

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2016-004-008594
[2016] NZDC 18850**

COMMERCE COMMISSION
Prosecutor

v

TRUSTPOWER LIMITED
Defendant

Hearing: 22 September 2016
Appearances: B Hamlin and N Flanagan for the Prosecutor
O Meech for the Defendant
Judgment: 22 September 2016

NOTES OF JUDGE R G RONAYNE ON SENTENCING

[1] Trustpower Limited has pleaded guilty pursuant to s 38 Criminal Procedure Act 2011 to seven charges laid under the Fair Trading Act 1986. Those charges are that the defendant company Trustpower Limited engaged in conduct that was liable to mislead the public as the characteristics of its services, more particularly television and Internet advertising and billboard advertising.

[2] There is an agreed summary of facts before the Court. The defendant Trustpower Limited is New Zealand's fifth largest energy electrical and gas retailer and a growing telecommunications telephone and Internet retailer. At all material times the defendant offered New Zealand customers, unlimited data broadband at a cost of \$49 per month for 12 months. That headline statement dominated the advertising campaign. It was heavily emphasised and was capable of immediate

reading and understanding by consumers, but in fact the offer was extensively caveated by these terms and conditions in smaller print:

The offer was only available on a 24 month contract term.

The cost of the unlimited data broadband increased up to \$79 a month for the second 12 months of the 24 month contract term, which would result then in an average monthly cost over that two year term of around \$64 a month.

If a customer wanted to cancel the contract at any time during the 24 month period they would incur a \$195 fee. In addition, if a customer left in the first 12 months they were also open to incurring a fibre exit fee of \$59 for each remaining month in the first year.

[3] The second year price was disclosed in small print terms and conditions at the foot of the advertising. These caveats that I have mentioned were not sufficiently prominent to qualify the dominant message of the advertising which was the offer to consumers of unlimited broadband for \$49 a month.

[4] The defendant used various forms of advertising which included television, online and billboard advertising to promote its unlimited broadband offer. These advertisements featured extensively on television channels both nationally and regionally including in Auckland, Hamilton and Wellington 28 March 2015 and 26 July 2015. The initial television advertisement was 90 seconds long and shorter versions were screened thereafter. Later versions had various amendments to the qualifying information displayed on screen. The advertisements were aired by TVNZ and TV3 and the 90 second advertisement was available on YouTube. The defendant also placed advertisements on billboards across Auckland, Hamilton and Wellington. Those facts are reflected in the seven charges. Five of which are relevant to the television and Internet advertising and two of which are relevant to the billboard advertising which was for shorter overall period.

[5] While agreement as to penalty sought reached by responsible and experienced counsel is an important and relevant consideration, the Court of course must remain independent and make a proper assessment of culpability and penalty. The purposes and principles of sentencing apply here in the usual way. The law as to the factors to be considered is well settled and I make reference in this regard to the

¹*Commerce Commission v LD Nathan & Co* and of course the well known principles of the Sentencing Act 2002.

[6] The matters that need to be taken into account are these:

- (a) The objectives of the Fair Trading Act.
- (b) The importance of any untrue statements made.
- (c) The degree of wilfulness or carelessness involved in making such a statement or statements.
- (d) The extent to which the statements departed from the truth.
- (e) The degree of dissemination.
- (f) The resulting prejudice to consumers.
- (g) Whether efforts were made to correct the statements and, if so, what efforts.
- (h) The need to impose deterrent penalties.

[7] So, dealing with some of those factors, first the importance of any untrue statements made and the extent to which they departed from the truth. The prosecutor's position is that the defendant's statements were critical and were constructed to appeal to consumers on the basis of price. While the statements were true, the way in which they were presented was seriously misleading. The value of a deal for 12 months at one price is plainly undermined where the customer is required to continue on for another 12 months at a substantially higher price and with an inhibitingly high penalty which would be imposed if the consumer attempted to end the arrangements. The position though of the defendant is that it denies that price was the main or only enticement saying that this was in fact a strong consumer proposition involving convenience and that it included price as a factor. It was a strong consumer proposition because it offered power, broadband and landline together.

¹ *Commerce Commission v LD Nathan & Co* [1990] 2 NZLR 160

[8] The disclaimers used to present the true position were, says the prosecutor, seriously deficient. They appeared in much smaller and less prominent text than the headline message of the advertisement which was in large colourful font and no reference was made to them in the voiceover. A particular feature of these advertisements was that at the point that the disclaimers appeared graphics of the fireworks going off appear on the screen which can only have distracted consumers from attempting to read the fine print.

[9] Moving to the factor of the degree of wilfulness or carelessness involved in making such a statement. The prosecutor's position is that the defendant's conduct can properly be characterised as reckless or, at least, seriously careless and, furthermore, that the fine print disclaimers were an obvious trap for consumers. The prosecutor also says that the defendant edited the advertisement several times. It also says that it did that altering the aspects of the advertisements, particularly at issue but without fixing the problem and that illustrates a significant degree of culpability.

[10] For the defendant's part, these propositions are rejected, but I do find with the greatest of respect the submissions somewhat unconvincing in this regard. The defendant seems to have relied on an assumption that consumers would assume that Trustpower's standard rates would apply to the second 12 months. However, the defendant, I am told, had taken legal advice. So I accept that reference to recklessness somewhat overstates the position and that I am dealing with a case of serious carelessness.

[11] As to the degree of dissemination, the unlimited data broadband offer was promoted through a national mixed-media marketing campaign and high profile television advertising was a critical feature of that campaign. It is, therefore, submitted that the degree of dissemination was high. The misleading statements were repeated on billboards and on YouTube. As to the resulting prejudice to consumers, approximately 8000 customers took up Trustpower's unlimited broadband offer. The other side of that coin is said to be of course a gain to Trustpower.


[12] As to whether efforts were made to correct the statements, it is submitted that efforts were made to correct the misleading statements in that the defendant introduced greater disclaimers as time went on. However, none of the disclaimers were sufficient and, therefore, the Court is invited not to treat these later corrections as a major factor in mitigation.

[13] There is of course a need to impose deterrent penalties and the Court cannot ignore the fact that on 17 June 2014 the Parliament tripled the penalties, so that the maximum penalty available for each charge laid is a fine of \$600,000.

[14] Various authorities have been brought to the Court's attention. When I take into account the various factors to which I have already made reference and the various cases put before the Court, I accept the submission that insofar as fixing a global starting point is concerned the appropriate range is a fine in the range of \$550,000 to \$650,000.

[15] There cannot be, at an individual level, a credit for past spotless record, so no credit is available there. However, to its credit Trustpower Limited fully co-operated in the investigation and has pleaded guilty to these charges at the earliest possible opportunity and has apologised both in written material placed before the Court and here in open Court to consumers for the confusion created.

[16] Taking all of those matters into account, I am satisfied that again taking a global approach the end penalty ought to be a fine of \$390,000. I will apply that across each of the seven charges as equally as I can rounding very slightly down. On each of the seven charges, Trustpower Limited is fined \$55,700. That is to be paid prior to 6 October 2016. No costs are sought which I take to be a responsible position by the prosecutor reflecting no doubt, as it does, the co-operation of Trustpower in this matter.



R.G. Ronayne
District Court Judge