IN THE DISTRICT COURT
AT WAITAKERE

CRI-2009-090-010852

COMMERCE COMMISSION

v

METHVEN LIMITED

Hearing: 4 October 2010

Appearances: Ms Pigeon for the Informant
D McClellan for the Defendant

Judgment: 4 October 2010

NOTES OF JUDGE J R CALLANDER ON SENTENCING

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[1] Methven Limited pleaded guilty to nine representative counts of offending against the provisions of the Fair Trading Act 1986 ("the Act") s 13(e). Originally there were other charges but my focus is only on the convictions that were entered pursuant to the guilty pleas on those nine charges. The defendant company is liable to a fine not exceeding $200,000 on each of those nine charges pursuant to s 40(1) of the Fair Trading Act.

[2] As both prosecution and defence counsel have correctly observed, it is proper for me to approach the issue of sentencing as has been done in all recent cases by reference to the 1990 decision of His Honour Gregg J in *Commerce Commission v L D Nathan & Co Limited* [1990] 2 NZLR 160. That decision has been amplified by a subsequent decision of my brother Judge Abbott in the Christchurch Court where he sensibly observed that there was the need to add some further criteria. Those criteria he saw in the case before him of *Commerce Commission v Tiketek New Zealand*

Limited [2007] DCR 910, (6 June 2003) as being six in number. I will refer briefly to all those criteria and then focus on the criteria that seem to me to be of particular concern in this case.

[3] As Gregg J said the following eight concerns need to be borne in mind by any sentencing Judge:

(a) The objectives of the Acts;

(b) The importance of any untrue statements that were made by the defendant;

(c) The extent to which the statement departs from the truth;

(d) The degree of dissemination of the untrue statements;

(e) Prejudice to the New Zealand consumer;

(f) The degree of wilfulness or carelessness involved in making the statement;

(g) Whether any and if so what efforts have been made to correct the representations; and

(h) The need to impose deterrent penalties so as to warn traders in general as to the sanctions that will be applied to those who breach the Act.

[4] The additional matters observed by Judge Abbott were the following:

(a) The financial circumstances of the offender;

(b) Any guilty plea and here it is accepted that there should be a one third discount for the early plea;

(c) The previous record, if any, of the offender;

(d) The effect, if any, of any publicity regarding the prosecution and/or the defendant's activities;

(e) The totality principle.

[5] In addition to those observations by the two Judges, I am also obliged to take into account the purposes and principles of sentencing, denunciated in the Sentencing Act, and particularly here I think there is the need to make the company accountable, to make it responsible for what has happened, to denounce the false advertising that occurred in this case.

[6] Having regard to all those principles, I turn to the issue that were of concern to the Commerce Commission in this case.

[7] The basis of the prosecution case was that the company made misleading representations about a product that it marketed called the "Satinjet" shown here. The summary of facts says that this product was launched in the year 2004. The significant product of concern today was a product called the "Satinjet Twin-Jet spray technology" which is employed by its shower products.

[8] The system, instead of causing a continuous jet of water from the 'shower rose' produces a lot of droplets of water which it is said makes the process of showering more pleasurable. That seems to be accepted by everyone as quite an appropriate representation.

[9] What landed the company in difficulty however was what it said about savings that could be gained by using the Satinjet shower products. New Zealand households generally have a low pressure hot water system which, I was told, on average puts through about nine litres of water per minute.

[10] The more modern houses and more modern hot water systems differ from that general older principle because they rely on the pressure from the mains and as a consequence there can be a lot higher through put of water than the nine litres per minute which was commonplace, and still is, with older systems.

[11] Mains pressure systems can run a through put of over 20 litres per minute. What occurred was that the Satinjet showerheads were sold with two controllers which restricted the water flow in two different ways. One of the water controllers restricted the water flow to no more than 14 litres and the other was a system that regulated it down to 9 litres per minute.

[12] So the nub of the issues really was that if somebody had the old system which was putting through 9 litres of water per minute then there would be no savings at all by using the Satinjet showerhead. There would clearly be savings if the regulators or controllers were employed for those people with modern systems in modern houses where the through put was obviously much greater and often well over 20 litres of water per minute.

[13] The defendant company very readily accepted that the advertisement that it employed include misleading representations about the likelihood of water savings or energy savings as a result of installing the showerhead and that is why at a very early point the guilty pleas were entered.

[14] Methven Limited accepted the statement at page 4 of the summary of facts and I quote:

> "These representations were misleading because the overall impression given was that if a consumer with an average New Zealand shower installed a Satinjet shower as advertised they would receive a benefit in terms of water and energy cost savings."

That is the nub of the prosecution case accepted, as I have already observed, by the defendant company in terms of its guilty pleas.

[15] Now, I turn to the various factors that are seen by both prosecution and defence as being of importance in the determination of the penalty to be imposed by me today.

[16] I have had helpful oral submissions today augmenting the written material that both counsel carefully prepared and filed before hearing. I also had the advantage of reading a well constructed affidavit by Trudi Smith who is the

General Marketing Manager of Methven Limited, the defendant company. That was helpful in giving me background as to how the advertising programme occurred and a lot of the background material which explained just what the thinking of company officers were when the advertisements were written and ultimately were disseminated by various means.

[17] The extent of the advertising was the subject of a certain degree of difference of opinion between prosecution and defence, but my examination of the written material before me indicates that I can really rely on the extent of dissemination that is identified by the defendant company. I have no reason to believe that they have tried to deceive the Court in terms of the marketing campaign that occurred.

[18] Mr McClellan in his submissions to me this morning was concerned to make the point that the marketing campaign was not a major one and that in terms of New Zealand marketing of a product of this sort could be viewed as somewhat modest.

[19] In brief there seems to have been the following dissemination of the material and, I should say, the material did differ obviously from medium to medium. I have read and seen the various exhibits that show each of the advertisements that were the cause of concern, obviously the radio broadcasting I have not heard but it has been the subject of submissions.

[20] I am told that there was a radio advertisement broadcast on three separate occasions, I have seen the written version of that but not heard, as I have said, any recording. There were advertisements in 11 additions of Monthly Magazines and one advertisement in a weekend newspaper. There were two brochures, there was information on the website, it is of course not before me as to how many viewers there were of that website, such a statistic can clearly be arrived at but all that it could show was in fact how many viewers have looked at that particular page of the website. It would not tell us who was focusing on the particular product in question.

[21] In any event there is no figure there before me. It could in case some case be of a particularly important factor because these days many prospective purchasers of

goods do look at websites as a very major part of their assessing comparative products, obviously the extent of such searching of websites is of significant to those who are selling products and that there are mechanisms of which I am aware by which they can determine how many "hits" have occurred on a given page of a New Zealand Building Guide. That was the extent of the dissemination and I think I can accept the defence perspective that this is not 'major league marketing' when compared to the sort of marketing one sees for other products.

[22] It is necessary to assess the importance of the statements. There has been difference of view between prosecution and defence as to the degree of wilfulness or falsity of the statements. It is difficult to, of course, really assess that factor without really cross-examining witnesses about their attempt in creating a given advertisement.

[23] The defence position is that while it is accepted that the advertising was misleading, that it was not deliberately false. Of course all marketing and advertising involve a certain degree of what used to be referred to as "buffery" making the product look as good as it conceivably can.

[24] But looking at the overall picture I think it was more than carelessness, here. Professionals who prepare advertisements, marketing managers who look to see what the advertising agents have prepared for them must obviously know what the product does and what real savings could occur and in what circumstances, here. Clearly that was not done and there was clearly a misleading statement, and I think it was clearly false in at least the extent to which it applied to ordinary households without the mains pressure systems.

[25] I am not suggesting, I think, here that it was necessarily wilful in the criminal sense of the word, "wilfulness" is of course a difficult concept because it is difficult always to determine just what the thinking of the writer of the ad or the publisher of the ad has in mind, and I guess this is a constant problem in the assessment of any form of advertising material.

[26] The company accepts that it should have been more explicit about the underlying assumptions but says it was not actually deliberate. Well, I think it was deliberate; at least it can be objectively seen as that given the wording of the ads and the manner in which they were disseminated.

[27] Having said that, I accept that I am about to impose a fine of a company with a very fine record in New Zealand. It is one of New Zealand's oldest companies. It has been in business since 1886, and the company has no convictions of any sort with respect to the falsity of any advertising or the making of misleading representations about their products. The company not only has its markets in the New Zealand but markets overseas. It is a company listed on the New Zealand Stock Exchange and has subsidiaries in several parts of the world.

[28] Ms Smith, the marketing manager, tells me that the company had revenue in excess of $129m and that was certainly borne out by the annual, a copy of which was appended to her affidavit. I simply wanted to make the point that this is not some sort of 'fly by night' operator who has gone about to try to cheat the New Zealand public in quite a deliberate and criminal way. The company is entitled, I think, to credit points for its history of excellence of well over a century.

[29] The next issue that I wanted to point to is the extent to which the statements had a propensity to mislead. That is accepted now by the defendant company.

[30] Mr McClellan pointed to some of the wording of the ads where he says the wording was really conditional and not absolute in its form. He points to the ad that commences with the words "You could potentially save up to" as being a concession that that would only apply in optimal conditions and that any normal reader of such an advertisement would draw that conclusion. I think that is probably fair.

[31] The other point he makes really is the fact that while the representations had a propensity to mislead, it would not have a dramatic impact on purchasers especially given the fact that there is, here, always a 'go between' in the sense that Methven is a manufacture and wholesale of the showerheads but are not retailers. The retailers are essentially the plumbers or the plumber's merchants and I think it is

of significance that that "buffer" of the plumber or the plumber's merchant is important because I think most people who go to purchase plumbing apparatus of this sort would want to talk to the retailer or the plumber and to make further enquiry as to just whether with their particular water pressure they would be likely to have any significant savings in either the amount of water they use or the amount of energy which was consumed in heating that water. Perhaps that is why there were no complaints made by any consumer.

[32] That is of course not the beginning and end of a prosecution by the Commission under the Fair Trading Act. I have dealt with several cases over the years where some other situation has occurred where neither (inaudible) has actually come forward from the public and grizzled about the falsity of the statement or the misleading nature of the advertising material.

[33] It must be remembered that the focus of the Act is well specified and perhaps bears repetition. The Act is a regulatory statute and is designed as it says to provide for the disclosure of consumer information relating to the supply of goods and services. The Act was created by Parliament to ensure that ordinary New Zealand consumers could make an informed decision about their purchases and could rely on the information that they were reading or hearing about a given product.

[34] The prosecutor today, Ms Pigeon, made a further point and that is borne out by the legislation as well, that the statute is also designed to create a system where there is free and equal competition between those who are in the same marketing field so that there is, I think, the term "level playing field" between traders marketing similar products. I am told here that that is how this matter came to the attention of the Commission - it was a complaint by a competitor.

[35] I raised a question of counsel during the course of submissions as to whether there was anybody else in the country that had a similar product and was told that there was nothing that got to be similar to the showerhead or 'shower rose' that we are talking about here "The Satinjet", and that I accept at face value, probably of course we are not really concerned so much as to the quality of the shower

experience as the issue of how much could be saved in terms of water or energy consumption, and that obviously is the critical issue.

[36] I have been urged by the prosecutor to look at the need to impose a deterrent penalty. I accept that that is one of the principles to which the case law refers. It is one of the principles that the Sentencing Act requires me to observe as well and I have already, I think, pointed to the need to denounce and to deter.

[37] I was referred to a number of cases under the Act which were said would be of some assistance to me in fixing the fine to be imposed. Both counsel of course accept that it is impossible to see any real pattern of sentencing in cases of this sort because the factual milieu is so remarkably different from case to case. That is very evident from the case law that was put to me. I did look at some of those cases, I must admit I had read some of them in the past but I refreshed my memory in a broad base way in terms of the *Carter Holt v Harvey* case, the *Laxo Smith v Kline* case, *The Warehouse v Big Blue* case. Those cases are helpful in the sense that they give guidance as to the way in which the various criteria should be the subject of address by the Court, but no authority is of course anywhere near similar to the case of Methven before me, today.

[38] One does not look for any sort of help from the cases in terms of any pattern of sentencing in terms of analysing just where the fine should go. It was suggested that *The Warehouse* fine of $120,000 was of some assistance but of course the details of that case were quite different and I really accept the defence position here that the degree of culpability of the present company, Methven Limited, is a lot less than, in my view, the case of *The Warehouse* decision.

[39] The prosecutor says that I should look to a starting point of between $100,000 and $120,000 given the criteria which I have hopefully addressed. There was an emphasis by the prosecutor on the so called 'wide dissemination' of the misrepresentations and the misleading nature of those misrepresentations. I do not, I think, need to underscore those matters further.

[40] The defence submission emphasised again orally before me this morning by Mr McClellan is that in fact the starting point should be roughly half the starting point urged upon me by the prosecutor, that one should look at between $50,000 and $60,000 given the mitigating matters that have been raised by the defence.

[41] I have given some thought to what should be the start point. There is no difficulty in fixing the end point because both prosecution and defence accept that in terms of the *R v Hessell* [200] NZCA 450 decision there should be a deduction of one third for the early guilty plea (end of recording)

J R Callander
District Court Judge