

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CRI-2016-004-009525  
[2017] NZDC 2670**

**COMMERCE COMMISSION**  
Prosecutor

v

**BIKE RETAIL GROUP LIMITED  
BIKES INTERNATIONAL LIMITED**  
Defendants

Hearing: 10 February 2017

Appearances: A McClintock and J Cairney for the Prosecutor  
R Coltman for the Defendants

Judgment: 10 February 2017

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**NOTES OF JUDGE D J SHARP ON SENTENCING**

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[1] Bike Retail Group Limited (BRG), and Bikes International Limited, (BIL), are for sentence today in respect of charges under s 10 Fair Trading Act 1986. The charges that are involved relate to Bike Barn as both companies operating together are known as. The conduct arose during a two year period from 1 July 2013 to 30 June 2015.

[2] There are 14 charges relating to claims that goods were being sold at half price. There are representative charges in respect of these matters. There are also charges that relate to clearance sales and there are a mixture in respect of one charge that relates to both half price claims and clearance sales. The companies have pled guilty in respect to all of the charges that are before the Court.

[3] The charges stem from advertising campaigns. The advertising campaigns were extensively pursued. They provide a basis for the public to be misled. The misleading impressions were impressions as to value. The retail prices of the products were determined by Bike Barn or those that control Bike Barn and the two defendant companies make half price representation which misled people as to the true value of the product.

[4] The clearance sale representations also were such that the public could be misled because the clearance sales were in fact no different to the position before those sales were announced.

[5] The advertising campaign was widespread.

[6] Mr Glenn Smith and Mr Rowan Chapman are the directors of the companies. They are the personalities that lie beneath the company structures and the corporate basis under which trading has been pursued.

[7] The advertising was pervasive via website, radio, print, online and media advertising. The time period that is represented by the charging documents is significant. It represents a period which calculated measures were taken with a view of promoting the companies' products. Regrettably, these involved statements which were capable of misleading the public as to the value that they would receive. The actual price of the bicycles were set by Bikes International Limited and it used its own formula for fixing the prices.

[8] The Commerce Commission had received some complaints. These were largely from competitors. The investigation that was required was necessary before it could be determined that in fact the representations were not correct as far as the value that the consumers could expect to receive.

[9] The marketing plan was extensive. It involved national newspapers, local newspapers. Television 1, channel 2, TV 3 and 4 were all used in respect of a campaign that cost \$2 million per annum to organise.

[10] The Bike Barn turnover, although it must be clear that turnover is different from the end profit, was significantly increased during the period in which the campaigns were operating.

[11] I have considered whether it is possible to categorise the improvement in the companies' financial position as an aggravating aspect and I find that difficult because I do not know enough about the way that the companies were managed or other strategies that might have been in place, but it has to be said that the campaign did have a significant financial impact. And that is only to reason because the company was pouring \$2 million per annum into its advertising budget and would have expected to see a return. The problem is that consumers were disadvantaged by a false perception which was created by the advertising campaign. Competitors may have also been disadvantaged in a way that was unfair, but the real impact of these offences is that the public are entitled to be protected against things which give them perceptions which are not correct.

[12] Bike Barn is in a position of accepting its responsibility and the company no doubt in many other ways supports employment and has other positive aspects but, as it now recognises, it cannot use the methods which were employed here in respect of advertising.

[13] I have to consider starting points in relation to the sentence which is imposed. To do so I have to consider the offending itself and the aggravating and mitigating aspects, if such can be found.

[14] The first aggravating aspect is the scale of the advertising. It is significant. It was intended to be widespread. The mediums which were used are widely circulated and the campaign was a determined one and that determined campaign would have brought the representations which are at the heart of the charges here into the knowledge of a vast number of consumers. The campaign had a financial impact in a positive sense as far as the companies' trading was concerned. That commercial outcome was designed and the company has benefited as a result of what it now accepts were illegitimate means with regard to its advertising programmes. The offending spanned a time period that is considerable. That is tempered to some

degree by the fact that when the stop now letter was received from the Commerce Commission the method which was used was taken out and has not been used since. On the other hand, there was interest from the Commerce Commission earlier and the company persisted with a programme which it now accepts it was not entitled to use. The offending was calculated. It is calculated with the sense that the business of the company showed improvement when it was used and the staff that were employed in stores would of their own volition, when asked, indicate that the marked price could be discounted relatively easily. The actual prices of the items and the advertised discounts are irreconcilable when considered on an objective basis. The offending, as said, is from a company that occupies a significant position, if perhaps less than some companies which have been dealt with previously for broadly similar offending. The actual position of the company in its market in New Zealand is significant and that brings with it a certain responsibility as a corporate member of the New Zealand scene to observe the standards that are required when considering its advertising.

[15] Now those factors, when taken into account, bring me to a point that I consider that a \$1.2 million overall fine is not only consistent with the aggravating aspects of the offending but also consistent with other cases that are broadly similar in terms of the level of fines that are now appropriate given the increases which have been made to the statutory maximum penalties. This increase occurred during the period of the offending here.

[16] Turning from those aspects to the defendant companies, they are entitled to credit in respect of the guilty pleas which have been entered to the charges. With that comes an acknowledgement of responsibility. With that acknowledgement of responsibility there is a type of remorse is present. That is supported in this particular case by actions of the company in assisting with the prosecution, co-operating with the prosecution, organising itself post the stop letter and for those reasons there will be a 25 percent discount in respect of the guilty plea.

[17] In addition to those matters, the company has no previous convictions. It is entitled to point to its character and the character of the individuals who are directors

of the company and there is nothing before the Court to indicate anything other than those having good character.

[18] The company, by its conduct, has provided a basis for assurance that this offending will not be repeated. Obviously, the level of penalty that has to be imposed is significant and will be a burden to the company. That burden is not too great for the company to bear and I have made the enquiries as to the level of fines being within the means of the company. I am assured that they are. That said, a stern lesson is provided by this level of fines. From that, and with the knowledge the company now possesses in terms of a propriety and the degree of propriety which is required when dealing with the public on large scale advertising campaigns, I take the view that the company is entitled to credit in respect of its conduct and its history to the point where a 33 percent discount overall, including the discount for plea, is an appropriate level of discount. That means that the \$1.2 million figure which was set as a starting figure will be reduced. The reduction is to take the level of fines to the sum of \$800,000.

[19] There are some difficulties in relation to the apportionment of the fines because although I mentioned the increase in penalty, some of the charging documents relate to a time period prior to the increase in the penalties which have been put in place by the legislation. Accordingly, I need to apply a level of fines that is reflective of the maximum penalties in each case and to do that I will spread the charges through the charging documents.

[20] For that purpose, Bike Retail Group Limited will be fined \$720,000. There are eight charges that are pre-June 2014. They will be at a level of \$25,000 per fine. And there are eight charges post-June 2014. They will have a level of \$65,000 per charge.

[21] In relation to Bikes International Limited, it will be fined the sum of \$80,000. There will be one fine in relation to the pre-June 2014 charge, which will be \$23,000, and one charge post-June 2014, which will be \$57,000. That will mean that in total the fines which are due to be paid will be \$800,000.

[22] The companies are now aware that having been through this process and having taken advantage of the good character that is present, there is an onus on the companies to ensure that with the knowledge of these factors that there is no repeat of advertising campaigns that cannot be objectively justified in terms of the value which is supplied to consumers.



D J Sharp  
District Court Judge