IN THE DISTRICT COURT
AT WELLINGTON

CRI-2017-085-001553
[2017] NZDC 21512

COMMERCE COMMISSION
Prosecutor

v

FUJITSU GENERAL NEW ZEALAND LIMITED
Defendant

Hearing:	20 September 2017
Appearances:	P J Radich QC for the Prosecutor J B M Smith QC for the Defendant
Judgment:	20 September 2017

NOTES OF JUDGE I G MILL ON SENTENCING

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[1] The defendant company has been charged with seven representative charges under the Fair Trading Act 1986. Five of those charges relate to s 12A of the Act for making unsubstantiated representations on its website about the efficiency of its heat pumps. The maximum penalty for those matters is one of a fine of $600,000.

[2] The remaining two charges are in relation to s 13(e) of the Act for making misleading misrepresentations about performance characteristics of its heat pumps made first on online advertising and secondly in pamphlet drops. The maximum penalty in respect of the charge relating to online advertising is $200,000 because the conduct occurred before 16 June 2014. The penalty in relation to the other matter is $600,000 as the conduct occurred after 17 June.

[3] There was an extensive summary of facts filed with the proceedings, but I will refer to the facts as recited in the submissions on behalf of the Commission as this summary, in my view, accurately reflects what the summary says.

[4] The defendant is a wholly owned subsidiary of the Australian company of a similar name which again is a subsidiary of the Japanese multinational company Fujitsu General Limited.

[5] Throughout the period of the offending the defendant retailed its heat pumps through retailers and independent installers who sold these heat pumps directly to the New Zealand public. Between May 2014 and October 2016, which is the period that I am concerned with, over 75,000 heat pumps were sold with total value of sales in excess of $104 million.

[6] In relation to the unsubstantiated representation charges, these representations were made on the company's website at various times over a period of more than two years. Firstly the company represented on its website that its heat pumps were variously *"New Zealand's most energy efficient solutions"*, *"New Zealand's most energy efficient heat pump range"* and *"New Zealand's most efficient heat pump range"*.

[7] Secondly the company represented that its e3 range of heat pumps were the most efficient system ever, delivered better heat efficiency and that the company leads the way with unique energy saving features ensuring consumers will receive the best possible economy right across a wide range of models and then lastly offering delivery of almost five times the heat of the amount of energy used.

[8] It is said that these representations gave an overall impression that the company's heat pumps were more energy efficient than that of its competitors and these representations are unsubstantiated because the company did not have reasonable grounds to make these claims at the time of publication.

[9] The charges relating to false or misleading representations are in respect of representations made about performance characteristics and the benefits of the e3

range of heat pump. Fujitsu made these representations through online advertisements and pamphlets. These pamphlets being distributed in Auckland, Hamilton and the Kapiti Coast.

[10] The online advertisements which were made between 13 May and 3 June 2014 stated that the e3 heat pump delivered $4.92 of heat for $1 of power. These ads appeared by way of pop-ups on a news and entertainment website and appeared for approximately 10 seconds at a time and provided a link to the company's website.

[11] The pamphlets were distributed in the Kapiti Coast and in Auckland in mid-2014 and it is stated that 3.7 kilowatts, e.g. e3 series heat pumps delivered $4.57 of heat for $1 of power used. Then another model delivered $3.67 of heat for $1 of power used and pamphlets were distributed in Hamilton in July 2014 stating that the e3 series heat pump is the breakthrough energy saver and delivers $4.57 of heat for every $1 of power used.

[12] 44,000 pamphlets were printed for Hamilton. 42,000 for the Kapiti Coast. 155,000 pamphlets were printed for distribution in Auckland, making 240,000 or thereabouts pamphlets printed.

[13] Now these representations were made without any qualification or explanation of the conditions necessary to produce the outcome claimed. The impression that a reasonable consumer would have from the representations was that they would receive the stated performance benefits of the heat pumps at all times and in all conditions. This was not correct.

[14] The dollar figures referred to were determined using a method of testing called *"Coefficient of Performance"*.

[15] This test measured the performance at only one temperature point only, that is 20 degrees internal and seven degrees external and at full load maximum conditions. It was carried out in laboratory conditions and did not account for a number of real world household variables such as temperature, humidity, the length of pipe runs, location of the outdoor unit, the insulation in the building, the placement of the heat

pump and the size of the indoor space which was being heated. Accordingly the representations stated incorrectly what the real world efficiency and corresponding cost savings would be of the heat pumps.

[16] I received extensive written submissions from both the Commission and the defence and these have been particularly helpful and I received them in a timely way so I could consider them before sentencing. I also received copies of numerous judgments, some New Zealand judgments and also some Australian High Court judgments for my consideration as to what a suitable penalty should be.

[17] I am going to refer to the Commission submissions and the defence submissions and then come to my own analysis of the case and impose a penalty.

[18] The Commission submits to me that the conduct of the company quite possibly did cause harm to consumers and its competitors. The Commission submits that the technical nature of the goods meant that any possible consumer would be unable to verify themselves the accuracy of the representations made about the heat pump.

[19] The conduct of the company may have encouraged consumers not to consider competitors products or to purchase the company's products in preference on the basis of the claimed efficiency benefits and yet these were not achievable in all conditions.

[20] This decision of mine will be the first case in New Zealand where a sentence has been handed down in respect of s 12A of the Act which relates to unsubstantiated representations. This section came into force in 2014. The section itself defines such a representation as being made if the person making the representation does not, when the representation is made have reasonable grounds for the representation irrespective of whether the representation is false or misleading.

[21] Previously the Act did not directly prohibit unsubstantiated representations and the purpose of the new prohibition was described in the explanatory note to the Consumer Law Reform Bill in the following way. The new s 12A prohibits a person

from making certain representations in trade unless the person at the time of making the representation had reasonable grounds for the representation.

[22] Sections 13 and 14 of the Act already prohibit representations that are false or misleading. The new s 12A aims to ensure that representations about goods, services or interests in land are made on the basis of sound information or evidence.

[23] It is submitted to me by the Commission that Parliament enacted the same maximum penalty for s 12A as was the increased penalty at the time for false and misleading misrepresentations. The Commission submit to me that the conduct targeted by s 12A must be therefore viewed as equally serious as that other conduct.

[24] I have received submissions from the defence concerning that and my view is that the seriousness of the case is simply determined on the facts of the particular offence. It could be at times that conduct under s 12A could result in a fine greater than conduct under s 13(e) depending on the nature of the breach, the culpability of the defendant in the breach and the facts of the case.

[25] The most I could say is that having the same maximum penalty, the breaches of this section could result in considerable fines, up to $600,000 as could be the case in other sections in the Act.

[26] It is submitted to me by the Commission that the purposes of sentencing of greatest importance are ones of denunciation and deterrence. The Commission submits that the approach in the High Court in *Connell v LD Nathan & Co Ltd.*[1] should give me some guidance as to the way in which sentencing should proceed under s 12A.

[27] I believe there is some sense in adopting that approach and so far as that is concerned, the matters that need to be taken into account are the objectives of the Act. The Commission submits the Act is designed to facilitate consumer welfare and promote effective competition. It requires accurate and substantiated in trade representations and fair trading practices.

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1 *Connell v LD Nathan & Co Ltd* [1990] 2 NZLR 160

[28] It is submitted to me that s 12A was inserted to ensure traders are able to verify, confirm, corroborate or otherwise have evidence to support claims made in relation to goods and services and that the overarching objective of the Act is for ensuring consumers can transact with confidence and that consumers and other traders in the market are protected from inappropriate market conduct.

[29] In relation to s 13(e), it is submitted that traders who disclose inaccurate or misleading information not only disadvantage consumers, but may also obtain an unfair advantage over competitors.

[30] It is submitted by the Commission that it is essentially irrelevant under s 12A whether the representation is true, false or misleading as the essence of the charge is reasonable grounds for making a representation, not the truth or falsity of. It is the extent to which the representations were unsubstantiated which is significant and here it is submitted that there are simply no grounds to make such a substantial claim. It is submitted by the Commission that the offences under s 13(e) involve representations about the costs and efficiency of the product and that these sorts of representations are particularly attractive to consumers as a selling point.

[31] It is submitted that the dominant message was that they would receive the stated heat output in all real world conditions when the reality was that it required a set of conditions or qualifications to achieve that outcome.

[32] As far as the degree of wilfulness or carelessness is concerned, it is accepted that the publishing of material on 20 October 2016 in relation to the e3 series heat pump and it being the most efficient system ever, can be ignored by me and I do so as that publication was an error and not intended by the company.

[33] It is submitted that the conduct under the s 12A offences is careless, approaching wilfulness. That the company is a sophisticated corporation with a comprehensive marketing campaign and it made five separate representations and for substantial periods on permanent display on its website. This website was a primary promotional tool.

[34] As far as s 13(e) is concerned, the Commission characterised this as careless approaching wilful. The conduct involved headline representations about performance, characteristics or benefits and claimed significant financial advantages that could be attained. As this is likely to be a key draw card for consumers, and that the appropriate qualifications were not given concerning these representations they must have been known to the company and this was a serious breach of its type.

[35] The degree of dissemination the Commission say was considerable over a prolonged period. The number of pamphlets, for example, the pop-up advertisements on the Internet were substantial. It is submitted that the advertising policy was developed carefully and was detailed and designed to make a difference and designed to reach as many people as possible with the exception of the pamphlets and a person who goes to a website deliberately and purposefully goes there as they are interested in making a purchase of a heat pump.

[36] I was referred to the case of the *Australian Competition and Consumer Commission v Recketts Benckiser (Australia) Pty Limited*[2] and that case is authority released in Australia for saying, really it is not possible to draw conclusions about the extent to which particular advertising at a particular cost, when compared with other advertising, influenced purchasing decisions. The most that can be said is that the representation in question was designed to influence purchasing decisions.

[37] The Commission says it is not possible to quantify any loss or damage in this case, however, relying on the same Australian authority it says that it is not necessary to do so as long as there was an intention to improve its market share.

[38] So in relation to s 13(e) the Commission further submits that the claims were highly attractive claims so far as consumers are concerned and it accepts that there was co-operation by the defendant once the investigation started.

[39] The Commission submits there is a need to impose a deterrent penalty. That heat pumps are a valuable item and consumers cannot readily check for the accuracy

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2 [2016] FCAFC 181, 16 December 2016

of stated claims about heat efficiency and heat output. It is submitted that the Act must be seen to have teeth, again relying on some authority and traders must not be left with a view that it is worthwhile breaching the Act because the profits will outweigh the fine.

[40] Relying on those submissions and the remaining submissions that I have received, the Commission submit that financial gain is not determinative or necessarily essential depending on the facts and circumstances of each case.

[41] So in response to that, the defendant has made a number of submissions which I have said already were fulsome in writing and orally. And in short, Mr Smith has submitted on the defendant's behalf that the conduct is at the lower to middle of seriousness of offending under the Act, but the representations comprised a very small proportion of the advertising that the company undertook over the period concerned.

[42] The representations were based on evidence that the heat pumps were highly efficient and that they were not in complete departure from the truth. That the offending was not deliberate, it was inadvertent or careless. That the extent of dissemination was relatively small and not part of an extensive advertising campaign and there was no demonstrable prejudice to the consumers or profit to the company.

[43] As far as the s 12A charges and unsubstantiated representations is concerned, the submission is made that Government agency responsible for such things, such as improving the energy efficiency in New Zealand homes and businesses awarded energy stars to the appliances that the company had. At the time that these matters occurred the company carried more stars across its range than any other brand of heat pump. So the claims, for example, that it had New Zealand's most energy efficient solutions or most energy efficient heat pump range, and better heat efficiency, does not come purely out of the blue, but comes from the fact that the company had these star ratings.

[44] The company, however, accepts that the number of stars in respect of the heat pumps in its range could not in itself substantiate the representations and the submissions that I have heard on this do justify that conclusion.

[45] As far as the other representations were concerned, relating to false or misleading information, it is accepted of course as I said that the reappearing of information on 20 October 2016 was a mistake and so I ignore that, but it said that the representations forming the basis of these charges, were an oversight on the part of the company, did not form part of the intentional advertising campaign, but importantly for the defendant it is said that the representations had little impact because they formed a small fraction of the advertising the company undertook for that period. The strategy focused on television commercials which was viewed as being the most effective form of advertising and reaching the greatest number of people at the most cost effective rate.

[46] The cost of advertising for the material and the charges was $30,500 or thereabouts and yet the company spent well over $5 million on advertising during that period. It is said that the impact of the advertising was limited in the same way.

[47] As far as the unsubstantiated representations are concerned, it said the total number of impacts which I take to be people accessing the website during that period, was a little over 230,000. Yet the impact for the television advertising in the same period was nearly 295 million impacts.

[48] I understand from what counsel has told me that the impacts from television advertising is an assessment done in a professional way as to the number of viewers who would be present and observing the advertisement at the time of its broadcast. The total number of impacts so far as the online advertisements on the Internet has been assessed at around about 2,400,000.

[49] The impacts, if they can be called that, of the leaflet distributing is 240,000 assuming that they were distributed and people actually read them. It is said therefore that the impacts in relation to the charges is very small considering the other impacts.

[50] It is submitted that there is no material financial gain to the company that can be determined. There is probably no gain in fact because during this period of time the company was performing below the average level of industry growth. It has performed better since this time and the change in performance has been connected to factors other than the advertising, such as the acquiring of other companies and I have had detailed submissions on that.

[51] It is accepted and the defendant submits that they immediately took steps to comply with the Act once the investigation started and I have already dealt with the advertisements that appeared after that and how I am going to ignore them.

[52] There are then submissions made to me about the sentence in this case and what weight I should give to the various matters raised by the Commission. First of all there is the submission that I cannot take it just on face value that the s 12A creates offences of equal seriousness. As I have said it just simply depends on the facts of the case.

[53] It is submitted to me that the s 12A offending, can be generally viewed as less serious because it relates to offences not of false or misleading conduct and that the conduct will often involve a lower level of culpability because of this.

[54] It is submitted to me that the representations made, although perhaps relevant to the purchase of the pump if one is thinking of doing so, are not necessarily or even closely what consumers may prioritise as there are a number of features the pump has, including appearance, quietness, reliability, size, effect on air quality, speed of performance, automatic settings, interaction with technology, humidity control, price and service standards and so the representations made were not of central importance to the product.

[55] So, the underlying culpability so far as those charges are concerned, should be based on carelessness rather than wilfulness and that the company logically inflated the fact that it carried the greatest number of stars to the effect that the pumps were greatly more efficient as a per product basis.

[56] As far as the statements are concerned or the representations, it is suggested that they were minor departure from the truth having regard to the various authorities which I was referred to and that the statements under s 13(e) charges were similarly an exaggeration as opposed to wholly without foundation.

[57] Although they may have misled consumers, they were at the opposite end of the scale to the authorities which involved more cynical conduct and I was referred to such authorities.

[58] It was suggested to me in submissions that the degree of dissemination was low, again compared with other cases, referring both to the Vodafone case which I accept is quite different and the *Commerce Commission v Bike Retail Group*[3] case. There is little prejudice, it is submitted, to consumers there being no evidence to support there being any profit made as a result of these representations and that although there has been some argument about the relevance of that, surely if it could be proved that profit and disadvantage was a result, then that would be relevant to sentencing and it simply does not exist in this case.

[59] What do I make of all that? What is my analysis and my decision?

[60] There is no doubt that heating of New Zealand homes is a major industry given our climate and also the unavailability of more traditional means of heating. So this is a big business, an important business.

[61] Taking into account all the submissions I have received and the facts of the case, my view of the offending is in fact that the offences under s 13(e) are more serious than the unsubstantiated representation charges. The representations made under the s 13(e) charges in my view were very specific. Tending to establish by means of an apparent test that these were heat pumps that were the most cost effective and yet that only applied in controlled circumstances.

[62] In my view the dissemination of information was significant and significantly inaccurate and that consumers or potential consumers are unable, through any

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3 *Commerce Commission v Bike Retail Group* [2017] NZDC 2670

reasonable means to test the accuracy of these claims. Claims such as these in my view would be a significant factor in the decision as to whether to purchase a pump and here it is at least implied that the performance was superior over what the competitors were producing.

[63] The offending under s 12A of unsubstantial representations in my view is less serious, although clearly unsubstantiated. This was a case of exaggeration. With one exception really these claims were made in general terms, likely perhaps to influence buyers but without the same dramatic claim as in the s 13(e) representations, except in the case of one charge where a claim of delivering five times the heat for the amount of energy used was made.

[64] As I said I have had considerable help from the submissions made and the authorities given and there are no cases to guide me in s 12A. So, what I think it is best for me to do is to set out the method I am going to use in my sentencing and this in part is based on the authorities that I have been given and the submissions I have made.

[65] My view is I need to consider the objects of the legislation, I have already referred to those and I will not repeat them. Then determine the seriousness of the offending itself. Then I will determine the culpability of the company in relation to the offending and this is really a consideration of whether it was deliberate or careless. I will look briefly at any possible impact of the offending on people who are protected by the provisions of the Act, and take into account that I need to denounce and deter such offending and I do take that into account without having to refer to it again and then reach a starting point for each set of charges. I will then determine the totality of the offending and what that warrants so far as the final stating point is concerned and then give the company credit for guilty pleas and co-operation and this has been agreed really and I agree with it also that 35 percent is the appropriate deduction for a guilty plea and co-operation.

[66] Now so far as the seriousness of the offences are concerned, the major issue here for the defence is the submission made is that the seriousness is at the low end of the scale or towards the low end of the scale given the overall advertising

campaign and strategy for the heat pumps at the time. I have had submissions I have already recited about the proportion of cost so far as this offending is concerned and the amount of exposure relating in fact to both sets of charges.

[67] Information was published on its website or by pop-ups. There is also the distribution of pamphlets and yet almost all the advertising budget was spent on TV advertising.

[68] While there is some appeal in the submission made by the defence, so far as this being a minimal or small part of the advertising, and while I accept there is no evidence before me or an expert before me as to how products are best marketed or how each set of proposed marketing attracts or interacts with other forms of marketing I believe I can make some basic comments and take some inferences from the facts of this case.

[69] While TV advertising may reach a wider audience, the medium really provides a time limited message designed to bring the attention of the viewer to the brand and the product. It is not an in-depth matter, it needs to be repeated again and again as obviously was the case here with almost 290 million views and the purpose of this must be, in my view, to implant in the mind of the viewer the message that this brand and this product is available. Repetition is the key so that when one thinks whether one should buy a heat pump or not, then the brand and the product comes into one's mind.

[70] In my view this would lead a genuinely interested buyer to making further enquiry and in today's climate this would inevitably lead to the Internet or a website. Here the company maintained those mediums and that would allow the potential buyer the time and access to the detailed information including what claims were made about the product. Unlike television ads these can be saved, they can be considered at leisure and are likely to lead to a decision to buy or not.

[71] Rather than the TV advertisement which relies on a clever presentation perhaps with celebrity endorsement. These other forms of advertising are more substantial. Likewise the pamphlets would have a greater permanency although not

necessarily so. They may be considered more carefully and at least can be kept or not for future reference.

[72] I do not see that the money spent is necessarily the key to assessing the seriousness of the offending and the extent. I do come to the view that the number of impacts on the website, as a result of other advertising, for example, is substantial and is part of a wider strategy.

[73] So while I take into account what Mr Smith has submitted to me about this, I do not minimise the offending as much as he would want me to do.

[74] As to culpability, that is the blameworthiness of the defendant company in respect of those charges of unsubstantiated representations. It is a case where the management were careless in their claims based on the star rating. It seems that a simplistic view was adopted here, even a naive view to proceed in this way. However, the claim that was five times more efficiency was approaching grossly negligent, but not a significant part of the overall offending in that respect.

[75] The culpability under s 13(e) involved carelessness, but this was of a greater level and verging on wilfulness, but not actually reaching that point. All the facts must have been known to the defendant company, including limitations of the test results and yet those limitations were clearly omitted in what was, in the end, a grossly misleading account of the efficiency of the heat pump. Dissemination through online ads and pamphlets, although admittedly limited, was significant.

[76] So my analysis is as follows. The Commission submits to me that the offences under s 12A being ones of unsubstantiated representation should result in a starting point of $350,000 to $420,000 and under the other section and the misleading representations a starting point of $300,000 to $350,000 making a total of between $650,000 to $770,000 from which should be deducted $100,000 for totality and a further 35 percent resulting in an end total of fines of between $375,500 and $435,000.

[77] The defendant is somewhat further apart on this and suggests a starting point for the unsubstantiated representations should be one of $100,000 to $130,000. For the other offences, $200,000 to $230,000 making a total between $300,000 and $360,000, reduced to between $280,000 and $310,000 for totality, reduced by $35,000 to an end fine of $180,000 to $200,000.

[78] Well what do I make of that?

[79] So far as the offences under s 12A of the Act, for unsubstantiated representations I note first of all there are five representative charges over a period of time. In my view the overall effect of that, taking into account all the matters that I have already referred to should result in a starting point equivalent to 40 percent of the maximum fine of $600,000, in other words a fine of $240,000.

[80] In relation to the other two charges which, as I said, I consider more serious, in my view more likely to influence consumers and in a case where no way could they verify the claim, a sum equivalent to 45 percent of the present maximum penalty would be appropriate, that is $270,000.

[81] That would make a total of $510,000 as a starting point which I reduce to $480,000 for totality.

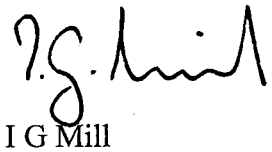
[82] I reduce that further by 35 percent to a total amount of fines in this case of $310,000. The fines will be apportioned in the following way:

(a) In respect of each of the five charges in respect of unsubstantiated representations, a fine of $25,000 is imposed together with Court costs of $130 and solicitor's fee of $250.

(b) In respect of the two other charges, in respect of the charge which was prior to the amendment in 2014 the company is convicted and fined $85,000 with Court costs of $130 and solicitor's fee of $250.

(c) In respect of the remaining charge, under that section, the company is convicted and fined $100,000 with Court costs of $130 and $250 solicitor's fee.

[83] In that way the company is fined in total $310,000, Court costs of $910 and solicitor's fees of $1,750.



I G Mill
District Court Judge