was just wanting to get the submission. I didn't really mean this to go off on a tangent.

MR DIXON QC:

But here we say the agreement's much more anyway.

GLAZEBROOK J:

No, I understand. No, I absolutely understand that.

MR DIXON QC:

Right, so we say that the critical paragraph really about this is paragraph 215 of the High Court's judgment which we went to yesterday, and I'll go through this in more detail but just to summarise what we say, that we say there is more work done by this expression, "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." So we say that that set a general rule that that's what was going to happen in the general case with contemplated exceptions, being those that arise in particular necessary or desirable circumstances.

So our submission, this is what the Court of Appeal found as well, is that there wasn't an absolute discretion when looking across all customers as opposed to looking at individual customers, and I think that's a really key distinction, and that is, just to be clear, how the Court of Appeal saw it, and there was some discussion yesterday about differences between the Court of Appeal and the High Court but the critical passage on this is paragraph 82 of the Court of Appeal's decision.

GLAZEBROOK J:
Para what, sorry? 102, is it?

MR DIXON QC:
82, which is page 102.0484. In there the Court says, "It's clear to us at that meeting there were references to any listings henceforth being vendor funded," and this is what the Judge found. "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 there will 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," that's what the High Court found, "if it was not the vendor, it would be the individual real estate agent and not the agency itself." The general rule is the seller. I've put that into the judgments as well. The seller would fund it, if not the seller, then the agent.

So they're essentially agreeing with the High Court but the focus between the High Court and the Court of Appeal is different because we went to that passage at paragraph 231 of the High Court judgment which, and there's another one as well in 227 but 231 is it, it's the second paragraph, second sentence, "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." Now that's what the High Court found and the Court of Appeal said well that's fine but really look at things across the whole sum of the sellers. So yesterday Justice France asked Mr Taylor, "Well you seem to be saying if there's any discretion it's not price fixing." And he said, "Correct, that's right, if there's any discretion it's not price fixing." But you can imagine a situation where companies agree that for 95% of customers we're going to charge them this price fix price but you have a discretion for five percent of customers, you know, if they're a good customer or whatever, you've got a discretion for five percent of them to vary from that. Now that's price fixing. On any individual transaction, for any individual customer, you can price however you like but when you look at it across the pool of customers, you can't and what we say is what His Honour –

WINKELMANNN CJ:

Sorry why can't you, when you look across – can you state your starting proposition for me again.

MR DIXON QC:

Yes Your Honour. So let's say you agree that for 95% of customers you're going to charge them a price fixed price, you're going to put up your prices by 20%, all of those people are going to pay that. The other five percent you can price however you like. Now Mr Taylor said yesterday that if there's any discretion it's not price fixing. So for him that's not price fixing.

WINKELMANNN CJ:

I don't think he did say that.

GLAZEBROOK J:

He did at one stage, I think he might have resiled from it slightly.

MR DIXON QC:

He certainly said the word "correct" in response to Her Honour's question.

GLAZEBROOK J:

I think he may have just, well not resiled from it but amplified on what he meant.

WINKELMANNN CJ:

Because that's a hypothetical because that's not here, we don't have percentages. His point was if there's a discretion allowed, if you allow a discretion without restraint then you allow the world in this area.

MR DIXON QC:

Right and what I'm saying is that there is a form of restraint here, that there's a general rule that it's going to be passed on to vendors, to sellers and that the discretion or the exceptions, the particular necessary or desirable circumstances might affect things on an individual basis, just like my five percent example and my five percent example where you're allowed to do it for five percent, for any individual one, full discretion applies but not across the board, not generally and that's the discretion aspect. So we say that paragraph 215 establishes a general rule, that's what the Court of Appeal found and His Honour used that term himself as well, he said in paragraph 230 for example, in the middle of paragraph 230 the High Court said, "Other publications including online", meaning online listings, "incurred a cost to the agency generally charged to the vendor in a sense of the seller." And that's what he means it's generally going to be charged, so there's a discretion not to do so.

So we say because this general rule was imposed, the arrangement did two things, for everyone who paid that price, that $159 or whatever, they got a price fixed price, so that's the price that they paid because the second point is, that arrangement set the price –

GLAZEBROOK J:

Sorry can you just back track, I think I missed the front of it.

MR DIXON QC:

Okay.

GLAZEBROOK J:

When you said "everyone", who did you mean by "everyone"? No I don't think I missed it because I don't think you explained who you meant by "everyone".

MR DIXON QC:

No the people who paid the price.

GLAZEBROOK J:

What price? You mean the sellers? Who do you mean?

MR DIXON QC:

Yes the sellers who paid the $159.

GLAZEBROOK J:

Or the agents, what do you mean?

MR DIXON QC:

Or the agent, yes.

GLAZEBROOK J:

Okay, so for every seller or agent who paid the Trade Me listing price.

MR DIXON QC:

Price of $159, they got that price fixed price because, and this is really the second point but they flow into each other, the arrangement set the price at which they would offer this to a Trade Me to their vendors, to their sellers or to the agents.

GLAZEBROOK J:

Well they were just paying what Trade Me was putting it out at, weren't they?

MR DIXON QC:

Yes.

WINKELMANNN CJ:

I mean is that found in the – that's not covered in the High Court judgment is it?

MR DIXON QC:

What is?

WINKELMANNN CJ:

That the arrangement, you've just said the arrangement was included, fixing the price which they would charge the seller or the agent. Did the Judge find that in High Court?

MR DIXON QC:

Not in so many words but that's because offer price aspect, this issue around fixing or controlling was not how the trial was run.

WINKELMANNN CJ:

All right, so this is something, because I'm just thinking I hadn't read it anywhere.

MR DIXON QC:

It just comes out of the evidence.

WINKELMANNN CJ:

But are you running it as an additional point or what's it significance because it's quite a significant point I feel?

MR DIXON QC:

What we say is this, our case was run that this fixed the price. Price includes the price at which goods are offered for sale.

WINKELMANNN CJ:

But that's quite different. The case you've been putting earlier which is that it fixed the price because it took off the table the presumption.

GLAZEBROOK J:

The discount.

WINKELMANNN CJ:

The discount.

GLAZEBROOK J:

The free carwash.

WINKELMANNN CJ:

The free carwash. This is quite a different version of it and is it something that was argued, I mean it's not in the judgments and you haven't supported the judgment on this additional ground.

MR DIXON QC:

With respect, I'll back up. I'm not actually arguing the point that I had the exchange with Justice Glazebrook about which was that I would say that if it was just a decision to completely – not to offer for free, I say that's still price fixing but our case is it's more and our case has always been that it's more.

GLAZEBROOK J:

No, no we're not on that point now. What I'd understood the case to be was that generally it was going to be funded by either the seller or the agent, that's what you've just said.

MR DIXON QC:

Correct.

GLAZEBROOK J:

Well I think yours was a bit higher in the High Court but you've got a finding that it's generally you say.

MR DIXON QC:

Correct.

GLAZEBROOK J:

So generally it was to do that and I'd understood the case to be and because that was generally the case, the price fixing was taking away the subsidy, ie the agency would pay the Trade Me cost, so that it's taking away the free carwash if you like because that's probably the best analogy in the cases but now you seem to be saying something slightly different.

WINKELMANNN CJ:

And I'm just anxious that you're advancing a new argument that is not – and it's quite a significant change and maybe you're not meaning to advance it at

all but I'm just wondering why we're suddenly dealing with the fact that they agreed about a particular price they'd passed on at ---.

MR DIXON QC:

With respect Your Honour this is not a new argument, this was front and centre of the Court of Appeal –

WINKELMANNN CJ:

It's a new argument in the sense that it's not reflected in either of the judgments and you're not supporting the judgment on an alternative ground, are you?

MR DIXON QC:

Well with respect Your Honour, if I could take Your Honour to paragraph 90 of the Court of Appeal decision.

WINKELMANNN CJ:

Okay, so I asked you if it was in the High Court or Court of Appeal judgment and you'd said no but now you're saying –

MR DIXON QC:

No, no with respect I didn't say that Your Honour, well I didn't mean to say that and if I did I apologise. It plainly was front and centre of the Court of Appeal argument and it is relied upon by the Court of Appeal.

GLAZEBROOK J:

All right, so you accept it wasn't in the High Court or do you say it was in the High Court as well?

MR DIXON QC:

No it wasn't, the offer price discussion was not part of the High Court.

GLAZEBROOK J:

Because the High Court you said, well as I understood it, just tell me if I'm wrong, that the price fixing was taking away the, and I call it a subsidy, ie the

agency playing a part which would obviously increase the price because you'd be paying commission plus the extra price.

MR DIXON QC:

Correct, we said that and we said that all those paid it have got a price fixed price and all those who have chosen not to list on Trade Me because they have not received a price that was set by the forces of competition, so it's not just those who pay it but also those who choose not to pay it are affected.

WINKELMANNN CJ:

Well for my part I'm very troubled by this and this is why I'm pressing you on this Mr Dixon because it's not something that Mr Taylor responded to, it's not something I had picked up in reading the judgments and it seems to be quite a different case and when you just put what your case was to us earlier, you didn't say and they agreed that the costs would be passed on at this price. So was it argued in the High Court, have you given notice that you support the judgment on different grounds?

MR DIXON QC:

No it was not specifically argued in the High Court. Yes it was an appeal point in the Court of Appeal, it was in our notice of appeal, it was in our submissions and it forms part of the Court of Appeal's decision.

WINKELMANNN CJ:

And at paragraph what?

ELLEN FRANCE J:

Mr Taylor does deal with it in his written reply.

MR DIXON QC:

In his written reply, so we haven't heard from him on that but if we start with 90 for example.

MR TAYLOR QC:

If it's of any assistance, I accept that it was raised, this argument was raised for the first time in the Court of Appeal and that's why we had a big argument

about pleadings and where did this come from and I hadn't investigated how the price was actually passed on individually by the agents, all of that sort of thing, so this argument was raised but only in the Court of Appeal, it was never part of the case in the High Court.

WINKELMANNN CJ:

So it's referred to in paragraph 90.

MR DIXON QC:

For example –

GLAZEBROOK J:

Can I go back to what was in the High Court because you say that all those who chose not list did not receive the price set by the forces of competition. Well it was set by Trade Me effectively, the price and set by Trade Me on the basis that we know you can't absorb this, so pass it on to the other people.

MR DIXON QC:

It was set by Trade Me to incentivise agents to pass it on. The evidence from Trade Me was that they expected approximately 25% of agencies not to do so and the evidence from Trade Me was they actually didn't care whether it was passed on but they set it at a price where they thought it would be but the price that a supplier sets their fee at does not determine the price that the reseller or the person who supplies that service to somebody else sets it at.

GLAZEBROOK J:

No I understand that, I just don't understand why they were deprived of a price that was set by the forces of competition because the vendor, the sellers could decide whether to do it or not.

MR DIXON QC:

Because they could have if, but for the agreement they might have competed on that price, some of them, if they hadn't had an agreement, maybe they wouldn't have been able to bring in this arrangement of all withdrawing, the all absorb or the free listing, or some of them might have tried to discount it.

A critical factor here, and I will get to this in –

GLAZEBROOK J:

Well, actually so it's really just the point, just so I'm clear, the point you were making earlier that it wasn't inevitable that they went to this model? It's nothing more than that really?

MR DIXON QC:

Correct, correct, and so –

GLAZEBROOK J:

Okay, that's fine. You don't need to go any further. It's just you'd put it in a different way and I was worried I had misunderstood, that it was some other point that I hadn't picked up. But if it's the same point, that's fine.

MR DIXON QC:

Yes, so –

WINKELMANNN CJ:

Can I just take you back to the Court of Appeal judgment? Do you say it's paragraph 90 that they deal with?

MR DIXON QC:

Well, certainly "offer price" is referred to there. "We accept Mr Dixon's submission…that the High Court failed to take account of the impact of the arrangement or understanding on the agencies' 'offer price'."

WINKELMANNN CJ:

Is there a finding by the Court of Appeal that there was a fixing of the price?

MR DIXON QC:

Yes, or a controlling.

WINKELMANNN CJ:

No, no, no, in a sense that you're now saying, not in terms of a general rule.

MR DIXON QC:

Yes. So if we look at 89. In our -- "So here the understanding was of a starting point of vendor funding, while recognising there would be," that's seller funding, "while recognising 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 section 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 that was what transpired…"

WINKELMANNN CJ:

You don't have to read it out, but what part do you say they agree the price was fixed at the $159?

MR DIXON QC:

"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 adverting it had lost an allowance or credit that had been previously provided," and, "The price for real estate agencies' services was correspondingly more."

GLAZEBROOK J:

But that's nothing to do with Trade Me. That was exactly what I just put to you. They'd lost a subsidy.

MR DIXON QC:

Yes, so –

GLAZEBROOK J:

Which is what you'd said in the High Court.

MR DIXON QC:

Yes, but…

GLAZEBROOK J:

So this isn't a finding that they'd fixed the price at the Trade Me price.

MR DIXON QC:

Well…

GLAZEBROOK J:

Sorry, that was what the Chief Justice I thought was asking you.

WINKELMANNN CJ:

Yes, that is, yes.

MR DIXON QC:

Okay, I'll – let me just give you –

WINKELMANNN CJ:

It might be you –

MR DIXON QC:

I have not directed myself to this particular point.

WINKELMANNN CJ:

Okay, all right, you might want to come back to it, Mr Dixon. I was just interested to see where the Court of Appeal made that finding because I hadn't picked it up and it just seems to be quite important, but…

MR DIXON QC:

All right, and I just want to go back to this offer price point because there's more than that. So this is 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." No necessity for there to be an agreement or understanding that an absolute position must be maintained. "Collusion on a start or offer price can be enough." They then go through European and UK authority on that and, in particular, *Plymouth Dealers*, the US Ninth Circuit case.

WILLIAMS J:

Isn't this just – I'm sorry, but if we go back to our favourite car wash, this is the effect of this arrangement was they paid their $18 for the car wash or they didn't get a car wash. In this case, they paid their $150 or they didn't get a TM listing. What's the magic in this?

MR DIXON QC:

Well, I think that's a – I think it's a little bit different to that, with respect, Sir. I think the *Caltex* example is half of the story here. So *Caltex* is, was, if you spend $20 you get a free car wash, and they took away the free car wash. So you spend $20 and you get nothing. So that's –

WILLIAMS J:

Well, you get $20 of petrol.

MR DIXON QC:

But nothing more.

WILLIAMS J:

Yes.

MR DIXON QC:

So that's the taking away of the free Trade Me listing.

WILLIAMS J:

Yes.

MR DIXON QC:

Here we say there's something more which isn't in *Caltex*. *Caltex* was then, "And for most customers we're going to charge them $2.50 a litre for petrol." There was something more here which is for most customers we're going to make them pay the 159 if they want it. So it's a different, it's an additional thing, so there's –

WILLIAMS J:

But it's the same as, "We're going to make them pay the $18 we charge for car washes," except it's their charge, not a passed-on disbursement.

MR DIXON QC:

For – yes, well, we've got an example. So from now on, if in *Caltex* there had been an arrangement or understanding in addition to withdrawing a free car wash, that they're all going to make them pay $18 for that in the future, then that would have been, well, it would have been additional price fixing.

WILLIAMS J:

Also the difference here is we're going to pass on the disbursement. This is what essentially is going on, and it's the difference between passing on a disbursement because it's good business and passing on a disbursement because you've sat around a table and agreed to it.

MR DIXON QC:

Correct, and the passing on disbursement because it's good business, the caveat I put on that is you can't always do so.

WILLIAMS J:

But if you can you would.

MR DIXON QC:

If you can you would but you might not because somebody might say, "You know what, I'm going to try and get some market share here."

WILLIAMS J:

Yes.

MR DIXON QC:

And we find that the agencies in this case were alive to that possibility and that's the –

WILLIAMS J:

You don't have to convince me that an agreement to pass on a disbursement amongst a cartel is going to be problematic for the cartel.

MR DIXON QC:

And that's our case. That's our case. So if I can circle back to this offer point, in my respectful submission this was raised in the Court of Appeal and it is covered in the Court of Appeal's judgment so it's not a new argument at all, with respect, Your Honour.

WINKELMANNN CJ:

Right, well, at some point you can show me where they actually make that finding.

MR DIXON QC:

I will. I will locate that, yes. That's actually what I want –

WINKELMANNN CJ:

But I mean can I, if we go back to you, just when you were – why I was so surprised by it, because we spent so long on going through what you said the agreement was, but you didn't mention that. Is it your case the agreement included that when they pass it on to the agent or the seller it would be at the price of $159?

MR DIXON QC:

Yes, at the price that they're being charged.

WILLIAMS J:

But it's inherent in the first proposition, $159 isn't a magic number, if they charged $199, that's what would've been passed on.

WINKELMANNN CJ:

No.

WILLIAMS J:

Passing on is in the first proposition.

MR DIXON QC:

The proposition is that they would pass on the price that they were being charged which is $159, yes.

WILLIAMS J:

That's inherent in the in the idea of vendor funding you see, so it's covered in the first proposition.

GLAZEBROOK J:

And taking away a subsidy, it's inherent in all of those I would have thought.

WINKELMANNN CJ:

Well I don't know, to me it seems you're arguing a different point because they could actually agree to pass on, they could agree with a seller that they pay a part of it. So it's actually an agreement to pass on the full amount is a different thing to just – it's quite a different thing.

MR DIXON QC:

To pass on the full amount.

WINKELMANNN CJ:

Okay, so you are saying they agreed that they would pass on the full amount, they would absorb none of it?

MR DIXON QC:

Correct. In the immortal words of Mr Lugton when that point was put to him, you could just absorb part of it, that wouldn't be in the spirit of the understanding. That was question and answer and I will take you to that.

WINKELMANNN CJ:

They may be immortal words to you Mr Dixon but I don't they're going to sound through the ages.

MR DIXON QC:

Well I rely upon those. That would not have been in the spirit of the understanding.

GLAZEBROOK J:

This is really just again, it’s really just another way of saying, isn't it, that that was the general understanding that the whole lot would be passed onto the seller?

MR DIXON QC:

Correct.

GLAZEBROOK J:

And the exceptions were so much at the margin that they didn’t take away from that general agreement which is price fixing because you’ve removed a subsidy or you’ve added to the price because you’ve passed on a disbursement or however you want to phrase it, it seems to me to come to the same thing.

MR DIXON QC:

You’ve interfered with the way the prices are set, yes.

GLAZEBROOK J:

And that’s the submission.

MR DIXON QC:

That’s the submission.

GLAZEBROOK J:

Is that okay? I just want to make sure I've understood it, that was all.

MR DIXON QC:

Own that box and I’ll stay there, how about that?

WILLIAMS J:

Move on quickly.

MR DIXON QC:

That's where I am. I do want to get to into the facts but I might just, so as not to side track the fact discussion, just deal with this not inevitable point, that it will –

GLAZEBROOK J:

So have you now finished your summary and now we're going on to do the more detailed?

MR DIXON QC:

I have, some other points, more detailed, correct. So what I want to say about that it wasn't inevitable and that competition on this could have occurred. I want to start with the proposition that the Trade Me fee or the Trade Me listings had been a source of competition between the agencies in the past.

So Mr Singh who is the co-owner of Monarch who gave evidence said that Monarch had to go on Trade Me, it didn't want to go on Trade Me but it had to go on Trade Me because its agents were coming to it and saying we are losing listings because our competitors, Lodge and Lugton, are offering it for free and we're losing listings because of that, so we need to be able to list on Trade Me. Now he said that in his interview with the Commission and the citation reference is 303.1997.

WILLIAMS J:

This is when the cost was just a few dollars?

MR DIXON QC:

Yes. The cost for Monarch ended up being $36,000 a year.

WILLIAMS J:

Yes. Tough market in Hamilton huh?

MR DIXON QC:

Well it's a very price sensitive market.

GLAZEBROOK J:

So which cost is that, the pre-cost or the post-cost?

MR DIXON QC:

The subscription model cost.

GLAZEBROOK J:

The subscription model, thank you.

MR DIXON QC:

The all you can eat, all you can list was 36,000.

GLAZEBROOK J:

Yes no, that's fine, just checking.

MR DIXON QC:

So that's 303.19 –

WINKELMANNN CJ:

So he was saying that passing on the cost was costing them business?

MR DIXON QC:

No, not, not having it, not providing it for free.

WINKELMANNN CJ:

Is it not offering Trade Me listings or not offering Trade Me listings for free?

MR DIXON QC:

Both. So let's have a look at that. So if we go to –

WINKELMANNN CJ:

So he wasn't on Trade Me?

MR DIXON QC:

He wasn't on Trade Me and the others were offering it for free. So let's have a look at what he said. If we go 303.1997. So it's three entries down, Mr Singh, and he says, "There was more time spent on promoting realestate.co

than Trade Me, as at the meeting." We might as well actually read this because there are some other parts that we'll come back to, "I guess my view is that everybody is similar to us, their minds are pretty well made up whatever they're going to do. We knew that if prices went to where they were, we knew what they were going to do and that was regardless of what everyone else did and when the question came up what people were going to do about it, you know, when the first one or two said, 'Well if this is what the price is then it will be a vendor paid option', that was kind of music to my ears really because I can go back our first meeting." What he meant was his first interview but I'll explain that in a moment and then he says, "I did explain that we were absolutely dead against going on Trade Me in the first place, I didn't think we needed it. We were already on Harcourts", which is the Monarch entity, the banner that he is under, "Excellent website, we're on real estate, all our listings are on there", that's the point I made before, "It wasn't like real estate wasn't functioning, it may not have had traction because no one was looking at it but all our listings were on those websites and I again said to people how many websites do we need to be on. What had happened at that time was, you can obviously confirm this by the way, contracts had expired so large Lodge, Lugton." So just thinking about the Hamilton market for a moment, Lodge is 35%, Monarch is something like 25% and Lugtons is 20 or 25%, so between those three they are 80, 85% of the markets. So those are the big guys, right. "They all went on before we did, we started to get pressure from our sales people who are saying hey look I've got a vendor, they want to be on Trade Me, they're going to go with the other companies because they will get Trade Me for nothing and I said we're not going in there, in the end we did."

So it's both the fact that they weren't offering it and that it was being given away for free and he confirmed that in his evidence that he was getting pressure and that's why they did it and that's at 204.0747. I'd need to take you to that but he confirmed that.

WILLIAMS J:
Is this Mr Singh again?

MR DIXON QC:

That's Mr Singh. So that was his interview and I put that interview to him in cross-examination and he confirmed that. Mr Lugton said a similar thing in his evidence. So that's at volume 202 and it's page 0294 and it's paragraph 4.2 of Mr Lugton's brief, "First began to advertise our listings on Trade Me in 2008, after one of our major competitors, Lodge, began doing so. We felt we also had to advertise on Trade Me to remain competitive." So Singh is saying even the fact that someone is giving it away for free and we don't have access to it, it could cost us a listing. I don't say it's as important. So that's point 1.

GLAZEBROOK J:

Did he make the same point about free?

MR DIXON QC:

No. Now there's another point about Mr Singh in his evidence and you'll recall in that excerpt I just took you to, he talked about it was music to his ears when his competitors were going round the table saying what they were going to do and I asked him about that in cross-examination and that's at 204.0759 and I asked him about that at line 8 of the transcript and he said, I put to him, "You know when the first one was issued, well if this is what the price is then it will be a vendor paid option, that was kind of music to my ears. You said that?" And he said he did. So at least two people it seems who said that it would be a vendor paid option, he didn't understand that.

WINKELMANNN CJ:

So I think I've got the wrong number here.

MR DIXON QC:

I'm sorry, 204.0759. And I started at line 8, where I put this "music to my ears", but I ask him about that and really that it's really at line 24 I pick it up, "And you were delighted by that?" And he said, "Yes." And I asked him, "Because you needed it to be vendor funded because that's what you were going to do." And he said, "We hadn't made up our mind on that yet."

WINKELMANNN CJ:

Why didn't he want to be on it when it was such a low cost?

MR DIXON QC:

Why didn't he want to be on it?

WINKELMANNN CJ:

Mmm.

MR DIXON QC:

What he expressed was he didn't think they need to be on more websites than the Harcourts website and realestate.co.nz.

WILLIAMS J:

Presumably they were free?

MR DIXON QC:

No the Harcourts one is, real estate is not.

WILLIAMS J:

But Lugton is a shareholder in PPL, sorry Mr Singh is a shareholder in PPL, is it more complicated than that?

MR DIXON QC:

It's more complicated than that. So PPL which owns realestate.co, half of that is owned by the franchises, the franchise heads. So yes Harcourts owns 10% of that or whatever but not Monarch, Harcourts the franchise and then the other half is owned by REINZ, the Real Estate Institute of New Zealand which owns it on behalf of all the other little agencies, including Monarch. So they've got the .0000 percent of it or whatever but they pay to have listings on it.

GLAZEBROOK J:

And when you say owned by everybody, you mean just general all of the agents as against the franchise?

MR DIXON QC:

The agencies.

GLAZEBROOK J:

All the agencies, yes.

MR DIXON QC:

Owned by Monarch, other than Harcourts, online rather Ray White, yes. Yes, so he's saying –

WILLIAMS J:

And were the prices genuine market prices or was there – by genuine market prices were they kind of something comparative to what Trade Me would be charging at that time?

MR DIXON QC:

Yes, the subscription model was I think comparable and relatively cheap compared to the Trade Me subscription model.

WILLIAMS J:

So cheaper than Trade Me?

MR DIXON QC:

No, but a relatively cheap amount, equivalent. They stayed on their subscription model when Trade Me went to the per listing model. So then it became much better.

WILLIAMS J:

Much better.

MR DIXON QC:

But at the same time they were paying for both originally.

WILLIAMS J:

Mmm, mmm.

MR DIXON QC:

Because Trade Me had more buyer eyes obviously, so they needed to be on there.

WINKELMANNN CJ:

And Mr Singh says he was delighted by it.

MR DIXON QC:

Yes.

WINKELMANNN CJ:

Because it would give him an opportunity to absorb the cost and have an advantage over the others.

MR DIXON QC:

Correct. He was thinking he might do that. Now so yesterday when my learned friend says it's beyond doubt.

GLAZEBROOK J:

Where did he say that sorry?

MR DIXON QC:

"So you're going to have to have vendor fund with these numbers, music to your ears. No. Well I've heard our two biggest competitors saying their definitely not going to do it, why is that music to your ears? Because we hadn't made up our mind yet and I saw as an opportunity that the more favourable pricing comes through from Harcourts Group, we'll still benefit, so we'll still absorb the cost." So when my learned friend said it was beyond doubt they'd all made up their mind they were going to vendor fund, I suggest this evidence is inconsistent with that. I suggest it's not a foregone conclusion. Yes I accept it's a lot of money and they're likely to do it but it's not a foregone conclusion.

ELLEN FRANCE J:

How does that fit with the it's a no-brainer type evidence?

MR DIXON QC:

It's a no-brainer that you might well try to pass it on but obviously Mr Singh is saying well we might get a better deal from Harcourts, we're a big company, we might get a better deal from Trade Me. In the end they didn't, Mr King and

Mr Singh didn't try and get a better deal from Trade Me. So I'm not resiling from the fact I don't –

GLAZEBROOK J:

He says that they might get a better deal somewhere on the same page. I just want to get it so I've got it noted somewhere.

MR DIXON QC:

Yes he does say that there. So yes, there is plenty of evidence that people said it was a no-brainer, it was an easy decision to make that you would do it but at the same time, you know, one of the appellants is saying well actually not so much. So the other point about it is, just to bear in mind is they could have –

WINKELMANNN CJ:

So it's interesting, it doesn't really sit very well with his interview though does it because his interview seemed to be that he really didn't want to be on it because it was a hassle or an added cost and how many internet sites did you need.

MR DIXON QC:

Didn't want to be on it originally in 2010 when they first went on it but now he's on it.

WINKELMANNN CJ:

But that's the context he's giving at interview.

MR DIXON QC:

Yes but here is now obviously convinced by it, might want to absorb it.

GLAZEBROOK J:

Either that or sees an advantage that he might –

MR DIXON QC:

Sees an advantage, this is the point, right, that people –

WILLIAMS J:

This is the outbreak of cheating.

MR DIXON QC:

It's not cheating, that's – I mean because bear in mind we –

O'REGAN J:

This is assuming no agreement, isn't it?

MR DIXON QC:

Yes.

O'REGAN J:

This is what he might have done if there hadn't been an agreement.

MR DIXON QC:

Correct.

O'REGAN J:

That's your case.

MR DIXON QC:

This is my case, that's exactly right and bear in mind it's not always that you have to take the $200,000 that Lodge said it was going to cost them or whatever it was. You don't have to vendor fund every single one, you could do it for two or three months to see if you can get some market share. You could do it for properties over $500,000, you could do it for new subdivisions, you could use it as a competitive tool in some way and bear in mind, if you think about that $200,000 for Lodge and the average commission is $15,000 on a sale in Hamilton, Lodge gets half of that, so seven and a half thousand dollars.

GLAZEBROOK J:

Although you pay whether you sell or not of course.

MR DIXON QC:

Correct but just thinking about this for a moment.

GLAZEBROOK J:

If it's not in the evidence I'm not sure we should –

MR DIXON QC:

It's in the evidence, this is all in the evidence.

GLAZEBROOK J:

Well then maybe refer to the evidence rather than –

MR DIXON QC:

Okay, I will find the evidential sites where – the simple point I'm making is this, is that if you get seven and a half thousand dollars per sale and you've got 1500 listing a year, you only need 26 more listings to make – to get 26 more listings off your competitors, 26 out of your 1500 in order to make this cost neutral. And there was evidence as to the profitability of these firms. Mr Lugton's evidence on that is at 202.0311. I'll just take you to that. The numbers are confidential so I won't say it out loud.

O'REGAN J:

Sorry, did –

MR DIXON QC:

202.

GLAZEBROOK J:

I lost the number, sorry.

MR DIXON QC:

202.0311.

WILLIAMS J:

Is that paragraph 8, is it?

MR DIXON QC:

Paragraph 8. 202.0311, paragraph 8. I think the cost for Lugton's was 70 or $80,000 it would have been to fully fund them all, to absorb the cost, and that's –

WINKELMANNN CJ:

How much, sorry, to absorb the cost?

MR DIXON QC:

My recollection is it was 70 or 80,000, but I'll confirm that. But that there was their profit. Mr O'Rourke gave evidence as to Lodge's profit which was…

GLAZEBROOK J:

So what was the extra amount for Lugton?

MR DIXON QC:

I will…

WILLIAMS J:

You said 70 k, didn't you?

WINKELMANNN CJ:

70 or 80 ---.

MR DIXON QC:

I'll just find his – I'll locate his evidence on that for you. Mr O'Rourke, Lodge's profit was 1.75.

GLAZEBROOK J:

Is that profit after paying commission to the agents?

UNIDENTIFIED SPEAKER:

(inaudible 10:56:47).

MR DIXON QC:

Well, that figure's confidential. Yes, but I haven't said what the figure is, so I haven't said out loud what the figure is.

GLAZEBROOK J:

Sorry, is that after paying commission to the agents?

MR DIXON QC:

Yes.

GLAZEBROOK J:

Yes, just checking.

MR DIXON QC:

Yes, 1.75 times that number, and he talks about that at notes of evidence 203.0651, but by way of a document that he handed –

O'REGAN J:

0651, did you say?

MR DIXON QC:

203.0651. He handed up a document. But that's the evidence he gave. But that's confidential, so those, both those numbers were confidential.

GLAZEBROOK J:

Can you just wait a minute, please? 203.065… Just finding it.

MR DIXON QC:

Yes. There's actually no real point in going to it. All he does is hand up a confidential document to the Court, so he doesn't say the number in the record but that's where he handed up the document that said that.

WINKELMANNN CJ:

Your point is that they were profitable enough to absorb it, is that your point?

MR DIXON QC:

Correct. Yes, if they had to they could have, and another point that's related to that, not only could they have, they may well have had to, and Mr Couch said this. If we go to Mr Couch. So he's from Lodge, and his evidence is at 203.0568.

WINKELMANNN CJ:

It seems strange though, doesn't it, because it certainly wasn't Trade Me's estimate that they could possibly absorb it?

MR DIXON QC:

No, but Trade Me thought some might, and Trade Me said in those documents, you know, you can pass it on where market conditions allow, and here we have at 203.0568 in the middle of the page there I ask Mr Couch, "Is competition in Hamilton fierce?" He said, "Yes." And I asked him, "You didn't consider using a price change against your other competitors to try and get a bit of market share?" "No. I think it'd be fair to say if we had everybody would have followed us." "They'd have been forced to do likewise?" "I'm assuming that, yes." "That's what you would think is the likely outcome?" "Yes, I would."

GLAZEBROOK J:

Why is that in favour of you rather than against you?

MR DIXON QC:

Because had they chosen to absorb the cost, the others would have had to do so as well. So this is my point, that if Lodge had broken ranks, had been competitive, the others would have had to follow suit. So it's not a foregone conclusion that they would have just all done it independently, and Ms Worley from Eves, which is a smaller agency in Hamilton, not part of the arrangement, very sort of new entry and small, said the same thing, well, the inverse of that at 202.0491. She said if the others had absorbed it, we'd have had to as well. 202.0491.

And so really all I'm saying there is just because it's in everybody's interests and everybody wants to do it doesn't mean it will happen, and we see that in *Caltex*. That's what happened, same thing. Bigger numbers, of course, here. I accept that. But that's my proposition.

WINKELMANNN CJ:

So, Mr Dixon, we're going to take the morning tea break now at 11.

MR DIXON QC:

As Your Honour pleases.

COURT ADJOURNS: 11.01 AM

COURT RESUMES: 11.16 AM

WINKELMANNN CJ:

Mr Dixon.

MR DIXON QC:

Thank you, Your Honour. I now want to turn to some of the factual analysis and the events leading up to the meeting and provide some context around that meeting, and the starting point for that is really a meeting of the New Zealand Realtors Network in early September 2013.

New Zealand Realtors Network is a group or collective of regional agencies throughout New Zealand who formed an alliance really so they could compete with the nationwide agencies. So they're all big in their individual areas but they don't really compete nationwide and the way they do that is through their colleagues in this network. So it's got Barfoot & Thompson in Auckland and Lodge in Hamilton and I think it's Tommy's down here in Wellington, and throughout the country. Mr O'Rourke was the chair of this at that time. The evidence at trial was that the New Zealand Realtors Network was informed of the likely Trade Me change by Trade Me in late August of 2013 and convened a meeting, a special meeting, of the New Zealand Realtors Board to discuss it. They canvassed it with their members, got their views and then they had a teleconference to talk about it, and what we had is effectively the minutes of that taken by a man named Vaughan Borcovsky who was the, effectively the secretary, of this network, and those minutes are very important so I'd like to go to those and they are 301.1416.

So you'll see that there's a memo to the Board, so there's the Network and then there's the Board of that, by Mr "Borcovsky on the 4th of September recording the conference call on the 2nd of September attended by a number of people, including Mr O'Rourke. So the first point under number 1 is that

they got feedback from the other members of their network who are all very unhappy about Trade Me's strategy, and we see just in passing, five points down there, "Some expect possible one or more of the real estate groups to absorb the cost and try and use this as a competitive advantage against them, eg, Peros." That's Mike Pero Real Estate. And then they said, "They felt that realestate.co needed to provide marketing material they could use in their appraisals to clients," and there's an indented point that, "Peter," that's Peter Thompson, "expressed this material already existed." So that's a response to that point.

And then point 2 we don't need to go to. That's about the contract. Mr Borcovsky tasked to go back and then there's a couple of subpoints which are the response to that.

Then 3, there's talk about meeting with other groups.

4, there's talk from the PPL group about what they are doing. "Peter outlined the feedback from the PPL meeting." "PPL," so what he means by that is all of these big agencies, nationwide head offices, "have agreed to all up loads to Trade Me be 100% funded by the client." So when we talk about, for example, that Trade Me's change in policy was really a disaster for Trade Me, well, there's no doubt it was, but in part it was a disaster because there were collusive arrangements that were entered and the PPL members, of course, all admitted that they did reach a collusive arrangement. Well, that's just by the by.

We get down to 5 which is the general discussion, and the second bullet point is interesting. "Timing was seen as an issue. If we were to work together as an industry we need to ensure we don't create a situation where one group, for example, Ray White, are charging for Trade Me listings but another company is not as their Trade Me contract has," I think it means, "not come up for renewal." So a difference in timing.

And then there's a bullet point underneath that and there was some discussion at trial as to whether that should have been indented or not. I think

Mr Borcovsky said that might have been a mistake but, in any event, it catches the mood. "Jeremy," that's Mr O'Rourke, "expressed that we should become proactive with the companies in our areas to open dialogue and to ensure a joint approach." Now Mr O'Rourke said, "No, no, I wasn't meaning about anything like this. I was really just meaning about promoting realestate.co."

But then critically we come to point 6, and this is the critical piece. "Subsequent to the conference call Jeremy has communicated that he has contacted each residential principal in Hamilton and they agreed in principle to," number 1, "Only vendor funding for Trade Me listings." Number 2, "Advertise realestate.co in their weekly newspaper advertising." 3, social media platforms. "He will meet to confirm this will happen in the next two weeks." Turned out Mr King was out of town so they didn't have the meeting for four weeks, but, "He will meet to confirm this will happen in two weeks."

Now Mr O'Rourke denied that he would have said anything like this. Mr Borcovsky said, "Look, I make a handwritten note. I wrote up these minutes within a day or so of the meeting," and I think he sent them out on the 5th of September. I think they're dated the 4th of September. He sent them out on the 5th. I mean he said, "I would have just done that from my notes." He had no independent recollection of the call. He's just going off his notes. Mr O'Rourke denied it. However, he had to admit that he had called around his competitors at that time and there was an email on the 5th of September where he had sent the Trade Me presentation that New Zealand Realtors Network had received to Mr Lugton. Now Mr Lugton, for his part, could not recall that. He accepted he must have got the email but he just couldn't recall that. He recalled having a conversation with Mr O'Rourke but he – in his recollection it was much closer to the date of the meeting. I think my learned friend said yesterday that Mr Lugton's evidence was that there was no such agreement, no such agreement in principle. I mean the better way of putting that is that Mr Lugton could not recall it. He couldn't recall getting the email either and there's plainly proof of that. But as Mr Taylor noted yesterday, His Honour found that the specificity of Mr Borcovsky's notes is hard to gainsay. But we don't have just this note. We've got quite a bit more.

So there was another meeting of the New Zealand Realtor's Network Board on the 16th of September, and that's at 302.1463.

WINKELMANNN CJ:

302?

MR DIXON QC:

.1463.

GLAZEBROOK J:

Can you just wait a moment, please?

MR DIXON QC:

Yes.

GLAZEBROOK J:

Right, 1…

MR DIXON QC:

463. I should have said, of course, that Mr O'Rourke was sent a copy of the minutes of the 5th of September that he – containing the statements that he denied making.

We have this memo and the key part of this page is number 6. "Jeremy advised that the principals in his area had agreed to not offer TradeMe to vendors and only to put them on TradeMe if they request it." Now Mr O'Rourke denied saying that, denied that he'd reached any agreements, or agreements in principle, with his competitors at all then or later and as the High Court noted there's the note, this notation in 6 underscores the likely accuracy of Mr Borcovsky's 4 September note, and again Mr O'Rourke was sent a copy of these minutes by email and he responded to that email with a suggestion about some other way that they could deal with Trade Me. One of the things that they were talking about doing is maybe putting up the listings a couple of days later on Trade Me. Again, that's reducing the usability or relevance of Trade Me to benefit real estate. It's a small point, but he responded to the email containing the minutes that he –

WILLIAMS J:

Same day, next day or do you…

MR DIXON QC:

I think it's the same day.

WINKELMANNN CJ:

Your point is he didn't contradict this?

MR DIXON QC:

Correct. Yes, in fact, if we just go over a couple of pages, it's the next day. So he gets sent these at 17 September, see at 302.1465, so the next page. Mr Borcovsky sends it to him and 13 minutes later, if we go to 302.1466, he says, "I had a thought." So he's plainly received the email.

GLAZEBROOK J:

Did he deny what was said there or…

MR DIXON QC:

Yes.

GLAZEBROOK J:

As well?

MR DIXON QC:

Yes. Oh, sorry, in the email or in the…

GLAZEBROOK J:

No, in his evid –

MR DIXON QC:

In 6?

GLAZEBROOK J:

– because in the 4 September –

MR DIXON QC:

Yes, he denies this. Yes. "Have reached no agreement. Didn't say I had."

GLAZEBROOK J:

Have we got the reference? I don't need to be taken there but have we got the reference?

MR DIXON QC:

I will provide that.

WINKELMANNN CJ:

But that's not your case, is it, in any case, that they'd reached the agreements?

MR DIXON QC:

It is my case that they had reached an agreement in principle before the meeting. This was not an accidental meeting, not an accidental discussion.

WINKELMANNN CJ:

They'd agreed to try and agree?

MR DIXON QC:

They had agreed in principle and were going to meet to confirm it.

WINKELMANNN CJ:

Yes, okay.

MR DIXON QC:

Now there's another email or another document I want to take you to and that's from Joanne Baylis. Now Ms Baylis works for realestate.co.nz and realestate.co.nz was as you'd expect very interested in what Trade Me was doing and she was new in the job so she was going around meeting with people and on the – I think it's the 18th of September. We'll go to it, 302.1467 – she had a meeting with Mr O'Rourke and Mr Shale as well as a couple of administrative people at Monarch. So on the 18th she met with Shale and she met with O'Rourke and the Judge found this must have come from O'Rourke

and Shale. She said, “Two of my key Hamilton offices ready to group together and boycott. I too will bring my feedback to a meeting tomorrow.”

Now what’s also significant is that Ms Baylis made notes. She keeps a client relationship software and she made notes of her meeting with Mr O’Rourke on the 18th of September and she talks about that in her brief. It’s probably easiest to go to that because the other document’s an Excel spreadsheet. So her brief is 202.0266, and the page I want to go to is 0271, and I specifically want to take you to paragraph 5.10. So that’s 202.0271, and she says there she entered in her client relationship management notes, “Met with Jeremy to introduce myself. He’s a strong believer that feature and showcase advertising is a waste of time,” and so on, so on and so forth. “He is however very concerned about the Trade Me price increase and wants me to get ads together for him and all the local big wigs,” the other agencies, “to place in the local paper at their expense so that we can educate the public that our site is where you will go to purchase real estate.” Now the reason I raise that, “He wants us to get ads together for him and all the local big wigs,” is if you recall note 2 of Mr Borcovsky’s note from the 4th of September about the agreement in principle, it’s about that they will put ads about realestate.co in the *Waikato Times* in their local weekly advertising. So he is saying effectively something consistent with that to Ms Baylis on the 18th of September, that’s consistent with the agreement in principle and supports the Commission’s proposition that Mr Borcovsky has faithfully recounted what Mr O’Rourke said.

WINKELMANNN CJ:
Why does it support that?

MR DIXON QC:
Because…

WINKELMANNN CJ:
Mr O’Rourke doesn’t dispute that he was promoting, keen to promote the realestate.co.nz ads –

MR DIXON QC:

No, but I'm focusing on the fact that Mr Borcovsky records that one of the three things that he's agreed in principle is that they will do this and here he is talking to the realestate.co person to get ads not just for him but for all the other local agencies, and I say that's consistent.

WINKELMANNN CJ:

Well, it's consistent with there having been discussion –

MR DIXON QC:

Yes.

WINKELMANNN CJ:

– is your point, is it?

MR DIXON QC:

Mmm. It's a small point but it aids in the accuracy and why it's hard to gainsay the accuracy of those minutes.

WINKELMANNN CJ:

So it's two points then?

MR DIXON QC:

Yes, and all of this communication leads us to the proposition that this is not an accidental discussion that just happened to occur in the course of a meeting. It was actually part of what they were meeting for.

WINKELMANNN CJ:

And what did Mr O'Rourke say about this?

MR DIXON QC:

That he just denies that. He says the meeting was only to advance realestate.co.nz.

WINKELMANNN CJ:

But does he – didn't deny what Ms Baylis is saying here?

MR DIXON QC:

I can't recall but my learned friend is saying he admitted it, so I'll go with what my learned friend – he admitted that he had that conversation with her, but –

MR TAYLOR QC:

You said he couldn't recall it but you didn't think it was, it was probably an accurate description of what he said.

MR DIXON QC:

He says, "I've," he said at 80 of his brief, "I recall meeting with her. I don't recall precisely what was said. I have no reason to doubt that her note accurately reflects our discussion."

ELLEN FRANCE J:

In her evidence she was a little unclear about quite what "boycott" meant?

MR DIXON QC:

Yes. She said that "boycott" was her word, not theirs. They didn't use the term "boycott", but it was her word for really the force of how they wanted to move away from Trade Me. It's – I suppose in some senses I attach more to the group together aspect of it, to group together and boycott, all right, a readiness to do that.

So then we get to the evidence of what transpired at the meeting on the 30th and it seems to be common ground that whatever the discussion was around the Trade Me price increase and the vendor funding that happened at the beginning of the meeting, and there was a discussion about the increased fee, how unaffordable it was and what the agencies planned to do about it. I just want to take you to some of the evidence about that and I'll start with Mr Lugton and his brief which is at 202.0297, and I want to start at paragraph 6.7.

GLAZEBROOK J:

Sorry, can you just give me the number again?

MR DIXON QC:

Yes, 202.0297, and I'm essentially here referring to paragraph 6.7 to 6.10 of his evidence. He says, "The meeting began with a discussion about Trade Me's price increase. It quickly became clear that all the principals shared the same view as me, that absorbing the cost of the price increase would have a significant impact on profitability." Each of the agencies were unhappy about it. "We briefly discussed what the cost increase would be for our businesses," and recalls Mr O'Rourke saying increase would be tenfold. He thought it would have a bigger effect on Lodge, and so on and so forth. Were unhappy about them catering to private sellers. That's a point I made before and that was an issue for him. "We discussed realestate.co and the option for boosting it," 6.9, "because we wanted it to become the main vehicle for Internet marketing." Hadn't really been promoted and so on.

"As part of the profile," this is 6.10, "As part of raising the profile of realestate.co we agreed that we would remove all of our property listings from Trade Me. We decided this would happen by 20 January 2014. Thereafter if a vendor wanted to list their property on Trade Me we were not going to deny it to them but it needed to be vendor pays. That was the agreement." That was the agreement. "None of the companies represented at the meeting wanted to bear the cost. There was a risk however that, unless we all took 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."

So that was his evidence-in-chief and by and large he stuck with that throughout cross-examination. He stuck with the idea that what they had reached was an agreement, and critically, and I'm just jumping ahead just slightly, Mr Lugton's evidence on this was supported by a contemporaneous document, and I want to take you to that and that is document 302.1520.

GLAZEBROOK J:

302 point?

MR DIXON QC:

1520. So this is dated the 17th of October. 302.1520. So there is this meeting on the 30th of September and it's also common ground that there was another meeting on the 16th of October attended by some of the agents, agencies, but not all of them, well, some of the representatives but not all of them, and the day after that meeting Mr Lugton sent this email, this memo to his sales team. He said there was no connection to the 16 October meeting, it was just that they met every two months. It was time to tell them this. So this is what he says to his sales team, "Due to a massive price increase, continued dissatisfaction with sharing a property portal that caters to private sellers, and the inflexibility and inability of Trade Me to display property in a quality manner all Hamilton real estate companies have agreed to stop supporting Trade Me for property promotion from January 2014 onwards." Then he goes on to say they've all agreed to do some things with realestate.co, and then there's the bullet points: "All of Lugton's listing will be removed from Trade Me by 20 January," and then five down, "From 20 January onwards Trade Me advertising will be solely at the vendors cost at $159 and Lugton's doesn't want salespeople to proactively offer it to vendors. If they insist on it they must pay for it." Then he said that's – he was asked why. He said all the Hamilton agents had agreed and he said, well, "Because I thought there that was the strength of the understanding that that was what was going to happen." That was the strength of the understanding from the meeting that that was what's going to happen. He said that at page 202.0362.

So under cross-examination it was put to Mr Lugton that there wasn't any agreement and it was just an inference he took from what people were saying, and I think it's important that we go to that. That's at 202.0331. Now you'll see probably at – he's asked a question at 12, "So rather than there being some agreement or some sort of moral obligation imposed on you, the inference that you drew from the meeting was nobody wants to absorb this, pretty obvious to me they're going to go to the vendor funded model, correct?" He answers that, "Yes."

Now if I can just take you to my learned friend's index to the notes of evidence for a moment, if you turn to tab 1 of that and go to page 4, you'll see in the second box on that page the last two lines he –

GLAZEBROOK J:

Page 4 of what tab, sorry?

MR DIXON QC:

1. They're numbered at the bottom.

GLAZEBROOK J:

No, that's all right. I missed the tab.

MR DIXON QC:

You'll see here there's the question and answer there and then it stops, and if we go back to the transcript what you'll see is…

GLAZEBROOK J:

You'll have to tell us where it is again, sorry.

MR DIXON QC:

I'm sorry, 202.0331, there's the next bit is, question at 17, "And it wasn't an agreement. It was simply an inference, an obvious inference form what people were saying, correct?" "Well, there was a plan to – how we were going to do it." "Pardon?" "There was a plan of how it was to be enacted." And then, that's my point, he says there's a plan. The next question is, "Right, but in terms," and it goes on from there, and if you go back to my learned friend's document you'll see that their next box picks up right there, and I just make this point because I – it's important to be a bit cautious with this document because it is expressly only the evidence that supports their case and they have excised from it evidence that doesn't support their case. My learned friend was quite frank about that.

WILLIAMS J:

But that was his, his point was that was because the Court of Appeal had said there wasn't any.

MR DIXON QC:

His point of – no, what I'm talking about is he's leaving –

WILLIAMS J:

But his point wasn't to give you balance.

MR DIXON QC:

Wasn't any, yes, yes, I –

WINKELMANNN CJ:

We know what you're talking about.

GLAZEBROOK J:

Well, you just show us where the other evidence is.

WILLIAMS J:

It was to rebalance the imbalance.

MR DIXON QC:

Exactly. But I guess my point is this. When he has these are the excerpts on the meaning of vendor funding, it's only the one.

WINKELMANNN CJ:

We've got your point, Mr Dixon. We've got your point.

GLAZEBROOK J:

You just show us where, like you are doing now, where there's bits left out and that, well, then we'll have the full picture.

MR DIXON QC:

I will –

WINKELMANNN CJ:

Because Mr Taylor did say that there was evidence to support the other view.

MR DIXON QC:

Yes, and I'm just saying –

WINKELMANNN CJ:

He didn't say **(inaudible 11:46:49)**.

MR DIXON QC:

– this is how – this –

WINKELMANNN CJ:

So you're saying take care with this material, remember it's got parts excised it?

MR DIXON QC:

Correct. That's exactly what I'm saying. So –

ELLEN FRANCE J:

He did accept yesterday that there was the reference to the plan.

MR DIXON QC:

Yes. You asked him that. You put that point to him as I recall. So when – I'll leave it at that. And then he – I'll go to those immortal words of his at 202.0337. it's just at the bottom of the page at 22, "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 the meeting that restricted you from doing that?" Answer, "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 the other." "Well, it's not one or the other, is it, Mr Lugton, because you could go out and agree to pass on part of it, or all of it or share it, couldn't you?" "Well it wouldn't be in the spirit of what the understanding we had in the meeting." So that's what I wanted to focus on with Mr Lugton. He was pretty clear about what he thought had occurred.

I now want to talk about Mr Coombes and his evidence is at 201 starting at .0195. 201.0195, and I'm really – he starts talking about the meeting at paragraph 7 and that's really by way of background but we pick up his discussion about what the meeting involved the next page at paragraph 7.8 which is on page 201.0196. So he says the meeting began with a discussion

about Trade Me's price changes and the financial impact. Recall some agencies cited increases in the region of 200,000. That's consistent with the O'Rourke number, although Mr O'Rourke says no one gave any numbers. "Although I can't remember which agency representatives said that." It was likely one of the big guys. "I recall everyone was upset at the huge price increase, no one was happy to continue to absorb the cost should they continue to pay for Trade Me listings themselves. None of the attendees at the meeting were prepared to bear the costs themselves, which led to the understanding, discussed below." Do not recall there being any discussion at the meeting that any of the attendees were in negotiations. "There was a discussion about agencies no longer posting listings on Trade Me. There was also a discussion about agencies removing listings from Trade Me. I was left with the clear impression that as a result of those discussions an understanding was reached by all present that we would remove our standard listings from Trade Me by early 2014. (While I don't recall the exact date, there was consensus that everyone would pull their listings from Trade Me around that time.) 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." "Certainly, coming out of the meeting, I had the expectation that this is what we would all be doing," and, "After that understanding was reached, the discussion turned to ways to promote realestate.co." So that was his evidence. Just while we're there – actually, I'll come back to that when we talk about Mr Coombes in more detail.

I now want to talk about the cross-examination of Mr Coombes and I want to pick that up from 201.0216 and there's some key pages here that I want to take you through. So at 201.0216 Mr Coombes is under cross-examination from Mr Taylor and I want to start at the top of the page, and he says, "Now when you came to the meeting there was a brief period at the beginning wasn't there where a lot of people were expressing their views about what Trade Me was doing, is that fair comment?" "That's correct." Then there's a little back and forth about the type of person he is, and we get to line 17, "Now as best you could recall of the meeting was it a sort of shall we say a free for all in the sense that people were chipping in, in that early part of the discussion?" He says, "I think it was, I think it might have gone – you know,

it's a long time ago now but I think it would've gone round the table and everybody had a little, had their little piece and there was a bit of just interjecting and throwing things around the table but it wasn't like a formal board meeting or anything like that." That's how he described it.

So if we just go forward a couple of pages to 201.0218 and at line 14 he's asked this question. "You say you indicated your intention that you weren't going to list in the future with Trade Me for standard listings, correct? That was your intention that you indicated at the meeting?" He says, "We indicated that we were going to withdraw all of our properties off Trade Me." "Right. Did you –" "And that included – this included the subscription model. That was the basic, not –" "Not feature –" "Not feature." "Okay. And it was you that disclosed that?" "I can't remember. It was one of us." Either him or his business partner. He was there with his business partner. "Right. Did you say, 'We're going to withdraw these listings now'?" and he said, "No, I think we said – not I think. We did, we said that we would take them off sometime in January the following year."

And then we go from that across the page to the next page at line 12. "So as best you can recall, you indicated at the 30th of September meeting that you intended to withdraw. You, yourself, intended to withdraw your listings?" Answer, "That's right." "In January, is that what you're saying?" "That's right." "You didn't give any sort of – you didn't give any commitment to do that. You were simply indicating your intention, is that right?" "Yeah, and we did, along with everybody else because we all agreed around the same thing." "All right." "On the same thing, all around the same date."

If we go over the page there's a bit of material at the top of page 220. He says, "I don't think there was an agreement. Let's just tidy that up because there wasn't an agreement." But he's a bit confused because, "There wasn't an agreement to?" Answer, "There wasn't an agreement for us, for everybody to take their properties off Trade Me. We didn't have a formal agreement. Nothing was signed or anything like that," and he's a real estate agent, all right, knows you've got to write things down. "Okay, so there was no written agreement?" "No." "Or contract?" "No." "But was anybody in that

room giving you any sort of commitment that they would do it?" "I believe so but that's my opinion." "Yes." "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 with you." "And when you say you believe somebody gave a commitment to do it in January, do you recall who gave that commitment?" "Well, my opinion is that we all gave it but I could be wrong." Just want to drill down into that. "For there to be any sort of commitment that you're even morally obliged to stick to, it has to be essentially between at least you and one other person, correct?" "Correct." "And what I'm asking is well, you expressed a view or intention that that was you were going to do?" "Correct." "Who in the room said, 'I agree with you and I am giving you my assurance that I'm going to do the same thing'?" "My understanding was that it was everybody who was in the room."

And then there's a bit more back and forth and we go over to the middle of the next page and he's asked a question about Mr O'Rourke at line 18, "Do you yourself recall Mr O'Rourke saying to you, 'I hear what you're saying. That's your intention. I'm going to do that too'?" "No, I'm, I'm not going to say that." I think is what my learned friend referred to yesterday as him refusing to answer the question. "All right?" Answer, "Because I've just, it's my opinion. I'm not going to cross you or cross Jeremy because in my heart of hearts I can't do that." "So is it fair to say that at the meeting the general tenor of what you heard, bearing in mind that people were talking across each other and at different times, the general tenor of what you heard was that people were strongly objecting to the proposed increase and your impression was they weren't going to or didn't want to absorb the cost?" "Correct." "And that was just an expression of opinion?" "Mmm." "And is it true that because people were talking across each other at the hearing you couldn't always hear what other people were saying?" "That's possible, yes." "And certainly you never gave any commitment or assurance," he goes back to this, "you never gave any commitment or assurance to anyone in the room that you were not going to absorb the cost did you?" "I think we did. I did verbally." "Well, it doesn't matter whether it's verbal or written." "No." "But we're just talking about that meeting. At the meeting you expressed an intention, didn't you, you couldn't yourself afford to" – "or a view you couldn't yourself afford to absorb the price?" "Correct." "And you weren't giving any commitment or assurance to

anybody else that you were going to move to this vendor funded model that Trade Me is putting up, did you?" "I think we did. Ray White Hamilton did." "Well when you say Ray White Hamilton gave a commitment at that meeting you'd already decided before you went to that meeting, hadn't you, that you're not going to?" "Correct." "And are you saying in this discussion at the beginning of the meeting indicated there was no way you were going to absorb this cost?" "That's correct, yep." "And you were doing at that point saying, 'This is my strong view, there's no way we're going to do it,' correct?" "Correct." "And you didn't sit down and have a discussion and say, 'Well, we're going to move to the vendor funded model. We're going to pass on all the costs.'" You know, pass on costs to yourself. "'Pass on all the costs.' There was no discussion of that nature, was there?" "That did come up." "And when you say that came up, did you say that?" "I can't say that. Honestly, I don't know whether I said that myself but I know it was part of the conversation." "So did some people say, 'We're going to pass on all of the cost'?" "For Trade Me, yes." Over the page. "So who do you say said that?" "I think, you know, I mean what do you want me to do? Point people out?" "Yes." "I think we all said that.

WINKELMANNN CJ:

How much further of this are you going to read, Mr Dixon?

MR DIXON QC:

This is the last page. But this is – I mean the reason I –

WINKELMANNN CJ:

Because you're not getting to the bit where he says he's really talking about feature ads which is the bit that Mr Taylor took us to?

MR DIXON QC:

Yes, I will come to that.

WINKELMANNN CJ:

So perhaps that would be useful.

MR DIXON QC:

So let me just – well, bear in mind he's talking about withdrawing listings as well, right? So he's talking about commitments being made, assurances being given, and my learned friend advances the proposition that there's no evidence anyone was going to do any of this stuff. There's no evidence of any assurances.

WINKELMANNN CJ:

He refused to say that. Mr Taylor said he wouldn't say that there was no evidence.

MR DIXON QC:

All right, well, he's made some fairly categorical statements and I think the significance in this last little piece, he says, "I think we all said that. We all spoke about that."

GLAZEBROOK J:

So, sorry, I've gone forward to the feature listing. So which page are you on now?

WINKELMANNN CJ:

Most of us probably –

MR DIXON QC:

I'm still on 176 or 223. Just to finish this off. "Well the reason you would go from Trade Me to realestate is people want this vendor funded model that the idea was that you promote realestate as a competitor?" "Yes absolutely." "Are you saying that your assumption at the meeting was that most of or everybody might or had indicated a view which suggested they were going to transfer to this model?" "Mhm." "That was your understanding?" "That was totally my understanding." "And you saw that as a good reason for why you would promote this competitor, realestate.co, that could provide similar service to your vendor, is that right?" "That's right because it was a subscription model, it was going to be cheaper." "It was the obvious thing to get behind, wasn't it?" "Absolutely." "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?" "Well, I'm pretty sure we did."

So he talks about commitments and assurances all about withdrawing listings and passing on the cost, and he's saying it's what they all said. Now my learned friend's made the point, and he's right, and I accept that, that during the course of his cross-examination Mr Coombes said, "The deal was we would all withdraw our standard listings and thereafter we would vendor fund feature ads rather than what the Commission says which is we'd vendor fund standard ads." They were already vendor funding feature ads. So it was the change from absorbing the cost of standard to vendor funding, that means the standard listings, and he described it in his evidence, and I accept he did describe it as, "No, no, we were talking about vendor funding feature listings." But that is, with respect, an error by Mr Coombes and an obvious one and an understandable one, and it was nothing more than that. Now the fact it's an error is apparent from until that point he had been talking about the standard listings and that's what's in his brief which I took you to at 7.9 and 8.6. So I'll take you to that. He talks – that's at 201.0197.

GLAZEBROOK J:
Do you clarify this on re-examination?

MR DIXON QC:
I did attempt to, yes, by –

GLAZEBROOK J:
But not very successfully?

MR DIXON QC:
Well, just it becomes jumbled –

GLAZEBROOK J:
No, sorry, you'll take us to that after the brief, will you?

MR DIXON QC:

Yes. I mean I think what I would say about that is it's an obvious error and it's an understandable error and the reason it's an understandable error is sort of two things, and I'll get to the second one in a moment, but the first one I would say is that Mr Coombes was obviously uncomfortable giving his evidence and when you read the start of his evidence you see that, you see the way he says he's nervous and things like that. He didn't like, apparent from this, giving evidence against his friends, including Mr King, to whom he apologised in the course of his evidence. So I'll come back to that point.

So what I'm talking about is 7.9 and what he says in 7.9(a) is that, "We would" –

GLAZEBROOK J:

You'll have to tell us where it is.

MR DIXON QC:

Sorry. 201.0197. And so it's a combination of paragraphs I need to go to to make this point. So in 7.9(a) it's, "We'd remove our standard listings from Trade Me by early 2014," and then (b), "If any vendors wanted to list on Trade Me after that date, they would need to pay for it." Right? So that's that point. We need to couple that with what he says at 8.6. Now I'll read that and then I'll give you some background. "This decision was made because Mr Glasgow and I wanted to keep faith with the understanding reached at the meeting on 30 September 2013 that the agencies would withdraw their listings and not pay for the standard listing prices going forward." The vendor fund the standard listings.

WINKELMANNN CJ:

What paragraph was that, sorry?

MR DIXON QC:

8.6. So anyway perhaps let me explain why it's understandable and put some context to this.

GLAZEBROOK J:

Can I just – what I'd thought was the submission made was that Mr Coombes, whatever his understanding was, that's what they'd decided to do, that they weren't going to provide standard listings, they were only going to provide feature ones and feature ones, they were going to make the sellers pay for them but that is fairly well in line with what they were doing in any event.

MR DIXON QC:

Yes.

GLAZEBROOK J:

So why is it a mistake – it might be a mistake in terms of what he thought the meeting was talking about, but it's not a mistake in terms of what he was doing which is what I thought Mr Taylor's point was or do you say they were doing something else?

MR DIXON QC:

They had to do something else and so let me explain that point. So we say the arrangement was around standard listings and we say that's what all of the witnesses say and we say that's Mr Coombes said in his brief and I'll take you to the summary of facts that Online admitted when it filed its admissions as well, where it says the same thing and –

GLAZEBROOK J:

Certainly he agrees the agreement was to remove the standard listings from Trade Me, that's what he says.

MR DIXON QC:

Yes and then in 8.6, vendor fund, which is what he means by not pay.

GLAZEBROOK J:

But doesn't he say vendor fund to them meant vendor fund the feature?

MR DIXON QC:

Yes he does say that.

GLAZEBROOK J:

Well did he mean that? Did he make a mistake because they were actually going to vendor fund the standard?

MR DIXON QC:

No.

GLAZEBROOK J:

Or did he not make a mistake?

MR DIXON QC:

No.

GLAZEBROOK J:

I can understand the argument make a mistake about what the agreement was or understanding, is that what you're saying the mistake – okay, that's fine.

MR DIXON QC:

Yes.

GLAZEBROOK J:

This wasn't a mistake about what he was going to do?

MR DIXON QC:

Correct but because of what he was going to do, he made a mistake about what the agreement was, that's what I'm saying.

GLAZEBROOK J:

No I understand that submission, I just didn't understand the submission that he made a mistake about what they were going to do.

MR DIXON QC:

No he didn't.

WINKELMANNN CJ:

But you're saying he didn't make a mistake about the agreement, he made a mistake in answering Mr Taylor, because he says the agreement is about features?

MR DIXON QC:

He made a mistake about the agreement at that point in his evidence.

WINKELMANNN CJ:

Which point? In his evidence?

MR DIXON QC:

When he was under cross-examination.

WINKELMANNN CJ:

So you're saying his evidence was mistaken, not that he was mistaken about the agreement?

MR DIXON QC:

Correct, because he correctly stated the agreement in his brief.

GLAZEBROOK J:

Well where does he say that that was – vendor funding was a standard?

MR DIXON QC:

In 8.6.

GLAZEBROOK J:

I don't read it that way.

MR DIXON QC:

"I wanted to keep faith with the understanding reached at the meeting on 30 September 2013 that the agencies would withdraw their listings and not pay." You can translate that into vendor funds.

GLAZEBROOK J:

No well not really because if he thought that it meant they would only have feature listings, they'd withdraw them and only have feature listings, that's not inconsistent with that, ie they would vendor fund the feature listings from then on.

MR DIXON QC:

Well with respect I don't read it the same, I don't read that the same way.

O'REGAN J:

It says "standing listings".

MR DIXON QC:

Well now they were certainly going to withdraw the standard listings, that's what he said all along.

O'REGAN J:

And then he says, "Not pay for the standard listings going forward."

GLAZEBROOK J:

But they weren't going to be paying for the standard listings because the only thing they would do is feature listings is what he had decided to do.

WINKELMANNN CJ:

So when we go back to your other paragraph, you say we need to read with it, he says so there's also that ambiguity because he'd, if you feed in his determination that from that date on he was only going to use feature listings.

O'REGAN J:

Well he talks about removing standard listings in the previous paragraph.

WINKELMANNN CJ:

No but Mr Taylor's point which I'm trying to get you to respond to is that Mr Taylor says sure you'll withdraw standard but if he's talking about he committed to do, he himself had decided only to list feature listings from that point on. So if you feed that into the middle of this, if you read that in that

context, Mr Taylor's point is that he was saying, and if people wanted to list for the feature, they would have to be paying for it.

MR DIXON QC:

Right. Let me take a step back and provide some context because I think this may assist so please just bear with me for –

WINKELMANNN CJ:

Well I'm only asking you for your response.

MR DIXON QC:

So Online, unlike the other agencies, didn't have a direct contract with Trade Me. Lodge, Monarch and all those guys had their own individual contracts with Trade Me. So when Monarch for example cancelled its Trade Me agreement in January 2014, even though it had three months to go, it could do that and it stopped paying Trade Me. So it could immediately move to vendor funding for standard listings. Online had a different arrangement, their contract with Trade Me was through the Ray White head office. So while Online made a decision to no longer offer standard listings and withdraw its standing listings, it withdrew its standard listings, it still had to pay for them, because it had to pay its head office, so tens of thousands of dollars each month it was paying when it could have had free listings on Trade Me and it chose not to do so.

WINKELMANNN CJ:

Chose not to do which?

MR DIXON QC:

Not to have free listings on Trade Me. It makes no commercial sense for it to have done that, right, so it's getting them for free until June of 2014.

GLAZEBROOK J:

Well when you say "free", under the subscription model.

MR DIXON QC:

Under the subscription model and it chose not to and as Mr Coombes says in his brief at 8.6, we did this to keep faith with the understanding. They withdrew all their listings. Now under the Real Estate Agent Rules, you cannot charge somebody effectively a charge that you can't identify as a separate charge. Right, so you've got to tell them we're paying this, so the charge is that, okay. Because Online was paying Ray White, had it sought to vendor fund standard listings, it would be in breach of the Real Estate Agent Rules, it couldn't do that because it didn't have a number that it could say it was paying for any individual person.

GLAZEBROOK J:

Some of them did pass it on though, didn't they, they had a charge? Were they in breach of the rules?

MR DIXON QC:

No because they had a method, because of their direct –

GLAZEBROOK J:

Well they could've had a – I mean they could've worked it out here couldn't they?

MR DIXON QC:

Well that's not what –

GLAZEBROOK J:

They didn't think they could?

MR DIXON QC:

That's not what they said. So what their workaround was –

MR TAYLOR QC:

We're concerned here –

MR DIXON QC:

No let me finish.

MR TAYLOR QC:

Because what my learned friend is putting to you was not evidence that was given by Mr Coombes, that the reason that they decided not to transfer, not to offer these listings was because of that. There's no evidence by Mr Coombes in respect of that or this sort of rationale. My learned friend is trying to put it forward to you as a possible explanation but it's not something that Mr Coombes gave evidence on.

WILLIAMS J:

Is the relationship, the funding relationship between Ray White and Online not in the evidence?

MR TAYLOR QC:

No the relationship is and the fact that they –

WILLIAMS J:

Well isn't he allowed to infer the explanation from that? He doesn't need direct evidence on that.

MR TAYLOR QC:

Well as long as long as it's just clear that that's what it is, it's just inferring an explanation because it's not –

WINKELMANNN CJ:

Well I don't know that he is allow to infer an explanation from it actually because the explanation should be in the evidence and I must say I'm struggling to understand the explanation.

MR DIXON QC:

Okay, this is in the –

GLAZEBROOK J:

Sorry, perhaps can you just put in, rather than take us through the evidence this way, can you just put into words what you say the inference is, like in reasonable words.

MR DIXON QC:

Okay, so it's really probably I hope best explained in document 101.0158.

GLAZEBROOK J:

Can I just check, are you explaining why they didn't charge it on during that period or why they did or what the answer was?

MR DIXON QC:

In the shortest point, they couldn't legally vendor fund standard listings, so instead they vendor funded feature listings to keep faith with the agreement which is what Mr Coombes said.

GLAZEBROOK J:

I don't think that's what he said at all actually. I think he said they withdrew it to keep faith with the agreement when they could have just kept them on. I can understand that.

MR DIXON QC:

Yes, yes.

GLAZEBROOK J:

But I can't understand the keeping face with the agreement you charge the feature bit.

WILLIAMS J:

Your point is they couldn't on-charge because that would've been in breach of the rules, the only thing they could on-charge was feature listings because they were always on-charged, so they're committed to that.

MR DIXON QC:

And they had a price.

WILLIAMS J:

Until the Ray White deal fell over in which case they could go back to the cartel deal you say.

MR DIXON QC:

Correct, that's exactly right.

WILLIAMS J:

Well not fell over, terminated.

WINKELMANNN CJ:

Yes, so you're taking us to an evidential basis for that in the agreed statement of facts?

MR DIXON QC:

Yes, so this is 101.0158, "Giving effect to the Hamilton agreement. Pursuant to the Hamilton agreement on 20 January 2014 Online withdrew all of its existing standard listings. Also pursuant to the Hamilton agreement, Online ceased to provide Trade Me listings. This is despite the fact that due to the nature of Ray White's online called One system and the incorporation of –"

GLAZEBROOK J:

So I just was noting down the point you were making which I now understand, so where are we now?

MR DIXON QC:

I'm sorry, 101.0158, paragraph 7.1 and I'm just reading 7.1 to 7.4.

WINKELMANNN CJ:

So your point is that for him the agreement was feature listing because of the contractual peculiarities, that's why he answers Mr Taylor in that way at that point?

MR DIXON QC:

Correct, that's exactly it, that he's mistaken about the scope of the agreement because of the nature of the way that they gave effect to it.

WILLIAMS J:

Well isn't it just that this is the way the agreement is affecting him because he was in a slightly different, well in a potentially significantly different position and that's what it had to mean for his business.

MR DIXON QC:

Yes, that's one way of putting it.

WILLIAMS J:

The question is what it meant for his business is what it must have meant for every business.

MR DIXON QC:

Well yes and so I've interpreted 8.6 of his brief where he says, "I wanted to keep faith with the understanding reached at the meeting that the agencies would withdraw their listings and not pay for standard listing prices going forward", that that's what he was trying to do.

WILLIAMS J:

That was the overall agreement and he was trying to stick as close to that?

MR DIXON QC:

That was the overall agreement.

GLAZEBROOK J:

But is his submission that he knew what the agreement was, he said what the agreement was and when he said that the agreement was for feature he was mistaken or is it because he had done it this way, he thought everybody agreed to do it that way?

MR DIXON QC:

No my submission is he was mistaken because on my reading and I know Your Honour has a different view of it but on my reading of what he's saying in his brief and the summary of facts –

GLAZEBROOK J:

Right, so you say he was right on your reading which is that they'd agreed to vender fund standard, he was right in his brief but wrong in his cross-examination?

MR DIXON QC:

Correct, that's exactly it and he was asked questions about –

GLAZEBROOK J:

But that depends on the reading of the brief.

MR DIXON QC:

Correct.

GLAZEBROOK J:

And does it matter really?

MR DIXON QC:

Well in my submission no because what really comes out of this is that whatever he was talking about he's very clear that there was commitments and assurances and so forth being made which is fundamentally inconsistent with my learned friend's case and I – my learned friend made a suggestion, well, maybe those words in cross-examination had come from the preparation of the brief and weren't his words and he rejected that quite tellingly, I think, and the reference for that if you need it is 201.0250.

WINKELMANNN CJ:

Point 0, sorry?

MR DIXON QC:

201.0250. And the point I make about this – well, actually, I'll take you to it because it helps make the point that his brief, if my interpretation of it is right, is a solid document, and what he says is, at 201.0250 at line 8, he was asked, "AS part of that process you signed a brief of evidence?" I think this is re-examination. "Correct." "And that's the brief you read today?" "That's right." "Tell us about the process involved with the preparation of that brief."

"The brief that I understand was prepared through our solicitors in Hamilton and representatives of the Commerce Commission," or their lawyers. "And did you see copies of that in draft?" "I did."

WINKELMANNN CJ:

I mean do you have to read us – you don't have to read it. It's him confirming that he's happy with the contents of his brief?

MR DIXON QC:

Yes, and he even goes further though because he specifically goes to this word "faith" at the bottom of the page. You know, "To tell the truth and that's what I'm here for, can I just go back, there might be one word in there that was – that some people are unhappy about and that's the word 'faith'. It wouldn't have been my choice of words but I like it, I understood it, I read it and I accepted it." So my point –

GLAZEBROOK J:

So where was the "faith" used?

MR DIXON QC:

In 8.6, in that paragraph, that he did it because he wanted to keep faith with the understanding and he describes what the terms of the understanding are, in my submission, in 8.6.

GLAZEBROOK J:

And that's what he's referring to, thank you.

MR DIXON QC:

Yes.

O'REGAN J:

Is there any evidence about what they actually did? So is the evidence that in fact there were no standard Trade Me listings from his agency?

MR DIXON QC:

I believe that's the evidence, yes, that they were feature listings only.

So the next witness is Mr Shale from the Bayleys franchise and his evidence in his brief is at 202.0372, and I'll go over that briefly because I want to move ahead to the –

WINKELMANNN CJ:

Sorry, 20?

MR DIXON QC:

202.0372, and I'm picking up really at paragraph 5.10, and he says there, I'm really looking at paragraphs 5.10 to 5.14, he described it as what he called an "uncover", that they were trying to, the larger agencies were trying to find out what was happening, what they were doing. He says there that piece that the Court of Appeal picked up on that when he was first interviewed he said he got the impression he was invited to try to reach some sort of consensus on a common approach so that everyone would be on the same page and he didn't recall it like that now but he accepted –

WINKELMANNN CJ:

Sorry, what paragraph are you at?

MR DIXON QC:

5.10. In essence that was Mr Shale's evidence, and it's fair to say that his view was more that this was an uncover that confirmed decisions that people had made beforehand and that's probably as high as he put it.

WINKELMANNN CJ:

So he was your witness?

MR DIXON QC:

He was. The Commission elected to call one representative from each of the agencies who was at the meeting.

WINKELMANNN CJ:

So you took the approach that you were going to call him notwithstanding that that wasn't particularly helpful to your case?

MR DIXON QC:

Exactly.

ELLEN FRANCE J:

Mr Dixon, is 202.0393 the best example of where he gets to and what "uncover" means?

MR DIXON QC:

I think question and answer is a fair way of putting it but certainly I think there was, and highlighted by the Court of Appeal really, a difference between what Mr Shale had said to the Commission and what he said or was prepared to say in his brief of evidence and that's why that paragraph 510 is written essentially the way it is and he was very clear, he thought they were trying to find out what he was going to do to get a – and that was about uncovering. He stuck with that, the uncovering part through his evidence. He also had in a –

WINKELMANNN CJ:

He also says about pressure.

MR DIXON QC:

Yes and I'll come to that. I mean he felt he was under pressure and he also talks at 7.1 of his brief and I'm sort of jumping ahead in my narrative about a call from Brian King from Monarch, so that's at 202.0374. So the evidence here is that Mr Lugton, in his brief of evidence, was keeping track of who had withdrawn their listing and was vending funding and who wasn't and he worked out that he'd withdrawn his listing and was vendor funding, Lodge had and Monarch had and Online, Mr Coombes and Success, Mr Shale, hadn't and he called Mr King and complained about this. That's in his brief of evidence. We then have the evidence from both Shale and Coombes who said they got calls from King saying, "Why haven't you withdrawn your listings?".

GLAZEBROOK J:

Have you got the. I don't suppose it matters, but the reference for the Lugton part of that?

MR DIXON QC:

Yes.

GLAZEBROOK J:

And a page number.

MR DIXON QC:

It is 202.0301 and it's 8.6.

GLAZEBROOK J:

And I don't think we were taken to where Mr Coombes said he'd had a call and we might as well just get the reference now.

MR DIXON QC:

Yes.

GLAZEBROOK J:

Oh only if it's really to find.

MR DIXON QC:

I should be able to find that fairly easily.

ELLEN FRANCE J:

201.0187.

MR DIXON QC:

Yes. Yes, so 8.2 on 201.0197.

ELLEN FRANCE J:

0187 isn't it I think?

MR DIXON QC:

Oh yes sorry. I worked off the confidential version of the brief, there's both a confidential and a non-confidential, it's just easier to work off that because it's got numbers in that that aren't in the public, but same points paragraph 8.2, "I get a call from Brian King, you buggers have still got your stuff on Trade Me." So that's sort of jumping ahead to things that had happened after the meeting

but that's – so Mr Shale's evidence about that we thought, we submit is consistent with there being an arrangement, certainly Mr King thinking they have an arrangement that they would get their listings off Trade Me.

So in terms of the evidence from the defendants, and I think it's fair to say that by in large they denied reaching an arrangement or understanding, I've taken you through Mr Singh's points but in that evidence and in those citations, those pages that I took you to, he does accept that there was a roundtable discussion where everybody said what they were going to do. This is the same sort of evidence that Mr Coombes had given.

So then there's Mr King, also from Monarch and he accepted that vendor funding was discussed at the 30 September meeting and that he may have asked others what they were going to be charged for Trade Me. That's at 204.0806. We'll go through a couple of things that Mr King has to say. 204.0806, and it's just really at the top of that page, .0806, just he accepts that he may have done that and at 204.0834 he accepts that – "Then you were asked, did everybody say what they were going to do and you said, 'Pretty much so, yeah.' So everybody was saying what they were going to do? Yeah they were, everybody was saying they couldn't absorb the cost, it was ludicrous, yeah."

Now in his interview with the Commission, Mr King had said this and I'll read it to you, you don't need to go to it because I then cross-examine him about it and I want to take you to that part but he said this at, and the document, so you have it is 304.2019 and he said this, "You know, there was talk around the table from, there was Bayley's there was, you know, there was consensus, hey that's what Trade Me wants us to do, well hey let's do it. That's what Trade Me wants us to do, let's do it, let us do it."

GLAZEBROOK J:
And is that the reference to vendor or seller finance, is it?

MR DIXON QC:
Yes exactly, exactly and this is picked up in the cross-examination at 204.0824 where he starts towards the bottom of that page, 204.0824, when

he says that – I'm asking him questions about what he'd said in his interview, about who brought things up, would have been either the Lodge or someone from Lugton. "I think they knew more than we knew at that stage." Still hoping that Harcourts would pull out the trump card. Then we get to the point, "You know the, there was talk around the table there was Bayleys there, you know, there was consensus." He said – I said to him, "Do you accept you used the word consensus?" and he says, "I think there was consensus right around the country, right through Hamilton," through Hamilton, through the Hamilton agencies, "that if it went to the figures that everyone was talking about it was not going to be absorbed." Right, and then I said to him, "Well, there was, you know, at the meeting on the 30th, so not talking about the rest of the country, we're talking about this meeting, there was consensus?" He interrupts me a bit as I read that through, and he says, "Consensus was the wrong word." I put to him, well, it's his word, and he says, "I think there was consensus that if it was going to get to the levels that people were talking it was going to be unaffordable to be absorbed into the businesses."

I put to him again, "There was consensus, hey that's what Trade Me wants us to do, well, hey let's do that, let's do it." Put to him there was consensus and he denied it. Accepted as far as it goes that there was consensus that it was going to be unaffordable and as His Honour found and therefore passed on.

Mr Couch and Mr O'Rourke also make some statements. They're covered in our written submissions. I probably don't need to take you to those in the interests of time. I guess the key point that we note in our submissions is that Mr O'Rourke accepted that what was being said was being conveyed to each other, so not just sort of an independent unilateral statement. They were being conveyed to each other.

WINKELMANNN CJ:
What, in a meeting they were talking to each other, is that the point?

MR DIXON QC:
Conveying what they were going to do to each other, not just saying it for the sake of saying it. So…

ELLEN FRANCE J:

Sorry but in terms of this witness he doesn't accept that.

MR DIXON QC:

He accepts the proposition at 22, "There was consensus that if it was going to get to the levels people were talking about it was going to be unaffordable to be absorbed into businesses," and His Honour found and therefore that meant that it was going to be vendor funded, but he doesn't accept that there was consensus on the point that he had said to the Commission in his interview, and I rely upon what he'd said to the Commissioners in his interview as a more unguarded statement.

GLAZEBROOK J:

0822, where do you – where were you reading from? What line?

MR DIXON QC:

Sorry, I was reading from line 22 on 0825.

GLAZEBROOK J:

Yes, all right.

MR DIXON QC:

So there were several documents after the meeting that I wanted to emphasise to you. I've already taken you to Mr Lugton's memo to his staff.

WINKELMANNN CJ:

Just before you move on to that, how do you feel you're going for time, Mr Dixon?

MR DIXON QC:

I need to pick up a little bit of speed but not too badly. I'd like to get through the facts a bit more quickly than I am so I will try to…

WINKELMANNN CJ:

Because after you've done this you have the legal test to deal with.

MR DIXON QC:

Yes.

WINKELMANNN CJ:

And your appeal points, issues that you're raising that Mr Taylor's responding to later.

MR DIXON QC:

Well, those are issues I'm responding to Mr Taylor on. I haven't – there's no cross-appeal.

WINKELMANNN CJ:

No, no, I know but I just saying what issues have you got to deal with yet after the facts?

MR DIXON QC:

Well, I want to talk about the *Giltrap* test and then I want to circle back to just why we say that this controlled the price.

WINKELMANNN CJ:

Right.

MR DIXON QC:

Which is essentially for the reasons that the Court of Appeal found.

WINKELMANNN CJ:

Okay.

MR DIXON QC:

So the documents that we can refer to are these, there's the Lugton document, there's the Shale document.

GLAZEBROOK J:

That's the one we've already been taken to is it?

MR DIXON QC:

We've been to the Lugton document. The Shale document you were taken to yesterday, that's where Mr Shale says, "We've made good progress on this one locally, we've got seven agencies committed to turning off the Trade Me fees." You were taken to that yesterday, it's referred to in our written submissions. We say that's consistent with our case.

Then there was a note from Ms Bayliss, who had met with Mr King and that note is important because she had met with him before the meeting on the 16th, so what this tells us is about what had occurred at the meeting on the 30th and I want to take you to that. Let's just go to her brief, it's probably easiest there, at 202.0273 and this is at 5.27 of her brief, 202.0273, so this is a note that she'd entered into her records and so she's meeting Mr King, "Jo met with Brian King to introduce myself. We talked about how come January, the whole of Hamilton real estate business will be using realestate.co.nz only. Him and other business owners in Hamilton have met and decided that they will all collectively move across."

Now that's come from Mr King to Ms Bayless. Mr King, Mr O'Rourke, they all deny that there was any agreement at the meeting on the 30th of September to withdraw listings or to vendor fund and yet Mr King is recorded as saying to Ms Bayless he and the other business owners have met and decided they will all collectively move across which is the withdrawal of listings from Trade Me.

WINKELMANNN CJ:

Is there anything made of the timing of the withdrawal of listings?

MR DIXON QC:

I beg your pardon?

WINKELMANNN CJ:

Is anything made by you of the timing of the withdrawal of listings?

MR DIXON QC:

Yes, because the appellants say look we just went to this meeting and we all just said out loud what we were going to do, there was no arrangement or

understand. Mr Lugton says well that's not right, there was a plan, there was a plan as to what we were going to do, when we were going to do it. So it's one thing to say I'm going to vendor fund, I'm going to vendor fund, I'm going to vendor fund and it's another thing to say okay when are we all going to do that and the decision made January 2014.

GLAZEBROOK J:

And when do you say that was made?

MR DIXON QC:

I say that that was made at the 30th of September meeting.

GLAZEBROOK J:

The timing as well?

MR DIXON QC:

The timing, January I would say is probably what they talked about, the detail of the precise date, 20 January whatever was confirmed at the 16 October meeting.

WINKELMANNN CJ:

Because you depend on the coincidence of the meetings is someone has expressly discussed the date. You depend on the coincidence of the timing then, because it suggests that someone has expressly – there's been a discussion about that particular date, there's no other logical explanation, although one witness says that's just when we tend to do things because it's a quiet time in the marketplace.

MR DIXON QC:

Well that's the reason that they chose that date but I say they chose it all together and they did it on the 30th and I draw support for that from the fact that Mr Coombes who attended the 30 September meeting but did not attend the 16 October meeting says that they discussed it then. Mr Singh, who attended the 30 September meeting but did not attend the 16 October meeting says the same thing, they discussed the withdrawal of listings at the 30th of September.

GLAZEBROOK J:

Do the others say they didn't discuss it at all, because I didn't think that was the case, they just said there was no agreement to do it until October?

MR DIXON QC:

No Mr O'Rourke denies there was any discussion.

GLAZEBROOK J:

He denied there was any discussion at all, okay.

MR DIXON QC:

And if you go to my learned friend's reply submission from yesterday, he talks about this at paragraph 5 of that because His Honour found on the balance of probabilities that the details of when they would withdraw were probably decided at the 16 October meeting and then he has this list of the Court about well Coombes wasn't there but his assertions are pure assertion, I'm not sure what that means but Lugton, well Mr Lugton actually did give an explanation and so on. So my learned friends have at the bottom there, "On balance it's more probably the details of the withdrawal decision were made at the 16 October 2013 meeting when withdrawal of listings from Trade Me was an obvious boost to the retention on realestate.co and the combination of its timing with media publicity was understood."

Now that's true, it's what the Court said. I would just ask you though to go to that paragraph of the judgment which is 187, now that's page 102.0254 and you'll see paragraph 187 is one that begins "on balance" and they end three and a half lines into that, "On balance there's more problem with details –"

GLAZEBROOK J:

Sorry tell me where we are, what paragraph?

MR DIXON QC:

102.0254, 187 of the judgment. So, "On balance there's more problem with details of the withdrawal decision were made, the obvious boost and the combination with its timing with media publicity was understood." My learned friend's quotation of that ends there but in my respectful submission there's

actually an important point that he goes on to say, the next line, “But that does not exclude the possibility that withdrawal from Trade Me was discussed more generally in the 30 September meeting, particularly given some agencies’ comprehension and so forth.” So His Honour accepted –

WINKELMANNN CJ:
Does it really matter?

MR DIXON QC:
Well it does because my learned friends say there was no plan and I say there's a plan, there's a plan to withdraw and there's strong evidential support for the proposition that it would occur in January and when you have a plan as to timing of when you're going to do something, that converts any unilateral unequivocal statements, if that’s what they were, into something more because –

WILLIAMS J:
Well does it? That’s an interesting question. If there is independent parallel unilateral decisions to withdraw and there is at least some evidence of that, as you’ve in a balanced way pointed out as well, the fact that they agree on the date they’ll do it is less problematic, isn't it?

MR DIXON QC:
I don’t see that Your Honour. I think that –

WILLIAMS J:
You're trying to say the agreement on the date must mean there's an agreement on withdrawal.

MR DIXON QC:
Correct.

WILLIAMS J:
But that doesn’t necessarily follow in logic does it?

MR DIXON QC:

Well I think it does. I'm going to withdraw, I'm going to withdraw, I'm going to withdraw, okay when are we going to withdraw?

WILLIAMS J:

That's right but that doesn't necessarily mean that if everyone has already independently decided to withdraw and they're only agreeing the date, is that a breach?

MR DIXON QC:

Yes Your Honour.

WILLIAMS J:

Why?

MR DIXON QC:

Because you're constraining a freedom that you have.

WILLIAMS J:

Well only as to the date.

MR DIXON QC:

Well, that can be important because when you're trying to change the status quo, right, you – it's much easier to do that if you know that your flank's not exposed because your competitors are all going to do it on the same day.

WILLIAMS J:

Sure, and you can you understand why that would make sense to agree, "Let's do this in an organised way, folks."

MR DIXON QC:

Yes.

WILLIAMS J:

But if they have already independently agreed it…

MR DIXON QC:

Well, I mean I think, with respect, I think going into a meeting where you've got an agreement in principle beforehand, you all say what you're going to do and then you agree upon when you're going to do it, in my submission that's an arrangement or understanding.

WINKELMANNN CJ:

I mean you could see –

WILLIAMS J:

As to what is the question.

WINKELMANNN CJ:

It's probably a question of fact, isn't it, because doesn't the fact of the date make it more likely that there was an agreement because the fact they've got this agreement gives each other comfort?

MR DIXON QC:

Yes, Your Honour.

WINKELMANNN CJ:

And it's just what's more likely to have happened, that they all unilaterally said they're going to do it without any input from each other and then agreed a date, or was it more likely that it was all a whole discussion going on?

MR DIXON QC:

Yes, Your Honour, that's right. The only other document I wanted to talk about at this juncture is the Metcalfe email, and I don't attach an enormous amount to this but my learned friend has made submissions to Your Honour and I'll simply say this. Mr Metcalfe worked for an outfit called L J Hooker and they weren't part of the arrangement. They're a fairly small agency. He was not friendly with the other agents except Mr King, and the evidence of that is clear. I'm not sure, that's not disputed. So the only person who is really talking to him was King and King said he did speak to him. So after the 30th meeting there was an email from Mr King to the others saying that he'd spoken to Mr Metcalfe and then Mr Metcalfe was invited to the next meeting

by Mr O'Rourke, and he responded to that meeting in a document which is referred to, probably just have a, easiest just to go to the Court of Appeal's judgment.

GLAZEBROOK J:

I'd rather know where it was in – we don't need to go to it there but if we know where it is it's…

MR DIXON QC:

Yes, I will just give you the – 302.1509. What he says is thanks for the update, is updated as to timing of – he's invited to the meeting on the 16th, so the second meeting. 302.1509, and it's in – the first part of this, "To be frank since you and the others decided to marginalise my company in conflict with the spirit of co-operation that existed amongst Hamilton agencies for decades," set that to one side. That's about some other issue that he has, why he wasn't talking to these guys, not really relevant for this purpose. "I now find it puzzling that you want to include me in this meeting or any agreement around Trade Me. Sure you'll be worried that I may break ranks and drive Trade Me company funded advertising in the future and thus gain market. At my lesser level of stock volumes this option is affordable to me. Until we play on the same playing field…" Now Mr Metcalfe did not give evidence. He was not called by either party. He was too unwell. He had a serious illness and was not able to give evidence.

Mr O'Rourke introduced this document into evidence in his evidence but there was an objection to it from the appellants on the basis that it was hearsay and the position that the Commission took is –

WINKELMANNN CJ:

Hang on Mr O'Rourke introduced it?

MR DIXON QC:

He did.

WINKELMANNN CJ:

But then the appellants objected to it.

MR DIXON QC:

They did.

MR TAYLOR QC:

You've got to be careful with it. There was a will say, it's covered in my response submissions but there was a will say statement produced by my learned friends in respect of Mr Metcalfe which annexed the email, so that when Mr O'Rourke filed his brief of evidence, referenced who the email was made because it was in response to the will say statement that had been filed. Subsequently in a pretrial conference my learned friend said we're not going to call him again and it was at that point we objected to the admissibility of the email.

The other point is that Mr Shale in his brief of evidence also referred to that email. So I just want to be clear that that's how things came. That objection was made and it was agreed that it would go in but only on the basis that it was not evidence of the truth of its contents and the reason for that was that my learned friend wanted to put the email to Mr King to try and establish that Mr King had told him something about the meeting. So that's the sequence and I don't think there's any dispute about that.

MR DIXON QC:

Well there's no dispute about that but the reality is that having been told that we weren't leading the evidence from Mr Metcalfe, my learned friend did not change Mr O'Rourke's brief and he introduced it into evidence but that's a sideshow because the reality is –

GLAZEBROOK J:

Well doesn't he just say it's because you wanted it to be there because you wanted to cross-examine Mr King on it or is that wrong?

MR DIXON QC:

Well I don't have to have it in evidence to cross-examine.

WINKELMANNN CJ:

Well that might be a little technical point but thank you, it's of assistance to understand the background to that.

MR DIXON QC:

Right but I mean the reality is simply this, we were never advancing it for the proposition of the truth of what is said in it, we weren't advancing it for whether he was in fact truthfully puzzled about being included in the meeting or whether they were worried that he might break ranks, the only proposition is that he can only have got this information from talking to Mr King because he wasn't talking to the others.

GLAZEBROOK J:

But you are relying on it for the truth of it then.

MR DIXON QC:

I'm relying for the –

GLAZEBROOK J:

So for the truth of Mr King having told him that there was an agreement.

MR DIXON QC:

Correct but that's not –

GLAZEBROOK J:

Well can you use it for that?

MR DIXON QC:

Yes I can because Mr King gives evidence, so it's not hearsay. I'm putting it to Mr King, so it's a – so the proposition that I am advancing at 4 is that he can only have got this information, there's information embedded in it which is that he's been told by Mr King that there is an agreement around Trade Me and that's the simple point. That's why I started this by saying I don't attach an enormous amount of significant to this, it's a small point but I have to respond to it because my learned friend has complained about it but it's really –

WILLIAMS J:

What did King say?

MR DIXON QC:

King said, “No, I didn’t tell him that. I spoke to him but I never told him that.” So it’s unexplained then where Mr Metcalfe can possibly have got the idea.

WILLIAMS J:

But that’s as far as you can take it.

MR DIXON QC:

Well I think I can take it further and say that we admission from Mr King that he did speak to Mr Metcalfe and there was evidence that none of the others would have.

WILLIAMS J:

So what, we do have to rely on it for the truth of the content?

MR DIXON QC:

Not the truth of what Mr Metcalfe says but for the fact that he is –

WINKELMANNN CJ:

So if you're not relying on it for the truth of content, what you're relying upon it for is that he recorded that in his email is it?

MR DIXON QC:

Admissions by King.

WINKELMANNN CJ:

But you can't rely on it for the fact that – if you agree to that limitation, then you couldn’t rely on it for the truth of the fact that Mr King said it.

MR DIXON QC:

I agree to the limitation that it would be hearsay with respect to the points, hearsay from Mr Metcalfe but I did not agree to it that it was hearsay as against Mr King.

WILLIAMS J:

But you got a denial from Mr King, so the contents of the email aren't any help for you. Mr King says, "No, didn't ring him, didn't say it."

MR DIXON QC:

Mr Metcalfe on the face of this, rightly or wrongly, knows something that he can only have got from Mr King.

WINKELMANNN CJ:

Is it, would it help, Mr Dixon, that you, I think we've had this before, this agreement was not recorded in a minute or anything, was it, the basis that this came in?

MR DIXON QC:

No.

WINKELMANNN CJ:

No.

MR DIXON QC:

Anyway, that, as I say –

GLAZEBROOK J:

And how did the Court of Appeal use it? Where are – well, they just mentioned it, didn't they, without saying anything about it?

MR DIXON QC:

Yes, they just mentioned it. My learned friend says that…

GLAZEBROOK J:

Which is really unhelpful.

MR DIXON QC:

Well…

WINKELMANNN CJ:

Anyhow…

MR DIXON QC:

So those are the documents that I want to take you to afterwards and that's probably a convenient point.

WINKELMANNN CJ:

Yes. Thank you for spotting that, Mr Dixon.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.18 PM

WINKELMANNN CJ:

Mr Dixon.

MR DIXON QC:

Thank you, Your Honour. I really want to focus submissions this afternoon on two main areas. The first is the *Giltrap* test and the High Court's application of that, and that includes addressing some observations around paragraph 192 and 188 of the High Court judgment, and then I want to talk about vendor funding and how that impacted the offer price and so forth here.

So in terms of the *Giltrap* test, I stand by the Commission's written submissions at section 2 and particularly from paragraph 2.2 on where we have laid out what the *Giltrap* Court said and we've said why that is a good and workable test and one that is consistent with international law and there's no reason to change it. We've laid out there that the key provisions of consensus and expectation have been New Zealand law for a number of years and are well understood and applied. The only point I really want to emphasise from that is this emphasis that my learned friend has placed on the idea that expectation in and of itself is not enough, and that's completely right but in my submission that's not inconsistent at all with the *Giltrap* test and I want to explain that.

WINKELMANNN CJ:

Well, the real issue for you is whether obligation in any sense is what's required by *Giltrap* and even the material and even the majority does seem to suggest it does, it is.

MR DIXON QC:

No, what the – let's go to *Giltrap* then. I think that's probably –

WINKELMANNN CJ:

But if your position that there's no need for that arrangement to create a sense of obligation?

MR DIXON QC:

There's no need for proof in the sense of subjective evidence about, "I felt obliged or under a moral obligation."

WINKELMANNN CJ:

No, no, the question is for the Court though but do you –

MR DIXON QC:

Correct. But what the *Giltrap* test says, and I think rightly so, is that if there is proof of consensus and from that consensus there's an expectation then by definition there will be, you will be in a situation where the parties have assumed a moral obligation to each other or given an undertaking or a commitment. The evidence –

WINKELMANNN CJ:

Well, we can easily grasp the difference between evidence and what the test is, and my question to you is do you accept that the test as put in *Giltrap* includes that there be that that consensus be accompanied by an obligation, moral or legal?

MR DIXON QC:

No. I don't accept that. I don't think that's a correct interpretation of what the –

WINKELMANNN CJ:

Because you just seemed to say, you just, how you formulated it before seemed to be that, but…

MR DIXON QC:

I'm following what I say the majority said in *Giltrap* which is that when you have consensus –

GLAZEBROOK J:

Well, what's "consensus" mean?

MR DIXON QC:

A meeting of the minds, that the minds have met. They've agreed.

GLAZEBROOK J:

Agreed to do what? Agreed to do something? Is that –

MR DIXON QC:

Some proscribed action, yes.

GLAZEBROOK J:

Right.

MR DIXON QC:

Exactly that, that's exactly what they say, and they say if the minds have met objectively and they have agreed to do some proscribed action, then that's enough and the reason is that by definition from that you can infer that there's an obligation or a –

WILLIAMS J:

That's easy. It's when it gets to understanding.

MR DIXON QC:

Well, that's the same for an understanding, Sir. That's what –

WILLIAMS J:

But an understanding isn't an agreement. It's an understanding of what others will do, you see.

MR DIXON QC:

Yes, but there has to be –

WILLIAMS J:

If you take the obligation out of that then parallelism is by definition covered.

MR DIXON QC:

I'm not taking the obligation out of it. I'm simply saying it's not something that's required to be separately proven.

WINKELMANNN CJ:

Well, no, well, this isn't – this is why I came back to you. I said to you we understand the difference between proof and test. The question is what are you saying is the test? So perhaps we'll have another go at it because we may be confusing you, Mr Dixon.

MR DIXON QC:

Well, I think we just go to *Giltrap* itself which is in volume 4, tab 22, and it's really we start off with paragraph 15 of that judgment on page 613, where the Court says, "We do not consider it appropriate to be tied in any determinative way to the concepts of mutuality, obligation and duty."

WINKELMANNN CJ:

Sorry, what paragraph are you at?

MR DIXON QC:

15, Your Honour. "While the concept of While the concept of moral obligation is helpful in that it will often reflect the effect of an agreement or understanding under section 27, the flexible purpose of the section is such that it is best to focus the ultimate inquiry on 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 involves communication among

the parties of the assumption of a moral obligation." It arises as a natural course from the consensus and expectation, and if you think about an agreement –

GLAZEBROOK J:

Sorry, can you just tell me where you're reading from again because I didn't –

MR DIXON QC:

That was paragraph 15.

GLAZEBROOK J:

Sorry?

MR DIXON QC:

15. And then they go on through citing *Basic Slag* there. When each of two or more parties intentionally arouses in the other an expectation they'll act in a certain way, when you've done that, it seems to me you incur a moral obligation.

So, at 17, "Before there can be an arrangement under section 27 (or for that matter understanding) there must be a consensus between those said to have entered the arrangement. Their minds must have met – they must have agreed."

WILLIAMS J:

That depends on what you mean by the word "expectation" there, doesn't it?

MR DIXON QC:

There's got to be a an –

WILLIAMS J:

Because it has two meanings.

MR DIXON QC:

Well, I think it goes on from here, if we read on, "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." So it's not an expectation which I might describe as a hope or a prediction or an anticipation. So before the meeting Mr O'Rourke might predict what Mr King's going to do, what his competitor is going to do. That's not enough under the *Giltrap* test.

WILLIAMS J:

So they sit around a table and per the evidence, "I'm pulling out of Trade Me." "I'm pulling out of Trade Me." "I'm pulling out of Trade Me." "I'm pulling out of Trade Me."

MR DIXON QC:

Yes.

WILLIAMS J:

That does, on the ordinary definition of the word "expectation", at least on one of those definitions, create an expectation that they'll all pull out but it probably doesn't meet what's intended by the *Giltrap* test.

MR DIXON QC:

Correct. There has to be a consensus, and so in that situation you have to conclude, first, that by their conduct, by the things they've communicated to each other at the meeting, they have reached a consensus. Their minds have met. They have agreed. And it's that agreement that has to give rise to the expectation.

WILLIAMS J:

But the agreement, the point is, and perhaps this is semantic but I'm not so sure, the agreement is that they are binding themselves all to act in a particular way shoulder-to-shoulder.

MR DIXON QC:

Binding in a loose sense, but yes.

WILLIAMS J:

Well, binding in a tight sense. Loose at the margins.

WINKELMANNN CJ:

And legally or morally sense.

O'REGAN J:

No, I don't think it is binding in a tight sense.

MR DIXON QC:

Well, not in the legal sense but yes. But in a moral or in honour or whatever.

WILLIAMS J:

Yes, that's right. So that's the obligation that's being spoken of. That's all.

WINKELMANNN CJ:

To use the words of, because they say somewhere here, or is it Justice McGrath who says –

O'REGAN J:

McGrath, I think.

WINKELMANNN CJ:

– "Moral (in sense not legal)"?

MR DIXON QC:

Yes, yes.

WINKELMANNN CJ:

He just clarifies that's all that's –

MR DIXON QC:

I mean moral it just means a non-legal sense.

WINKELMANNN CJ:

Mmm, because it's a slightly confusing word.

MR DIXON QC:

It is and it confused, for example – that's one of the reasons why it's not a good test, because people don't understand what it means. Mr Lugton, when he was asked about, you know, "Did you make a moral decision?" –

GLAZEBROOK J:

Well, expectation is even worse because it's ambiguous.

MR DIXON QC:

Well, there has to be – it's got to be about a specific thing, a specific action or inaction, a proscribed specific action or inaction, and it's got to be engendered by the consensus.

WINKELMANNN CJ:

So I mean if you go back to the words of the section, what's trying to be captured is an agreement or an arrangement which will create – which each feels obliged in some way to carry forward, or another way is each has an expectation in the other, that they'll carry it forward.

MR DIXON QC:

Yes.

WINKELMANNN CJ:

So that's like the mirror image of it.

MR DIXON QC:

Correct, as in – and because it's an objective test it's a reasonable expectation. All right? So it's an objective test that they have reached a consensus. We don't – we say if you've got an outside observer looking at that would they think that they've reached a consensus and from that there's an expectation of this prescribed action?

WINKELMANNN CJ:

Yes, the difficulty with the use of the word "expectation," because what you're saying I think is really that expectation is simply another formulation of creating the sense of obligation.

WILLIAMS J:

Correct.

WINKELMANNN CJ:

There is sufficient there for each person to feel a sense of obligation to move forward in accordance with the arrangement.

WILLIAMS J:

Yes, which means that obligation is in. It must do because otherwise, it's otherwise a non-binding, I suppose, consensus, like everyone in the room agrees to a particular thing but it doesn't involve any mutuality of obligation would be covered and we're all agreed it's not.

MR DIXON QC:

Well, I think that's right. If we just take the simplest example of trader A says to trader B, "Let's agree to increase our prices by 10%," and trader B says, "Yes, okay, let's agree to do that," and maybe they shake hands. They've reached a consensus objectively giving rise to an expectation that that's what they're going to do. Is there a –

GLAZEBROOK J:

Well, it's not. They've actually reached a consensus that they're going to do it.

MR DIXON QC:

Correct.

GLAZEBROOK J:

And each has an obligation to the other to do it.

MR DIXON QC:

Right, and my point is that the obligation simply arises from the consensus, from the –

GLAZEBROOK J:

Well, I'm not sure that your friend is arguing anything differently from that, so you just have to have it. So whether you have to prove it separately or it's embedded in the word "consensus" I'm not sure that he cares.

MR DIXON QC:

Well, I think he, and maybe I misunderstood him yesterday because he was saying more than that.

O'REGAN J:

He was. I agree, yes.

WINKELMANNN CJ:

So what do you say is –

O'REGAN J:

But the expectation is just the obvious of the obligation, isn't it?

WINKELMANNN CJ:

Yes.

MR DIXON QC:

Yes, exactly. That's –

WINKELMANNN CJ:

Mirror image –

O'REGAN J:

The expectation is that I have an expectation that you will do something which means that you are obliged to do it. You have some, in a loose sense, obligation to do it.

MR DIXON QC:

Correct.

O'REGAN J:

And that's what's created my expectation that you will.

WINKELMANNN CJ:

Mutuality.

ELLEN FRANCE J:

Well, that's what's said in the passage, albeit, that's cited in 16 from, albeit in the tax avoidance context, "The essential thread is mutuality as to content. The meeting of minds embodies an expectation as to future conduct. There is consensus as to what is to be done."

MR DIXON QC:

Exactly, and we think that's right. We think that's the correct approach.

WILLIAMS J:

So taking things practically, because these words are frustratingly loose in some ways, looking at it practically, "I'm going to put my prices up by 10%," "Yeah, me too. I can't survive at this," versus, "I'll put my prices up at 10% if you will." That's covered. The former is not.

MR DIXON QC:

Well, the former might well be if there's an understanding there and I'm not necessarily convinced that there needs to be an element of conditionality. You need to be careful about conditionality on conduct and conditionality on agreement.

WINKELMANNN CJ:

I think that Justice Williams was asking do you suppose that there wasn't anything else more to it.

MR DIXON QC:

Well, there's – yes, the, "Yeah, yeah, I will too, it's unsustainable," you –

WILLIAMS J:

That's right.

MR DIXON QC:

– that's a matter of fact as to whether or not that's sufficient.

WILLIAMS J:

Exactly, but that illustrates the difference in principle.

WINKELMANNN CJ:

That's conscious parallelism.

O'REGAN J:

I don't think it is.

MR DIXON QC:

Well, with respect, I don't know if I agree with that. I think that when two –

WINKELMANNN CJ:

The first, no, the first, where they're not making any agreement. One is saying, "I'm doing something," and the other person says, "Yeah, I am too."

MR DIXON QC:

"Yeah, I will too." Well, I, with respect, I –

WINKELMANNN CJ:

I was saying "am". So did Justice Williams say "will"?

O'REGAN J:

Depends whether they winked at the time or not.

WILLIAMS J:

Yes, exactly, that's right.

GLAZEBROOK J:

Well, it depends whether they meant to create a sense of obligation.

MR DIXON QC:

Yes, well, that's right, I mean that's one of the things –

GLAZEBROOK J:

And then objectively you would look at whether that was merely talking about what you're going to do –

WINKELMANNN CJ:

It's a question of saying –

GLAZEBROOK J:

If you'd say, "I'm going to the pictures tomorrow," "Oh, that's odd, so am I," as against, "I'm going to the pictures tomorrow and I want you to go to the pictures tomorrow."

MR DIXON QC:

Yes, particularly when you've convened a meeting to talk about whether you'll go to the pictures or not.

GLAZEBROOK J:

Well, that's…

WINKELMANNN CJ:

It's a question of fact. Mr Dixon, it's a question of fact.

MR DIXON QC:

Question of fact. Of course, it is.

WINKELMANNN CJ:

Yes.

MR DIXON QC:

That's exactly right, Your Honour. But what I would want, what I want to say is that the High Court understood and applied the *Giltrap* test as we have just had that discussion and I want to take –

WINKELMANNN CJ:

Just before you do that, can I just ask you one point of clarification? Do you say that what Justice McGrath says is wrong, or are you happy with his judgment also?

MR DIXON QC:

Well, I'm happy with it. If we go to Justice McGrath's judgment, which is at paragraph 64, he says he's in general agreement but he wants to have a different point, and what he says is, at 66, "Paragraph 15 of the judgment of President Gault 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 non-legal obligation," and with respect I think that's the point about them being two sides of the same coin, "that in my view should remain an important touchstone for determining whether there's an arrangement or understanding." Well, we accept that. He goes on over the page at the top to say, "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." Well, that's probably true. It must be true. So that's how he's using it. It's an important touchstone. But one of my learned friend's –

WINKELMANNN CJ:

Well, apart from the next sentence goes further, doesn't it?

MR DIXON QC:

Yes, well, that's still the same.

WINKELMANNN CJ:

He's saying you can't really have it unless you've got a concept that the person's either legally or morally obliged to do so.

MR DIXON QC:

Yes.

WINKELMANNN CJ:

And I thought you were accepting that anyway Mr Dixon because you're just saying it's the other side of the coin of expectation.

MR DIXON QC:

Yes and in any event in 70 he says it's perhaps arguable that by focussing on the notion of consent is a workable test can be applied to an arrangement that does not import the concept of moral obligation. So that's sort of the yin and the yang of those two paragraphs but really it's summed at the end of 70, "In my view the concept of moral obligation is likely, in the great majority of cases, to be valuable in deciding whether there's an arrangement or understanding." Well I accept that proposition. I think the test as annunciated by the Court in *Giltrap* is an appropriate and useful one.

WINKELMANNN CJ:

But can we assume that you accept that obligation, consideration of whether an obligation on an objective assessment of the facts, whether the parties are leaving the room feeling under an obligation is critical as to distinguish it from conscious parallelism?

MR DIXON QC:

I think the test is an objective one and I think that whether someone subjectively thinks that they're under a moral obligation or not is irrelevant in the sense that Mr McKenzie in *Giltrap* said he wasn't –

GLAZEBROOK J:

Well everybody agrees with that, so nobody is suggesting that you look at it subjectively and neither is anyone is saying it's irrelevant.

O'REGAN J:

I think Mr Taylor said that.

MR DIXON QC:

He did, Mr Taylor said he wants it to be the subjective evidence.

GLAZEBROOK J:

No, no he said you can have subjective evidence which is taken into account in the objective assessment. I think he was then told it mightn't be taken into account, given an incredible amount of weight because it might be seen as self serving.

MR DIXON QC:

Oh I see. What I would say is that it's what is really important is what are the facts, what is the evidence that gives rise to the sense that you're under an obligation? What has the other party said or done, what's the context that makes you feel that you're under a moral obligation or not.

WINKELMANNN CJ:

I'm not trying to be difficult but I'm just trying to get clear what your submission is as to whether you agree with that obligation is part of the test for an arrangement because clearly obligation is created by an agreement but a sense of obligation, so arrangement is really capturing something which is lesser than a legally enforceable agreement?

MR DIXON QC:

Yes I accept that there will be a sense of an obligation. I think the test is best phrased as one of consensus and expectation that an objective consensus, if you've got an objective consensus and an expectation, then necessarily it's because one of the parties has some loose form of obligation to the other because otherwise how can you objectively have a consensus with an expectation that some prescribed activity will occur.

WILLIAMS J:

On one reading of both of those words, that must clearly be so but the trouble is that consensus doesn't of itself necessarily carry the idea of a binding shared understanding, although it can involve a shared understanding, not a binding one and expectation can be merely predictive rather than carrying the same sense of obligation. That's the problem. So as long as you say consensus carries obligation, then I think we're all on the same page.

MR DIXON QC:

But I agree with all that, the only thing I say is expectation is only used in the sense of an expectation arising from a consensus.

WILLIAMS J:

Yes but you see the problem is that the word “consensus” isn't as tightly constrained as you suggested because all of one mind, which is what consensus means, includes, on its face, conscious parallelism.

MR DIXON QC:

Well I don’t regard two parties who are conscious parallel to have agreed.

WINKELMANNN CJ:

What about an arrangement?

MR DIXON QC:

Correct, they have not agreed.

O’REGAN J:

They’ve just told each other what they're going to do but they haven’t agreed.

MR DIXON QC:

They haven’t agreed and therefore there's no consensus.

WILLIAMS J:

So meeting of people around a room, we think the sky is blue, we have a consensus, yes we have a consensus, nothing binding about that whatsoever, it’s just a lot of people agreeing about a particular thing for some purpose or other, right?

O’REGAN J:

But when we put the price up next week, do we have a consensus, yes.

WILLIAMS J:

Sure but the conscious parallelism can also involve the same consensus, just not in a binding sense, it’s just they're all saying they're going to do it.

MR DIXON QC:

Yes, I mean it depends what you –

WILLIAMS J:

And it becomes a question of fact which is where this conundrum takes us to probably,.

MR DIXON QC:

And certainly, and we are talking about a very extreme form of conscious parallelism where people have got in a room and are talking about it.

WILLIAMS J:

Yes, yes.

MR DIXON QC:

Normally when we talk about conscious parallelism it's more about I know what you're going to do, I can anticipate it, I know the market. We don't talk about it but –

WILLIAMS J:

I understand your point, you see we're talking in the abstract about the formulation of the words, not the evidence in this case.

MR DIXON QC:

Yes. So, sorry I'm just conscious of time. I want to go to the High Court judgment please because there was a suggestion, I think was made yesterday, that the High Court really just found conscious parallelism and we pick it up really at 177 of the judgment. This is tab 22 of volume 102 and the page number is 102.0251 but this is the general discussion of the Court and really just a proforma recitation of the *Giltrap* test and defining what consensus means, an apparent meeting of the minds and as I say an objective meeting of the minds.

GLAZEBROOK J:

Can I ask why they've got at least one person there? I can understand in certain circumstances but it seems hard to – I should have asked you this when you went through *Giltrap* but I can't see how a consensus meeting of minds was an obligation relates to just one person doing something. I can see in certain circumstances it might be that we think you agree who are the

outlier to put your price up because our prices are all at this level but in a general sense, unless you're in that sort of situation where the obligation is we'll keep our prices up here and you come and match up. It's difficult to see why it wouldn't be more than one person.

MR DIXON QC:

Agree.

GLAZEBROOK J:

Okay so it is, as you understand it, it's the sort of thing I'm talking, somebody bringing, an outlier bringing their prices up as part of that agreement?

MR DIXON QC:

Yes. The cases talk about mutuality in two concepts, in two ways. They talk about mutuality of the consensus, it's got to be a mutual consensus. In this example the one person, they still have to have mutuality of the consensus but there can be mutuality of action, you know, you're going to do this and I'm going to do that but that's not necessary. It will be rare, I mean the example you use where we've all put our prices up 10% and you're going to come up to meet us, I mean that's one person's actions but implicit in that is that the others will keep. So that's all that is I think.

GLAZEBROOK J:

So you think that's all they meant because it is a bit odd.

MR DIXON QC:

Yes, yes.

GLAZEBROOK J:

They might have just been taking that from the tax context because in a tax context you often are just having one person do something.

MR DIXON QC:

Yes, it's actually a big argument in Australia and I think it's talked about in *Basic Slag* as well, where there needs to be reciprocity of obligation. So it

doesn't arise very often I would expect. It might arise bid rigging perhaps, another example.

GLAZEBROOK J:

In what sorry?

MR DIXON QC:

Bid rigging perhaps, you're all going to bid on this might be another situation, I don't know.

GLAZEBROOK J:

Yes, yes.

MR DIXON QC:

So His Honour at 177 cites that and then he talks at 180 following that objective test and he's talking about from outward appearances what a reasonable person would infer and he's talking there about expectation that neither itself or any others would absorb the cost of Trade Me's new fees and would withdraw by January 2014, leaving realestate as the only comprehensive site. Any subsequent Trade Me listings to be vendor funded. There was an apparent meeting of the defendants' minds on those subjects. So he finds there was a consensus, objectively their minds had met and he talks about that.

So importantly at 181 he says, "I'm disregarding their statements about their own comprehensions or expectations, I'm just looking at this objectively." He goes through 182, talks about that and then describes at 183 what the consensus is.

GLAZEBROOK J:

But you'd say you can take into account witnesses' assertions of a consensus arising and should, wouldn't you? And equally your friend would say, well, you take into account people saying they didn't reach a consensus and then objectively take all that into account.

MR DIXON QC:

Well, my submission is that the conclusion that people draw, there was a consensus or not, is less important than why they've – the factors that go into why they've drawn that conclusion. So I think if someone says there's a consensus the next natural question is why and it's because everybody nodded.

GLAZEBROOK J:

Well, virtually everything you took us to this morning they didn't say why. They just said, "Yes, we had a plan."

MR DIXON QC:

Yes, that there was a plan. Why –

GLAZEBROOK J:

So you're arguing against your –

MR DIXON QC:

Well, no, I'm not, because why is there a plan. "Because we talked about when we," he said, he explained, "We talked about when we were going to do it." So that's the communication that gives rise to the consensus. That's why there's that sort of material. And Mr Coombes said the same thing, "It's because we talked about it. I don't recall who said it but I think we said it," said it out loud. So I think those are the things we rely upon.

But then we get to this next important paragraph which is 184. "Any reasonable observer of the whole to of the defendants' conduct," so the whole of the conduct, "also would have concluded the agencies had decided together to withdraw their standard listings." Now we bear that in mind because when he gets to 188, which is the paragraph that the Court of Appeal was a little bit uncertain about, he says, "There was no sense of conditionality objectively to be drawn from any of the 'will not absorb' or 'will withdraw' expressions." But he's also said they've decided together reasonably. And this is I think why the Court of Appeal was saying, "Well, we're struggling to understand what you're saying there in light of the things you've said elsewhere," because we see again at 190 – I'll just actually round out 188 and

just to explain the last couple of sentences my learned friend took you to where – the last couple of sentences of 188. "Whether the defendants' comprehensions included a sense of reciprocity or moral obligation between them is irrelevant." So my learned friend said, "Well, he's excluding moral obligation." He wasn't. He was excluding their comprehensions of it because it's an objective focus. That's all he was saying there.

But go on to 190, they've said these things unconditionally but he says that's not a complete answer, and goes on and explains why that is, and the last sentence is important, "The independence of the agencies' prior decisions is undermined by the mutuality of their understanding arising from 30 September 2013," and with respect I would say that's not the language of conscious parallelism. Mutuality and understanding is the language of consensus.

And then he says, gets to 192, which is what my learned friend had an issue with yesterday. He says, "It is enough to establish consensus here that the defendants communicated to each other their intended and common course." And we have the footnote 32 where he compares it to *Caltex*. "If, for example, the advice given by Mr Crum," of I think it was Caltex, "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," to follow his lead, "there would not be an understanding." So what he has said in there about establishing consensus is about – has got to be looked at in the context of that observation, advice that they're going to follow his lead, because that's really what we say the witnesses say. So –

WINKELMANNN CJ:
In reading the evidence I noticed that, I think I'm right, that Mr Taylor asked witnesses about whether they had a sense of moral obligation, did he?

MR DIXON QC:
Yes. And I mean…

WINKELMANNN CJ:

I was just wondering if, on your case, that's what the Judge is responding to at 188?

MR DIXON QC:

Yes, I think he is and I think he's responding to that at – I think he's exactly responding to that, and this is part of the difficulty because Mr Lugton said, "Well, I never got to the point of making a moral decision because I was doing what I wanted to do anyway," and people misunderstand what is meant by a moral obligation, I mean he'd agree to do something he says that he wanted to do anyway which of course you can reach an agreement with someone to do. We talked about that at the beginning, that's uncontroversial.

So in my respectful submission the High Court did find and rightly so that there was a consensus here and the expectation that the test under *Giltrap* was met and in my submission the Court of Appeal was right to agree and to uphold that. As they said in paragraph 36, just this line, "We consider that there was a good deal of clear evidence indicating an arrangement or understanding as found by the Judge", and they go on and explain that. So that's what I wanted to say about those points on *Giltrap*. I now wanted to turn to the vendor funding aspect.

WINKELMANNN CJ:

So you don't want to take us through any of the other authorities from other countries, you're content for us to – the written submissions okay.

MR DIXON QC:

I rely upon our written submissions on that, we've taken you through the American cases and so forth and the English and European cases and the English and European cases, we're taking you through what they say about arrangement or understanding, we're not taking you through what they say about concerted practices, it's something different. The focus is on arrangement or understanding and we've explained the Australian position.

WINKELMANNN CJ:

So for the English cases you rely upon their discussion of –

MR DIXON QC:

Arrangements or understandings, not their discussion of concerted practices. I want to turn the vendor funding aspect of it and as I said in the beginning, what we say properly understood paragraph 215 of the High Court judgment means, that's the one about in principle to be borne by the vendor. What we say happened here is that the agencies were settling on a general course of action and they were no longer going to offer Trade Me for free to their customers and I said in opening that I would take you to *Caltex* on that and I will do that now. That is in volume 3, tab 16. So there were two judgments in, or three really, two judgments in Caltex, there was a strikeout judgment by Her Honour Justice Elias, that was upheld by the Court of Appeal and then there was the substantive judgment of Justice Salmon and where I'm taking you to is the judgment of Justice Salmon because it includes the part from Justice Elias' judgment that I want to go but also adds some additional flavour.

So the agreement there was we will all remove the free carwash worth $20, you won't get more than your $20 of petrol for it and would start off with page 313, at the top, it's the second paragraph, line 4. For *Caltex* too it was argued that the lack of specificity as to what prices would be offered following the withdrawal of the free carwashes lacks the requisite elements of fixing or controlling prices or discounts whether for petrol or carwash services. Justice Elias rejected that in a similar argument and I'm really relying upon the long quote there which I don't propose to read out aloud.

And His Honour at the end of that notes that, "of course, still remains to be determined on the facts whether or not the promotion operated as an integral part of petrol or car washing pricing or was a discount in relation to them." And what to me by integral there is indivisible, it is actually part of the pricing and we that at page 322 and there's a heading there at line 25, "The relationship of the carwash promotion to petrol or carwash pricing. It will be recalled that in her decision on the strike-out application Elias J predicated her legal findings on the correctness of the Commission's contention that the free car wash promotion operated as an integral part of petrol or carwash pricing. To consider that." His Honour talks about price being a valuable

consideration, in his view the free carwash was part of a valuable consideration.

WINKELMANNN CJ:

Does this help us much though? It's also fact specific isn't it?

MR DIXON QC:

Well all I'm saying is I'm really relying upon the quote at 313, I'm actually saying that that actually came to fruition in that part. It was established that it was part of it. The point is really the excerpt from Her Honour Justice Elias' judgment.

WINKELMANNN CJ:

And what's the point you say?

MR DIXON QC:

The point is that in removing the free carwash/in removing the free Trade Me, the rule of free carwash, as in the free carwash to everybody, free Trade Me to everybody and removing that, that amounts to price fixing and that was the point I think I was making right at the beginning and have said I'll come back to.

GLAZEBROOK J:

Let's not get tied up semantics again.

MR DIXON QC:

What was that?

GLAZEBROOK J:

We got tied up in semantics last time.

MR DIXON QC:

We did, but I did promise to take you to this, so I thought I'd better live up to that, probably a consensus that I would do so, I certainly felt obliged.

So really what we say is they're settling on a general course of conduct that they would vendor fund the listing and the scope of that understanding depends upon what vendor funding means, what's meant by it because it is a term of art it seems in the industry.

WINKELMANNN CJ:

Well you would think it's not but you just think it means that the seller is going to pay for it?

MR DIXON QC:

It's usually used in that sense.

WINKELMANNN CJ:

Because it's a play on many of the words, it doesn't sound like a term of art to me.

MR DIXON QC:

It doesn't sound too hard.

WINKELMANNN CJ:

No, it doesn't sound like a term of art.

MR DIXON QC:

Well it is a term of art because there are these, when you say "vendor funding", what you mean is in principle the seller is going to pay but you do comprehend that that might not occur. That's what the High Court, it's what the Court of Appeal found.

WINKELMANNN CJ:

Okay but that's not within the real estate industry, it's simply in the context of this case, it acquired some special meaning.

MR DIXON QC:

No I'm not making that submission Your Honour, what I'm saying is at the meeting all they said is it's going to be vendor funded, they didn't seek to define that in any way because they all understood what vendor meant.

GLAZEBROOK J:

They all said they understood something quite different by it in the context of that meeting, so I'm not sure that is very helpful.

MR DIXON QC:

But I think there is clarity around that. I think that the High Court found that when they said “vendor funding”, they meant in principle to be funded by the seller but in particular, in desirable circumstances it could be the agent or the agency. The Court of Appeal took a slightly different view, the Court of Appeal said actually when they said “vendor funding”, they meant the seller or the agent but there was scope for it sometimes to be in principle the seller or the agent but there was scope for it to be the agencies.

WINKELMANNN CJ:

Isn't that just, I mean if there's no evidence that they were – that is the kind of thing you’d expect to have some evidence to base because if the market operates, the real estate agency market operates as one assumes it does on the basis that vendor funding is from the seller, how could the Court of Appeal or High Court conclude they were using it in a different sense unless they had some evidential basis for it?

MR DIXON QC:

With respect I don’t the High Court or the Court of Appeal were, well they did differ but I think that they both think it’s a term that is definable and was defined and there is plenty of evidence in the record as to what vendor funding meant and my learned friends have a whole tab of their binder attached to that and I don’t disagree with those quotes. There are other quotes but there's numerous ones in there as to what vendor funding means and I think the High Court and the Court of Appeal were right to reach conclusions on that.

If we go to that, if we look at page 23 under tab 2 and go to Mr Couch, at the end, the last entry there, page 23, cross-examination of Mr Couch, he is asked about paying for things, “Well what about something more traditional for you other than Online, billboards outside somebody’s house with photographs. Yes. Do you vendor fund those? Yeah in the main we do. In

the main? Yeah sometimes our sales people, if we need to do it to give a good vendor client an extra service we will do it." So vendors in principle or otherwise the agent or the agency and we see that happening in particular with this agreement.

WINKELMANNN CJ:

Yes but they're not saying vendor funding means agent funding there, are they?

MR DIXON QC:

Well not in that particular quote but –

WINKELMANNN CJ:

He's just "vendor" in its common and everyday sense there.

MR DIXON QC:

Yes well they ordinarily use it to mean the seller.

WINKELMANNN CJ:

Yes.

MR DIXON QC:

It's just that that's the shorthand because that's the customary uses and that's why I say there's a general rule that it will be, you will attempt to pass it on to the seller, that's what the scope of the agreement was. It's just that there is a nuance to vendor funding that at the margins it will be borne by the agent or the agency.

WINKELMANNN CJ:

So is your point really that the vendor funding means vendor funding and there was just this wiggle room at the margins?

MR DIXON QC:

Yes.

WINKELMANNN CJ:

Because it wasn't a formal legal agreement.

MR DIXON QC:

Yes, yes. We say that look when they say "vendor funding", the point was that it would be as a general rule, that's what the Court of Appeal said or generally.

WILLIAMS J:

The default setting?

MR DIXON QC:

The default setting. The default setting would be it would be passed on to the vendor but you're not going to lose a listing.

WILLIAMS J:

Right. You were going to take us to the specific evidence that Mr Taylor said was the only evidence on this point, was it Mr O'Rourke's? I've forgotten whose it was. You were going to walk us through that and explain to us why Mr Taylor is wrong, so is this the point?

MR DIXON QC:

I can do that now. So perhaps I'll pick up at 5.4 of my written submissions. So this sets at A to D a number of the steps with citations, a number of the steps that Lodge took to, we say give effect to the arrangement or understanding and for example at A there were written directions given to staff that they would no longer automatically list properties, that's turning off the feeds and that –

GLAZEBROOK J:

Sorry I lost your submissions, they've got buried. What paragraph are you at?

MR DIXON QC:

5.4.

GLAZEBROOK J:

Thank you, sorry about that.

MR DIXON QC:

It's right at the end of the day, it's first time I've really gone to them, but 5.4, Lodge gave directions to staff that they would no longer automatically list properties on Trade Me, that listings would have to be manually loaded onto Trade Me and paid for by the vendor or the sales person. Lodge admitted in its statement of defence that it directed its staff in that way and Mr O'Rourke accepted that Lodge moved to a pure vendor funded model and another point Mr Couch said, by vendor funding he meant no company money. There were minutes of meetings of Lodge, as we see say in C, that the vendor has the option to pay and so on and they changed their listing forms.

WINKELMANNN CJ:

I suppose they use, when vendor funded, the objective to be achieved is it currently doesn't carry the can, so they don't mind who it is.

MR DIXON QC:

Exactly. They don't mind whether it's the agent or the vendor. So that's Lodge and I will get to the seven out of 12 in a moment but let circle it because we get to Monarch and Monarch admitted in its statement of defence that it vendor funded Trade Me in the sense used in our pleading which is to say either the vendor or the agent had to pay for it. So that's at 52.1 of the statement of defence. So there didn't need to be too much evidence on it that they've admitted that but there was evidence and these emails here that I've listed in A with the citations to the record for you are there. All future Trade Me advertising will be way of vendor paid or agent paid, they were to all vendors as a user pays option, in the future will be a charge passed to our vendors as a marketing option and Monarch, in an information request, said at C, "It was impracticable for Monarch to split the new model costs between a vendor and salesman and Monarch in an easy way, as such Monarch wholly adopted the Trade Me recommendation with regards to the vendor paid model, meaning they passed it on to their vendors and Lugton did the same, Mr Lugton says that at 8.3 of his brief at 202.2990. For the sake of speed I won't take you to that but that's there, 202.2990, 8.3 of his brief of evidence.

So that sets the background for analysing the very limited data that we had from Lodge. We don't need data from Lugton, we don't need data from Monarch because they didn't do it. So it's not the case that we can extrapolate from Lodge out to any of the other agencies. So the short point, there are really two points that I made about the seven of 12 or whatever it is, the one set of numbers is from February 2014, one set of numbers is from August 2014. You can put a line through the August 2014 numbers. The Commission's case was that the agreement came to an end at the end of June. So what happened a month or two later is not relevant, so it's not a factor.

With respect to the seven out of 12, we do not have a clear evidential record relating to that. What we do have is that three of those seven were re-listings. So what happened is that Lodge had promised its customers that they would be on Trade Me as part of their service guarantee and then they unilaterally withdrew them from Trade Me without telling them and then we see that three of those people who had their listings withdrawn, go back up and Lodge has paid for those. We don't know why there wasn't evidence around that. I did not cross-examine on that, there are 1500 listings that they have each year and in the context of all of the clear evidence from Lodge that it was directing its staff that this was only going to be vendor funded, funded by the seller or the agent, as we see in paragraph 5.4 of my submissions and none of that evidence is contested, none of that evidence is disputed, there's nothing more I can add. It's an isolated set of data and it could also equally of course simply be cheating, we don't know.

WINKELMANNN CJ:
Well was that put to the witness?

MR DIXON QC:
That it was cheating? No I didn't cross-examine him on this.

GLAZEBROOK J:
Cheating on the agreement you mean?

MR DIXON QC:

Correct, I didn't put it.

GLAZEBROOK J:

In inverted commas.

MR DIXON QC:

Well I don't the commas but yes Your Honour.

WINKELMANNN CJ:

Well you do actually put commas around agreement because you don't say it's an agreement, you say it's an arrangement.

MR DIXON QC:

Fair point Your Honour.

GLAZEBROOK J:

Well no it was the cheating really because if there was the ability to do it then they weren't cheating. If there wasn't the ability to do it under the agreement then they were cheating which was all I meant by inverted commas.

MR DIXON QC:

Yes I understand. So to circle back, what we say then is that the agencies understood, comprehended that vendor funding meant in principle that it would be passed on to the seller and that that outcome fixed or controlled or maintained prices for a service that they supplied in competition with each other and –

WINKELMANNN CJ:

So really what you really mean is that the agencies understood that vendor funding meant that they wouldn't be paying for it?

MR DIXON QC:

Yes but I think it is a little bit more in that they wouldn't be paying for it and the objective was that it would be passed on to vendors.

GLAZEBROOK J:

And by that you mean true sellers in this case with an exception for possibly agent or agency?

MR DIXON QC:

Correct and that is a constraint because it interferes with price setting and the difference that we – where we differ from the High Court is that the High Court's focus was on individual transactions and we look at it overall. So we say, and actually as an example that the Court of Appeal picked up, if all the car dealers on a particular street all agree that they will not – that they won't offer the new Toyota Corolla at less than $25,000, even if they're free to negotiate with potential buyers, that's still a price fix because it has set a boundary for the negotiation, it's interfered with the free setting of price, the buyer can't play off a car sales yard against another one by saying well the guy down the road is offering it for 24,000 because you know you've all agreed the offer price is 25 and it's a constraint and so that's what we say is happening here and you see that in those emails that I took you to in 5.4 and 5.5 where Mr King is saying it will be – it will be offered to people at this figure, if they want it, they've got to pay for it. The vendor has the option to pay and we say that's what happened.

So it set the offer price and that argument was on the appeal because what we were saying is well even on the arrangement or understanding that His Honour found that's still price fixing because it sets that offer price and that's why it came up in that context. We say, as I think I said before, it's also the case that if somebody is affected, even if they don't take up that offer because they haven't been offered a price that's set by the forces of competition because there's an agreement and that's how we approach that and in our written submissions on this, we take Your Honours through a range of different cases that hold that but I do want to look at one of those which is the *Plymouth Dealers* case which is in the appellants' authorities, volume 4 at 25.

So *Plymouth Dealers* is a US case involving sort of an agreed price list and with an increased margin and they could still negotiate away from that margin and we see at page 132 and in the right-hand column there's a bracketed 3-5

and there's some pretty standard US law here, a combination or conspiracy form for the purpose and with the effect of raising, depressing, fixing, pegging, stabilising the price is unreasonable. 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. That's the test that I've been talking, it's the test applied in *Caltex*, test applied in *Concrete Constructors*.

The competition between *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, was an agreed starting point, it's been agreed upon by competitors, it was in some instances in the record respected and followed. It had to do with and had its effect upon price. It goes on, "The fact that there existed competition of other kinds between the various Plymouth dealers or they cut prices in bidding against each other is irrelevant." And go over the page.

GLAZEBROOK J:
Can I just ask was there specific evidence on the effect on price or was that just an assertion?

MR DIXON QC:
Well I think there was evidence to that. Here?

GLAZEBROOK J:
In this case that's what I would've thought, there was an evidence as to an effect on price.

MR DIXON QC:
Yes, well in what sense? In the sense that –

GLAZEBROOK J:
Well I don't know that's what I'm asking you.

MR DIXON QC:

Well I think the starting point price was higher than prices had been before, so it increased the margins.

ELLEN FRANCE J:

And then the Court says I think it was used in 75% of cases.

MR DIXON QC:

As a starting point.

ELLEN FRANCE J:

That's right.

MR DIXON QC:

Yes so not evenly universally applied.

GLAZEBROOK J:

No but there was evidence that it had actually affected the price is what I was asking.

MR DIXON QC:

Correct but they don't think that's a relevant consideration because as they say the test is not what the actually effect is on prices but whether such agreements interfere with the freedom of traders.

GLAZEBROOK J:

That's what I'm not sure because they have a sort of line of that stuff down there. So I'm asking you the question, you say it didn't matter that it actually had an effect on price but why did they say so if it didn't matter?

MR DIXON QC:

Look I'm not sure I can answer that. The reality is that the US cases are very clear on this point that it doesn't have to affect prices. The New Zealand cases are too.

GLAZEBROOK J:

Well it has to have the potential to affect prices.

MR DIXON QC:

Yes or the purpose.

GLAZEBROOK J:

Or the purpose to affect it, so you just say it's an irrelevance that it actually did in this case.

MR DIXON QC:

Well the reality is that we don't –

GLAZEBROOK J:

Because the fact is being free to negotiate out of it is the difference in respect of something like this.

MR DIXON QC:

Yes we don't – it's not a relevant consideration whether in fact it raised prices or lowered prices, what we say is did it impact the way that prices were set, if it did, then it's had an effect on price or is likely to have an effect on price or has a purpose of an effect on price. So if it interferes with the freedom of traders to set the price according to their own inclination.

ELLEN FRANCE J:

The appellants' argument in relation to this or one of them, was that this is looking at whether or not it's within the per se category of the Sherman Act, do you agree that's what the Court was doing and does that matter?

MR DIXON QC:

Yes they were trying to make that determination and no it doesn't matter because they're really reciting here statements of principle. So the statement of principle, if we go to page 134, at the top of that page, "To agree to put the starting price for their bargaining at $2340 instead $2130 which was the manufacturer's retail price", so they'd enhanced the price, "They were following a minimum price, not within their control , that's $2130, as modified

by a hypothetical gross price, controlled by the dealers." That's the increase in mark up. "This established as a matter of actual price one boundary the range within which sales would be made and this is a factor which prevents the determination of market prices by free competition alone." And those principles apply irrespective of what exactly the Court is analysing here, whether this is per se or not, that's not relevant to – that doesn't stop it being relevant to the analysis here and the same law applies in other jurisdictions as well and in many respects it's the same law that applied in the *Air Cargo* cases and so forth, because they negotiate away from that.

WINKELMANNN CJ:
Just looking at the timing Mr Dixon.

MR DIXON QC:
Yes Your Honour, I better wrap up. So that was really the point I wanted to say about that. My learned friend has not advanced oral submissions on what he calls section 30's required effects test in his written submissions and he doesn't address those in his written reply, so I don't propose to do so either and I stand by what we said in our submissions at 5.10 on that and I stand by the Court of Appeal's rejection of that.

In our submission, the factors, and Mr Taylor said this at the beginning, we do regard this in many ways as an orthodox case of price fixing. What really happened here, we say, is that the agencies were faced with a price increase by a supplier. That happens in lots of cases. Air cargo, freight forwarding, so on. They didn't want to pay that. They didn't think they could afford to pay that so they agreed, they met and agreed on what they would do in result of it, and they agreed they wouldn't offer it for free. They would no longer continue to offer it for free and after that they set a general course that the seller would pay for it and we say that interfered with the free exercise as we've talked about. So to use Mr Taylor's analogy, I mean mice can run at the cheese all they like but they can't meet and agree that they're all going to do that and then agree when they're all going to do that and then go and do that, and that's essentially what happened here.

May it please the Court.

WINKELMANNN CJ:

Thank you, Mr Dixon. Mr Taylor.

MR TAYLOR QC:

Thank you, Your Honour. I don't expect I'll take long. Your Honours will have read the synopsis of the appellant's reply submissions. I've got just one addition to make to the references in that and it's on the issue of the prior minutes. The statement's attributed to Mr O'Rourke and at footnote 3 I refer to the brief of evidence at paragraphs 60 to 64 and that's in respect of the first of those minutes that talks about the agreement in principle but, just for completeness, the reference to his discussion of the second one, which was an assertion of a that they won't offer it, that there was an agreement not to offer it or they've agreed not to offer it. He deals with that at paragraphs 70 to 77 of his brief of evidence. So I'd just add that reference, and as I say in those submissions, there was no finding of this preconceived plan. There was – it was certainly a major plank of the Commission's case, as one would expect, but at the end of the day there was real uncertainty as to whether statements as recorded would have been made. No finding disbelieving Mr O'Rourke on this point and all of the evidence as to this agreement in principle, all of the evidence saying there was no such agreement in principle. So the explanation perhaps is some sort of miscommunication, some perception by Mr Borcovsky as to what was said when in fact it wasn't said in that way and perhaps a good example of the risk of that occurring is in the second minute where the record is that they won't offer it, that they've agreed not to offer vendor funding. Well, it's never been. The only person who has suggested there was an agreement not to offer vendor funding, not to offer Trade Me listings, is Mr Coombes, and so that second minutes says they've all agreed not to offer it but in fact it's not been suggested anywhere that there was an agreement not to offer it except by Mr Coombes.

And on Mr Coombes, could I – I hate to go back to Mr Coombes' evidence but my learned friend's suggestion that this was his evidence on this question of what the agreement was, what his understanding of the agreement reached at the meeting was, was somehow in error or mistaken, in my submission is completely defeated by the fact that I specifically took after, towards the end

of the cross-examination, I specifically took Mr Coombes to the statement that he had made in his brief of evidence at paragraph 7.9, and if we go to that he says, “I was left with the clear impression that as a result of these discussions, an understanding was reached by all present that,” one, there be this withdrawal of listings and, secondly, (b), “If any vendors want to list on Trade Me after that date, they would need to pay for it (or the salesperson would have to pay for it),” and I took him to that statement in his brief of evidence and I said, and it’s at page 185 of the transcript, and I repeated that statement to him and he says, “That was my understanding Sir.” “Okay, well if you look at subparagraph B it says the understanding you understood to exist was if any vendors wanted to list on Trade Me after that date they would need to pay for it or their salesperson would.” “I do.” “As I understood your evidence a few moments ago you were saying, ‘My understanding of what we agreed was that if anybody wanted to list on Trade Me they would need to have a feature ad and pay for the cost of it,’” and he says, “Correct, and I don’t know why that’s not in there but it’s not.” So he specifically said that should be changed to reflect that, and he repeats that further on in the cross-examination at page 190 of the transcript, and there I was taking him to the agreed statement of facts in the settlement agreement that he had signed.

WINKELMANNN CJ:

What page, sorry?

MR TAYLOR QC:

At page 190 of the transcript.

O’REGAN J:

What transcript?

ELLEN FRANCE J:

You mean 201.0237. You’re giving the little number, aren’t you?

MR TAYLOR QC:

Yes, I am. I’m sorry. Yes, yes.

GLAZEBROOK J:

Sorry, could you just say which it is again, sorry?

ELLEN FRANCE J:

So it should be 201.0237 and then the previous one to 2.

MR TAYLOR QC:

232, yes. And there I took him to the second part of the settlement agreement that says that after the date the vendors requested – if the vendors requested a residential listing on Trade Me that their listing fee would be funded by the vendor or the real estate agent, and he said, "That's right." "And that's clearly incorrect, isn't it? From your perspective?" and he says, "I just thought, I thought the word 'feature' should have been in there." So what I'm saying is this wasn't some error on his part, some misunderstanding. He was saying, "That's what I understood had been agreed that nobody would offer standard listings and that everybody would offer feature listings," and in my submission it's simply not possible for the Court to reach, given those specific statements by him, it simply isn't possible to reach the conclusion that my learned friend was inviting you to do which was to say that, oh, no, he just was giving effect to it, to the arrangement not to pay for standard listings by doing that. He's clearly accepted that that isn't what his understanding of the arrangement was. And, of course, that is reflected in the comments by the Judge when he's discussing the evidence and what he understood Mr Coombes to be saying.

The only other point I would make in respect of Mr Coombes, and I hate to do it again but it's coming back to this question of withdrawal of the listings, if one goes to his cross-examination at 201.0225…

WILLIAMS J:

0112?

MR TAYLOR QC:

Sorry, 201.0225. And we're talking about his decision or the decision that was made by them, by Mr Glasgow and him, to withdraw listings, and he says, and I put it to him, "It was around about, give or take because I remember I was in

the office. I was there by myself. Carl was at the beach." "Yes." "And when he came home we removed them." "Yes." "Whenever that was. Sometime late January." "And you see the reason you did that was that you had lost faith in Trade Me, hadn't you?" "We had." "You'd lost trust in them?" "Yeah." "You wanted to send a message to them, didn't you?" "Correct." "And so the reason that you withdrew the listings was because that loss of trust in Trade Me, correct?" And then he says, "Yes" – and he says, "Correct." And, "Combined with your perfectly natural reaction to say, 'We want to send a message that we – that Online aren't interested in supporting or promoting Trade Me,' correct?" "Correct. Because we felt we had a better alternative." "Yes. And the better alternative was that if people notwithstanding you not offering standard listings, if not withstanding that somebody said, 'Look, we really want to be on Trade Me,' we'd say, 'Well, we've got a deal for you. We can do that for a charge.' Correct?" "Yes," he says. "But your belief was," that the charge was very substantially less than that being offered or being offered for feature listings, and he says, "Yes." So the point I'm making is that although he was adamant that there was an agreement by everyone at the 30th September meeting that there be this withdrawal of listings, his evidence is that the reason as he understood it for withdrawing the listings was to send a message by Online to Trade Me that we're not having a bar of it.

The other point I would make is that Mr Shale in a couple of parts of his cross-examination said, look, there was no consistency in the positions being taken by people at the meetings. Some were saying they wouldn't offer it. Some were saying they were vendor funded.

WINKELMANNN CJ:
Who said this, sorry?

MR TAYLOR QC:
Mr Shale, and I may – he said it actually a couple of times in cross-examination. I will come back to you in a moment when my learned friend's found those. But let me just see if I can…

O'REGAN J:
But that would still involve an agreement not to offer it as a freebie.

MR TAYLOR QC:

Not to offer it. Could be. Well, yes, but what he's suggesting is that from what he was hearing in that initial tumult of the first part of the meeting was that some people are saying, "Well, we're just not going to offer it," and others were saying, "Well, we can't afford to," or, "We're not going to absorb it," or, "We're going to vendor fund it." So what he was really saying is that there was no consistency in that regard. So again –

O'REGAN J:

No meeting of minds, is that the point?

MR TAYLOR QC:

Yes, yes. The other point, my learned friend took you to the memorandum that was issued by Mr Lugton to his staff where he's – and it's a point that was noted by His Honour when considering whether the withdrawal of listings agreement was on the 30th September or the 16th of October, but the way that is worded is that they – he comes out of the meeting on the 16th, the following day he issues this memo to his staff and he said the principals and the agencies in the area have agreed not to support Trade Me, and what I say about that is given what they had discussed the previous day, which was to promote realestate.co, some of them had been, there'd clearly been a discussion about withdrawal of listings. That statement that the agencies have decided not to support Trade Me is perfectly – it's the sort of statement you would easily make having just come from a meeting where what is being intended and what is being promoted is saying there'll be less listings, we're going to attack this now and promote realestate.co and clearly some discussion by the persons there that they wouldn't be – they would be withdrawing the listings. So it's easy to infer from that that there's an agreement by the persons present not to support Trade Me but that is a different –

WINKELMANNN CJ:

Can you just re-state that, Mr Taylor? I found that hard to follow.

MR TAYLOR QC:

Yes. Well, what he's saying is the agencies have agreed that we're not going to support Trade Me and that's a perfectly reasonable statement to make if he's just been to a meeting the previous day where the discussion has been about when they're going to promote this campaign for realestate.co, that it's clear as Mr Shale said following that meeting that people are going to turn off the automatic feed, in other words they're not going to automatically support Trade Me, and there's been this discussion of withdrawal of the listings. So all of that is consistent with the message that he's giving his staff the next day that they've agreed that they're not going to support Trade Me. That, in my submission, is an obvious inference from all of the discussions that had preceded that none of the agencies wanted to support Trade Me but how they were going to respond, in the words of Mr Shale, involved inconsistent, or not inconsistent but different positions, either not offering or vendor funding.

WINKELMANNN CJ:

So you're saying it's an obvious inference with the constellation of things that were happening?

MR TAYLOR QC:

Yes, exactly. So, and all I'm really saying is that not much weight can be put on that.

WINKELMANNN CJ:

Are you going to address this issue of the timing which you didn't address first time through?

MR TAYLOR QC:

I've addressed it in the written reply and it really goes back to the evidence of Mr O'Rourke who says at the 16th of October meeting they decided that they would commence the campaign on the 22nd of January, in other words they would commence the media campaign through the *Waikato Times* promoting realestate.co. On the 22nd of January, and the rationale for that was that there would be less listings at that time and given Mr O'Rourke clearly states that he said at that meeting that he would be withdrawing the listings, that the rationale for doing that then was that there would be fewer listings at the time

that campaign began, in other words the advertising or promotion of realestate.co, because – and it's probably just worth making a small point about it. This discussion or this note that Baylis makes that everybody was going to move over to realestate.co, that's not what it was about. As my learned friend makes clear, all of the real estate listings would be loaded up automatically to realestate.co. The only ones that wouldn't go up automatically were the private listings. So it wasn't a question of moving from one to another. What this was about was raising or promoting the profile of realestate.co because as Trade Me well understood, Trade Me was the go-to real estate listing, online listing place. Realestate didn't, realestate.co didn't have the profile. So the whole reason for this promotion of realestate.co and the roadshow that was carried out up and down the country was to raise its profile. And the way Trade Me got out of balance in terms of its share of the listings was a response to its price increase when compared with the fact that realestate.co was charging, say, $6 a listing, the vendors were being asked to pay 190. So it was a classic voting-with-your-feet and something that Trade Me expected to happen to a small degree but totally underestimated.

Unless – I think I addressed –

WINKELMANNN CJ:

So Mr O'Rourke accepted that he mentioned the date he was going to withdraw, I think?

MR TAYLOR QC:

Yes, yes.

WINKELMANNN CJ:

And he said it was the 16th of October, he did mention that?

MR TAYLOR QC:

Yes. He gives very clear – he doesn't resile from that at all. He says, "That was raised at the meeting and that's what I told them that I was going to do. I didn't care whether they did it or not. But that's what I was going to do," and that part of the rationale was that there would be less listings in the Hamilton market by the time they started. So that gives the significance of the date.

Mr Coombes said the significance of the date was that, well, December's a good time to make decisions like that and January's a quiet time of year, and no doubt all of that was part of it.

On the question of the obligation, I don't think I need to say much on that. It seems to be accepted by my learned friend that the obligation is a necessary part of an arrangement or understanding but he says, well, we don't have to prove it separately, and I've never quite understood what is mean by this separately proving. What you have to do is look at all the evidence, including the evidence of the subjective views or perceptions of the parties, and say given all that evidence has the representation that's been made, does it carry with it the sense of obligation, the sense of commitment, the sense of assurance, which gives rise to a reciprocal obligation to comply with it?

WINKELMANNN CJ:
I wonder if – well, I noted reading through the evidence that you had mentioned several times, you'd asked several times, my recollection, whether or not that person had felt a sense of moral obligation?

MR TAYLOR QC:
Yes.

WINKELMANNN CJ:
And I wondered if the Judge was in a way responding to that.

MR TAYLOR QC:
Yes, he was, but what I'm saying is did you have any perception? Did you have any sense of commitment or did you assume any obligation of that nature? And that's a perfectly legitimate question to ask when you are considering whether or not this is simply an exchange of views or an exchange of information or whether the circumstances of the representations were such that they carry with them that sense of obligation, and one of the ways of assessing that is to say, well, what was your perception? Is how it occurred? Mr Shale, for instance, said no, there was no sense of "I will if you will", everybody had made their independent decisions, and I am –

WINKELMANNN CJ:

I am not criticising you for asking the question.

MR TAYLOR QC:

No.

WINKELMANNN CJ:

I was just thinking how it was formulated. He – if a submission was made that everyone said they felt no sense of moral obligation, he might naturally respond to that in a judgment?

MR TAYLOR QC:

Yes, yes, but what he – the way he responded in it was to say their personal perceptions of that are irrelevant, and in my submission that shows very clearly that he misunderstood what was meant by the term "consensus" and expectation arising from the consensus, applying the *Giltrap* test.

WINKELMANNN CJ:

Or else on Mr Dixon's case he's just simply saying, "Well, I'm not going to pay much attention to what they personally say. I'm going to take an objective view"?

MR TAYLOR QC:

Yes, but I think the way he says it's irrelevant, "I'm not going to take into account those perceptions," shows that he got it wrong because totally I accept that overall it's an objective assessment of whether or not that sort of commitment, reciprocal commitment has arisen, but that is not one that can be made devoid of any evidence of what the subjective feelings or perceptions of the parties were and certainly that evidence is relevant to that inquiry in determining whether there's that objective assessment, and in my submission the fact that he got it wrong is made very clear by I think it's 192 of his judgment where he says it was enough that they communicated their intentions and really this is, to my mind anyway, this is the critical point because there's no law about – there's no law against stating to anybody what your intention is or what your view is or anything of that nature, the law is that you cannot arrive at an understanding, one with the other, by which you

commit yourself to any particular course of action which is prescribed and it's that fundamental point that there has to be that consensus, that I will if you will, that assumption of an obligation to act in a certain way which was absent in this case because all you had was people expressing views or intentions from which others gained that similarly as to the way they thought people were going to move to some sort of vendor model and that just lacks that element of obligation and obviously I rely on the written submission that I put in by way of reply but unless there are any questions, those are my submissions.

WINKELMANNN CJ:

I don't know – have parties the issue of costs in the submissions?

MR TAYLOR QC:

Sorry Your Honour?

WINKELMANNN CJ:

Issue of costs.

MR TAYLOR QC:

Costs, sorry.

WINKELMANNN CJ:

You've said they should be set by the Court of Appeal in light of the Supreme Court's judgment and I imagine Mr Dixon would follow suit on that and Mr McLellan.

MR TAYLOR QC:

Yes.

ELLEN FRANCE J:

And I may have just missed it but is it clear somewhere exactly what is confidential?

MR TAYLOR QC:

I think the only material that was confidential was their individual profitability.

ELLEN FRANCE J:

Is it just the figures, right.

MR TAYLOR QC:

There were confidential versions and non-confidential versions.

ELLEN FRANCE J:

Yes, I know and I found it hard without doing a compare, to work out exactly –

MR TAYLOR QC:

Well I think the only – there was a lot of Trade Me were very sensitive, so they wanted the whole of their board papers kept secret and all of that sort of thing but I think that in the end fell away didn't it? As far as my clients are concerned, the only information that would want to remain confidential would be their profit level and even that's probably of less relevance, given the number of years.

O'REGAN J:

Well it's more are there existing orders that the Court has to be careful that we don't breach. Did the lower Courts make orders about this?

WINKELMANNN CJ:

Well can counsel file a memorandum which sets it out clearly.

MR TAYLOR QC:

Yes, yes, that's going to be easier.

GLAZEBROOK J:

And if it's information within the person's own information and the order is wider, could you indicate that, ie if in fact in terms of your clients, whole piles of it supposedly confidential but in fact shouldn't be, under the order is what I meant.

MR TAYLOR QC:

Yes, we will make that clear.

WINKELMANNN CJ:

Yes, so in other words if we can actually stop suppression because it just makes it easier if there's – it sounds like most of this would be referred to in any judgment in any case.

MR TAYLOR QC:

Yes, yes.

WINKELMANNN CJ:

All right, well thank you very much counsel, thank you for your patience with our questioning and we will take some time to consider our decision and let you have it in the usual course thank you.

COURT ADJOURNS: 3.54 PM