IN THE DISTRICT COURT
AT HAMILTON

CRI-2009-019-003306...

NEW ZEALAND POLICE
Informants

COMMERCE COMMISSION

v

KENNETH JAMES ROSS
Defendant

Hearing: 21-25 September 2009
28-30 September 2009
5-9 October 2009
12-13 October 2009
(Heard at Hamilton)

Appearances: N Flanagan and I Brookie for the Informants
A Speed for the Defendant

Judgment: 25 November 2009

RESERVED DECISION OF JUDGE RLB SPEAR

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[1] In October 2006, the defendant approached the management of Hamilton International Airport with a proposal to stage an airshow at Hamilton Airport over 7-9 March 2008. The proposal was presented at a meeting held at the airport between Mr Ross for the one part and Rosemary Poole and Simon Hollinger for the airport company. The defendant was not previously known to the airport management.

[2] The airshow proposal presented by the defendant was partly written and partly oral. The written document ("the proposal") is an extensive document which included some information about the defendant, his "management team" and the general concept of the air show programme. Additionally, it included some market survey material and a general marketing plan.

[3] The general presentation clearly impressed the airport company with the result that a formal agreement was entered into on 19 December 2006 between the airport company and an entity described as "Hawker Holdings (NZ) Ltd t/a Airshow.co.nz". As it happens, "Hawker Holdings (NZ) Ltd" did not exist at that time and, indeed, was not incorporated until 16 February 2007. In all respects in relation to this case, however, it is accepted that the defendant was the principal in respect of all dealings on behalf of *Hawker Holdings (NZ) Ltd / Hawker Holdings Ltd* and *Airshow.co.nz/Airshow.co.nz Ltd.* That last-mentioned company (Airshow.co.nz Ltd) eventually emerged as the operating company for the airshow and replaced Hawker Holdings (NZ) Ltd. However, Airshow.co.nz Ltd was not incorporated until 8 May 2007.

[4] It is perhaps timely to observe that the defendant was at all times the sole director and sole shareholder of Hawker Holdings (NZ) Ltd and Airshow.co.nz Ltd.

[5] The agreement entered into on 19 December 2006 essentially provided that the defendant, as promoter of the airshow, would have

> *"primary responsibility for the promotion and organisation of an airshow at Hamilton Airport on an annual basis which will increase public awareness of the airport, its tenants (and their businesses)."*

[6] The agreement identified the division of responsibilities between the defendant and the airport in relation to the airshow. Essentially, the defendant was responsible for all matters relating to the airshow with the airport providing the venue in good condition and also continuing support for the airshow. As previously indicated, the agreement was to cover a period of five years (2008-2012). Significantly for the purposes of this case, under Clause 4 *Organisation*, it is specified that the promoter (the defendant) would be responsible for:

> ...4.8 The cancellation of the event. The (defendant) will have sole authority to cancel the event, in case of inclement weather or other Act of God, in consultation with (the airport), NZ Police, or NZ Fire Service. However, the (defendant) agrees that (the airport) will have authority to cancel the event if there is non-compliance with regulatory or Local Body requirements before or during the airshow. (The airport) will advise (the defendant) who will be given reasonable opportunity to remedy the situation and achieve said compliance prior to cancellation.

[7] Over the following 14 months, a great deal of work was undertaken in relation to the airshow but, as it happened, to not avail. In late February 2008, the defendant gave notice both to the airport and to the public at large that the airshow planned for 7-9 March 2008 had been "postponed." However, by that time it was clear that the relationship between the defendant and the airport company had broken down somewhat irretrievably and, in particular, the airport company had completely lost confidence in the defendant's ability to stage an event of this size and nature. In that respect, the airport company cannot be criticised.

[8] A number of charges have been brought against the defendant in relation to representations or statements made by him at various times and also the manner in which he has conducted himself over the period commencing with the initial presentation of his proposal in October 2006 right through to just prior to his decision to "postpone the airshow".

[9] It is important to state, right from the outset, that the defendant was serious in his intention to stage the airshow. Indeed, it appeared that he wished to stage an airshow that could at least rival the *Warbirds Over Wanaka* airshow which had become such a success over the years. It is no part of the prosecution case, and it has never indeed been suggested in relation to these charges, that the defendant set out to

defraud the public. Without question, the defendant wanted to stage this airshow and he fully committed himself to that end. His downfall, and the collapse of the airshow as an event, can I believe more appropriately be attributed to the defendant's naivety, his lack of administration support, his inability or reluctance to either obtain or accept necessary professional advice (particularly in relation to resource consent matters), and his increasing inability to maintain the necessary commercial relationships (particularly between the airport company and himself) that were essential to the success of an event of this size and nature.

[10] The tragedy is that the defendant clearly had an exciting vision for the staging of an airshow with ancillary activity. That vision was immediately grasped by the airport company, by Waipa District Council (the local authority), by a large number of commercial entities and by the general public at large. It could so easily have been a success. The defendant could well have been now heavily in the midst of the planning for the third airshow for 2010 rather than awaiting the outcome of a defended hearing on a number of criminal charges.

The Charges

[11] Initially, the defendant faced a total of 133 charges split between 14 under the Crimes Act 1961 and 119 under the Fair Trading Act 1986. During the course of the hearing, some rationalisation of the charges was undertaken with the consent of the defendant. That rationalisation was entirely appropriate and enabled the real allegations or complaints to be focused upon. In particular, it saw the Fair Trading Act charges reduced from 119 to 21.

[12] There are seven separate sets of Crimes Act charges with each set comprising a lead charge and an alternative charge. In each case, the lead charge is brought under s242(1)(b) of the Crimes Act 1961 and the alternative charge under s242(1)(c).

[13] The lead charge under s242(1)(b) can essentially be described as publishing a false statement in a document with intent to deceive. The alternative charge under s242(1)(c) can conveniently be described as making a false statement in a document with intent to induce any person to entrust or advance property to any other person.

[14] Section 242 of the Crimes Act 1961 is as follows:

> **False statement by promoter, etc**
>
> (1) Every one is liable to imprisonment for a term not exceeding 10 years who, in respect of any body, whether incorporated or unincorporated and whether formed or intended to be formed, makes or concurs in making or publishes any false statement, whether in any prospectus, account, or otherwise, with intent—
>
> (a) to induce any person, whether ascertained or not, to subscribe to any security within the meaning of the Securities Act 1978; or
>
> (b) to deceive or cause loss to any person, whether ascertained or not; or
>
> (c) to induce any person, whether ascertained or not, to entrust or advance any property to any other person.
>
> (2) In this section, **false statement** means any statement in respect of which the person making or publishing the statement—
>
> (a) knows the statement is false in a material particular; or
>
> (b) is reckless as to the whether the statement is false in a material particular.]

[15] It is of significance that the section defines a "false statement" as including the situation where the maker of the statement is recklessness as to whether the statement is false in material particular.

[16] While the charges refer to the publication of the statement as being *"in respect of the body described as "Hawker Holdings Ltd"/"Airshow.co.nz.ltd"*, the evidence is overwhelming that the statement in each case was either made directly by the defendant or that he knowingly caused it to be made. In either respect, he is a party to the offence alleged under s66(1) Crimes Act 1961.

[17] Accordingly, in respect of each of the Crimes Act charges, this left the prosecution with the onus of proving beyond reasonable doubt the two remaining essential elements of the offence:

a) That the statement was false; and

b) That the statement was made either with intent to deceive (the lead charge – s242(1)(b)) or with intent to induce a person to entrust property to another person (the alternative charge – s242(1)(c)).

[18] I note that "*publishes*" (as used in s242) is not specifically defined. It appears elsewhere in the Crimes Act and some assistance can be taken from the way in which it has been approached. Section 81 deals with the crime of sedition but includes the following:

> "To publish" means to communicate to the public or to any person or persons, whether in writing, or orally, or by any representation, or by any means of reproduction whatsoever.

[19] Clearly, in relation to sedition, a wide catchment is described for what is meant by *publishes* or *to publish*. Furthermore, the learned authors of *Adams on Criminal Law* (Robertson edition) offer the following additional guidance with respect to this particular section (s242):

> The critical element of publication under s242 is the communication of the relevant information to the public at large, or to a sector of the public, or to specific individuals. The method of communication should not matter - publication could be oral, by written word or by electronic media.
>
> Although the section heading refers to statements by "promoter" etc., on the actual wording of the section there is no requirement the maker of the statement have any formal position with the body in question, or indeed that the maker have any connection with it at all.

[20] The Fair Trading Act charges are brought under either s11 of the FTA that prohibits any person from engaging in conduct in trade that is liable to mislead the public as to the nature, characteristics, suitability for a purpose or quantity of services or s13 of the FTA that prohibits false or misleading representations of certain types. Again, the essential elements of the charge must be proven beyond reasonable doubt before a conviction may be entered. Where the FTA charges differ from the Crimes Act charges is, in particular, in relation to intent. No intent is required to be proven by the prosecution in respect of the FTA charges. There are, however, certain statutory defences set out in s44 of the FTA for which notice is required to be given in advance of prosecution and, in that event, the notified defence must be established on the balance of probabilities.

[21] Some detailed consideration was given to the issue as to whether the defendant could be the "person" identified in either s11 or 13 as committing the offence given the involvement of Hawker Holdings Ltd and Airshow.co.nz Ltd. Again, and in my view responsibly, Mr Speed conceded the point, or at least certainly indicated that he could not argue against the defendant being the person liable for the acts done as particularised in relation to Hawker Holdings (NZ) Ltd or Airshow.co.nz Ltd. In this respect, it is clear that a broad approach is required when considering the question of whether individuals might also be liable for the actions of companies controlled by them - see the line of authorities accommodating in *Body Corporate 202-254 v Taylor* [2009] NZLR 17 at (78).

[22] Again, in respect of the Fair Trading Act charges, the evidence is clear and consistent (indeed, largely not challenged) that the relevant representation in each case was made by the defendant on the day or days specified and at the place specified.

[23] Section 40 of the FTA makes it an offence to breach either sections 11 or 13.

[24] In order to prove a charge brought under s11, the prosecution is required to prove beyond reasonable doubt:

a) That the defendant engaged in conduct that was liable to mislead the public as to the nature and characteristics of services;

b) That he did so while acting in trade. There is no dispute that this is established in each respect.

[25] What then is conduct that is liable to mislead the public. It is clear that "liable" is to be read as requiring a lower threshold than (for example) "likely to mislead the public." In *Sound Plus Ltd v CC* [1991] 3 NZLR 329; (1991) 3 NZBLC 101, 989 at p 332, Anderson J stated:

> Ss 10 and 11 are concerned with conduct that is essentially true but capable of being reasonably construed as something which is not true, whereas s13(g), (h)(i) and (j) is (sic) concerned with representations that are essentially false but which purport with either boldness or sophistication to

be true. The differing approaches are explicable on the basis that ss 10 and 11 are concerned with public dealings and s13 are concerned with dealings which are more restrictive than public dealings.

[26] Again, the real issue to be determined in respect of the s11 charges is whether the conduct particularised was liable to mislead the public as to the nature or characteristics of services. It is the airshow that is considered to be the "services" in each respect.

[27] Section 13 of the FTA prohibits false or misleading misrepresentations of certain types.

> **False [or misleading] representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—
>
> . . .
>
> (b) [make a false or misleading representation] that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill; or
>
> . . .
>
> (f) [make a false or misleading representation] that a person has any sponsorship, approval, endorsement, or affiliation; or
>
> . . .

[28] In so far as the s13 charges are concerned, the prosecution is required to prove beyond reasonable doubt:

a) That the defendant made a representation of a certain nature;

b) The representation was false or misleading;

c) He did so in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services; and

d) He did so while in trade.

[29] Again, the evidence is abundant and clear that the defendant made the representation relied upon by the prosecution, that it was in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of the services, and that it was also while he was acting in trade. Again, Mr Speed responsibly did not seek to challenge those elements of the offences.

[30] These s13 charges really rise and fall on whether the prosecution has proven to the requisite standard that the representation concerned was false or misleading.

[31] The defendant also raises the statute defence of mistake under s44 FTA to certain charges.

Charge Categories

[32] The charges can conveniently be considered within 11 separate categories:

- Airshow proposal
- Brochure
- Airshow update
- WINZ and Wheels sponsorship brochure
- Website - ticket sales 21 December 2007
- Website - ticket sales 11 January 2008
- Email to Goodwater Co Ltd re ticket sales - 25 January 2008
- ICAS
- Website changes to terms and conditions

- Website - no gate sales

[33] Schedule 1 to this decision contains the Crimes Act charges identified as CA 1, CA 2 etc together with the offence section, and a particularised description of the charge.

[34] The particulars specified in CA 1-2 and CA 9-14 do not appear on the Informations. They are contained in material provided to the Court in advance of the hearing and as part of an earlier rationalisation of the Crimes Act charges. That rationalisation saw a number of the earlier Crimes Act charges withdrawn to be replaced by new charges with composite particulars. Again, this sensible approach to the formulation of the charges was with the consent of the defendant. It enabled the Court to focus on what was really an issue rather than deal with the same issue over and over again in respect of separate charges.

[35] For convenience, further reference in this decision to the charges will be as CA 1 or FTA 1 as the case may be rather than by the CRN reference.

Airshow Proposal charges

[36] These charges obviously relate to the proposal presented to Hamilton Airport in October 2006. It was presented at the time of the first meeting between the defendant and Hamilton Airport management on 25 October 2006. It had been preceded by the defendant's letter of 6 October 2006 and no doubt subsequent communications.

[37] The defendant met with Rosemary Poole, the Business Development Manager of Hamilton Airport, and Simon Hollinger, Regional Manager of Hamilton Airport. The defendant impressed them with his proposal for the staging of an airshow. The presentation referred particularly to the defendant's background and experience, the administrative support he would enjoy, the marketing plan and the support already indicated from both potential sponsors and by the public.

[38] The statements to which the two Crimes Act charges CA 1 - 2 relate are:

a) That he had certain named individuals comprising a management team that was in place to organise and promote a proposed Airshow when this was not the case;

b) That Hawker Holdings (NZ) Ltd had secured the exclusive broadcast television screening rights for the popular drama mini-series "Piece of Cake" when this was not the case.

[39] The Crimes Act charges are, as is the case with the other sets of Crimes Act charges, in the alternative with the lead charge being brought under s242(1)(b) and the alternative Crimes Act charge under s242(1)(c).

[40] FTA 1 was explained to me as a second alternative charge to CA 1 although, indeed, it could have appropriately stood by itself. However, prosecution counsel expressly presented their case on the basis that, where FTA charges were identified as alternatives to CA charges, FTA charge or charges were to be treated as second or subsequent alternatives.

[41] FTA 1 relates to a representation that the defendant is alleged to have made in the proposal that he had a "30 year career of aviation (RNZAF)" when in fact he had only been a member of the RNZAF for 12 years. It was formally admitted that the defendant's RNZAF career amounted to 12 years.

[42] In the written proposal, p 5 is headed up "Confidential" and below that appears a description of "The Management Team". That amounts to an introduction of the "management team" in some detail but, with the exception of the defendant, only the christian name is given.

[43] It is the prosecution case in this respect that this "management team" was, with the exception of the defendant, not a team at all. With the exception of the defendant, the evidence was overwhelming that all but one of the seven individuals described as part of a support management were not at that time committed to working for the defendant's airshow and were more correctly individuals known to

the defendant whom he hoped might become involved. However, the evidence in this respect is in conflict.

[44] The meeting between the defendant, Rosemary Poole and Simon Hollinger on 25 October 2006 saw the defendant make his presentation, not only by production of the written proposal but also various representations and statements that were also made by him at the time as part of the general discussion. The defendant stated in evidence that he made it clear that the management team (identified on p 5 of the proposal) was more an indication of the "calibre of people that either had or could engage in this company." Rosemary Poole, however, gave evidence that the defendant left her with the understanding that the management team was "already on board" - that is, that they were already committed to working for the airshow.

[45] Neither Simon Hollinger nor Rosemary Poole were however prepared to state that the defendant had orally represented that any of those individuals named in the management team sheet were actually committed at that time. That may have been the understanding with which Rosemary Poole was left. However, Mr Speed established the good point in his cross-examination of Rosemary Poole and in his closing submissions that this meeting was at a time when the airshow was simply a concept. At best, the evidence surrounding p 5 of the proposal can in my view amount to a statement that certain individuals with appropriate skills were available to become part of the management team or form the management team if the proposal went ahead. That is not the same as stating that this management team had already been established to the point where there was a commitment by each of them at that time. That, indeed, is the statement alleged by the prosecution to have been made by the defendant.

[46] The first consideration then is whether the prosecution has proven that such a statement as particularised for CA 1 or 2 was ever made. It must be proven beyond reasonable doubt. I do not consider that it has been proven that this particular statement was ever made in such clear-cut terms as the prosecution would have me accept. An air of reality must be brought to bear on this. The details of the management team do not even include their surnames. There also does not appear to

have been much discussion about the individual members of this so-called management team.

[47] What appears to have been overlooked here, however, is the description of the experience and qualification of each of the so-called members of the management team, proposed or committed as the case may be. I am in no doubt that there was a gross exaggeration if not a complete distortion by the defendant of the background, experience and expertise of the individuals concerned. Take the identified sales manager described as "Paul" and his profile which stated that he was, *"a dynamic team leader with a very, very successful Sales Career and large retail management. He can implement a sales strategy and motivate a Sales Team to meet pre-set revenue targets."*

[48] Paul was identified as Paul Rangi. He was called by the defence to give evidence. Paul Rangi is the defendant's nephew. His evidence was that he worked for the New Zealand Police for approximately two years after he left school and then joined the New Zealand Army rising to the rank of Sergeant. He was principally an administrator within the Army. On his release from the Army, he commenced work on the shop floor in the New Plymouth branch of Briscoes and rose to the position of manager of that branch within 12 months. He remained in that position for about 3-4 years until about 1994-1995. He then undertook what he described as a few odd jobs, worked for the New Zealand Army as a civilian in their inventory management division, moved up to Auckland and worked for the Fire Security Services as a surveyor (of fire alarm systems), then commenced work for an engineering company as an office clerk. He did not stay that long in the office before moving out into the field and operating a crusher machine for that same engineering company. He was still working as a crusher operator in a quarry at Waitakaruru at the time he gave evidence in this case.

[49] He eventually accepted in evidence that he did not have a strong sales background or, more exactly, a "very, very successful sales career in large retail management."

[50] Similar observations can be made in respect of the expressed profiles of other members of the management team.

[51] If this particular case had been presented on the basis that the statement of the management team's expertise was false, then I would have had little difficulty finding that that was established.

[52] However, the particular statement presented as the first basis for CA 1 and 2 related to the issue as to whether a management team was or was not in place to organise and promote the proposed airshow. I do not consider that the evidence brings me to the point where I am left sure that this statement was effectively made by the defendant much less that it was false.

[53] The second limb of CA 1 and 2 is that the defendant published a statement that Hawker Holdings (NZ) Ltd had secured the exclusive broadcast television screening rights for (what is described as) the popular drama mini-series "Piece of Cake" when this was not the case. A great deal of evidence was given in respect of this issue.

[54] At p 34 of the proposal, and as part of the marketing plan for the airshow, the defendant effectively stated that these exclusive broadcast television screening rights had been secured. In this respect, the wording in the proposal is unambiguous. It is clear that the defendant made or published the statement concerned. The remaining issues are whether it is also proven:

a) The statement was false;

b) In respect of CA 1, he did so with intent to deceive the airport;

c) In respect of CA 2, he published the statement with intent to induce Hamilton Airport "to entrust property (Hamilton International Airport) to Hawker Holdings Ltd in respect of the Hamilton International Airshow."

[55] The initial evidence for the prosecution was given by Augustus Delgaro by video-link from Australia. He is in charge of sales for Australia, New Zealand and Japan for ITV - a UK company.

[56] Augustus Delgaro explained that in late 2006 he was approached by the defendant who wished to obtain the right to broadcast this "Piece of Cake" series on a terrestrial network which he said would be either TV1, TV2, Prime or TV3. Mr Delgaro explained that the rights were available, agreement was reached on price and then, in accordance with standard practice for ITV, a credit application form was sent to the defendant as a preliminary step. Mr Delgaro said that ITV never received a response notwithstanding that it followed the matter up "a few times." In about March 2007 it was decided that this was not potential business that needed to be pursued further and so the file was closed. Mr Delgaro stated that the defendant never secured the right to screen the programme.

[57] ITV was formerly known as Granada Media Group Ltd and that indeed is the name that appears on some of the documentation. Mr Delgaro was shown a copy of an email from sales@granadamedia.com dated 28 September 2006 addressed to the defendant with the subject reference "Piece of Cake" and which read:

> Hi Ken, thank you for your letter of 4 September re: the TV programme, "A Piece of Cake." Please find attached the licence agreement for New Zealand in accordance with the terms you requested. We look forward to receiving this completed, together with the licence fee notated. If we can be of further assistance, please advise accordingly, thank you, John.

[58] Mr Delgaro said that he found the email "really unusual", that he was not aware of it, and that he was surprised at it as well.

[59] Because of the evidence given by the defendant in this respect, I granted leave to the prosecution to call rebuttal evidence from Alison Fawcett, (again via video-link). Ms Fawcett explained that she was the head of legal and business affairs at ITV Global Entertainment Ltd based in London. Further, that that company had changed its name from Granada International Media Ltd on 18 September 2008. She had been with the company since May 2006. Certain documents put in evidence by Mr Delgaro (Exhibit J) and the defendant were

referred to Ms Fawcett. It is fair to say that she questioned the authenticity of some of this documentation and in particular communication exchanges.

[60] The defendant gave evidence that he had previous dealings with ITV (then Granada) in 2001 in relation to "Piece of Cake" but that those dealings did not reach the point of securing the broadcast rights. The defendant gave evidence that he wrote to ITV/Granada on Hawker Holdings letterhead on 4 September 2006 seeking the terrestrial broadcast rights for Piece of Cake. The defendant stated further that he received back an email under the name "John from sales@granadamedia.com" stated to have been sent on 28 September 2006 (Exhibit J) with a draft licence agreement for execution and return with the "licence fee notated." The defendant's evidence is that he then responded to ITV/Granada by fax of 28 September 2006 attaching a copy of the signed licence agreement and advising that the hard copy had been sent to ITV/Granada's offices in "Leicester Square, London" that day. The defendant said that he did not forward payment for the licence fee but instead included a separate document "the addendum to licence agreement" which purported to vary the terms of the licence agreement by making the due date for payment of the licence fee contingent upon the defendant obtaining "a broadcast agreement with a television station in New Zealand."

[61] Of course, the issue as to whether the statement is or is not true and the defendant's intent in respect of CA 1 and 2 is to be measured as at 25 October 2006 being the date when the initial meeting took place at Hamilton Airport. Even if the defendant's evidence is to be believed, it clearly does not establish any doubt as to whether he had secured the exclusive broadcast rights for this television series. At best, if his evidence is to be believed, he was still in the process of negotiating this and there remained an outstanding issue as to the date for payment of the licence fee. In that latter respect, it appears clear that it was a matter of some importance given Mr Delgaro's evidence that the initial response from his office was to forward a credit application form. If the defendant's evidence is to be believed, ITV/Granada wanted the licence fee paid at the time the agreement was signed. Of course, as no payment was made there is no independent document trail that could provide support for the defendant's account. However, if the defendant's evidence is to be believed, even to the point of raising his account of events as a possibility, it does not alter the

obvious conclusion that the statement as to exclusive broadcast rights was false. No such rights had been allocated.

[62] That notwithstanding, is it possible the defendant believed that his dealings with ITV/Granada had secured those exclusive broadcast rights? The prosecution contends the defendant is not to be believed in respect of his account of events and that he has indeed fabricated documentation to try retrospectively to establish some kind of paper trail.

[63] Mr Flanagan pointed initially to a letter found by the Police with the defendant (Exhibit 185) dated 14 November 2006 from the defendant to Granada Group Media. It is in identical terms both as to content and lay-out as the letter produced by the defendant (Exhibit X) dated 4 September 2006. The defendant was unable to provide a satisfactory explanation as to why there were two identical letters just bearing different dates - 4 September 2006 and 14 November 2006 initiating a communication with ITV/Granada in relation to the securing of the broadcast rights for the series. It is significant, Mr Flanagan contends, that the two letters are written effectively on either side of the date of the meeting at the airport when the proposal was presented.

[64] Mr Flanagan also cast doubts on the material produced by the defendant. He asked the Court to take particular notice that the defendant's records did not disclose any documentation at all from ITV/Granada except the email (Exhibit J) that the defendant said he received from London. Ms Fawcett reminded me that ITV/Granada had no record at all of dealing with the defendant or any of his associated companies in relation to the Piece of Cake series except the enquiry which was referred to Mr Delgaro. She said that the only person named John, who worked in sales for ITV/Granada at that time. was based in Los Angeles and looked after the USA business. She said New Zealand was looked after by Mr Delgaro based in Sydney. In that respect, her evidence is entirely consistent with that of Mr Delgaro. Ms Fawcett said that ITV/Granada would not have dealt directly with the defendant from its London office but would have referred the initial enquiry to Mr Delgaro as a matter of internal business practice. That indeed occurred. Of course, Ms Fawcett

was perfectly entitled to give that evidence on the basis of her knowledge of the business practice of ITV/Granada.

[65] Ms Fawcett went further and cast doubt on the authenticity of the email that the defendant stated came from sales@granadamedia.com bearing date 28 September 2006. Mr Speed objected to this evidence from her on the basis that she simply did not have the expertise to give opinion evidence as to the authenticity of that email. To an extent, Mr Speed is correct and I uphold his objection. However, it is certainly a matter of business practice to which Ms Fawcett can give evidence within her expertise that emails were not sent from the address sales@grenadamedia.com and that this was simply a mailbox at which sales enquiries are received. They are then distributed to the sales staff who responded from separate addresses.

[66] So, even accepting Mr Speed's objection, I am left in no doubt at all that the defendant fabricated these documents in an attempt to demonstrate that he believed he had secured those exclusive broadcast rights. I do not accept his evidence that, at the time of the meeting at Hamilton on 25 October 2006, even as a possibility, he believed that he had secured those broadcast rights.

[67] Accordingly, I find CA 1 proven as clearly the defendant published that statement concerning the Piece of Cake series, it was false, and his intention at the time was to deceive Hamilton Airport. That is, his intention was to have the management of Hamilton Airport believe that he had the exclusive broadcast rights when he knew that that was not so. Furthermore, he obviously did that to dishonestly enhance the proposal that he was making to Hamilton Airport in relation to his marketing strategy for the airshow proposal.

[68] Of course, the defendant did not need to go to such lengths. He could have simply left it on the basis that he intended to secure the broadcast rights and that he understood that they were available. If that was his representation, I doubt whether Hamilton Airport would have been deterred from embracing the proposal.

[69] I accordingly find CA 1 proven beyond reasonable doubt. It is also clear that CA 2 is proven to that same standard as his deception was for the purpose of securing Hamilton Airport as the venue for the airshow.

[70] The third charge in respect to the proposal is brought under s13(b) and s40(1) FTA. The representation complained of is that, in the proposal, the defendant represented "that he had a "30 year of aviation (RNZAF)" when in fact he had only been a member of the RNZAF for 12 years.

[71] Essentially, the prosecution case is that the defendant represented that he had a 30 year career of aviation with the RNZAF. However, that is not exactly what is stated in the proposal. Certainly, some might well read that statement as giving that impression. Others may focus upon the initial words *"30 year career of aviation"* as being the operative statement with "*RNZAF*" simply indicating that some of that time was through an involvement with RNZAF. In my view, the expression is equivocal.

[72] It must be proven beyond reasonable doubt that the representation is either false or misleading. I do not consider that it reaches that point even in respect of an examination as to whether it might be seen as misleading or not.

[73] I do not find FTA 1 charge proven.

Brochure Charges (Exhibit 64)

[74] This set of charges relates to a glossy 8-page fold-out brochure. The defendant accepts that he authorised the production and distribution of the brochure and, indeed, he had significant input into its contents. The brochure was widely distributed both to the public at large and also specifically delivered to all those either involved or who were perceived as having an interest in the airshow. Distribution occurred particularly by way of being inserted in to various newspapers including the New Zealand Herald and the Waikato Times. This distribution occurred from mid-October 2007 to mid-December 2007.

[75] The brochure was principally designed to both inform and raise interest with the public in respect of the airshow. The front page of the brochure described the airshow as being "*Wings and Wheels over Waikato*" and described it as "*The Biggest Airshow in New Zealand.*"

[76] The brochure without question is eye-catching. It contains a lot of photos designed to attract interest, it contains information relevant to the seating plan and different ticket options, and it also contains an official booking form.

[77] The brochure set of charges relates to representations or statements alleged to have been made in the brochure. There are again two Crimes Act charges brought in the alternative (CA 3 and 4) and 4 FTA charges (FTA 7-10).

[78] Again, there is no dispute that the brochure was indeed published by the Defendant and as to time and place as specified. The statement in question in respect of the Crimes Act charges is,

> "*(the) implied assertions of fact that Airshow.co.nz.ltd had secured the participation of a United States based jet aerobatic team, a F1 11 aircraft, a Bleriot monoplane and a Spitfire aircraft at the airshow.*"

[79] CA 3 alleges that this statement was false and that it was published by the defendant with the intent to deceive the public.

[80] CA 4 in the alternative is that the statement was false and that it was published with intent to induce persons to advance property - namely, the ticket price to the *Wings and Wheels over Waikato* Airshow - to Airshow.co.nz Ltd.

[81] The FTA charges are all brought under s11 relating to conduct in trade liable to mislead the public in relation to the nature or characteristics of certain specified services. The FTA charges are alternatives to the Crimes Act charges.

[82] In relation to the Crimes Act charges, the first consideration must be whether the statement concerned has been proven beyond reasonable doubt to be false. The test for determining whether the statement is or is not false is set out in s242(2).

[83] The first consideration in relation to CA 3 and 4 must be whether such a statement or statements were made in the brochure either expressly or implicitly. If so, was that statement or statements false. It is clear that a "statement" does not have to be expressly recorded in the brochure (in this case) and that it can be established by implication providing that no other reasonable possibility exists.

[84] Accordingly, the first of the statements is that the defendant by his company Airshow.co.nz Ltd

> "had secured the participation of a United States based jet aerobatic team."

[85] The parts of the brochure that are relevant are the front or cover page on which four jet aircraft are depicted flying in formation and the top part of page 7 under the large heading "**THE YANKS ARE COMING!**"

[86] The case for the prosecution relies on the combined effect of the display on the cover page of the jet aircraft and, in particular, both the photo of four jet aircraft flying in formation on page 7 and appearing under the specified heading, beside the flag of the United States and above the bold assertion:

> See perhaps the very best USA jet aerobatic team and exclusively at the "Wings and Wheels Over Waikato airshow.!!!"

[87] The clear and consistent evidence is that the photos of the jet aircraft both on the cover page and in particular on page 7 are of the Patriots' Jet Team. The jet aircraft were identified as the Patriots' Jet Team by a number of knowledgeable witnesses who recognised them solely from the photographs. This is notwithstanding that the graphic artist who had put together the photo of the aircraft on the cover page had changed the colouring of the aircraft and inserted the words *airshow.co.nz* on them.

[88] The prosecution called the owner of the Patriots' Jet Team, Randy Howell from California. Mr Howell gave evidence, by video link, and explained that the Patriots' Jet Team was a four-ship jet team using L 39 jet aircraft and that it operates out of Byron, California, near San Francisco. Mr Howell identified the photographs as being that of the Patriots' Jet Team. He explained that the Patriots were

recognised as the leading USA jet aerobatic team outside the military but that it operates only within a 630 nautical mile radius from its airbase. It does not operate outside that area for a variety of reasons relating to not only costs where refuelling en route is required but also that its principal sponsor has its 40 stores located only on the West Coast of the United States.

[89] Mr Howell explained that he received phone call approaches from (he thought) the defendant in mid-2007. This was by way of an enquiry as to the Patriots' Jet Team performing at an airshow in New Zealand. A relatively brief but general discussion took place on each occasion which eventually turned to the substantial cost that would be involved bringing the Patriots' Jet Team to New Zealand. Mr Howell's recollection is that matters never progressed beyond that and but that he never said that they could not take the team to New Zealand. As he explained in the course of his evidence, there are airshows in the world that have the financial resources to meet the sort of costs that would be required to move the team a substantial distance. He did not know whether this was one of them.

[90] The Defendant indeed arranged for a Californian based friend to meet with Mr Howell to see if negotiations could be progressed. Clearly, that person did not make a favourable impression on Mr Howell who indicated that he politely terminated the meeting within a few minutes.

[91] It was put to Mr Howell that a figure of some $200,000 was mentioned as the sort of costs required to bring the team to New Zealand. Mr Howell's understandable response was simply was that might equate to taking one aircraft one way to New Zealand. He explained that the aircraft would need to be broken down and then packaged in specially prepared containers for the journey to New Zealand where they would have to be re-assembled. Not only would the aircraft engineers need to be both transported and accommodated in New Zealand but the time that the pilots would be away from the United States and their regular employment would have to be the subject of compensation as well.

[92] I was left with the impression that if Mr Howell ever had to calculate a charge for bringing the Patriots' Jet Team to New Zealand, it would be well in

excess of $US1 million. However Mr Howell was clear that matters never got beyond that rather unsatisfactory exploratory discussion phase.

[93] Mr Howell was also able to explain that there were no other jet aerobatic teams in the States using L 39s.

[94] I am in no doubt that the statement was made in the brochure that a United States based jet aerobatic team would be performing at the airshow. Furthermore, the evidence is overwhelming that at the time the brochure was distributed, no arrangements had been made to secure any jet aerobatic team from the USA, much less the "very best USA jet aerobatic team", much less the Patriots' Jet Team.

[95] The defendant's attempts to establish that he had reached the point of meaningful discussions with a USA jet aerobatic team company was quite unconvincing and simply amounted to bluster.

[96] Accordingly, I find that the statement concerning a USA jet aerobatic team was made and that it was false.

[97] I am also in no doubt that, at the time the brochure was published, the defendant clearly intended to deceive the public by it. That is, that if members of the public purchased a ticket for the airshow then they would see a USA based jet aerobatic team perform at the airshow when, of course, the defendant well knew that no arrangements were in place for this to occur. Furthermore, he must have also appreciated at that time that he simply did not have the financial resources to provide that attraction at the airshow.

[98] The charge goes further, however, and refers also to participation at the airshow of an F1 11 aircraft, a Bleriot monoplane and a Spitfire aircraft. The prosecution case for those statements being made is by reference to photos of those three aircraft.

[99] A photo on page 2 of an aircraft with a large bright exhaust cloud behind it was identified by witnesses as an F1 11 although that is not expressly mentioned in the brochure. The caption accompanying the photo is of "Awesome flying displays."

[100] A photograph of the Bleriot aircraft and the Spitfire are found on the top half of page 8 of the brochure under the heading "The Famous New Zealand Warbirds Association." The caption refers to aircraft from World War I, World War II and the Cold War era. The caption is accompanied by four separate photographs of aircraft including the two in question.

[101] The issue arises in respect of the F1 11 for one part and the Bleriot and Spitfire aircrafts for another is whether the inclusion of photographs of those aeroplanes alone amounts to a statement that they had been secured for participation at the airshow.

[102] It is clear that, at this time, nothing had been done to secure an F1 11 except an enquiry of the Royal Australian Air Force which was met with a reasonably prompt refusal.

[103] The New Zealand Warbirds Association had indeed been engaged by the defendant at that time to provide the aircraft display and indeed run the air display side of the airshow. It is clearly a reputable and professional organisation. However, the Warbirds Association had provided the defendant with a list of aircraft which it indicated it could provide for the air display and the Bleriot and Spitfire aircrafts did not feature in that list.

[104] It is clear that the photographs of the F1 11, the Bleriot and the Spitfire were simply found and extracted from one source or another and included as part of the promotion of the airshow. It is clear that, at the time the brochure was published, the defendant knew that neither an F1 11 nor a Bleriot aircraft would feature at the airshow if it went ahead. At best, there was only a faint possibility of a Spitfire aircraft being available and eventually that no longer remained even a possibility.

[105] All that notwithstanding, I do not consider that the simple inclusion of photographs of those aircraft, by themselves, amounts to a statement that they would be necessarily be participating at the airshow. That premise must be established before any consideration is given to the question as to whether the statement is or is not false.

[106] There is some qualification on the website, referred to in the official booking form on page 4 of the brochure as containing "full terms and conditions of sale" reserving the airshow organisers the right to substitute one plane for another. However, it is unnecessary for this to be considered.

[107] I have reached this view in respect of the photographs of the aircraft with a great deal of hesitation. However, I recognise that there must be an unambiguous statement established before consideration need be given as to whether it is or is not false and whether it was made with intent to deceive or not.

[108] I accordingly find CA 3 and necessarily CA 4 proven but only in respect of the statement that the defendant's company had secured the participation of a United States based jet aerobatic team.

[109] A much lesser standard is required to establish the Fair Trading Act charges in this respect. Again, there is no question but that the defendant was in trade at the time. The question is then whether the prosecution have proven beyond reasonable doubt that he engaged in conduct that was liable to mislead the public as to the nature and characteristics of services. They are particularised in relation to the various photographs of aircraft dealt with within CA 3-4.

[110] FTA 7 is presented on the basis that the nature and characteristics of services on which the public was liable to be misled by the defendant's conduct was the inclusion of the photograph of the F1 11 in the brochure. A similar approach is taken in respect of the Bleriot monoplane and the Spitfire aircraft. F 10 deals with a US jet aerobatic team.

[111] I reiterate, however, that the simple inclusion of a photograph of an aircraft in this context cannot with certainty be taken as a representation that that particular aircraft or an aircraft of that type would be participating or on show at the airshow. The brochure contains a large number of photographs of aircraft, motor vehicles, boats and other attractions. The simple inclusion without more of the photos of those vehicles/aircraft cannot be elevated to the point where they become an unambiguous representation that that particular vehicle/aircraft or that type of vehicle/aircraft would be on display.

[112] I accordingly find FTA 7-9 not proven. For obvious reasons, however, I find FTA 10 proven.

Airshow update

[113] CA 5 and 6 are charges relating to a document published by the defendant on or about 23 January 2008. This, as the title to the document suggests, was a progress report on the then current state of the organisation for the airshow. It is not known exactly how widely this document was distributed but it was certainly sent to two contracting sponsorship partners - Epic Brewing Ltd and The Goodwater Co. Ltd as well as the Warbirds Society and Hamilton Airport. The statement focused upon by CA 5 and 6 in the airshow update is that "ticket sales had reached $1.15m".

[114] Without question, the airshow update makes that statement.

> "January 2008
>
> So....., how's it going? Well from 0 to $1.15m ticket sales and in just 14 weeks! And what a rocket ride it has been too. Frequently our mailbox simply has a single card inserted stating that there is too much mail for the box - the mail order tickets with accompanying cheque payments just keep coming and coming and often exceeds the capacity of the P O Box! . . . "

[115] It is clear that the airshow update was distributed for the purpose of engendering confidence in the airshow organisation in the sponsorship and other contracting partners. This was, however, at a time when the prospects of the airshow actually "getting off the ground" were almost negligible. This was well assessed by John Pringle who was, at that time, working on the airshow for the defendant

apparently in charge of sponsorship. In Mr Pringle's assessment, the airshow update document was published at a time when "*the wheels were coming off and money was very tight.*"

[116] The charges faced by the defendant do not require a determination as to why the airshow did not proceed. However, given the extensive evidence that has been led in this respect and because it is important to understand where the organisation was on 23 January 2008, some observation in that respect is called for.

[117] In my assessment, what was seen by many as a very good idea (being the airshow) became doomed to fail when the defendant did not support his endeavours with an able management team from an early stage. The evidence was clear, to the point of being overwhelming, that the defendant really operated as a "one-man band" until the latter stages of 2007 when other individuals came on board in drips and drabs. It is clear that the defendant attempted to undertake himself virtually all the significant organisation required for the airshow until at least mid-late 2007. Certainly, the defendant had some assistance but that was more of a clerical nature rather than significant, capable management expertise.

[118] The evidence, particularly from Rosemary Poole and Simon Hollinger from Hamilton Airport on the defendant's relationship with Hamilton Airport management is illuminating. As the planning for the airshow became more detailed and sharper decisions were required in respect of the fine detail, the relationship between the defendant and Hamilton Airport started to sour. Clearly, the Defendant had a dream as to how the airshow should run and he found it difficult to deal with practical issues that were raised that appeared to obstruct that vision. An obvious example was the placement of the grandstands in the general spectator area. Was it to be on the airport terminal side of the runway or on the other (western) side of the runway? That was of vital importance because of car-parking and general traffic management. The defendant envisaged traffic arriving at the airshow off the main Hamilton/Te Awamutu Road and he was obviously frustrated when the police indicated it would oppose such a major traffic movement.

[119] There was also the major issue as to whether a resource consent was required from Waipa District Council. Without question, the issue as to whether resource consent was required and, if so, the obtaining of that consent was a matter entirely for the defendant. It became clear that a resource consent was required because the defendant's event, "*Wings and Wheels over Waikato*" envisaged not just an airshow but also an automobile and boat show as well. This, indeed, was heralded at the time of the proposal and continued with the planning right through to the glossy brochure that was distributed extensively around the upper North Island. The non-airshow aspects of the event were described as "*The Great Outdoors Expo*." Indeed, in the brochure, it was indicated that up to 3,000 classic cars would be on show as well as a great selection of canoes, boats, caravans and campervans and such-like. Additionally, the brochure indicated wine-tasting, live music and a children's playground.

[120] Waipa District Council indicated, when it first became involved, that a resource consent would be required because of the non-airshow aspects to the planned event. This was advice that the defendant did not or was not prepared to accept. He took the view, it would appear, that an airshow was a permitted use of the airport and the rest of the activities were simply part and parcel of the airshow in the way, perhaps, that a circus may have sideshows. That is when major difficulties emerged. The defendant did not deal with this resource consent issue in a timely way. His response appeared to be confrontational if not defiant. As the airshow date became closer, the problems surrounding resource consent simply became more difficult to resolve.

[121] A resource consent would obviously require formal approval on the part of Police and Transit New Zealand in respect of the traffic movement by way of a traffic management plan. The defendant simply did not have the capability of providing this.

[122] I need to point out that the evidence is also clear that both Hamilton Airport and Waipa District Council appeared to do everything it could to assist the defendant get this airshow off the ground (as it were). In particular, Waipa District Council staff indicated on a number of occasions that they were ready to drop virtually

everything to work on the airshow consent application when that was formally presented. Hamilton Airport indeed referred the defendant to its own resource management consultants for professional assistance and eventually the defendant took up that invitation.

[123] By 23 January 2008, however, all that the defendant could hope for was an airshow put on by the New Zealand Warbirds Association. He had no resource consent for a more elaborate event. Indeed, the downgrading of the event to just a pure airshow was seriously contemplated. That it came to nothing was, I suspect, because the defendant clearly understood that he would be sailing into troubled waters indeed if he attempted to deliver an event markedly different to that advertised to the general public.

[124] In relation to CA 5 and 6, the statement was clearly made that sales had reached $1.15m and that statement was false. There is simply no basis in reality for the defendant making such a statement. Sales had indeed reached the point of just over $500,000 as at 23 January 2008 but that left a difference between actual ticket sales and professed ticket sales of approximately $500,000.

[125] The defendant contended that this figure of $1.15m took account of bus tours that he expected would turn up on the day and pay entrance fees at the gate. However, there was no evidence at all that suggested that this was even a possibility. The defendant was unable to point to any work undertaken by him that could have given him any real confidence at all that even one bus would turn up with a group of individuals ready to pay at the gate. All in all, it was a rather pathetic attempt to explain away the statement made in the airshow update as to total ticket sales at that time.

[126] Epic Breweries and the Goodwater Co. had reached agreement with the defendant to come on site as suppliers of beer and water respectively. That required a concession payment/sponsorship fee to be paid to the defendant in two stages. This airshow update was provided to both those companies and it was clearly done for the purposes of convincing them that the planning for the airshow was on track and that they could safely advance the balance of the sponsorship money. The

principals of both companies gave evidence. It was clear that they were newly formed companies looking to raise their public profile through an event such as this. They were bitter indeed at having been duped by the defendant in relation, in particular, to the second payment required.

[127] Mr Speed endeavoured to downplay the issues in respect of Epic Breweries and The Goodwater Company with the submission that they were contractually bound to make the payments and the defendant simply received what he was due. However, this was a commercial arrangement and it should not have been one-sided. It is clear that if Epic Breweries and the Goodwater Company's concerns about the organisation of the airshow had not been dispelled by the statements in the airshow update document, they would not have made the second sponsorship payment and they would have looked to minimise their losses at that point.

[128] I find proven beyond reasonable doubt that, when the accused made the false statement in the airshow update as to total ticket sales, he did so with the intent to deceive those persons to whom the statement was made and in particular the various sponsors and other related organisations including the Warbirds and Hamilton Airport. I find CA 5 and 6 both to be proven to the requisite standard. Additionally, and for obvious reasons, I also find FTA 15 proven beyond reasonable doubt.

Wings and Wheels Sponsorship Brochure

[129] CA 7 and 8 require a return to the television mini-series "Piece of Cake"that was initially addressed as part of the airshow proposal charges CA 1 and 2. Again, the charges are that the accused stated that the exclusive broadcast screening rights for the popular mini-series "Piece of Cake" had been secured. That statement was as false then then as it was when made earlier within the proposal. Equally, the defendant made it with the intention to deceive The Goodwater Company Ltd (CA 7 - s242(1)(b)) alternatively with intent to induce the Goodwater Company Ltd to advance property namely a $25,000 sponsorship investment (CA 8 - s242(1)(c)).

[130] The statement is alleged to have been made between 6 August 2007 and 31 August 2007 at Auckland. There is no question but that the statement in question

was included in a sponsorship brochure provided to The Goodwater Company Ltd, at that time and place with the intention to attract the Goodwater Company Ltd as a sponsor for the airshow. The overall presentation was accepted by that company which entered into a sponsorship contract.

[131] The simple position is that nothing had materially changed between the time that this statement was made initially in the airshow proposal in October 2006 and when it was re-made in the Wings and Wheels sponsorship brochure in August 2007. That is, the statement was false as the defendant, either on his own part or through one of his companies, had not secured the exclusive broadcast TV rights for that mini-series. Furthermore, the defendant knew that he had not secured those screening rights. The defendant clearly intended to deceive The Goodwater Company as to the strength of the marketing campaign for the airshow in much the same way as he deceived Hamilton Airport at the time of the proposal.

[132] I find CA 7 proven beyond reasonable doubt. Additionally, the alternative charge is also proven to the requisite standard as the intent can also be categorised also as being motivated by an attempt to induce the Goodwater Company to advance sponsorship mines.

Website - Ticket Sales

[133] CA 9 and 10 are charges that on 21 December 2007 at Hamilton and elsewhere, the defendant published a statement on the airshow.co.nz website that the gold pass tickets were down to "last seats" when they were not, that that statement was false, and that it was made with the intention to deceive those looking at the website (CA 9 - s 242(1)(b)). Alternatively, with the intent to induce those viewing the website to advance property by purchasing tickets or investing in the airshow as a sponsor.

[134] It is clear that the statement was made and that it was caused to be made by the defendant. It is also well established that it amounted to a misrepresentation as to the number of tickets sold as there were still plenty of gold pass tickets available for sale. Accordingly, it is well proven that the statement was false.

[135] In relation to CA 9, was there then an intent to deceive? That is more problematic.

[136] An intention to deceive is well understood to mean an intention to cause another to believe something is true when it is not (Adams, *Criminal Law* CA 240.02).

[137] The concern I have is that this charge may technically have been made out but does it really warrant the involvement of the criminal law? In my view, this statement can more appropriately be categorised as a promoter's exaggeration or sales pitch which the consumer public are confronted with virtually on a daily basis. What is the difference between what the defendant caused to be stated here and a shop that slightly exaggerates the quality of its products. Another example perhaps is a circus that advertises itself as the greatest show on earth when, of course, in the case of most circuses, nothing could be further from the truth.

[138] I take a similar approach with respect to the alternative charge requiring proof of an intention to induce members of the public to buy tickets or sponsors to make a contribution.

[139] I would have taken a different approach, and treated the charges more seriously, if there was evidence that anyone entered into a sponsorship contract with the defendant at a time when they were influenced by this representation. Of course, the sponsorship inducements were addressed with CAs 5-8. Those representations/statements would have been far more effective at encouraging the recipient to advance monies.

[140] While an attempt to deceive does not require proof of loss, there must be a threshold over which a false and misleading promotional statement must pass before it should attract the attention of the criminal law. I do not consider, in this case, that a statement shown on the event website that a certain class of tickets was almost sold out raises the case in respect of CA 9 and 10 to that point.

[141] Accordingly, while I consider that the charges are technically established, I am not prepared to enter convictions in either respect.

Website - Ticket Sales

[142] CA 11 and 12 relate to a similar statement (CA 9 and 10) that the gold pass tickets were down to the last seats and yellow, pink and blue pass tickets were sold out. This statement is alleged to have been made by posting on the website on 11 January 2008.

[143] For the same *de minimis* point explained above in respect of CA 9 and 10, I am also not prepared to enter convictions in CA 11 and 12 notwithstanding that both charges can be considered to have been technically proven beyond reasonable doubt.

Email - The Goodwater Company Ltd

[144] CA 13 and 14 relate to a statement contained in an email sent by the defendant to the sponsor The Goodwater Company Ltd on 5 January 2008 that:

a) Over 50% of the gold pass tickets had been sold when they had not;

b) Some of the cheaper family price tickets had sold out when they had not.

[145] This statement is along much the same lines as dealt with in earlier charges. However, statements such as this in an email to a sponsor that was hesitant at making its final sponsorship payment is significantly different to a statement posted on the event website for the general attention of anyone who might care to inspect it. Again, the evidence is overwhelming that over 50% of the gold tickets had not been sold and furthermore that some other categories of tickets sold out when again that was not the case. Accordingly, the statement was questionably false and the defendant knew that it was false.

[146] Equally, the defendant made that statement at a time when he was seeking to encourage The Goodwater Company Ltd to make the final sponsorship payment

under the contract. The statement was clearly made for the purposes of dispelling any concerns that The Goodwater Company Ltd might have as to whether the airshow would or would not proceed.

[147] The defendant clearly made this false statement with the intention to deceive The Goodwater Company Ltd for the reasons outlined. I find that charge proven beyond reasonable doubt. Similarly, the alternative charge CA 14 is proven to that same standard.

ICAS

[148] FTA 2-6 relate to the use by the defendant of the ICAS logo on various documents:

a) FTA 2 - letter of 6 October 2006 sent to Hamilton Airport;

b) FTA 3 - letter dated 24 October 2006 sent to Hamilton Airport;

c) FTA 4 - business card sent by facsimile to the General Manager of New Zealand Warbirds Association dated 12 October 2006;

d) FTA 5 - business card given to Hamilton Airport between January and May 2007;

e) FTA 6 - business card given to Waipa District Council in December 2007.

[149] ICAS is the insignia of the International Council of Airshows which is an organisation based in the United States of America.

[150] Mr John Cudahy is the President of the International Council of Airshows and he gave evidence by video link from his home in Virginia, USA. Mr Cudahy explained that ICAS is a 41 year old trade association that represents the interests of airshow organisers and airshow performers both in North America and around the

world. He explained how the airshow industry is substantial and, indeed, is understood to be a $US150m business just in North America.

[151] Mr Cudahy helpfully explained the role of ICAS as being the representative organisation for airshows throughout the world. He explained that members were required to abide by a "*relatively strict code of ethics*" and "*a safety creed that makes some stipulations about looking out for the best interests of both spectators at airshows and the safety of airshow performers.*" Furthermore,

> *"Like any trade association we are a facilitator of relationships, we help put the event organiser into contact with individuals, performers, support service providers, that can help them, we lobby on their behalf to the, in the United States and Canada, to the Federal Government on issues relating to airshow regulations. We promote airshows, both in the United States, Canada and all around the world via our website in our magazine to bring them to the attention of, ah, potential spectators. We, conduct public programmes on behalf of the entire industry to highlight the safety of spectators at airshows, ah, the cost of effectiveness, ah, going to an airshow as a form of family entertainment, that's the kind of thing."*

[152] Mr Cudahy explained that his position as President of ICAS was a fulltime position and in that respect he was one of four fulltime staff members and three part-time staff members of ICAS.

[153] ICAS has a logo that incorporates the four letters with the A having something of a tail which, Mr Cudahy explained, was designed to appear to be smoke emerging from an airplane. He identified the ICAS logo appearing in documents (letters and business cards) which are the focus of FTA 2-6.

[154] Mr Cudahy finally was able to confirm that the defendant was not, as far as his records could indicate, a member of ICAS. The defendant's name did appear alongside an organisation Point Blank Productions Ltd of Auckland, New Zealand as being a prospective member or otherwise recorded as being involved in a potential airshow somewhere in New Zealand. However, Mr Cudahy was adamant that the

defendant was never a member of ICAS. Furthermore, the defendant never had permission from ICAS to use that logo either on his letterhead or on any business card.

[155] Mr Speed cross-examined Mr Cudahy quite closely about the accuracy and extent of the ICAS database on which Mr Cudahy based his evidence. Mr Speed managed to ascertain that when a search was conducted of the defendant's name on the membership database, there was a reference to the defendant but only as a member of Point Blank Promotions (another of the defendant's companies). Mr Cudahy was adamant that neither the defendant nor Point Blank Promotions ever paid membership dues or was ever a member of ICAS. He said he felt confident to give this evidence as ICAS had undertaken an exhaustive search of the database and their accounting records in this respect. He explained that the defendant's name and that of Point Blank Promotions Ltd was noted in the database but then, ICAS tracked any airshow in the world that they hear about and record the names of individuals or other entities of interest.

[156] Mr Speed described, for Mr Cudahy, a letter to the defendant from ICAS dated 13 August 2001 that appears to have been faxed to the defendant. It started off "*re membership. Thank you for your membership application and welcome to ICAS.*" Mr Cudahy explained that that this was a standard letter that a new or prospective member would receive from ICAS. However, Mr Cudahy explained that the balance of the letter answered the enquiry. The letter went on to indicate that the defendant's membership application would be processed when ICAS received payment. Accordingly, Mr Cudahy did not dispute the fact that an enquiry as to membership may have been made by the defendant in 2001. However, he was adamant that the defendant never took it to the next stage of forwarding payment so to become a member of ICAS.

[157] The defendant's attempts to establish membership of or even an association with ICAS was again somewhat pathetic. Frankly, I simply do not believe him. It is clear that the defendant never belonged to ICAS and indeed he could never have thought that he belonged to that organisation. However, that did not dissuade him from using the ICAS logo on the letterhead of the introductory letter he sent to

Hamilton Airport on 6 February 2006 indicating an interest in hosting an airshow at Hamilton Airport.

[158] Mr Hollinger, the airport manager, explained that he undertook a search of the ICAS website on receipt of this letter and he was impressed at the apparent connection or association between the defendant and ICAS. In other words, Mr Hollinger was impressed, as the defendant clearly intended would be the case, that the defendant appeared to have some formal association with the international organisation involved with airshows.

[159] The defendant's use of the ICAS logo was quite fraudulent. Clearly, he used the logo on all five documents referred to by FTA 2-6 for the purposes of bolstering his credibility as an airshow organiser with those with whom he was dealing.

[160] In order for any of these charges FTA 2-6 to be proven, the Informant must prove beyond reasonable doubt that the representation concerned (that either the defendant or Hawker Holdings Ltd was a member of ICAS, was false or misleading.

[161] I am satisfied that the defendant represented that he was a member of ICAS by including the logo on the letters and the business cards. Furthermore, that representation was both false and misleading. It was also in connection with the supply or possible supply of services or the promotion thereof while effectively the defendant was in trade.

[162] I find all five charges CA 2-6 proven beyond reasonable doubt.

Website - Change to terms and conditions

[163] FTA 16 is concerned with the alterations to the terms and conditions on the airshow.co.nz website on or about 21 January 2008. Of course, this was at a time when over $500,000 worth of tickets had been purchased. Additionally, and perhaps more pertinently, the defendant was facing major difficulties in respect of the airshow because of the failure to obtain resource consent. Against that background,

he caused the website to be amended as to the terms and conditions relating to the airshow by the inclusion of the term:

> There is no refund or exchange and no obligation is assumed by the airshow organisers should local District Council resource consent be declined or revoked.

[164] This is argued by the Informant to amount to a,

> *"statement (that) was false or misleading as to the contractual rights of ticket holders as it purported to unilaterally vary the terms and conditions of the contract between the defendant and ticket holders to exclude the right to a refund when such a right was not excluded by the contract between the parties."*

[165] It is for the Informant to prove that the statement is false or misleading. At the time that it was inserted onto the website, I consider that it was probably designed to mislead and that it might well mislead those searching the website.

[166] There can only be one explanation as to why the defendant made this alteration to the terms and conditions on the website. That is, he must have become increasingly concerned that he would not be able to proceed with the airshow because of problems in relation to resource consent. It must be beyond coincidence that, from October 2007, the defendant was advised repeatedly by Waipa District Council that resource consent was required for the non-airshow aspects of the event. The defendant did apply for resource consent but not until 21 January2008 (the date of the alleged offence FTA 16). This application was seen by Waipa District Council as deficient in many areas and the defendant was invited to file a more complete or amended application. It is at this time that the defendant inserted that additional term in the conditions and no doubt he did so in an attempt to protect his personal position in the likely event that resource consent would not be forthcoming in time for the event to proceed.

[167] I consider that, without identifying that this particular term applied to ticket sales after 21 January 2008, the statement as made was misleading. It would have been very difficult for any person attempting to obtain a refund to ascertain the date

that the terms and conditions were altered to include this new term. While intent is not required for this charge, I am in no doubt at all that the defendant inserted this new term in an attempt to mislead ticket holders in the (then) highly likely event that the airshow would not proceed because of this resource consent difficulty in particular.

[168] I find FTA 16 proven beyond reasonable doubt.

No Gate Sales

[169] FTA 17-21 relate to various statements made on the airshow.co.nz website, in magazine advertisements and a newsletter between August 2007 and January 2008 that there would be "no gate sales" at the airshow. The case for the Informant in these respects is, however, that the defendant always intended that there would be gate sales and that the "no gate sales" averment was simply a marketing ploy.

[170] These five charges are brought under s11 requiring proof that the defendant engaged in conduct that was liable to mislead the public.

[171] The evidence is clear that the defendant did intend that the "no gate sales" statement would encourage the public to purchase their tickets in advance. Was there any real harm in this? There would have been no gate sales if cars were to arrive at the airshow from the Hamilton/Te Awamutu Road as the Police and Transport NZ would simply not allow gate sales. However, even if parking was on the other side of the airfield, which might provide the opportunity for gate sales without causing traffic management issues, is this really conduct that warrants the intervention of the criminal law? Indeed, the defendant would have run the risk that the public would take him at his word and not turn up at the airshow if they thought that they were too late to purchase a ticket.

[172] Of course, the defendant made a number of statements including the assertion that he expected some $500,000 from gate sales from bus tour parties but really assertion has no basis in reality.

[173] This set of charges raises again the difficult issue as to when a promotional or marketing statement, that strictly speaking is misleading or false, warrants the intervention of the criminal law. I do not consider that any of these five charges reach that point and so those Informations will also be dismissed.