IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2019-009-009141
[2020] NZDC 6371

COMMERCE COMMISSION
Prosecutor

v

OCEAN CONTRACTING LIMITED
Defendant

Hearing:	27 February 2020
Appearances:	S C Carter for the Prosecutor D Jackson for the Defendant
Judgment:	17 April 2020

RESERVED JUDGMENT OF JUDGE R E NEAVE
On Sentencing Reasons

Introduction

[1] On 27 February 2020 I sentenced the defendant company to a total of fines of $75,000 plus reparation. Given the time available on the day and the complexity of the exercise I indicated that the reasons would follow. These reasons I now give.

Charges

[2] The company was charged with 10 charges of making a false or misleading representation in trade in respect of s 40(1)(b) and s 13(h) Fair Trading Act 1986.

Summary of Facts

[3] The summary of facts records the following relevant matters.

[4] The defendant was a limited liability company based in Christchurch. Its primary business was servicing heat pumps.

[5] In 2016 and 2017 the defendant carried out a marketing campaign in Otago and Southland which involved cold-calling heat pump owners. Those contacted were offered the opportunity to have their heat pump serviced and the quoted price was typically between $100 and $130.

[6] The 10 complainants in this case were customers of the defendant during this period. Most were retirees and aged between 60 and 85 years. The complainants engaged the company to perform services on their heat pumps.

[7] During the relevant period employees of the defendant attended the complainants' addresses to carry out the servicing of the heat pumps.

[8] During these services each of the complainants was told that the heat pump was leaking refrigerant gas. They were told that the leak would need to be fixed urgently or the heat pump would not function correctly. The complainants were told that it would cost between $180 and $400 to top up the gas and most agreed to pay the amount.

[9] If the price was accepted an employee of the defendant then purported to complete a top-up procedure, sometimes doing this while the complainants watched.

[10] In fact, none the complainants' heat pumps required a required a refrigerant gas top-up. Furthermore, the evidence would suggest that the defendant's employee did not actually carry out the gas top-ups which had been held out as necessary and which, in some cases, it purported to do. The particulars of each complaint are:

Charge 1: Madeline Clark

10 On 30 March 2016, Madeline Clark had her heat pump serviced by Ocean Contracting, having received cold-calls from the company.

She had not previously experienced any issues with her heat pump. During the service one of the technicians told her that the outside unit was leaking gas and not functioning correctly, showing her a gas gauge with a purportedly low reading. Ms Clark was charged $350 for a gas top-up which took the technician approximately 10 minutes.

11. Ms Clark became suspicious after not finding any signs that the refill pipe had connected to the unit. She had her unit inspected by another company which revealed spider webs in the external unit, indicating that the unit had not been cleaned, or even opened, by the technician. The unit would have to have been opened if Ocean Contracting had carried out a gas top-up.

12. Ms Clark's fee was eventually waived by Ocean Contracting after media reporting about her and other consumers' experiences.

Charge 2: Fiona Stirling

13. In August 2016, Fiona Stirling was cold-called by Ocean Contracting and agreed to book a service for her heat pump. Two technicians arrived on 20 August 2016. During the service, one of the technicians told her that he had discovered a refrigerant gas leak and that it required a refill, which would cost $185. She agreed to pay this and the technician purported to carry out the procedure, which only took approximately five minutes. Following the purported procedure there was no sign that he had taken the unit apart which would have been required if the gas top-up had in fact been performed.

14. Ms Stirling's heat pump had been installed one year prior to these events and she had never had any issues with it.

Charge 3: Judith Turner

15. Judith Turner was given a $25 discount card for Ocean Contracting's services by a relative. Ms Turner booked a service of her heat pump for 13 September 2016. While servicing the heat pump, the technician told Mrs Turner that a screw in the outside unit had not been tightened properly during installation. He said he had tested the unit and that gas had leaked. He implied that if it was not topped-up, the unit would be damaged. He charged her $150 for the top-up, which took under half an hour. The price was reduced by the technician when Ms Turner did not have enough funds to pay his original quoted price.

16. When Ms Turner booked this service, her heat pump was less than five years' old and was working correctly.

Charge 4: Myrtle O'Callaghan

17. Myrtle O'Callaghan was also given a $25 discount card for Ocean Contracting's services by a relative. In January 2017 she called and booked a service for her heat pump for 11 January 2017. During the service, the technician told her that her heat pump was leaking gas and required a refill or the unit would stop working. He said the work would cost $400 but offered it to her for $300 as she could not afford the higher price.

18. Ms O'Callaghan had not had any previous problems with the heat pump.

Charge 5: Johannes de Waal

19. In January 2017, Johannes de Wall's wife received a cold-call from Ocean Contracting asking if the couple wanted their heat pump to be cleaned. They agreed and technicians came for the service on 11 January 2017. During the clean, one of the technicians attached a gauge to the heat pump. He showed it to Mr de Waal and told him that the pressure was reading 1000, when it needed 1400 as a minimum to work properly. He said a top up of four units, costing $400, was necessary. Mr de Waal refused.

20. Mr de Waal later had the heat pump checked by another company, which advised that the heat pump was working correctly and had the right amount of refrigerant gas.

Charge 6: Joy Waters

21. In February 2017, Joy Waters was cold-called by Ocean Contracting and was offered a service of her heat pump. The technician arrived on 2 February 2017 to perform the service. During the service, he told Ms Waters that there was rust and a gas leak in her external unit. He told her that it would require a gas refill and he would return on another day to carry it out. She agreed, believing that the heat pump would cease working if it was not repaired. The technician returned on 10 February 2017 and carried out the work. It took only 5-10 minutes, for which Ms Waters was charged $300.

22. The heat pump had not previously been causing Ms Waters any issues.

Charge 7: Noeline Campbell

23. Noeline Campbell was cold-called by Ocean Contracting and was offered to have her heat pump cleaned for $100. When the technician arrived on 18 March 2017, he claimed he had located a refrigerant leak and that a top-up was needed. The purported top-up procedure took approximately 15 minutes. She was charged $285 for the top-up procedure and $100 for the cleaning service.

24. Ms Campbell's heat pump had been operating "perfectly" before the service was carried out.

Charge 8: Chantel Ashley

25. During 2017, Chantel Ashley was cold-called many times by Ocean Contracting. She contacted the company in April 2017 as she was having issues with one of her heat pumps. The technician arrived on 6 April 2017 and provided her with a quote for repairs of this heat pump. While at the property, he also cleaned Ms Ashley's second (fully functional) heat pump. During this clean, he showed her a gauge which he said had identified low gas pressure in the outdoor unit. He told her that it would need to be topped up. She agreed to

this and was charged $395. The whole procedure took about 10 minutes.

26. Ms Ashley became concerned and contacted another company to inspect the work done by the defendant. This inspection revealed that the technician cannot have actually carried out a gas top-up on her outdoor unit – there were cobwebs inside and the screws were still factory tightened.

Charge 9: Gregory Knox

27. Gregory Knox was cold-called in late March 2017 by Ocean Contracting. The company's representative told him that heat pumps required annual servicing and offered to carry out a "discounted" service for $125 instead of the usual $175. Mr Knox agreed and the technician arrived on 8 April 2017. While cleaning the heat pump, the technician claimed he had noticed a leak of refrigerant gas and that the heat pump would fail to operate within days if it was not repaired. He charged Mr Knox $400 for the repair. He was at the property for no more than an hour.

28. Mr Knox's heat pump had been in fine working order. He became suspicious and contacted the original installer of the heat pump. After speaking to them, he refused to pay Ocean Contracting. When contacted about the outstanding invoice, he told the company's representative that he thought he had been scammed.

29. Ocean Contracting promised to investigate but did not contact Mr Knox again.

Charge 10: Noelene Beker

30. Noelene Beker contacted Ocean Contracting because her outdoor heat-pump unit was freezing up. A technician attended and told her that the reason for this was that the heat-pump needed a gas top-up. He carried out this service for her. Her heat-pump was under warranty so she did not make payment.

31. It was clear shortly after the technician left that the gas top-up had not addressed the problem. Ms Beker contacted another company for a second opinion, which informed her that she may need a new thermal probe.

32. Ms Beker called Ocean Contracting and asked for the technician to return. The technician told her that her heat-pump would need replacing. Ms Beker asked him to replace the thermal probe, which he agreed to do. He came back another day and purported to carry out the replacement.

33. Ms Beker's heat pump continued to cause her issues, so she called the other company and asked them to come and look at it. They attended and replaced the thermal probe. It became clear when carrying out this service that the external unit had never been opened and so no gas top-up had been performed and no new parts had been installed as claimed by the technician from Ocean Contracting.

34. The replacement of the thermal probe addressed the issues with Ms Beker's heat pump.

[11] In April 2017 the Otago Daily Times ran a news story about the experience of one of the complainants. The director of the defendant was contacted for comment and he stood by the work that had been done on the particular complainant's heat pump. Nearly two weeks later another article was published in the Southland Express based on the experience of two further consumers and which expressed concern about the defendant's cold-call marketing campaign. Following the media reports eight of the complainants contacted the prosecutor and another two complainants made formal complaints once they were contacted by the Commerce Commission during the investigation.

[12] Job sheets and invoices obtained by the Commission showed that the defendant had carried out 150 refrigerant gas top-ups in the lower South Island between 17 July 2016 and 6 April 2019. One hundred and thirty six of those job sheets recorded that a gas top-up was required due to a leaking Schrader valve.

[13] Experts consulted by the prosecutor advised that gas leaks in heat pumps were rare. They were usually caused by incorrect installations and typically resulted in the heat pumps becoming non-functional relatively quickly. They are usually thus discovered in the weeks or months after installation. Further, Schrader valves are fitted with pressure caps to prevent refrigerant leaves and thus they are very unlikely to develop leaks regardless of the amount of pressure or heat levels within the system.

[14] Finally, the Commission's experts advised that refrigerant gas replacement would require the whole gas charge to be emptied and refilled rather than topped-up. The cause of the leak would need to be identified and repaired and this is a process which takes several hours.

[15] The Commission spoke to employees of the defendant, including the technician who serviced the heat pumps for the complainants. That technician admitted to diagnosing falsely refrigerant leaks and said he did so because he felt pressured by the defendant's director. The technician admitted he did not know how

to perform the refrigerant top-ups properly and did not ever complete one proper top-up procedure. He received no financial benefit from the top-ups.

[16] The investigation also showed that another employee had become suspicious of the number of these top-ups and had raised this with the director. This employee also alleged that he felt pressured by the director to find more customers who needed the top-ups.

[17] A number of the complainants are financially vulnerable. Paying for the top-up procedure was a significant expense for them. Six of the complainants paid the amounts charged by the defendant and of the remainder one had her fee waived after adverse media attention, two refused to pay and one had the cost covered by a warranty. In addition, several of the complainants incurred unnecessary costs by calling out other heat pump companies to verify the defendant's work. The prosecution alleges the complainants were also vulnerable in that they lacked the technical expertise to know if their heat pumps actually required the top-up and that the whole experience was unnecessarily stressful and time-consuming.

[18] Furthermore, it is alleged that the defendant's behaviour damaged the customer relationships with other service agents operating in the area with these companies receiving calls from various customers blaming them for faulty installation which, of course, had not occurred.

[19] When contacted by the Commission and in answer to written questions from the Commission, the director denied any knowledge of unnecessary top-ups and ascribed them to the actions of a rogue employee.

[20] The defendant claimed that a high incidence of leaking Schrader valves in the area was to be expected because these markets were under-serviced and thus heat pumps tended to be dirty in the region. Experts consulted by the Commission considered this unlikely to be accurate. Their view was that while accumulated dirt and grime on filters can affect the operation of a heat pump it would not cause a leak of refrigerant.

[21] The defendant alleged that the conduct was carried out by a rogue employee, while that employee alleged he was instructed to carry out the conduct by the defendant. It was not necessary to resolve this conflict because the company was said to be responsible for the false and misleading representations because:

(a) Its technician made the false or misleading representations within the scope of his employment and as a representative of Ocean Contracting.

(b) It pressured its technicians to perform high numbers of refrigerant top-ups. The relevant technician felt vulnerable because he believed his work visa was dependent on is continued employment by Ocean Contracting.

(c) It failed to properly monitor or supervise its technicians, despite being in daily contact with them.

(d) It failed to take any action to cease the conduct until it received adverse media attention, even though it was, or should have been, on notice of:

  (i) The unusually high number of top-ups being performed.

  (ii) The disproportionate number of top-ups being performed by one particular technician, when compared with the other technicians.

  (iii) The disproportionate number of top-ups being attributed to "Schrader valve leaks", which are rare occurrences.

  (iv) The short periods of time that the purported top-ups and leak repairs were taking the technician.

  (v) The discrepancy between the low quantity of refrigerant supplies being used, and the high number of refrigerant top-ups being invoiced.

(e) It failed to properly investigate the complaints is received from consumers, despite its own technician advising it that top-ups were being performed even when there were no leaks.[1]

[22] The company has never appeared before the Court before.

[23] Victim impact statements were filed on behalf of six of the complainants. They referred to the complainants' stress, worry, lack of trust as well as financial loss on behalf of the various complainants.

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[1] Paragraph [53] Summary of Facts.

Prosecution Submissions

[24] Ms Carter submitted that there were no tariff cases that were applicable, in part because of the wide variety of circumstances that may arise under the legislation. Furthermore, she reminded me that the maximum penalty for each offence was a fine not exceeding $600,000 and it was to be noted that the maximum penalty had been increased threefold in 2014.

[25] She also, appropriately, reminded me that s 40(2) Fair Trading Act provided that a single maximum penalty should apply for all contraventions of the Act that are "Of the same or a substantially similar nature and occurred at or about the same time". She submits that there were, in effect, something like approximately four clusters of offences and, on that basis, an overall maximum penalty of no less than 2.4 million dollars was available, although she accepted that obviously a penalty nowhere near that was going to be imposed in this particular case.

[26] Further, she submitted that the applicable sentencing principles were well settled. In particular, she suggested the authorities referred to:

(a) The object of the legislation, in particular the policy of protection and the need to facilitate fair competition;

(b) The importance of any untrue statement made;

(c) The degree of wilfulness or carelessness in making such a statement;

(d) The extent to which the statements departed from the truth;

(e) The degree of the untrue statements' dissemination; and

(f) Whether any efforts were made to correct the untrue statements.

[27] She submitted that those matters were somewhat overlapping and that they could usefully be grouped in the following way.

(a) First, the consciousness of the defendant's misconduct should be evaluated. Namely, was it deliberate, reckless or careless and to what extent.

(b) Secondly, the detriment to consumers and other traders should be assessed. This will take into account the importance of the untrue statement, how far it departed from the truth and how it was disseminated.

(c) Third, the efforts taken by the defendant to correct the problem should be taken into account.

(d) Finally, these matters should be balanced in arriving at a starting point which fulfils the objects of the legislation, taking into account the deterrent effect of a conviction and fines and the need to remove any unfair competitive advantage that the defendant gained through its offending.

[28] Ms Carter submitted that the leading case on the appropriate penalty for Fair Trading Act offences was *Commerce Commission v Steel and Tube Holding Ltd,* a decision of Duffy J.[2] In that case she held that bands should be adopted depending on the state of mind of the defendant:

> 26. ...
>
> In general, the acts of commission or omission that constitute a strict liability offence will be done inadvertently, carelessly or deliberately. Inadvertence will be a mitigating factor, whereas, deliberate conduct will be an aggravating factor. Careless conduct will sit in between; being viewed as either neutral or aggravating depending on the degree of carelessness involved. Thus, in broad general terms a starting point for inadvertent misrepresentations might be up to 33.3 per cent of the maximum fine, careless misrepresentations might be between 33.3 per cent and 66.7 per cent of the maximum fine and deliberate misrepresentations from 66.7 per cent upwards. There may also be room for some overlap between these bands. For example, gross carelessness may fit somewhere between the second and third band. Recklessness may also fit in this area. Further adjustment of the chosen starting point will then be required to accommodate other aggravating and mitigating features of the offending.

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[2] *Commerce Commission v Steel and Tube Holding Ltd* [2019] NZHC 2098.

27. Applied to the maximum penalty in the present case, the "bands" would be as follows:

    (a) *Inadvertent misrepresentations*: up to $200,000

    (b) *Careless misrepresentations*: $200,000 to $400,000

    (c) *Deliberate misrepresentations*: $400,000 to $600,000

[29] Ms Carter accepted, as noted by Duffy J, and also reflecting the Court of Appeal's comments in *Zhang* that adjustments within the bands would be necessary to reflect other aggravating and mitigating factors in the present case and that flexibility and discretion are required, notwithstanding any guideline judgment.[3]

[30] The judgment of Duffy J is currently under appeal and the Commission has adopted a conservative approach in respect of the present case.

[31] Ms Carter referred me to a number of comparable cases in her submissions from paragraph 31:

31. In *Commerce Commission v Sales Concepts Ltd*, the defendant company pleaded guilty to ten FTA charges, including seven under s 13. These charges related to untrue statements made by door-to-door salespeople about the intended delivery times for "Christmas bundles" over the period October-December 2015. A total of 731 customers purchased bundles during this time; the value of each purchase was between $599 and $1,599.

32. The defendant company had between eight and 12 sales staff at any one time. These staff operated out of cars and sold door-to-door using various catalogues. Frequently, staff would take three-to-four-day road trips throughout the North Island.

33. The company submitted that it was unaware of its employee's unauthorised representations – characterising them as "rogue staff". The Court ultimately did not accept this as a full explanation of the offending. The untrue statements were characterised by the Court as an exploitation of an ambiguous sales catalogue, encouraged by a "lack of compliance procedures" and a "culture of obtaining sales with little regard to any adverse impact on the customers". Given the size of the company and the proportion of staff implicated in these practices, the Court thought it implausible that the directors were not aware of the problematic behaviour. In any case, the Court noted that the company had a positive onus to ensure compliance with the FTA. A starting point for the s 13 charges of **$215,000** was considered appropriate.

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[3] *Zhang v R* [2019] NZCA 507.

34. In *R v Love Springs Ltd*, the defendant company faced 11 representative charges under s 10 of the FTA. The charges related to false claims by the company's door-to-door salespeople about the safety of tap water. The company relied on these misrepresentations to sell its filters; salespeople were explicitly trained to believe (or at least to pretend to believe) that tap water caused health problems in New Zealand.

35. Around 1,200 contracts were entered into across the North Island (each of a value of approximately $1,500), though the Court acknowledged that "ultimately nowhere near that number" were actually enforced. The company's revenue from the sale of filters across the charging period was approximately $3.7 million.

36. The Court found that the defendant "knew of, approved, and encouraged" training techniques which were "designed [to] and did produce misrepresentations" by salespeople with the aim of selling water filters. The defendant's culpability was held to be high, bearing in mind the profit made from the techniques and the pernicious nature of claims about drinking water. A starting point of $500,000 was adopted. As the offending took place in 2009, the maximum penalty for each offence was $200,000. A roughly equivalent starting point would be approximately **$1.5 million**.

37. *Commerce Commission v Auckland Academy of Learning Ltd* involved both home visits and telemarketing calls. The defendant company misrepresented the nature of an educations assessment carried out on customers' children, and subsequently misrepresented that the assessment revealed a need for their children to receive further (paid) assistance.

38. Over the relevant period, the company employed around 56 staff, including 17 sales consultants. The company entered into 3,359 agreements with consumers, though around a quarter of these were cancelled during the cooling-off period. Customers who did not cancel paid between $3,304 and $11,017 for the defendant's product.

39. The offending was assessed as serious and of high culpability, given the scripted nature of customer interactions and the fact that sales "capitalised" on parents' concern for their children. The Court adopted an overall starting point of **$500,000** for these misrepresentations.

[32] Applying the foregoing she submitted:

40. The Commission submits that the offending discloses the following aggravating features:

    (a) *Vulnerability of consumers:* The complainants were vulnerable in a number of ways:

        (i) They relied on the technical knowledge of the defendant's employees. The only way to challenge their assessment of the need for a refrigerant gas top-up was to pay another service provider. Similarly, the technical nature of the service meant that it was very

difficult for complainants to tell whether a service had actually been performed as claimed.

(ii) Many of the complainants were also particularly vulnerable because of their age and retired status (which had implications for their financial resources).

(iii) Finally, the complainants were rendered particularly vulnerable because the offending took place in their homes.

(b) *Recklessness of the defendant:* The Commission submits that the defendant was grossly reckless. This is for the following reasons:

(i) The defendant pressured technicians to perform refrigerant gas top-ups. The technicians interviewed by the Commission explained that they felt vulnerable because of their work visas and so had a strong desire to perform as expected. In this regard, it is important to note that the defendant, not the technicians, benefitted from the funds taken in exchange for the purported top-ups.

(ii) The defendant then failed to properly supervise its technicians, despite having the easy ability to do so and in fact being in regular contact with them.

(iii) Finally, it turned a blind eye to the clear signs (described above at paragraph 13) that consumers were being misled. It had the information that it was not using the refrigerant gas that would have been required, was receiving additional sales revenue, and yet did nothing – even when concerns were directly voiced by staff and it received complaints from consumers. Ultimately, it failed to take any action to curb its technician's misconduct until adverse media reporting.

(c) *Extent to which the representation departed from the truth:* The representations were wholly, and deliberately (on the part of the defendant's technicians) false.

(d) *Importance of the false representation:* The representation was the sole reason that the complainants agreed to purchase the defendant's services. Heat is a crucial household requirement, and the complainants were *concerned* that their heat pump would suddenly stop working, and they would be without heating.

(e) *Degree of dissemination:* The misrepresentations took place over a nearly two year period. The pressure placed on employees and the unusually high frequency of gas top-ups carried out by the defendant during this time suggest that the

misrepresentations were the result of systemic and widespread practices, rather than limited to a few occasions.

(f) *Consumer detriment/unlawful benefit:* The complainants were charged between $150 and $400 for the refrigerant gas top-ups (though not all paid this amount). While the sums are not large in the context of some of the above cases, it is important to acknowledge that vulnerability of many of the complainants – for whom this was a significant amount. Some complainants also incurred additional costs hiring other service providers to inspect the work carried out by the defendant's technicians.

(g) *Effect on other service providers:* During the investigation, the Commission spoke to a number of related businesses in Dunedin and Invercargill, who expressed concern that the defendant's misconduct had harmed the reputation of all local heat pump service providers. The defendant's technicians had advised many of the complainants that the gas leak had likely been caused by faulty installation by the initial service provider.

41. The Commission submits that there are no mitigation features of the offending.

[33] Applying these to the appropriate starting point she submitted:

42. The Commission submits that an appropriate starting point would be in the region of $200,000. This has been arrived at applying the analysis from paragraph 23 as follows:

(a) The defendant's culpability is submitted to be high. The defendant created the circumstances which incentivised the employee's misconduct. It then failed to properly supervise the employees and ignored obvious warning signs (while continuing to benefit financially from its misrepresentations). It acted in apparently deliberate disregard to the interests of its customers.

(b) There was significant detriment to consumers, for the reasons given above. Completely untrue statements by the defendant's employees – which consumers had no easy way of verifying – caused the complainants to purchase services which they neither needed nor actually received. These misrepresentations also harmed the reputations of the defendant's competitors. The Commission accepts that the scale of dissemination and unlawful gain was less than in some of the cases discussed above but submits that the fact that the misrepresentations took place in the complainants homes adds a particularly dimension of harm.

(c) the defendant did nothing to curtail its employees until after receiving adverse media attention. At this point it waived the fees of one complainant.

(d) Weighing these points and the aggravating factors discussed above, the Commission submits that a significant fine is necessary in order to denounce and deter the defendant's offending. However, no specific uplift is sought to counteract the defendant's unlawful gain, as the scale of the offending does not require it.

43. As is often repeated in the authorities, it is difficult to draw a direct comparison with any particular case. However, the Commission submits that the culpability lies somewhere between *Sales Concepts Ltd* (where individual employees were allowed to make untrue representations by a lack of compliance procedures and a poor company culture) and *Auckland Academy of Learning Ltd* (where misrepresentations were in sales scripts prepared by the company). Both of these cases involved consumers being targeted in their homes and misrepresentations which could not easily be verified.

44. The Commission submits that the case involves more serious misrepresentations than *Sales Concepts Ltd.* The product did not merely arrive late; it was completely unnecessary. Moreover, the representation was particularly exploitative because consumers believed that they had to pay for the top-up or else their heat pumps would cease functioning. To an extent, this balanced out by the greater dissemination and charge to consumers in *Sales Concepts.* However, a starting point comparable to that in *Sales Concepts* is, it is submitted, still warranted.

45. Applying the guidance from *Steel & Tube Holdings* would suggest a starting point in the region of $400,000 (in the overlap between bands, as Duffy J suggested was appropriate for cases involving recklessness). Since that would be a significant departure from previous case law, and the High Court judgment is still under appeal, the Commission does not seek such a starting point in this case.

46. Rather, it is submitted that a starting point of $200,000 would be consistent with the case law cited above.

[34] The Commission did not rely on any personal aggravating features specific to the defendant and in relation to mitigation it was noted that the defendant belatedly waived the fee charged to one complainant and generally co-operated with the investigation, even though it denied any wrongdoing. The defendant had not previously been investigated by the Commission and, obviously, had no previous convictions. However, she submitted that the Court should not give excessive weight to these factors and it is not appropriate to be giving routine standard discounts, referring me to the *Stumpmaster* decision.[4] As to that, that comment was in the context

[4] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 883.

of a routine discount having been given to reparation figures and needs to be applied in the light of the decision in *Hessell* and *Zhang* for that matter.[5]

[35] She submitted that the credit for factors such as good character, et cetera, should be limited to five percent. She accepted that 25 percent was available in the circumstances of the case. Finally, in respect of reparation and financial capacity, she submitted as follows:

> *Reparation*
>
> 52. The Commission submits that this is a case where reparation should be ordered. Specifically, the Commission submits that the following amounts (as set out in the reparation schedule **annexed** to these submissions) should be ordered under ss 12 and 32 of the Sentencing Act:
>
> (a) repayment of the amounts charged for the purported gas top-ups: and
>
> (b) repayment of the costs incurred by some complainants in obtaining a review of the defendant's work.
>
> 53. Given that the amount of reparation will only reflect a very small proportion of the starting point, the Commission submits that it would not be appropriate for the defendant to be credited a discrete reduction in the starting point to reflect the payment of reparation. Even a five per cent credit would likely result in the defendant receiving a greater discount than it was required to pay in reparation.
>
> *Adjustment for financial capacity*
>
> 54. If the defendant company is unlikely to be able to pay a significant fine, some further reduction in the end fine may be warranted.
>
> 55. However, the Commission has not yet sighted the defendant's financial information. Leave is sought to file further submissions on this point once this information has been provided.
>
> 56. Were the Court minded to reduce the fine for financial incapacity, the Commission respectfully requests that it first identify the fine that would have been imposed but for this reduction. Having this information is useful as guidance for future cases.

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[5] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

[36] And submitted that the defendant should be sentenced in the following way:

> 57. The Commission submits that the defendant should be sentenced as follows:
>
> (a) Reparation should be ordered to the complainants for the funds lost as a result of the defendant's offending.
>
> (b) A total fine of approximately $142,500 should be imposed (subject to the defendant's ability to pay). This would be calculated as follows:
>
> (i) Starting point of $200,000
>
> (ii) Less 5 per cent for personal mitigating factors – being $190,000
>
> (iii) Less 25 per cent for an early guilty plea – being $142,500

Defence Submissions

[37] Mr Jackson submitted that a total fine of $30,000 payable over 12 months would be appropriate. He suggested that would place a burden on the company but would not be sufficient to cause closure and liquidation. He clarified certain factual aspects of the company's plea. While accepting that the technician may have felt pressured to perform the top-ups the defendant never accepted that it had actively pressured the technician to do so. The company accepted responsibility for the offending, as it must, and accepted that its own lack of supervision or proper systems enabled the offending to occur but it was not accepted that it had, in effect, actively promoted the offending.

[38] He pointed out that although there was reference in the Commission's submissions to technicians or employees plural the offending appeared to have involved only one particular employee in the Otago/Southland area. He submitted that once the rogue employee was discovered and confronted during the course of a disciplinary process that employee resigned.

[39] Mr Jackson also points out that the investigation took three years to reach a conclusion and concerned only a small initial pool of 12 complainants, subsequently reduced to 10, and focused entirely on the Otago/Southland area where the defendant had only two employees of the company. The company's main geographical areas of

business were the Canterbury and Marlborough regions and there had been no problems or complaints in those areas. Perhaps this serves to confirm that the company's fault was in the nature of oversight. Where they had the more active and major involvement there were no problems, but in the less significant and probably less supervised area they fell short.

[40] He also pointed out in the relevant time period the company carried out nearly 3000 services of which the rogue employee carried out just over 500. This was approximately 17 percent of the company's business during the relevant period.

[41] Further, since the investigation began in 2017 there have been no further complaints and he submits this is evidence of the impact of the departure of the rogue employee and an improvement in the company's practices. He rejected the submission that the offending was the result of systemic and widespread practices but rather it occurred in new territory for the company and in circumstances where it failed to monitor, supervise, or otherwise have in place adequate systems to safeguard against this kind of behaviour.

[42] Subject to those points of clarification the company largely accepted Ms Carter's submissions on behalf of sentencing, subject to a greater allowance sought for personal mitigating factors. Mr Jackson submitted as follows:

> **Personal Mitigating Factors**
>
> 15. The Commission has, at paragraph 48, submitted that the company *"generally cooperated with the investigation (albeit that it denied any wrongdoing)."* That is to damn the company with faint praise.
>
> 16. The company was first notified of this investigation on 4 July 2017. It responded by counsel's letter dated 28 July 2017 asking for details of the complaints to be provided in order for instructions to be taken (so that it might respond to a series of questions posed by the Commission in its letter of 4 July 2017).
>
> 17. The Commission subsequently provided details of the 12 complaints on 4 August 2017, which were responded to in full on 18 August 2017. A copy of the letter is **attached.** It is fulsome in its answers and displays a positive engagement with the Commission.
>
> 18. There then followed a request for invoices and otherwise for bank statements from the company, all of which were provided promptly. Nothing further was heard from the Commission until a request for

interview as made in mid-2018, which the company agreed to and which occurred on 31 May 2018.

19. It was not until 24 April 2019 that the company received a notice of intention to prosecute, which the company responded to by counsel's letter of 24 July 2019 confirming the company's admission of responsibility and its intention to cease trading (to which I shall return).

20. The timeline serves to highlight that over a three-year period the company has never denied any wrongdoing and has co-operated fully. The directors are mortified that the offending took place and have fully engaged with the Commission.

21. Since the investigation commenced the company has trimmed its staff to five employees including Mr Naidu, its director, who works as a technician. It is now focused on the Canterbury region which is easier to monitor and supervise.

22. Further, in addition to it fulsome cooperation, the company has offered reparation to the victims on multiple occasions (total $2000), has offered to attend restorative justice with them and has otherwise waived fees as recorded in the Commission's submissions. The Commission criticises the company because *"it has not reached out to affected customers"*. It did not contact customers during the Commission's investigation for fear of that contact being misinterpreted by the Commission.

23. In addition, to its previous good commercial character, the aforementioned actions are all discreet mitigating factors under the Sentencing Act for which a global discount is warranted. It is submitted 10% to 15% is warranted in addition to the full discount for an immediate guilty plea.

24. The company confirms that reparation will be paid in full immediately upon sentencing in the amount specified in the schedule. Counsel's instructing solicitor holds $2000 in its trust account pending orders.

Adjustment for financial capacity

25. Even if, on the company's analysis the endpoint sentence should be more in the order of $120,000, the fact remains that the company cannot afford to pay a fine of that level at all.

26. **Attached** to these submissions are financial statement showing the company's financial performance for the last three recorded years.

27. It is plain from the accounts that the company is not profitable.

28. In fact, its financial position would suggest that cessation of business or otherwise liquidation would make commercial or corporate sense. The directors seriously considered doing so. However, they have resolved to face these charges, accept liability for them and to pay any fine imposed over time.

29. That is to say that whilst the company is not doing particularly well, it can pay a fine of say **$30,000** over time. This will enable the company's five employees to keep their jobs and for the business to continue.

30. Rather than cease business and/or liquidate the company and run away, the company has admitted fault and will take its punishment.

31. Again, since the departure of the rogue employee there have been no further incidents or complaints. The company no longer operates in Otago/Southland where the offending occurred. There is no suggestion that the company is otherwise acting in a way which lacks commercial probity or offends consumer protection legislation.

32. Accordingly, the company seeks a fine which it can pay which is commercially realistic having regard to its circumstances.

33. In simple terms, by moving into Otago/Southland, the company bit off more than it could chew. It must be punished for its lack of systems, supervision and management. However, the offending – viewed in context – does not warrant a level of fine which would end the company and make five people unemployed.

An assessment of culpability

[43] Ms Carter submits that this case comes close to the *Sales Concept* decision. She said it cannot be accepted that the company did not know about the top-ups and that it had to have been aware of it and should have done something to stop it. Once the technicians had contacted the company they should have known there was an issue to deal with prior to the Commerce Commission raising the matter.

[44] As against that it was not accepted by the defendant that another technician had made a complaint and that there was any awareness of the issue prior to the articles in the Otago and Southland newspapers.

[45] I am not satisfied there is sufficient evidence to show that the company was aware of the issues prior to the news media raising it. That is not to say, however, that they ought not to have been aware. The company ought to have had systems in place which would have ensured that this did not occur.

[46] I do think there is merit in the submission that the company was, in effect, courting disaster by sending unqualified staff into a new area without adequate support.

[47] Assessing the importance of the untrue statement can be a difficult exercise. In the scope of this set of facts the representation is fairly important. However, when you appear it with the *L D Nathan* case which involved flammable children's nightwear there is simply no comparison. In this case there is no question of any serious risks to health or widespread attacks on the financial health of a large proportion of the community.

[48] I do not say this to in any way diminish the significance in respect of the individuals involved in this case but I think the scale of the exercise is relevant in assessing the overall importance of the untrue admission.

[49] The cases cited by the Commerce Commission, whilst illustrative, all tended to reflect a much larger scale enterprise than is involved here. Furthermore, the offending in this case is nowhere near as cynical at the top end of the company, or as organised as many of the other cases of deception. Essentially, this was a situation that was created by the company's flawed policies and for which the company must accept responsibility.

[50] Certainly, it could be alleged that the problems could have been prevented with reasonable ease, but I do not accept the submission of the prosecutor that the recklessness in this case was gross.

[51] It is also worth notice, as Mr Jackson urges me to do, that the company's profitability is marginal. While I agree with Ms Carter that the company can pay a fine over time and thus a greater level of penalty might be available, it is important not to impose a fine that would have the effect of driving the company into bankruptcy and making the employees unemployed. There are certainly cases where that may well be a desirable consequence if the company's conduct is sufficiently egregious. That is not the case here.

[52] It is also worth noting the company has maintained a responsible attitude and rather than shutting up shop, as it could so easily have done, it has elected to keep trading and to pay whatever fines the Court considers should be imposed.

Decision

[53] It seems to me that a starting point of $150,000 by way of fines is an adequate reflection of the seriousness of the conduct and the need to mark the company's conduct with a sufficiently deterrent penalty.

[54] That being said there are a number of matters which need to be taken into account. While it is important to bear in mind the High Court's caution in the *Stumpmaster* decision about excessive credits leading to an unrealistic discounting from the original penalty, it is also important to reflect properly matters to which the company is entitled to credit. It is just as important to ensure that we do not artificially deflate credits which are appropriately given.

[55] It seems to me the company is entitled to five percent credit for its previous good character and lack of previous convictions. I also consider a further 10 percent is appropriate for its co-operation and attempts to correct the problems. Furthermore, in addition to reparation, with which I will deal with separately, the company offered to attend restorative justice and has otherwise waived fees as noted in the Commission's submission. The Commission criticised the company in its submissions because it "has not reach out to affected customers". Mr Jackson submits the company did not contact customers during the investigation phase for fear of that contact being misinterpreted by the Commission. I think this is fair criticism. It is not dissimilar from the situation one frequently sees where defendants are criticised in victim impact statements for failing to make an approach to an affected person. Often as not there are bail conditions preventing the very same thing to avoid any suggestion of interference with witnesses. The company is in exactly the same position here and I accept the company did everything that was reasonably practical for it to do in the circumstances.

[56] Also, it is appropriate to note that this matter was the subject of some considerable delay in the investigation phase. The investigation was first notified to the company in July 2017 but it was almost two years later that the company received a notice of intention to prosecute and charges were laid after that. The company has

had this matter hanging over its head for some considerable time. I think it is appropriate to reflect this in the credits available to the company.[6]

[57] These credits combined, I think, are justifiably set at 10 percent. Furthermore, the company has committed to pay the reparation that is sought which, while not significant, is full reparation for all of those people out of pocket in respect of whom sums are claimed. That is a further two and a half percent.

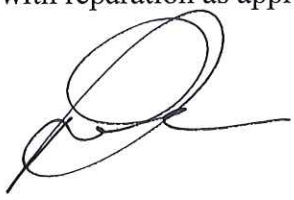
[58] This brings me to a total of 17½ percent by way of discounts which, on a purely mathematical basis, is $26,250 off the starting point.

[59] The company is entitled to full credit for its plea of guilty, which is just under $31,000. This brings me to a net figure of $92,613.

[60] I also need to step back and assess the penalty against the company's ability to pay.

[61] Assuming the company is able to arrange payment over a five year period I think a total penalty of $75,000 is appropriate. This amounts to $7500 in respect of each charging document, together with reparation, where appropriate, as per the schedule attached to the prosecution statement of facts.

[62] Accordingly, the company was fined $7500 on each charging document and with reparation as appropriate.[7]



R E Neave
District Court Judge

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[6] See *R v Williams* [2009] NZSC 41.

[7] This decision was given before the Covid-19 outbreak. What effect that will have on the company's ultimate profitability and existence remains to be seen. However, the fine I considered appropriate at the time without knowledge of the economic implications of the global pandemic.