IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2021-004-007296
[2022] NZDC 23889

COMMERCE COMMISSION

v

ASHLEY & MARTIN (NZ) LIMITED

Hearing:	5 December 2022
Appearances:	A McClintock and J Barry for the Prosecutor DA Campbell and AS Nair for the Defendant
Judgment:	5 December 2022

NOTES OF JUDGE NICOLA MATHERS ON SENTENCING

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[1] Ashley & Martin (NZ) Limited (A&M), has pleaded guilty to 10 representative charges under s 12A of the Fair Trading Act 1986 (the Act).

[2] In pleading guilty A&M accepts the Summary of Facts. I first set out the introduction of the Summary of Facts which gives a succinct overview of the charges.

> 1.1 The defendant, Ashley & Martin (NZ) Limited (A&M), faces 10 representative charges under s 12A of the Fair Trading Act 1986 (FTA or ACT). The charges relate to A&M making unsubstantiated representations

about the purported success rate of hair loss treatment programmes it offers to consumers in New Zealand.

1.2 A&M represented to consumers that its hair loss treatment programmes had a "98% success rate". The representations were made prominently on A&M's website, and in radio and television advertising. In most instances the representations were not qualified to refer to any specific treatment programme, and would have been understood by consumers to apply to A&M's programmes generally (Headline Representations). However, A&M also made targeted 98% success representations on webpages for its "RealGROWTH for Men" programme (Targeted Representations).

1.3 A&M did not have reasonable grounds for making the representations at the time that they were made as the material it relied on was outdated and in any event inadequate to provide reasonable grounds for A&M's claims:

a) When asked to substantiate the representations A&M stated that it relied on a 14-partiicpant clinical trail from 1999 (the Study) and a 109-particiapnt customer survey from 2007 (the Survey).

b) More recent information provided by A&M to the Commission, including subsequent customer surveys and academic literature monitored by A&M, appeared inconsistent with the 98% success rate being claimed.

c) In any event, the 1999 Study and 2007 Survey relied on by A&M do not appear to substantiate the proposition that A&M's treatments are effective for 98% of consumers who undertake them.

d) Despite the fact that the headline Representations were made to consumers in general, A&M was not able to provide any material demonstrating the success rate for consumers undertaking treatments other than its "RealGROWTH for Men" programme.

1.4 The conduct occurred over the period from 12 October 2016 to 15 May 2021 (Charge Period). The charges are all representative and are structured as follows:

a) Charges 1 – 3 relate to the Headline Representations made to the public at large on its website throughout the Charge Period.

b) Charges 4 – 6 relate to Targeted Representations made to the public at large on its website throughout the Charge Period.

c) Charges 7 and 8 relate to the Headline Representations made to the public at large through television advertisements between February 2019 and May 2021.

d) Charges 9 and 10 relate to the Headline Representations made to the public at large through television advertisements between February 2019 and May 2021.

[3] Pursuant to s 40 of the Act, it is an offence to breach s 12A. Upon conviction the maximum penalty is $600,000 for each offence.

[4] To put matters in perspective, the typical cost in New Zealand for a 12 month A&M programme started at approximately $3000. In the year commencing 2017, A&M had 694 contracts. By 2021, this rose to over 1600 and brought in revenue including GST of over $3.5 million. At the heart of this prosecution is the representation of a "98% success" made to the public at large and referred to in the Summary of Facts as both headline representations and also the "RealGROWTH" for men treatment programme. The "98% success" representations were made on A&M's website, television and radio advertisements by way of headline representations to the public at large during the whole charging period. In fairness to A&M, an asterisk was shown after the success rate referring to text at the bottom of the front page in small text as:

> "*Based on Australian Photobiology Testing Hair Count Study and 2007 Nielsen Survey"

[5] It included the date when referring to the 2007 Survey but omitted the date when referring to the 1999 Study.

[6] The advertisements were placed on NZME and MediaWorks channels including different verbal claims during the different campaigns. In the television advertising, they showed in small print "Verified by Nielsen Survey and University of Sydney Clinical Trials". The number of advertisements during the February 2019 to October 2020 period ran on a range of channel at least once per week and as recently seen by the Commerce Commission on 15th May 2021.

[7] Then there were Targeted Representations relating to the "RealGROWTH for Men" treatment programme including representations that:

> "RealGROWTH is a clinically proven regrowth program. This unique treatment actually stimulates dormant follicles and regenerates your very own hair. **You do need to act fast to increase your chances of success but when you do, you can look forward to a 98% chance of success**".

[8] Before turning to the rest of the prosecutions lengthy submissions and the lengthy defence submissions, I note, as in most submissions, there is a general tendency by both parties to attempt to move beyond the details in the Summary of Facts. The Summary in this case is very detailed. It is what the defence has pleaded

guilty to and is what they must accept, as the basis of their mitigation. Both parties also spent a lot of time comparing different cases and trying to place this offender in the appropriate box. I must say I do not find that approach very helpful, other than for not being unfair or being significantly outside established sentencing levels. In my view, it is better to assess the seriousness of the offending in terms of the statutory principles and the level of penalty that the legislature has enacted into law.

[9] Of significance is the fact that no additional documentation to support the defence representations was provided to the Commission. The study was small, starting out with 14 people but ending up with only 10. The survey was a one-page report recording 109 telephone interviews. The findings recorded in the Summary are:

- 92% of customers who have started the Ashley & Martin RealGROWTH programme "agree/strongly agree" that their "hair appears healthier"

- 94% of customers who have started the Ashley & Martin RealGROWTH programme "agree/strongly agree" that their "hair loss has stabilised"

- 90% of customers who have started the Ashley & Martin RealGROWTH programme "agree/strongly agree" that they "have more hair now"

- 98% of customers claim they have experienced hair regrowth since starting the RealGROWTH program — with 90% experiencing hair regrowth within 6 months of undergoing the program.

[10] The Commission takes the view that the Nielsen findings "did not provide reasonable grounds" for the representations to be made, were outdated, relied on "very small" sample sizes and "do not appear to support the 98% success representations". Then when evaluating the Study and the Survey, the Commission concludes:

> "The Study and Survey do not, even in their own terms, properly substantiate that the "RealGROWTH for Men" (or any other) treatment program offered by A&M was successful for 98% of all consumers. Also the Commission relies on interviews with the CEO of the defendant and the assurances of the defendant that the material it relied upon was out of date or inadequate.

[11] Finally, the Commission refers to detriment and says the detriment includes:

10.1 Unsubstantiated representations as to the efficacy of medical and/or health services have a number of detrimental effects. These can include:

a) Misleading consumers as to quality or likely efficacy of services, which may in turn induce them to undertake treatments they would not otherwise have undertaken.

b) Reducing public trust in representations about the efficacy of medical or health services made by other traders who do have a proper basis to substantiate them; and

c) Disadvantaging competitors who take on increased costs associated with ensuring that representations they make are properly substantiated on an ongoing basis.

[12] In this respect, I note in particular that it is not only detrimental to the public but also to competitors who substantiate their representations at a significant cost.

[13] The supporting submissions of the Commission largely follow the details in the Summary of Facts but flesh them out, plus helpfully summarising the core offending. The Commission submits that A&M's conduct was reckless. When referring to the statutory criteria, it submits that any unsubstantiated representation, as defined in s 12A, is made "if the person making the claim does not, when the claim is made, have reasonable grounds for making it, irrespective of whether it is false or misleading".

[14] In the defence submissions, in this respect, they point to the fact that the Commission does not allege the representations were false as distinct from the other cases referred to. I place little weight on this submission. I consider the fact that A&M did undertake some work to substantiate its claim is overtaken by the terms of s 12A where A&M had no reasonable grounds for making the 98% claims. The charge period is lengthy compared to other cases and I cannot accept the submissions that the period of the charges should be averaged out. The television and radio campaigns were significant coupled with the claimed 98%, plus the fact that the false or misleading sections have the same maximum penalty.

[15] Mr Campbell for A&M has helpfully summarised in his submissions A&M's overall position. First he says the culpability is "low". I am afraid I cannot agree. While I am minded not to agree with the Commission's term of "reckless" conduct by

A&M, it was certainly "insufficient" and very careless in the way it interpreted the data, such as it was.

[16] I can agree that a 25 percent discount for guilty pleas is appropriate even though the plea took some time to be entered. In a case of this kind, it is reasonable to consider carefully the 10 representative charges and the detailed Summary of Facts.

[17] While a discount is appropriate for cooperation and good character, I am not prepared to fix it at 10 percent. In my view five percent is appropriate.

[18] The appropriate starting point needs further consideration of the defence submissions and reply by the Commission. Mr Campbell says "gravity is the key issue" which I agree applies to almost every case of this type. I do not, however, accept that the "offending was limited to incorporating research data into advertising in a way that was not reasonable". It was not just the fact of incorporating into advertising. The inadequacy of the data, its continued use, the failure to advertise or take into account later surveys, the over prominent use of the claimed 98%, and the careless interpretation of the base data are all significant.

[19] Also, I do not accept the categorising of "misapplication of data" and I do not accept that A&M "made genuine attempts to substantiate the success rate claim". The use of the word "genuine" disguises the lack of care in relying upon the data and then prominently relying upon it.

[20] Mr Campbell then takes me to a heading of "Sales process nuanced" and refers to the intervening process of medical treatments, consultations with a doctor and regular clinic visits. It is lost on me as to how the later process as against the prior representations is relevant in this case. Neither do I consider "the money back" guarantee to be relevant and I note it did not apply in all circumstances.

[21] I have commented already on the similar cases referred to me. Both sides refer me to similarities and differences. But to me the important facts in this case which distinguish it from the other cases relate to the length of the charge period and the extensive advertising by television and radio and on its website, together with the very

dominant claim of 98% success. There is also the significant cost of a trial and programme. I acknowledge that A&M did some work to substantiate its claims, inadequate and very careless as I have found it to be. Also, I have not reached the reckless level contended by the Commission, albeit very careless, as I have found.

[22] Nevertheless, I have carefully considered each case as to whether it fixes any level in this case, but in the context of the agreed facts and my findings as set out above.

Penalty

[23] I take into account the legislative framework and the increase in penalties. There must be a consideration of deterrence together with the ability to pay. To some extent, the mere fact of conviction of a s 12A offence is a deterrent as it must adversely affect a company such as A&M. I do not have any defence financials but note the concern as to whether A&M has the ability to pay a substantial fine beyond what it considers the starting point.

[24] The starting point submitted by the parties is significantly disputed. The Commission submits it is $750,000 to $800,000 and A&M submits between $260,000 to $300,000. I accept a 25 percent discount for the guilty plea and fix five percent for cooperation and good character. Because I have not categorised the offending as reckless but rather very careless, I consider the starting point proposed by the Commission to be too high and equally A&M as being too low. Taking all matters into consideration and standing back as to an overview of the offending, I fix a starting point of $525,000 which after applying the discounts gives an end fine of $367,500, which will be divided between the 10 charges.

[redacted]

District Court Judge