

**IN THE DISTRICT COURT  
AT MANUKAU**

**I TE KŌTI-Ā-ROHE  
KI MANUKAU**

**CRI-2019-092-013692  
[2020] NZDC 16755**

**COMMERCE COMMISSION  
Informant**

**v**

**KENNEDY'S FOODCENTRE (2003) LTD t/a PAK 'N SAVE  
Defendant**

Date of Hearing: 18 August 2020

Appearances: J Phillips and D Barry for the Informant  
I Thain for the Defendant

Judgment: 25 August 2020

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**SENTENCING NOTES OF JUDGE D J McNAUGHTON**

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[1] The defendant appears for sentence, having entered guilty pleas to six charges under s 13(g) of the Fair Trading Act 1986 for misrepresentations regarding the promotional price of goods sold in its supermarkets. The charges each carry a maximum penalty of \$600,000.

[2] The charges relate to the display by the defendant of a promotional price for one or more items on its website and/or at the supermarket shelf, when a higher price was charged on purchase at the checkout. The period covered by the charges is 11 June, 12 June, 25 June, 26 June, 8 October and 9 October.

[3] Under a franchise arrangement each Pak 'n Save store is individually owned and operated. The Pak 'n Save Mangere store is owned and operated by Kennedy's Foodcentre (2003) Ltd, the defendant. Annual turnover in the 2018 financial year was \$55 million. As at August 2019 the defendant had an average of 3,203 customers per day with a daily average customer spend (including GST) of \$58.58 on an average of 11.5 items. Nationally, the Pak 'n Save group of stores is marketed as having a policy of: "New Zealand's lowest food prices".

[4] Generally, pricing promotions and pricing integrity are the responsibility of the individual Pak 'n Save stores. Promotional pricing by the defendant included specials where individual products were temporarily advertised at reduced prices. It also included *multi-buy* specials where consumers receive discounts if they purchase multiple specified products in one transaction. This promotional pricing was advertised online via the Pak 'n Save website and/or on price tickets and signs in the store.

[5] The defendant's pricing integrity systems included a manual checking of all prices (including promotional prices) using a scanning gun, typically between midnight and 8 am on Mondays. Each aisle would be signed off as checked and any discrepancies noted. There were also spot checks from the supervisor of the price integrity department. Any customer queries regarding price discrepancies were recorded on a *pricing query* form which was used to identify and address any pricing discrepancy on the same day and then used to double check prices the following morning. Those forms were not retained after the double check had taken place and there was a written training manual for staff on pricing together with on the job training and supervision.

[6] As a result of regular consumer complaints about supermarket pricing, the Commerce Commission undertook a series of mystery shops at the supermarket including six separate occasions which are the subject of the charges at Pak 'n Save Mangere. Commission staff purchased a selection of products advertised as on special either online or in store. Any price discrepancies were raised with customer service staff at the store immediately following the mystery shop. Commission staff would then return the following day and re-purchase the products which had identified price discrepancies to check whether those price discrepancies were still occurring.

[7] The price discrepancies relate to various food products and baby wipes. The price difference noted by the informant ranges from 18 cents to two dollars extra. The discrepancies were a mixture of individual specials and multi-buy specials. Identified over charges on items totalled \$20.99.

[8] When the price discrepancies were pointed out at the checkout, during these mystery shops, Commission staff received refunds except in one case where the promotional price ticket was no longer displayed at the time the issue was checked. Despite notifying these price discrepancies with customer service staff on three occasions the price discrepancies were still in place during the follow up shops.

[9] The defendant was not able to provide a precise figure to show the amount of money that consumers were overcharged or the number of individual customers who were overcharged after the Commission notified Pak 'n Save of discrepancies which were not immediately corrected.

[10] A schedule of the price discrepancies recording the individual products is attached as schedule 1, and schedule 2 is a schedule of sales volumes provided by the defendant in relation to the various items.

[11] The summary of facts records that the defendant at all times was fully co-operative with the Commission throughout the investigation. Michael Kennedy, the director and store operator, was interviewed together with general counsel for Foodstuffs North Island Limited. Mr Kennedy could not identify specifically how the price discrepancies had occurred but suggested that for some of the products the issue could be due to the wrong barcode being scanned or the wrong sign having been displayed, or an error in setting up the multi-buy special system.

[12] He was unable to explain why in some cases pricing issues reported by the Commission had not been rectified by the following day, and he acknowledged that Pak 'n Save Mangere's emphasis on pricing over the years had not been as good as it should be said that he was now dealing with the underlying problem.

[13] Mr Kennedy said that the defendant had put in place additional processes to identify and remove price discrepancies including:

- (a) providing a notice to all checkout operators to immediately report to a supervisor when a price discrepancy was identified;
- (b) training all checkout operators on store policy with written confirmation of their understanding;
- (c) setting out in writing the procedure for all duty managers when a price discrepancy was identified and regular training of all managers together with written confirmation of the managers' understanding of the procedure;
- (d) adding additional columns to the pricing query sheet so that more information was recorded in relation to action taken to address the discrepancy; and
- (e) improving the sign off sheet to be used by staff checking prices on a Monday morning.

[14] On 1 July 2019, Commission staff conducted a further mystery shop at Pak 'n Save Mangere. 42 items were purchased including multi-buys and no price discrepancies were identified.

[15] In addition, the defendant has also undertaken further steps to search for and analyse all relevant sales data which has been shared with the Commission to determine the extent and cause of the discrepancies as set out in the two schedules. The defendant has introduced an electronic price ticketing system removing the need for printing labels and therefore reducing the opportunity for human error in pricing and finally, has reduced the use of multi-buy deals when there are multiple product groups.

[16] In its written submissions the Commission emphasised that the Fair Trading Act 1986 is the cornerstone of New Zealand's consumer protection legislation and that penalties for companies breaching part 1 of the Fair Trading Act 1986 were significantly increased in 2014. Ms Phillips submitted that breaches of the Act in the present case were significant because 59 percent of grocery sales in New Zealand are

sold on promotion and it was regular consumer complaints that had prompted the Commission to investigate. It was submitted that all traders should accurately represent the level of discount available to consumers purchasing the goods and particularly supermarkets where consumers were often making multiple purchases at once and thereby reducing any opportunity to identify a price discrepancy.

[17] Addressing the culpability factors set out by the High Court in *Commerce Commission v LD Nathan & Co Limited* she submitted:<sup>1</sup>

- (a) The conduct was careless and not isolated given that there were price discrepancies in relation to 10 different products across various departments of the supermarket.
- (b) The price discrepancies were repeated and on occasion not corrected after Commission staff had pointed them out.
- (c) The discrepancies were most apparent on the fifth and last visits at which time the Commission had raised pricing discrepancy issues on the previous four occasions.
- (d) Mr Kennedy acknowledged a less than rigorous approach over a period of years.

[18] She submitted that the representations were a substantial departure from the truth but the present case is a long way from the blatantly untrue representation in some of the other authorities relied on.

[19] As to the extent of dissemination it was submitted that was evident across a four month period. While there was clearly overcharging of the individual customers neither the defendant nor the informant were able to quantify the amount but given the amounts involved and the sales volumes, overall it was unlikely to exceed \$10,000.

[20] Ms Phillips emphasised the need to impose deterrent penalties, both specific and general, to deter the defendant and other supermarkets. Given the high maximum

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<sup>1</sup> *Commerce Commission v LD Nathan & Co Limited* [1990] 2 NZLR 160.

penalties, and substantial fines imposed in other cases, deterrence was a primary consideration.

[21] It was submitted that the financial capacity of the defendant ought to be taken into account in assessing the level of fine, otherwise modest fines might simply be seen as the cost of doing business. Finally, the informant submitted that minimal efforts were made to correct these discrepancies until the defendant became aware of the possibility of prosecution.

[22] Relevant authorities referred to by the Commission were *Commerce Commission v Hill and Stewart Appliances Limited*, *Commerce Commission v The Warehouse Group Limited* and *Commerce Commission v 2 Cheap Cars Limited*.<sup>2</sup>

[23] The Warehouse Group Limited pleaded guilty to 11 charges relating to misrepresentation of prices of DVD's and toys, two charges of misrepresenting items as: "exclusive to The Warehouse", four charges relating to advertising that goods were on sale at a specified price, having failed to offer the goods for a reasonable period at that price or to have reasonable quantities for sale, and six charges relating to misrepresentation regarding the composition of duvets.

[24] Judge Harvey took a starting point of \$130,000 in that case for all of the charges except those relating to the duvets. Allowing credit for guilty pleas and remedial steps taken, the fine was reduced to \$110,000. \$75,000 of that sum was applied solely to the pricing misrepresentation. Those fines were imposed prior to the increase in the maximum penalty.

[25] Ms Phillips submitted that under the present regime that offending would attract a starting point in the vicinity of \$260,000-\$325,000 and possibly higher, given the size and resources of the company and the need to impose a meaningful deterrent penalty.

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<sup>2</sup> *Commerce Commission v Hill and Stewart Appliances Limited* DC Auckland CRI-2007-004-003838, 30 November 2007; *Commerce Commission v The Warehouse Group Limited* DC Auckland CRI-2008-004-011407, 27 February 2009; *Commerce Commission v 2 Cheap Cars Limited* [2019] NZDC 12800.

[26] Inadequate pricing integrity systems were said to be at the heart of the offending in the present case and also in The Warehouse. It was submitted that the degree of carelessness was at a similar level but here the offending was confined to one franchise operator whereas The Warehouse was much larger company operating nationally for whom deterrence required a heavier penalty.

[27] The informant submitted that a starting point at roughly half of the applicable starting point, had The Warehouse been sentenced for offending carrying a maximum penalty of \$600,000, was appropriate and therefore the starting point for this offending was somewhere between a \$130,000 and \$180,000.

[28] The defendant has no previous convictions and cooperated with the investigation. On that basis, a discount in the range of five to 10 per cent was appropriate together with a full 25 per cent discount for early guilty pleas.

[29] Mr Thain stressed that the defendant's conduct was inadvertent and therefore culpability should be assessed at the lower end. He submitted that the defendant had taken the prosecution seriously and to the fullest extent possible has sought to improve its processes to avoid any pricing discrepancies in the future. He suggested that given the nature of the supermarket business with its high volume of low value sales, regular changes in the pricing of products and reliance on human involvement at the point of sale, it was unlikely that pricing discrepancies could be eliminated entirely. Further, the value of the discrepancies and the volume of sales were low and therefore the proposed starting point submitted by the Commission was too high.

[30] Mr Thain emphasised that as soon as the defendant was officially advised of the investigation at the end of 2018, immediate steps were taken to review the defendant's pricing integrity systems and when the further mystery shop was undertaken six months later, all 42 items purchased were at the correct price.

[31] By far the most prevalent and repeated pricing error related to smoked salmon which was initially barcoded when it arrived in the store, but as the product approached its best before date, another lower price was barcoded. The error was at the checkout, where staff inadvertently scanned the wrong code. The volume of salmon actually

purchased was relatively low (2.4 times on average per day for a four week period in June 2018).

[32] The other primary reason for pricing discrepancies was the erroneous loading of multi-buy deals which has since been remedied. Any other remaining issues were manual processing or human error which the new electronic ticketing systems would substantially correct.

[33] The defendant acknowledged the primary purpose of the Fair Trading Act is to protect consumer interests and promote competition. It was accepted that its customers were influenced by promotional pricing and minimisation of error was important in ensuring a robust pricing integrity system but at the same time those customers were also likely to check that the pricing paid was correct.

[34] Mr Thain illustrated this point by reference to schedule 1. Pam's cold sliced smoked salmon 100g, sold on 8 October at a promotional price of \$5 but a checkout price of \$5.79 and therefore a price difference of \$0.79. In Schedule 2, sales volumes for that same item show that seven items were sold on 8 October at an average price of \$5.33. Mr Thain submitted that at least four of the seven items were sold at the correct price either because the checkout operator had scanned the correct original barcode, or because customers at the checkout had pointed out the discrepancy.

[35] Mr Thain submitted that the low value of the promotions in the brief period for which they were in place minimised the importance of the representation and there was no intent to mislead consumers. Any errors were inadvertent rather than careless, because the defendant already had an existing pricing integrity system and training in place and a refund was given in all but one incidence.

[36] The promotional pricing was confined to the defendant's store at Mangere and typically the promotions last only a few days. He emphasised the low volume of sales and the level of pricing discrepancy being \$2 or less, and in respect of eight of the 10 items, less than \$1. He submitted the fact of prosecution and fine was a significant penalty in itself and a "huge wakeup call" to the grocery industry across the board. He submitted a significant deterrent penalty was not required, because the offending in



*Hill and Stewart, The Warehouse and 2 Cheap Cars Limited* was in each case at a far more serious level and not comparable.

[37] Mr Thain placed some emphasis on *Commerce Commission v Sales Concepts Limited*.<sup>3</sup> The defendant sold Christmas deal bundles of between three and seven items of electronic goods to customers on the promise that goods would be delivered by Christmas 2015. In fact, consumers were to receive only one of the goods in the bundle prior to Christmas. The remainder of the goods were to be delivered on full payment. For the majority of contracts, full payment and delivery would have occurred 14 to 15 months later in January or February 2017, not the one month as represented.

[38] The price of the Christmas deal bundles was misrepresented in two ways. Firstly, Sales Concepts failed to disclose to some of its customers that the price of each Christmas deal bundle excluded a delivery fee that was payable and secondly, it misled some of the customers as to the total amount payable under the uninvited direct sales agreements. Sales Concepts were convicted of two charges for these pricing misrepresentations. Each charge was subject to a fine of \$18,570. The starting point adopted for the seven misrepresentation charges was \$215,000 under the current maximum penalty of \$600,000.

[39] By comparison, the offending in the present case was substantially less serious and a starting point in the range of \$75,000 to \$90,000 was appropriate. In the *Sales Concepts Ltd* case the defendant was entitled to a 20 per cent discount to reflect its co-operation with the investigation and remedial steps taken, and the end sentence was fines totalling \$145,000.

[40] The starting point for sentence is the protection of consumer interests and fair competition. Pricing compliance in the supermarket context has always been critically important and I note the High Court's comments in *Foodtown Supermarkets Limited v Commerce Commission*.<sup>4</sup>

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<sup>3</sup> *Commerce Commission v Sales Concepts Ltd* [2017] NZDC 16387.

<sup>4</sup> *Foodtown Supermarkets Limited v Commerce Commission* [1991] 1 NZLR 466 at 469.

Whilst a shopper is clearly able to return the selected goods to the shelves on a change of mind, the final decision to purchase is usually made at or near the shelf based on inspection of the goods at the prices there displayed [...] [Consumers are] relying upon the invariable practice of [...] the shop owner adhering to the price for goods inspected.

[41] Consumers are entitled to rely on an error-free pricing integrity system. These pricing systems are at the core of the defendant's business. With respect, it is no defence to claim that error is somehow inherent in a business involving high volume, low value sales and regular changes in pricing. That is the defendant's business model, its point of difference in the market and the engine of its profits.

[42] The defendant took no issue with the suggestion that up to 50 per cent of grocery sales in New Zealand are sold on promotion and no doubt these price promotions significantly influence customer choice.

[43] It is common ground here that there was no intention to deliberately mislead customers. None of the more blatant misrepresentation described in *Hill and Stewart* or *2 Cheap Cars Ltd* are present here, and to that extent those cases are not a useful guide for setting a starting point. Of the authorities referred to by the informant, the most relevant decision is *The Warehouse Limited*. When assessing the level of carelessness judge Harvey noted an element of: "deliberateness arising out of omission where proper enquiry or more care would have resulted in more accurate advertising". He characterised the offending in relation to the duvet inners as even more serious, being wilful.

[44] Whether the defendant's conduct here is characterised as careless or inadvertent, the culpability assessment is the same. The pricing discrepancies related to a number of individual items across different departments of the supermarket and they were repeated, and the defendant did not immediately take steps to correct its pricing systems. I would not go as far as saying there was an element of deliberateness here or that the conduct could be characterised as wilful, but nonetheless it was repeatedly careless and not immediately rectified.

[45] In contrast to *The Warehouse* where there was widespread dissemination of the advertisements nationally and the offending had occurred over a period of 11 months,

here misrepresentations are confined to one store and repeated on six occasions in June and October.

[46] The Warehouse generated considerable profits as a result of the offending. In relation to the duvets alone those profits exceeded \$400,000. Here the overcharging in total could not have exceeded \$10,000 and the defendant's profits were a fraction of that.

[47] Finally, whilst the defendant is a sizeable operator, given the annual turnover of \$55 million as a single store, The Warehouse was a national company operating on a much larger scale.

[48] If, as the informant submitted, an appropriate starting point at today's sentencing levels in respect of *The Warehouse Limited* offending would be in the order of \$300,000 then on a comparative basis the overall culpability of the defendant I would assess at one-third, given the degree of carelessness, local dissemination, a shorter period of offending, significantly lower profits and a single operator albeit a sizeable and profitable one.

[49] From that starting point I would apply an uplift of 20 per cent to recognise a significant aggravating feature of the defendant's offending, the failure to take immediate steps to correct discrepancies when those were pointed out by the mystery shoppers at the checkout. Certainly, once the defendant was formally notified of the Commerce Commission investigation it took significant steps to remedy the problems and the end sentence will be discounted to recognise that mitigating fact, but the immediate failure to act was inexcusable.

[50] The remedial steps taken by the defendant did not extend to refunding overcharged customers. I accept that the defendant was never in a position to do that given the volumes and the small amounts involved here, but the 20 per cent discount applied by Judge Sinclair in the *Sales Concept Limited* case was due to the company offering customers the option to cancel their agreements and to receive a full refund, or confirming the agreement. Refunds were made totalling \$28,646 and all items were delivered to customers in advance of Christmas where they elected to affirm their agreements. That was a special case justifying a significantly higher discount for

remedial steps taken, and here I see no basis to depart from the standard discount of 10 per cent for remedial steps taken and a lack of previous convictions.

[51] The defendant pleaded guilty at an early stage. A full 25 per cent discount is available on that basis which results in an end sentence of \$81,000 or \$13,500 for each individual charge.

**ADDENDUM:**

[52] This addendum is issued to correct a sentence. From a starting point of \$100,000 fine I had applied a 20 per cent uplift to recognise aggravating features of the offending, and then a 10 per cent discount for remedial steps taken and a lack of previous conviction. I then applied a 25 per cent discount to that figure for early guilty pleas to arrive at an end sentence of \$81,000 or \$13,500 for each individual charge.

[53] As counsel have pointed out, the sentencing framework set out by the Court of Appeal in *Moses v R* means that the correct calculation is in fact an end sentence of \$78,000 or \$13,000 for each individual charge, and I have noted the charging documents accordingly.<sup>5</sup>



D J McNaughton  
District Court Judge

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<sup>5</sup> *Moses v R* [2020] NZCA 296.