

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 116/2018
[2019] NZSC 28

BETWEEN

LODGE REAL ESTATE LIMITED
First Applicant

MONARCH REAL ESTATE LIMITED
Second Applicant

BRIAN KING
Third Applicant

JEREMY O’ROURKE
Fourth Applicant

AND

COMMERCE COMMISSION
Respondent

Court: William Young, O’Regan and Ellen France JJ

Counsel: L J Taylor QC and M A Cavanaugh for First and Fourth Applicants
D H McLellan QC and M S Anderson for Second and Third Applicants
J C L Dixon QC, L C A Farmer and D S Houghton for Respondent

Judgment: 19 March 2019

JUDGMENT OF THE COURT

- A** An extension of time to file the application for leave to appeal is granted.
- B** Leave to appeal is granted (*Commerce Commission v Lodge Real Estate Ltd* [2018] NZCA 523) on the question whether the Court of Appeal should have allowed the respondent’s appeal to that Court except as set out at C below.

C To the extent the application for leave seeks to argue that the respondent had not adequately pleaded and to appeal from the dismissal of the applicants' cross-appeal the application is dismissed.

REASONS

[1] In the High Court the applicants (real estate agencies and directors of those agencies) were found not liable for penalties arising from an alleged arrangement or understanding contrary to ss 27 and 30 of the Commerce Act 1986.¹ Jagose J found that there was an arrangement or understanding between the applicants relating to Trade Me's fee structure for residential property listings but that arrangement or understanding did not have the purpose or effect of price fixing.

[2] The Court of Appeal allowed the respondent's appeal from that decision.² The Court dismissed the applicants' cross-appeal. The applicants seek leave to appeal from those decisions to this Court. In addition to challenging that part of the Court of Appeal's decision relating to s 30 of the Commerce Act, the application for leave to appeal also sought to challenge the following:

- (a) the Court of Appeal's finding that the respondent's pleading accurately described "the essence of the Commerce Commission's claims, as found to exist by the Judge";³ and
- (b) the decision to uphold Jagose J's ruling that the evidence of James Mellsop, an economist, be excluded (this formed the basis of the applicants' cross-appeal).

[3] Neither of the proposed appeal grounds described in [2](a) and [2](b) above raise any question of general or public importance or of general commercial significance.⁴ Rather, they are issues turning on the particular factual circumstances

¹ *Commerce Commission v Lodge Real Estate Ltd* [2017] NZHC 1497 (Jagose J).

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

³ At [105].

⁴ Supreme Court Act 2003, s 13; and Senior Courts Act 2016, s 74.

of the case. Nor is there any risk of a miscarriage of justice in the sense required in a civil case.⁵

[4] On the pleading point, the indications were that the Court of Appeal would have, in any event, allowed the respondent to amend the pleading if that was necessary.⁶

[5] The expert evidence in issue addressed what would have occurred but for the alleged arrangement and understanding. Both the High Court and Court of Appeal considered the admission of that evidence would remove the benefits of s 30 of the Commerce Act and so would not be substantially helpful in terms of s 25(1) of the Evidence Act 2006. Nothing raised by the applicants shows sufficient doubt about the correctness of the conclusion on this point reached by the Courts below in the present case to justify the granting of leave.

Result

[6] The result is as set out below. First, an extension of time to file the application for leave to appeal is granted. Secondly, leave to appeal is granted on the question whether the Court of Appeal should have allowed the respondent's appeal to that Court except as set out below. To the extent that the application for leave seeks to argue that the respondent had not adequately pleaded and to appeal from the dismissal of the applicants' cross-appeal the application is dismissed.

[7] The Registrar is directed to set the appeal down for a two-day hearing in the period 19 to 22 August 2019 (inclusive).

Solicitors:
Wotton Kearney, Auckland for Applicants
Meredith Connell, Auckland for Respondent

⁵ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

⁶ See *Lodge (CA)*, above 2, at [109].