IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-003976
[2017] NZDC 27148

COMMERCE COMMISSION
Prosecutor

v

AUCKLAND ACADEMY OF LEARNING LIMITED
Defendant

Hearing: 28 November 2017

Appearances: A McConachy for the Prosecutor
F McGeorge for the Defendant

Judgment: 28 November 2017

NOTES OF JUDGE N J SAINSBURY ON SENTENCING

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[1] For the purposes of this decision I will first refer to the facts on which sentencing is based. That taken is from an agreed summary of facts. I will then assess culpability as it informs the starting point. In doing that I will discuss cases referred to me by counsel for each party that assist me in assessing the proper staring point. I will then consider appropriate mitigating features that reduce the penalty so as to reach the final sentence.

The facts

[2] I turn first to the summary of facts. I do not intend to read out the schedules that go with the summary of facts. But they will be part of the Court record. They will be available to be considered if media, who have expressed such an interest in seeing this material, wish to do so.

[3] The defendant, Auckland Academy of Learning Limited, faces 11 charges under the Fair Trading Act 1986. The charges relate to misrepresentations made by the defendant's sale representatives, during the sale of the software programme called "Computer Aided Mathematics Instruction" referred to as CAMI and a failure by the defendant to give oral notice to consumers of their right to cancel its uninvited direct safe agreements.

Misrepresentations during the sale process

[4] Misrepresentations were made to parents of school age children, both in initial telemarketing calls and in person, at subsequent home visits by the defendant's sale representatives. In summary, the defendant misrepresented:

(a) In phone calls to parents that the home visit by the defendant's representative would provide an evaluation and tutoring session to school age children in the household. There are three charges under s 13E Fair Trading Act relating to that misrepresentation.

(b) During home visits, that the education assessment the defendant gave to school children, covered the New Zealand school curriculum and would demonstrate the child's learning. There are three charges under s 13E Fair Trading Act relating to that misrepresentation.

(c) That based on the results of the education assessment, the consumer needed to purchase CAMI programme. There are three charges under s 10 Fair Trading Act in relation to that representation.

The Fair Trading Act disclosure failures

[5] The defendant also failed to disclose to consumers' certain information required by the Fair Trading Act. As a supplier, under an uninvited direct sale agreement, the defendant failed to give consumers oral notice both before agreements were entered into, of the consumer's right to cancel the agreements within five working days of the date on which the consumer receives a copy of the

agreement. There are two charges under s 36L(3) Fair Trading Act relating to those disclosure failures.

The charge period

[6] The charges cover the period 1 March 2011 to 30 September 2015 and are representative charges. The charges are set out in schedule 1, that accompanies the summary of facts.

The defendant's business

[7] The defendant was incorporated on 17 December 2010 with Gordon Craig McPherson as its manager, sole director and shareholder. The defendant is an Auckland based seller of CAMI and held its distribution licence in New Zealand. The company trades as Academy of Learning throughout New Zealand. Over the relevant period it had offices in Auckland, Hamilton, Wellington and Christchurch, employing around 56 employees including 17 sales consultants. The defendant's sales consultants were not required to have any qualifications in education or teaching. The defendant's representatives received a minimum retainer of $100 per day for a five to six day working week. In addition, they received commission of approximately $500 for selling a 24 month subscription to CAMI and approximately $600 to $750 for selling a 48 month subscription.

[8] CAMI is an educational software programme. It originated in South Africa and has been used in a number of countries, including Australia. It was said to be primarily designed to help children improve their maths. CAMI was installed on a consumer's home computer and children used it to complete exercises. The exercise results were intended to be sent monthly to a CAMI tutor in Australia, who reviewed the results, sent a report to the parents and could design new exercise plans for the child to complete. The children could also call an 0800 number and speak to a CAMI tutor in Australia if required.

[9] Between 1 March 2011 and 30 September 2015, the defendant entered into 3359 agreements with consumers for the supply of the CAMI programme. Of those,

approximately 27 percent cancelled during the cooling-off period, resulting in 2430 contracts that went to completion. Customers paid between $3304 and $11,017 for the CAMI programme. Depending on whether the consumer bought or subscribed to the programme and if they subscribed, the length of the subscription period.

[10] Subscription agreements were for periods of 12, 18 or 24 months and purchase agreements were for 48 months. The different contract types are discussed below. The maths, assessment, sales presentation and other material used by the defendant, were provided to it by CAMI in Australia. Mr McPherson was involved in the sale of the CAMI programme in Australia, through an entity known as The Victorian Academy of Learning Proprietary Limited, before its introduction into New Zealand.

Marketing and sale of the CAMI programme

The initial survey call

[11] The defendant operated a call centre that called households in different suburbs and towns on a rotational basis. The defendant's telemarketers identified parents with school age children by either:

(a) Cold calling members of the public, using commercially available consumer databases, or;

(b) Obtaining from customers who have signed up to CAMI, referrals to other people with school age children. On occasions those referrals were obtained through using a laptop or a waiver of part or all of the installation fee, as an inducement.

[12] Using a generic script, a copy of which is on the Court file, the defendant's representatives asked parents to participate in a questionnaire consisting of general questions about the education system in New Zealand and the demographics of the household. There was no mention during the initial survey call that the defendant

was selling a product. During that call, the consumer was told that they might be selected to receive a complimentary evaluation and tutoring session.

Callback

[13] After the initial survey call, a defendant's telemarketer made a second phone call to those consumers who indicated that they were working and had school age children. The telemarketers followed a second generic script, a copy of which is on the Court file, and used this during the second phone call. The consumer was told that:

(a) Their family had been selected to receive an evaluation and tutoring session for their children in school.

(b) The evaluation related to maths and English and was to determine whether the child had a full understanding of basic concepts, and would identify if the child had any knowledge gaps.

(c) The results of the assessment would be put into the CAMI programme, although CAMI was not otherwise mentioned. The telemarketer then arranged a time for a home visit by a defendant representative.

Home visit

[14] During the home visit the defendant's sales consultant followed a presentation script that he or she was required to learn verbatim, a copy of which is on the Court file. The presentation was made to both the parents and their children. The sales process consisted of:

(a) Providing the child or children with a written maths assessment, a copy of which is on the Court file.

(b) Giving a Powerpoint presentation about the CAMI programme to the parents. Again, a copy of which is on the Court file.

(c) Providing a demonstration of the CAMI programme.

(d) Giving the parents the option to purchase or enter into a subscription for the CAMI programme.

[15] The written maths assessment took approximately 15 to 20 minutes to complete. The assessment given to the child was headed with the word "Level" and a number between 1 and 11. The defendant's sales representative told the parent that the assessment that the child was asked to do was based on last year's work.

[16] For example, a child in year 4 was given a level 3 assessment. While the child completed the assessment, the defendant's representative gave the Powerpoint presentation to the child's parents. The presentation consisted of a number of slides. In addition to the content of the slides, the defendant's representative followed the memorised sales script.

[17] The presentation claimed that children learn sequentially and discussed a problem of knowledge gaps, or missing concepts and how these could compound and have a detrimental effect on a child's future career prospects, if not addressed. The presentation contained various representations about the New Zealand school system, discussed further on.

[18] The script used for the home visit was amended three times between April 2014 and October 2015. For the purposes of the present charges, the only material changes resulting from the amendments were the removal, after April 2015, of:

(a) I have given him last year's work, in reference to the assessment.

(b) Once kids are placed, they cannot move up, the movement is down because of the difference in workload between each level, in reference to the different class streams.

[19] Once the child completed the assessment, the defendant's representative marked it, by circling the wrong answers with a red pen. The majority of

complainant's that assisted the Commission's investigation, said their children performed poorly on the assessment.

[20] As discussed further on, the assessment was not based on the New Zealand school curriculum and did not match the level it purported to assess, with many questions being too difficult.

[21] After the assessment, the defendant's representative gave a demonstration of the CAMI programme on his or her laptop and allowed the child to have a turn completing some exercises. The defendant's representative asked the parents if they were interested in purchasing or entering into a subscription of the CAMI programme. If the parents indicated that they may be interested in purchasing or subscribing for the CAMI programme, the parents were then taken through a number of different contract options that they could choose from.

The defendant's contracts

[22] The defendant offered the choice of either a subscription agreement or a purchase agreement. Examples of each type of contract are on the Court file.

Subscription agreements

[23] Subscription agreements were for a term of either 12 or 24 months. Under the subscription agreements, the debtor made weekly payments for a specified amount for the term of the contract and in return, received the right to use the CAMI programme. The subscription agreements had a short cooling-off period. A typical subscription agreement was for 24 months, with weekly payments of $59.39 and total payments of $6176.56, which was the amount paid by the majority of customers.

[24] The terms of the subscription agreements changed over time. Between 2012 and mid-2014, the contract stated that if the customer wished to cancel the contract, they were required to pay the greater of:

(a) The total of the periodic payments remaining on the contract, or;

(b) 12 months' worth of periodic payments.

[25] From mid-2014, the contracts required the customer to make payments for a minimum of six months. After the minimum term, the customer:

(a) Could terminate the contract on 31 days' notice;

(b) Was required to pay the subscription amounts for either the three months after the termination or the balance of the agreement, whatever was the lesser.

Purchase agreements

[26] Purchase agreements were offered from November 2011 until November 2014. Under the agreement, the defendant agreed to supply the CAMI programme to the debtor, who made weekly payments over a 48 month term. After which it was agreed that the customer would retain access to the CAMI programme, although the tutor support aspect would only continue until the youngest child had finished his or her schooling. The purchase agreement also had a short cooling-off period. Outside the cooling-off period, the customer was required to make payments for the term of the contract. A typical 48 month term contract had a weekly payment of $52.97, resulting in a total payment of $11,017.76.

Fees

[27] Both the subscription and purchase agreements provided for a number of fees, including:

(a) An administration fee.

(b) An information fee of $12.10, payable when the debtor requested information about the contract.

(c) An installation and training fee of $195 or $295 to cover the installation of the CAMI programme on the debtor's computer and initial training on how to use the programme.

[28] The defendant ceased charging the administration fee in or around December 2013. In some instances, the installation and training fee was waived.

The Commission's investigation

[29] The Commission commenced the present investigation into the defendant in January 2014. The Commission has received approximately 182 complaints about the defendant, 1689 were received after the current affairs show, *Campbell Live* aired a series about the defendant in October and November 2014.

[30] In the course of its investigation, the Commission spoke to a large number of complainant's, the company's director Mr McPherson, as well as current and former employees of the defendant. The defendant voluntarily provided information to the Commission about it and the sales process for the CAMI programme. The Commission also obtained information about the CAMI programme, under statutory notice.

Misleading representations

[31] The defendant made misleading representations to consumers about the performance, characteristics, uses or benefits, need for and suitability for purpose of the CAMI programme, in breach of the Fair Trading Act. Those misrepresentations were made by telephone at the call-back stage and during the home visits undertaken by the defendant's representatives.

Misleading consumers about the purpose of the home visit

[32] During the call-back, telemarketers told consumers that the home visit would:

(a) Provide an evaluation and tutoring session to school children in the household.

(b) Determine whether the children have a full understanding of basic concepts in maths and whether the children had any knowledge gaps.

[33] In fact, the purpose of the visit was for the defendant's representative to sell the CAMI programme to the consumer.

[34] The sales representatives were not required to have any qualifications in education or teaching and did not provide any meaningful tutoring to the child, not any evaluation of the assessment, beyond merely marking answers as wrong. As discussed below, the simple assessment given to the child was insufficient to determine whether the child had a full understanding of basic concepts or any knowledge gaps.

Misleading consumers about the educational assessment

[35] During the home visit, the following representations were made to consumers:

(a) That the educational assessment it gave to school children in the household:

(i) Covered the New Zealand school curriculum, and;

(ii) Would demonstrate what the child was understanding and learning at school, including identifying whether there were any missing concepts.

[36] These representations were misleading, because:

(a) The educational assessment did not correspond with the New Zealand school curriculum. It was provided to the defendant by CAMI in Australia and originally developed by a private sector mathematics education software seller, Australian Institute of Mathematics.

(b) The educational assessment did not demonstrate the child's learning or understanding:

(i) The educational assessment was given at an inappropriate level for the child. So many of the questions were too difficult for the year level it was purporting to assess. In particular, in most of the levels approximately 50 percent of the questions were too difficult for the ascribed school year or were otherwise inappropriate.

(ii) In any event, a single assessment was insufficient to determine a child's learning or understanding. This is particularly so where the answers were marked with no availability to evaluate how the child arrived at the particular answer.

[37] In contrast, the national standards system employed by New Zealand primary schools, judges a child's achievement based on numerous pieces of data that are considered together, relative to the standard that is to be achieved. The defendant provided some parents with and required them to sign, an assessment advice letter, which stated the sole purpose of the exercises were for determining the appropriate entry level for students, into the CAMI programme and that the exercises were not representative of the overall academic ability of the student. A copy of the assessment advice letter is on the Court file.

[38] However, the letter was not in use before the end of January 2013. In addition, not every sales person had parents read and sign the letter. Further, those who did, often did so at the end of the home visit, after the options for purchasing or entering into a subscription for the CAMI programme had been discussed.

Misleading consumers about the need for and suitability for purpose of CAMI programme

[39] Based on the assessment results, the defendant's sales representatives misrepresented to consumers, the need to purchase CAMI in breach of s 10 Fair

Trading Act. The results of the assessment were used as part of the sales process, as a way of demonstrating the need for maths help, which the CAMI programme could provide. In fact, the educational assessment was not based on the New Zealand curriculum and included many questions that were too difficult for the level purportedly being assessed.

[40] Many complainants reported that their children resulted poorly in or failed the assessment. After showing the results to parents, the defendant's representatives asked if that was the result the parents expected and, up until the script was changed in April 2014, whether they agreed that their child may need some help.

[41] The defendant's sales representatives, represented the consumers as part of the sales script and/or the presentation shown to the consumer that they needed to purchase the CAMI programme for their children because:

(a) The educational assessment demonstrated learning gaps the children may have.

(b) There was no exact standard in primary schools.

(c) Then, or shortly before early high school, children enter an assessment phase and they are assessed every four weeks.

(d) Children then entered a placement phase where they would be placed in general, intermediate or advanced classes.

(e) Once placed in the class, the child could only move down levels, not up.

[42] This representation was removed from the sales script from April 2015 onwards.

[43] The representation was misleading because:

(a) The results of the educational assessment did not demonstrate the child's academic performance because:

(i) The assessment did not correspond with the New Zealand school curriculum.

(ii) The assessment was inappropriate because it was too difficult for the year level it was meant to assess.

(iii) A single assessment is insufficient to determine the child's learning or understanding.

(b) It is not correct to say that there is no exact standard in primary schools. Primary schools use national standards to assess the standard expected at each year level.

(c) Each school develops its own assessment schedule, so it is incorrect to say that high school children enter an assessment phase and are assessed every four weeks.

(d) Similarly, each school has its own approach to streaming of classes and it is therefore incorrect to say that children enter a "placement phase" where they are placed into general, intermediate or advanced streams and once in that stream, they can only move down levels and not up.

Failure to comply with disclosure requirements

Failure to give notice of cancellation rights or uninvited direct sales agreements

[44] From 17 June 2014 s 36L Fair Trading Act required a supplier under an uninvited direct sale agreement, to give consumers oral notice of their right to cancel before the agreements were entered into. As discussed above, the initial home visit was described by the defendant's telemarketers as being for the purposes of an evaluation and tutoring session and consumers agreed to the defendant's

representative attending on that basis. In fact, the purpose of the visit was for the defendant's representative to sell the CAMI programme to consumers. The consumer did not invite the defendant to attend their house for that purpose.

[45] Where that consumer then entered into an agreement for the supply of the CAMI programme, the defendant was a supplier under an uninvited direct sale agreement, for the purposes of s 36K Fair Trading Act. The defendant's sales representatives were therefore required to give the consumer oral notice before the agreement was entered into, of the consumer's right to cancel the agreement within five working days, after the date of which the consumer received a copy of the agreement and how the consumer could cancel the agreement. The defendant's sales representatives failed to give such oral notice. The contracts entered into by the consumer did however state that the contract was subject to a cooling-off period of seven days. Clients were also left a separate pre-addressed notice of cancellation letter, which the client could post or fax to the defendant if they wanted to cancel within the cooling-off period.

Detriment to consumers

Unlawful commercial gain

[46] During the charge period, the defendant entered into 2430 agreements for the supply of the CAMI programme. It is highly unlikely that consumers would have paid thousands of dollars for a maths software programme and tutoring service, without the misleading representations made by the defendant, to the effect that:

(a) The defendant's assessment provided an accurate measure of how the child was performing at maths, or;

(b) The child needed to improve his or her performance before entering the placement phase in early high school.

[47] In the years ending 31 March 2013 and 2014, the defendant had sales income of $554,508 and $1,818,381 respectively. Sales income in the six months to

30 September 2014 was $1,000,344.44. The defendant was not entitled to enforce any of the agreements where it failed to comply with the uninvited direct sales provisions of the Fair Trading Act.

Detriment to consumers

[48] The defendant's conduct has caused significant harm to consumers. Its sales tactics used misrepresentations that deliberately capitalised on parents' concerns that their children were falling behind at school and painted a concerning picture in the event that they did not address the supposed problem by buying the CAMI programme.

[49] More than 2400 consumers were potentially misled into purchasing the CAMI programme. This resulted in consumers being locked into lengthy contracts with high weekly payments. Due to the failure to make proper oral disclosure under those contracts, the consumers may not have understood their cancellation rights and therefore not exercised them.

Defendant's statement

[50] As part of the Commission's investigation, Mr McPherson attended an interview with the Commission on 25 November 2015 under s 47G(1)(c) Fair Trading Act and s 95(c) Commerce Act. During the course of that interview, Mr McPherson made the following statements:

(a) Call centre employees were required to follow a script that appeared on a computer screen.

(b) Sales representatives went through a two-week intensive training process where they were required to learn the presentation script verbatim.

(c) The defendant did not require sales representatives to have any particular qualifications and did not maintain a qualified maths teacher on its staff.

(d) The CAMI programme and assessments were not designed to either teach or measure the New Zealand curriculum per se.

(e) The educational assessment did not measure how well a child was doing according to the New Zealand curriculum. Rather, it was an assessment that showed the level they were at in their learning journey.

(f) The purpose of the educational assessment was to determine the appropriate entry level into the CAMI programme and to assess any learning gaps or missing concepts.

(g) The year levels of the educational assessment did not correspond with year levels within the school system.

(h) The CAMI programme was a customisable programme that covered the New Zealand curriculum.

(i) In the defendant's experience generally speaking, high schools placed children into general, intermediate and advanced streams at about the year 10 level.

[51] When asked how the defendant's representatives were instructed to respond to questions from consumers on the issue of cancellation of the defendant's contracts, Mr McPherson stated:

(a) The consumers asked about cancellation of the subscription agreement, they were referred to the termination clause of the agreement; and

(b) Representatives were instructed to advise consumers of their right to terminate the contract within the cooling-off period only, if asked by the consumer.

Previous convictions

[52] The defendant has not previously appeared.

Culpability/Starting point

[53] I now turn to the issue of culpability and its relevance to assessing the starting point. Counsel on behalf of the Commissioner have advanced the proposition that I first set a starting point for the misrepresentation charges and then provide an uplift for the two charges relating to the failure to provide oral notice of the rights of cancellation. Indeed, defence counsel has used a similar approach in her submissions in terms of assessing the appropriate starting point and then end sentence. I intend to follow that process.

[54] In terms of the approach to be taken, companies are a legal entity and exist in a sense as a form of legal fiction, which we pretend to be real people. Of course companies are not real people, yet they are subject to the criminal law as if they were and as such are subject to the Sentencing Act 2002. In considering the sentencing principles that apply, I consider that, as well as they can apply to a company, the one that has the greatest weight in a sentencing of this nature is deterrence. That is both deterrence to the particular company and general deterrence.

[55] A company does not have a conscience. Insofar as it is able to think and act, it does so through its officers. The company exists because there is a social utility in using it as a vehicle to conduct business. In the vast majority of cases, the company exists as a device to make profit. There is nothing wrong with that. But in providing deterrence to a company, the main lever is a financial penalty and a financial penalty at a level that will both deter the current defendant and others like it, from breaching their obligations. That approach is reflected in the high maximum penalties that are provided for breaches of the Fair Trading Act and as is seen in cases that have addressed breaches of those sections.

[56] In determining culpability there are two steps that I need to consider. First, I need to look at this particular offending and make an assessment of how serious it is. The second, and related aspect of that exercise, is that there needs to be consistency in sentencing. Accordingly, I need to ensure that the penalty I impose can be seen to be in-step with penalties imposed on other companies for similar breaches.

[57] Both counsel for the Commissioner and counsel for the defendant company have referred me to various decisions where other companies have been sentenced. They have used those as benchmarks to show where this offending should fit. I will refer to a number of those cases shortly. There is value in them. But ultimately each case turns on its own facts. With those cases referred to, there may be factors which inform the penalty that are more serious than this case. Also, there may be factors that are more serious in this case than in those, that also inform this penalty. So while mindful of the need for consistency, I need to first, and I think most importantly, identify what it is that sets the level of seriousness for this offending.

[58] The first issue is the product itself. Ms McGeorge, on behalf of the defendant, has made the point in both her written and oral submissions that the product itself is a worthwhile product. She has provided me with information that indicates that there were consumers of this product who found it useful, who were pleased to have purchased it. Indeed, the Commissioner does not dispute that. The prosecution has not been brought because the product itself is a sham or is flawed in important ways.

[59] There is no doubt, that had this been a case of a substandard product being sold through improper pressure, it would put it in probably the highest category of offending. Ms McGeorge is right to point out that in assessing culpability, that is an issue. The essence of this prosecution and the basis on which the company is being sentenced, is that the method of sale was misleading.

[60] What Commissioner says has happened is that there has been a deliberate targeting of parents of school age children. The initial phone call is a device to enable representatives of the company to get access to the household. What then follows is misleading information by way of the assessment, so as to cause concern

to the parents that their child or children are not meeting the educational standard. That pressure was used to induce them to enter into the contract. The product may well have been worthy, but rather than sell it on its merits, the company set about selling it in a misleading way.

[61] The aspects of this that I find concerning are that the sales process was strictly scripted. That is seen from the material on file. This is not a case of rogue or over enthusiastic sales representatives making representations they should not have done with the company being careless about how it trained or supervised them. The basis for the misrepresentations is inherent in the system this company set up. I consider that makes this serious offending.

[62] I consider the nature of the misrepresentations also to be serious. Parents are being targeted over the education of their children. Again I note that the product for sale may well be worthy but that was not how it was sold. The assessment that was given to the children did not reflect what it claimed to be. Not only was it at a different level, it was higher. Inevitably the children would fail in many cases. That would then put pressure on the parents concerned about their children's education. I cannot see any other conclusion from the material in the agreed summary of facts, other than that was planned and deliberate. It was cynical marketing, attacking people who are vulnerable because of their natural concern for their children.

[63] This is borne out in the victim impact statements. A common theme that I have read is how guilty parents felt that they were somehow failing their children. That they needed to buy this product to somehow make up for that. There is reference in the victim impact statements to families who have very little, cutting back on basics, even food, to meet these payments because they felt that is what they should be doing for their children.

[64] There is no law against hard selling per se. But the reason the Fair Trading Act exists and the reason that there are serious penalties for misrepresentation is because of the damage that can be done when hard sell crosses into misrepresentation. A company can be tempted to do this because it stands to make a lot of money if it makes such misrepresentations. Had the Auckland Academy of

Learning been content to sell its product on its product's merits, it would not be here. It was not content to do that.

[65] On behalf of the defence it is noted that at least from January 2013 onwards, there was an assessment advice letter given to parents and that provided them with information both as to the reason that the sales representatives were there and the purpose of the assessment. It is argued that that mitigated some of the misrepresentations. It is certainly true that the use of the letter is better than there not being one. But the reality of the situation is that this was more than hard sell, it was targeting the vulnerabilities of parents. I do not see that the existence of the letter greatly reducing the culpability from January 2013 onwards.

[66] Another factor that was referred to by the defence was that there was in fact a teacher involved for a period of time on the staff of the company. I am not sure how this helps the defendant. The sales representatives were not teachers nor trained in education. If the teacher was there, did the teacher provide information that might have put the defendant straight about his misrepresentations? If so, why was that not followed? I have no information on that. Accordingly I simply put this point to one side. I do not see in the absence of any other information how the fact that a teacher had at some time been employed greatly assists.

[67] So looking at this on its own facts, I do assess the offending as involving a high level of culpability It was serious offending. That said, I need to consider how this fits with other sentencing for offending by companies who have breached the Fair Trading Act.

[68] A case that is referred to by both defence and prosecution, is that of *Commerce Commission v Love Springs Limited.*[1] This is a case of a company that was selling water filters door to door throughout the North Island. The offending is well summarised in the quote that the prosecution referred to from the decision of Judge Collins. It gives a flavour of where that decision sits in terms of seriousness. At paragraph [6] Judge Collins described the offending in this way:

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1 *Commerce Commission v Love Springs Limited* District Court AucklandCRI-2012-004-011695 (11 December 2013).

> In marketing or selling the product in that way representations were made to members of the New Zealand public that tap water presented all sorts of health problems for New Zealanders. Those representations were consistent with how a significant number, in my view, of the trainees were being trained. That is they were being trained to develop the belief that tap water was dangerous to consumers' health, that tap water could cause cancer, birth defects, leukaemia and miscarriages, that tap water contained bacteria such as giardia, cryptosporidium and other similar impurities. The sales representatives were encouraged, whether explicitly or implicitly, to relay that information to consumers. That message was a critical message in the company's selling technique and that is so particularly in relation to step 3 of that technique, "building the need".

[69] In that case, having provided those misrepresentations to the hapless customers, the representatives then went on to sell a water filter that was grossly overvalued. The water filter cost $1600 of which $1445 was gross profit.

[70] Quite rightly, that decision is regarded as something of a high point in terms of culpability, especially because of the breath-taking audacity of the lies that were being told in order to sell the product, coupled with the gross over valuation of the product. Both defence and the prosecution agree that case represents a higher level of culpability than this one.

[71] In *Love Springs* the starting point adopted for the company was $400,000. The director had also been charged. His charge had a starting point of $200,000. So the global culpability was assessed as $600,000. That case was under the earlier regime before the penalties were significantly increased. So in terms of individual charges, the maximum penalty was $200,000. By contracts for three of the charges faced by the defendant company in this case, the maximum penalty is $600,000.

[72] The Crown argument is that if *Love Springs* was sentenced under the new penalty regime, the starting point would be adjusted to be closer to $1 million. Accordingly for this case, which is in part under the new penalty regime, a starting point appropriate to reflect the seriousness of this offending should be at a comparatively lesser level than the adjusted *Love Springs* starting point.

[73] The defence does not disagree with that general approach. But the defence considers that the starting point for this case should be significantly less than

Love Springs. That is because *Love Springs* represents such an audacious piece of serious offending.

[74] The next case that is referred to is *Commerce Commission v Youi.*[2] This involved representatives of an insurance company contacting consumers, giving misleading information through telephone calls and emails in order to secure a sale. In some instances when potential customers asked for a quote, the representatives signed them up as customers and then billing them, even though the potential customer had not entered into a contract.

[75] In that case, a starting point in the range of $650,000 to $750,000 was imposed. This was a case under the new penalty regime. There, the particular serious features, included not only the misleading representations but the fact that consumers were treated as being in contracts they had not entered into and then billed. That put the behaviour into a particularly serious category.

[76] The defendant refers to the case *Commerce Commission v Ace Marketing Limited.*[3] In that case, Ace Marketing was a mobile trader selling both on the web but also door to door. The misrepresentations in this case involved telling customers that they could not cancel the contract, with a story made up to justify how that might be. They also claimed that they could repossess items without notice.

[77] The defence position is that these were misrepresentations that went to the heart of the legal obligation and the legal rights that the individuals had. That often there was a degree of vulnerability with those who had purchased through Ace. They were often people who would not get credit anywhere else. In that case, the starting point for all charges was $290,000. The defendant's argument is, that this offending is less than that and that should inform the overall starting point to be adopted.

[78] The defendant also refers to the case of the *Commerce Commission v Kowhai Montessori Preschool Ltd.*[4] That was a case where the school charged parents, when

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[2] *Commerce Commission v Youi Insurance Group Limited* [2016] NZDC 25857 [15 December 2016].
[3] *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165.
[4] *Commerce Commission v Kowhai Montessori Preschool Ltd* [2017] NZDC 12211

they were in fact not entitled to do so. But they misled the parents by asserting to them that they were allowed to do just that. This allowed the particular school to get funding it was not entitled to of over $220,000. In that case a starting point of between $300,000 and $323,000 was considered within the range, with the actual starting point a little over $300,000.

[79] The point defence counsel makes about that case, is that it was a direct misrepresentation of the legal position and that the parents were in no position to know different. But more than that, it was deliberate and calculated. The school knew they were lying and keep on doing it. The defence position is that that is worse offending because there is such a high level of premeditation and deceit.

[80] As I noted earlier, the difficulty in this exercise is that there will be issues of culpability that are very much unique to particular facts and which do not always easily cross over. For instance, in the *Youi* case, the inherent dishonesty and fraudulent nature of signing someone up to a contract that they have not entered into and then billing them, is serious. In *Montessori*, knowing the true legal position and lying to parents is serious. In *Love Springs,* the deliberate creation of fear through lies about tap water in order to sell an adequate but grossly overvalued product, informs its seriousness. *Ace Marketing* involved misleading people as to their legal rights.

[81] Stepping back from that though, I am not convinced that there is, in terms of culpability, a meaningful distinction between a misrepresentation as to a specific legal right or a misrepresentation designed to create a fear to push someone into signing a contract. It is a matter of assessing the degree in the particular case.

[82] I have read all the decisions that I have referred to above along with the others usefully referred to me, which I have not discussed expressly in this decision. My conclusion is that I accept that there is a distinction to be drawn with the level of culpability in *Love Springs*. That is not just because of the seriousness of aspects of the behaviour but also the offending itself was far more widespread. By comparison more consumers were involved in that case. The financial gain was also at a very high level, just under $18 million.

[83] The Commission argues that the starting point in terms of the misrepresentation charges should be in a range of $430,000 to $550,000 but argues that in reality, it is the upper level of that range, the $500,000 to the $550,000. That is far less than where *Love Springs* would be and is less than the starting point in the *Youi* case. There would then need to be an uplift for the failure to provide oral notice of cancellation. The Commission argues that it should be in the region of $20,000.

[84] On behalf of the defendant company, Ms McGeorge argues that this case is really nearer to the *Ace Marketing* case, although perhaps less serious. The defendant company's position is that a starting point for the misrepresentations should be $290,000 and accepts there should be an uplift for the failure to give oral notice of cancellation, but assesses that at $10,000.

[85] As I have said, I consider there is a degree of pre-meditation, deliberation and cynicism, in the way that this offending happened. It targeted people who are vulnerable because of the very nature of what is being sold and how it was sold. The responsibility for that lies squarely on the company. The company had the obligation to ensure that it sold its product in a way that did not breach the law.

[86] I note, in passing, that the Australian company that Mr McPherson, the defendant's director, was also involved with was put on notice of need to comply in Australia with the law as to representations to customers. I am not sure really how much relevance that can have given the very scant and bare information I have before me. Accordingly I put it to one side.

[87] The real issue here is that the company has an obligation to apply the law properly. It did not do so. The reason it did not was so that it could profit from sales. It did that not by relying on the merits of the system it was selling but by misleading those to whom it was selling the product.

[88] I am mindful that some of the charges are under the old regime and others are under the new regime. Both the defence and the prosecution referred to that in submissions. It is accepted that it is necessary to apportion the penalty between charges, taking into account the maximum penalties. What I am going to do is first

set is an overall starting point for the misrepresentation charges. I assess that as $500,000. In terms of the failure to provide oral notice of cancellation, I agree there needs to be an uplift and I assess that at $20,000. When the final total is reached it can be apportioned between the charges.

Mitigating features that reduce the penalty

[89] The next issue is, what discounts should be allowed? It is argued that there has been co-operation and that should be reflected by way of discount. Further, that the company has no previous convictions. Insofar as a company can have good character, it has good character.

[90] Ms McGeorge in her submissions argues that a 10 percent discount to reflect the company co-operating and having no previous convictions is appropriate. For their part, counsel for the Commissioner, do not disagree that there should be some discount, albeit modest, for co-operation. The Commissioner agrees that there should be some discount for good character or, at least, lack of previous convictions.

[91] I think it is important for prosecutions of this nature that co-operation is encouraged. Cooperation means, especially if matters are resolved through a sensible approach, there is a saving as to the cost of the investigation and prosecution, a saving to the Court but also there are benefits to the victims of offending. I agree that a discount of 10 percent is appropriate and I apply it to cover the lack of previous convictions and co-operation.

[92] The defence also seeks a discount to reflect the significant impact on the company of the negative publicity. It was noted in the summary of facts, there had been publicity through investigative journalism. I have information before me that indicates that following that publicity, there was a significant and serious impact on the company's sales. That certainly is understandable. However, my view is that is the inevitable consequence of the offending. It does not in my view merit a discount.

[93] There is then the issue as to a discount for a guilty plea. It is not uncommon with cases such as these that the time between a charge being laid and final

resolution, is not insignificant. In the ordinary course of events, a full discount is only given for a guilty plea entered at the earliest reasonable opportunity.

[94] It is noted in this case that a trial date had been set and that guilty pleas were entered approximately a month before then. On the face of it that is not an early plea. Ms McGeorge however makes the point that, as is not uncommon in cases of this nature and regardless of the not guilty plea that may have been entered, there is considerable discussion and negotiation about resolution that is going on behind the scenes. Also, inevitably there is a large amount of information to be worked through so that resolution when reached is not something that has simply happened because of a change of heart as the Court door looms, but is the result of an ongoing and lengthy process. Often this process is reflected in the fact that charges are amended. The summary of facts will often be the subject of intense discussion as to what its contents should include.

[95] In those circumstances it is argued, simply to look at the timeframe and to judge the discount by that, does not fairly reflect the reality of what has gone on. I think there is sense in that argument. Accordingly, I am prepared to grant a discount of 25 percent for the guilty plea. What that means, is that from a starting point of $520,000 there is a 10 percent reduction of $52,000. There is then a further reduction of $117,000, which comes to an end point of $351,000.

[96] There is then an argument that there should also be a reduction to reflect the company's limited means to pay a fine. I have before me some information relating to the difficulties that the company has faced since publicity has come to light about these matters and the charges. It is correct that the Court has a discretion to reduce what might otherwise be the appropriate penalty, because that penalty will be disproportionately harsh to the defendant company. That consideration normally would be based on detailed information as to the financial position of the company. It can also be based on the fact that there will be downstream consequences to, if you like, innocent third parties. For instance, where a company employs a wide range of individuals who had nothing to do with this particular offending but whose livelihoods would be in peril if the company collapsed. It might be appropriate to do so where a company that is struggling to survive, has made a mistake but corrected

it. It would assist in these situations if the culpability level was at the lower end of the scale, certainly was less than this one.

[97] The difficulty I have in this case is that I have little information on which to make an assessment as to the company's actual position. What I do know is that the product the company sells has value. There are many customer references that the company itself has referred me to, that attest to that. There is no reason why the product cannot be sold profitably if done properly.

[98] This is a serious breach. If the factors of deterrence are to have proper effect, then the fine that is imposed needs to be significant. Money is what drives a company, money is something a company understands. If this fine means that this company is not viable, then that is the consequence of egregious misconduct and so be it. I am not prepared to reduce the fine because of the company's financial position. I neither have sufficient information, nor do I consider in principle, that it is appropriate.

[99] In terms of the final sentence, given the starting point and discounts set out above the total amount is a fine of $351,000. It is apportioned as follows:

(a) Charge 1 CRN ending 1925, $26,000.

(b) Charge 2 CRN ending 1927, $26,000. Those two charges have maximum penalties of $200,000.

(c) Charge 3 CRN ending 1929, $60,000. That charge has a maximum penalty of $600,000.

(d) Charge 4 CRN ending 1931, fine of $26,000.

(e) Charge 5 CRN ending 1933, a fine of $26,000. Those two charges have a maximum penalty of $200,000.

(f) Charge 6 CRN ending 1935, $60,000. That has a maximum penalty of $600,000.

(g) Charge 7 CRN ending 2074, fine of $26,000.

(h) Charge 8 CRN ending 2076, a fine of $26,000. Those two have maximum penalties of $200,000.

(i) Charge 9 CRN ending 2086 $60,000, that has a maximum penalty of $600,000.

(j) Then in terms of the failure to give notice charges, Charge10 CRN ending 2087 and Charge 11 CRN ending 2088 $7,500 each.

[100] That, on my calculation comes to the total, which is the important figure, of $351,000.

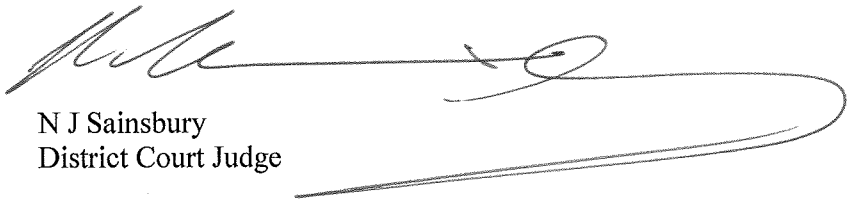
ADDENDUM:

[101] Following from my refusal to discount the fine on the basis of the company's inability to pay that, Ms McGeorge has raised with me the issue of payment of that fine over time. It is common enough, that fines both against individuals as well as companies, can by arrangement with Collections, be paid over time. That ordinarily requires some investigation into the financial means of the person who has to pay the fine. Ms McGeorge advises that if the company was able to pay over a three year period, it would be able to generate sufficient funds in order to pay the fines.

[102] On behalf of the Commissioner, Ms McConachy says that without having seen the financial information, they cannot comment.

[103] I make the following observation: if the company is in a position where it would be able to pay the fine as long as it was given sufficient time, such as three years, I would consider that is what should happen. The final decision is for Collections in consultation with the company and undoubtedly some information would need to be provided to Collections. But my view is that with that financial information then payment over three years is appropriate. It is better that the fine is paid and the company functions lawfully, than the company collapses and nothing is paid.

[104] The final assessment is for the Collections but I am hoping that my view will carry some weight with them.



N J Sainsbury
District Court Judge