

**IN THE DISTRICT COURT
AT AUCKLAND**

CRN-09004505728

COMMERCE COMMISSION
Informant

v

VODAFONE NEW ZEALAND LIMITED
Defendant

Hearing: 10 August 2011

Counsel: N Flanagan and I M Brookie for Informant
B Gray QC and J McGuigan for Defendant

Judgment: 27 September 2011

RESERVED DECISION OF JUDGE A E KIERNAN

[1] Vodafone provides internet access for its mobile phone customers. From 11 July to 13 November 2008 the company stated on its website that customers would only be charged \$1 per day for 10MB for casual internet data usage. A statement appeared on the company website that “if you use less than \$1 worth of data in a day, we’ll only charge you for what you used”. The Commerce Commission alleges that this statement was liable to mislead the public as Vodafone failed to advise customers that the \$1 threshold would be reached after 204.8KB of data usage up to that threshold was charged at \$5 per MB.

[2] Three complaints were received by the Commerce Commission from Vodafone customers who thought they would pay only a fraction of the \$1 charge if they did not use all of the 10MB.

[3] The Commission’s position is that there was no way customers would have known Vodafone’s pricing structure from the website publicity. Vodafone defends the charge stating that the company never set out to mislead customers. The billing plan was similar to an all-day parking offer. If a motorist left a parking lot at 11.00 am they would not expect a refund for the remaining hours.

[4] On 10 August 2011 at a defended hearing on this representative charge evidence was presented to the Court by way of Memorandum of Agreed Facts, Exhibits, and I heard submissions from counsel.

Background

[5] Vodafone is one of the two largest mobile phone service providers in New Zealand and as at June 2008 had approximately 2.4 million mobile customers. By the end of 2008 Vodafone had approximately 52.1 percent of the New Zealand mobile telecommunications market and in that year the total mobile retail revenue across all service providers was approximately \$2 billion.

[6] Vodafone provided mobile phones to prepaid customers or on account customers. A casual data rate applied to all Vodafone customers other than the small

percentage of on account customers with a data plan. As part of its service customers were able to access and download data from the internet via mobile handsets. Before 11 July 2008 the casual data rate was \$11.25 per MB. This rate was disclosed by Vodafone on its website at least since December 2007. From 11 July 2008 Vodafone introduced and promoted a new data casual rate of "\$1 a day" with the maximum allowance of 10MB of data per day. This was promoted by television, cinema and digital media and also on its website www.vodafone.co.nz:

On its "internet on your mobile" page, under the heading "What is internet on your mobile?", Vodafone stated:

It is super affordable to view any website with our new casual rate of \$1 a day with a daily allowance of 10MB. This will only be charged on the days you use it.

Further down the page, under the heading "Other things to know", Vodafone stated:

If you use less than \$1 worth of data in a day, we'll only charge for what you used.

And further down the same page:

How much does it cost?

You can enjoy a casual rate of only \$1 a day, with a daily allowance of 10MB. You only pay for the days you use it so it's really affordable to jump on the internet from your mobile.

If you use more than 10MB in a day, extra data will cost just \$1 per MB.

As a guide, within 10MB of data use you could:

Browse 8 pages of bebo, stream 3 minutes of YouTube video, download 1 purchased game, download 2 purchased full music tracks, place a bid on Trademe, browse 6 pages on Gmail, browse 6 pages on Stuff ...

... and still have 3MB left to use for the day.

Here's how the pricing works:

If you access...	It costs ...
Vodafone Live! Homepage	Free to view the homepage
SKY Mobile TV	No data cost, you just pay the weekly subscription fee
Other Vodafone Live! Pages Other internet websites	Up to \$1 a day for a 10MB daily allowance (only charged on the days you use it) <i>Additional data over the 10MB daily allowance is \$1/MB</i>
Music Downloads, Games, Ringtones Other downloads from Vodafone Live! Other data usage from your mobile	Up to \$1 a day for a 10MB allowance Plus any purchase of subscription price for downloads or premium services <i>Additional data over the 10MB daily allowance is \$1/MB</i>

[7] Vodafone charged Casual Data Users a per KB rate of \$0.004882 (or \$5 per MB) (the \$5 MB Rate), which meant that the \$1 fee was incurred once customers used 204.8KB of data (204.8×0.004882). Vodafone then zero rated any data over 204.8KB up to the 10MB maximum allowance. Beyond 10MB, Casual Data Users were charged at the rate of \$1 per MB. 204.8KB equates to approximately 2% of the 10MB allowance.

[8] Casual Data Users who used less than the threshold amount of 204.8KB in any one day were charged in accordance with the per KB rate of \$0.004882. For example, if a Casual Data User used 150KB in a day, he/she was charged approximately 73 cents (150×0.004882).

[9] According to the defendant, 204.8KB of data usage would allow a Casual Data User to either:

- (a) Check up to ten text only emails (without attachments) on a mobile phone; or
- (b) Access five to ten Vodafone Live! Pages, or around four standard web pages; or
- (c) Send up to five photos as email attachments or website uploads (at web sized quality).

[10] According to the defendant, 204.8KB of data was:

- (a) Likely insufficient to send via email or upload a single photo to a website in a high quality format; or
- (b) View or send a single video clip.

[11] An average length pop song of about four minutes will total approximately 4MB in standard "mp3" compressed format.

[12] The change in the Casual Data Rate from \$11.25 per MB to \$5 MB Rate was not disclosed by Vodafone in advertising material or on Vodafone's website during the Charge Period, nor was the threshold at which Casual Data Users would be charged the \$1 rate (namely 204.8KB).

[13] In September and October 2008 the Commerce Commission received three complaints from Vodafone casual data users relating to the \$1 a day promotion. These users found they had been charged \$1 when they had only downloaded small amounts of data. The complainants were under the impression that the \$1 a day charge would be calculated in proportion to the 10MB maximum, namely at a rate of \$1 per 10MB. For example, the use of 5MB in a day would result in a charge of 50 cents. One of these customers was told by a Vodafone customer representative that the \$1 a day rate was actually a \$1 cap after 100KB of usage. Briefs of evidence in relation to all three complainants were produced as exhibits at the hearing, as was a copy of the Vodafone website page at the time.

[14] As a result of the complaints the Commission investigated matters and wrote to Vodafone requesting information. Vodafone responded on 14 November 2008 and that letter was produced as an exhibit. Vodafone advised the Commission that they had received one complaint and that had resulted in a change to the website. Vodafone further amended the website as a result of the Commerce Commission investigation. Vodafone stated:

“The issue is not with our billing system, rather than that (sic) the explanation of our charges was perhaps overly simplified on our website. While the above statement is true, customers may not have understood that they actually incurred \$1 of data usage prior to reaching their 10MB limited.”

[15] About 14 November 2008 Vodafone amended the “how much does it cost” page of the mobile data statement of its website to include reference to the \$5 MB rate and the 204.8KB threshold. The amendment stated:

“If you use a small amount of data you will be charged at the core rate of \$5 per MB (1 MB is equal to 1024KB), until you use \$1 worth. This will be at around 205KB (about 5 to 10 Vodafone Live! pages or around 4 standard web pages).”

[16] In April 2009 the Commission sent a notice under s 47G of the Fair Trading Act 1986 to Vodafone seeking further details regarding the \$1 a day promotion. Vodafone responded to that notice and stated, amongst other things:

“Our initial webpage on our \$1 a day casual pricing focused primarily on the key message that our customers could perform a range of mobile internet functions (web browsing, email, sending photos, etc) for the very reasonable charge of \$1 per day. However we accept that we could have been clearer on how very low data usage would incur charges - so we rectified it.”

“The changes to the website ... went live on or before 14 November 2008.”

“(The) changes were made to clarify the \$1 a day pricing following the Commission’s letter of 22 October 2008.”

Legal Principles

[17] The Fair Trading Act 1986 is consumer protection legislation and the offence set out in s 11 is one of strict liability. Section 11 provides:

Misleading conduct in relation to services

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

[18] Four elements need to be proved beyond a reasonable doubt.

- (1) That the defendant is a person.
- (2) That the defendant was in trade.
- (3) That the defendant's conduct was **liable to mislead the public** (emphasis added).
- (4) That conduct was in relation to the nature, characteristics, suitability for a purpose or quantity of services.

[19] "Liable to mislead" is not defined in the statute. The Oxford English Dictionary definition of "mislead" includes:

- To lead astray in action or conduct;
- To lead into error;
- Giving incorrect information or a false impression;
- To delude or misinform.

[20] The Oxford English Dictionary definition of "liable" includes:

- Exposed or subject to;
- Likely to suffer from;
- Subject to the possibility of.

[21] Right from the enactment of this legislation the Court have acknowledged that provisions are to be construed in their natural and ordinary meaning, and

New Zealand Courts and commentators have referred to Australian authorities as most helpful in what it constitutes “to mislead”.

[22] Both counsel have referred to *Sound Plus Limited v Commerce Commission* (1991) 3 NZLR 329 and the discussion by Anderson J:

“Liable is not defined. Since its ordinary meaning as an active infinitive contemplates a possibility of doing something (see the Shorter Oxford Dictionary 3rd ed. P.1205), a concept importing a potential less than likelihood or probability. I am inclined to the view that the legislature intended that where the public is concerned a lesser tendency for misleading than likelihood shall be proscribed. It is pertinent to note that the Shorter Oxford Dictionary definition conforms to the judicial observation in Squibb United Kingdom Staff Association v Certification Officer [1979] 2 All ER 452 and 459:

“The phrase ‘liable to’ when used otherwise than in relation to legal obligations has an ordinary and well-understood meaning, namely, ‘subject to the possibility of’.”

Thus, in relation to sections 10 and 11 the question “is the conduct liable to mislead the public?” could equally be posited “looking at the issue sensibly could the conduct mislead the public?” I would add that the only justification for such tautology is the fact that the employment of different words to explain a particular concept might help to elucidate the concept. “Liable to” may have the synonymous exposition as I have suggested. In the result it connotes a potential which is less restricted to scope than likelihood of probability.

...

I hold that sections 10 and 11 are concerned with conduct that is essentially true but capable of being reasonably construed as something which is not true, whereas sections 13(g), (h), (i), (j) are concerned with representations that are essentially false but which purport either with boldness or sophistication to be true. The different approaches are explicable on the basis that sections 10 and 11 are concerned with public dealings and section 13 is concerned with dealings which are more restricted than public dealings.

[23] In *Telecom Corporation Limited v Clear Communications Limited*, High Court Wellington CP 504/92, 30 July 1992 Greig J, an Application for an Interim Injunction was brought under s 41, where Telecom sought to restrain Clear from conduct alleged to be misleading or deceptive or likely to mislead or deceive. This passage appears in Greig J’s decision:

The other point is that if a statement is wholly true then it cannot mislead or deceive. But it may not be wholly true; there may be other meanings which

can be reasonably drawn from the statement which may be false. There may be an overall impression while based on truth which will give a false or misleading impression overall. Moreover, the statement which is complained of must be looked at in the context of the whole advertisement or other material placed in the matrix of the market, bearing in mind the person to whom the statement is addressed and the likely customers whom it is intended to affect. It is those last who are entitled to be protected from being deceived about the services that are being offered to them or with which they are prospectively interested.

[24] In *Mills v United Building Society* (1992) 2 NZLR 392 Casey J stated:

Whether any particular conduct by a vendor is misleading or deceptive, or is likely to mislead or deceive, is essentially a question of fact. As the High Court of Australia recognised in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, the test is objective; that some consumers have been misled is not conclusive. The character of the market reasonably likely to be affected by the conduct must also be taken into account.

[25] The concept of “conduct” in ss 9-12 of the Act is wider than that of “representation” which is the term used in s 13. Section 2 states:

- (2) In this Act, a reference to engaging in conduct shall be read as a reference to doing or refusing to do an act and includes, that
 - (a) omitting to do an act: or
 - (b) making it known that an act will or, as the case may be, will not be done.

[26] In *Sound Plus* (supra) it was made clear that s 11 differs from s 13 in that it is “concerned with conduct that is essentially true but capable of being reasonably construed as something that is not true”.

[27] The public, as defined in *Taco Company of Australia Inc. V Taco Bell Pty Limited* (1982) 42 ALR 177 and approved in *Red Eagle Corporation Limited v Ellis* (2010) NZSC 20 refers to “the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations”.

[28] As to characteristics of services, the terms on which a product is offered including price have frequently been determined to be characteristics of services (see *Commerce Commission v Telecom NZ Limited* (2004) 11 TCLR 139) and *Sound Plus* (supra).

The issue in this case

[29] Was the statement “if you use less than \$1 worth of data in a day we’ll only charge you for what you used”: on the Vodafone website liable to mislead the public about the charging practices of the company regarding the \$1 a day offer for casual data usage?

Informants submissions

[30] Counsel for the information submitted that statements may be true but nonetheless misleading, particularly where an omission of relevant information or silence makes what is said, written or done misleading. Counsel also pointed out that the Vodafone website did in fact mislead because complaints were received by the Commission. Those complaints were not as a consequence of careless assumption or inattentive reading but were consequences of the way that the website was written, and in particular the phrase “if you less than \$1 worth of data a day, we will only charge you for what you use”. There was no way that consumers, the Commission submitted, could find the answer to the basic question as to what \$1 was worth or how much customers would be charged for using less data.

[31] Counsel submitted that in fact customers were charged \$1 for using just 2% of the 10MB advertised as being \$1 worth and consumers could not have known this from the website and were unable to work it out for themselves. That was especially so when various other inferences, counsel submitted, could naturally be drawn from the advertising. Consumers could have understood that up until the point they were charged \$1 the rate was proportional to that, and indeed some did. Alternatively, consumers might have rationally sought that the rate was \$1 per MB as that was the only rate per MB disclosed by Vodafone, and applied after 10MB was consumed.

The later amendment to the website with a simple paragraph added at the end corrected the error, but for the months to which the charge relates the wording on the site, counsel submitted, was truly liable to mislead.

Defendant's submissions

[32] Counsel for Vodafone submitted that when the website page is considered in totality it was not liable to mislead. The use of the phrase "daily allowance" several times on the webpage made it clear that Vodafone was offering an allowance type deal: i.e. either customers could use up to 10MB of data and the cost was capped at \$1. It was further submitted that wording from the website such as "this will only be charged on the days that you use it" and "you only pay for the days that you use it" underscored the fact the emphasis was on communicating an allowance, that a customer could use up to 10MB and pay \$1.

[33] The phrase "if you use less than \$1 worth of data in a day we will only charge for what you use" appeared under the subheading "other things to know". If consumers used less than \$1 worth of data in a day the website truthfully stated they were only charged for what they used. That was true. The complaint is that Vodafone failed to advise customers that the \$1 threshold would be reached after 204.8KB of data up to that threshold was charged at \$5 per MB. Vodafone failed to tell customers the rate at which data was charged up to the \$1 threshold. Counsel referred to the evidence of one complainant who stated clearly that she thought the charge would be on a pro-rated basis and that if only 5MB were used it would cost 50 cents and 2.5MB 25 cents. Counsel submitted that most customers would not assume that the charges would be pro-rated because, counsel submitted, this was a product marketed as an allowance with a capped fee.

[34] Counsel submitted that a suitable analogy was a car park deal such as an early bird special entitling a consumer to park for up to 15 hours for \$15. No consumer might reasonably expect to pay only \$1 if they left the car park after one hour. Counsel also used an example of a package type deal in the supermarket where there is an offer for, for example, to buy two items for \$5. In those

circumstances, counsel argued that it was not reasonable for consumers to assume that one of the items could be purchased for \$2.50.

[35] Counsel also alerted to the “character of the market” and suggested that the public using Vodafone mobile services were reasonably technologically savvy and of above average levels of intelligence. The submission was made that, objectively, people of that sort would not reasonably assume that data charges would be pro-rated and Vodafone customers expected to pay \$1 a day when they used internet on their mobile phones.

[36] Counsel submitted that looking at the webpage as a whole the emphasis was not on the point at which a consumer would be charged \$1, but rather on the allowance that a consumer could use up to 10MB and pay only \$1. The webpage emphasised the cost of data over and above the 10MB allowance rather than the cost of data under the \$1 threshold. On a realistic objective analysis counsel submitted that the webpage was not liable to mislead simply because customers were not told that \$1 would be accrued after 204.8KB updated usage. On the contrary, the statement that “if you use less than \$1 worth a day, we will only charge for what you use” was in fact true and it was not reasonable for users to assume those charges would be pro-rated from the cost of the maximum allowance.

Decision

[37] The Vodafone website between July and November 2008 was designed to attract customers to use the internet on their mobile phone, something which is of course much more common now. In 2008 Vodafone had a massive market share of well over 2 million members of the public in New Zealand. The way the website was set up was under three headings. The first of these was: “What is the internet on your mobile?” Under that heading the statement appears “It is super affordable to view any website with our new casual rate of \$1 a day with a daily allowance of 10MB. This will only be charged on the days that you use it.”

[38] The second heading was “Okay, love it! How do I get it?” Under this heading and the subheading “Other things to know” the statement appears “**If you use less than \$1 worth of data in a day, we’ll only charge for what you used**”.

[39] Under that the third heading was “How much does it cost?” Under this heading the statement “You can enjoy the casual rate of only \$1 a day, with a daily allowance of 10MB. You only pay for the days you use it so it’s really affordable to jump on the internet from your mobile. If you use more than 10MB in a day, extra data will cost just \$1 per MB”. Under that same section with a subheading “Here’s how the pricing works” is the statement “Up to \$1 a day for a 10MB daily allowance (only charged on the days you use it). Under that in italics “Additional data over the 10MB daily allowance is \$1 per MB.”

[40] The statement that Vodafone charged \$1 a day for 10MB of data was clearly conduct concerning the characteristic of a service, i.e. the price of Vodafone mobile internet, and that is not in dispute in this case. The statement that the company charged \$1 a day for 10MB of data was true. A true statement may nonetheless be liable to mislead. That is also not in contest.

[41] Three Vodafone customers, members of the public, were actually misled by the statements on the website. This fact is of course not conclusive as to whether the conduct was liable to mislead the public. However it is persuasive and may be taken into account. The evidence from those three customers also makes clear that the offer was indeed an attractive one to mobile phone users as the casual data allowed you to change from \$11.25 per MB to \$1 for a daily allowance of 10MB. That was a very significant reduction. All three of those Vodafone customers who had complained to the Commerce Commission assumed that they would be charged on a pro rata basis for internet usage less than 10MB. There was nothing on the website to support that view. Equally, there was nothing to the contrary and there was simply no statement made as to how usage less than 10MB might be charged.

[42] Vodafone responded to the first inquiries of the Commerce Commission in October 2008 by stating in answer to the question:

5. **Why has Vodafone charged customers a \$1.00 per day if they have used less than the allocated 10MB that day?**

Because, as above, the \$1 amount is reached at 204.8KB, not 10MB.

For example, if a customer uses 300KB of data, they will be charged \$1 per day. However, if a customer incurs less than 204.8KB of data, they will be charged the per KB rate (e.g. if the customer uses 150KB they will be charged approximately 73 cents (\$0.004882 x 150)).

[43] In the letter response (April 2009) to the Commerce Commission Notice the company was asked:

3. **You have indicated in your letter of 14 November 2008 that the \$1 a day casual data rate charge accrues when the first 204.8KB of data is downloaded:**

- a. **Are customers made aware of this?**

Yes.

- b. **If so, where is this notification?**

The notification appears at the foot of our web page <http://www.vodafone.co.nz/mobile-data/mobile-web.jsp> where we state:

If you use a small amount of data you'll be charged at the core rate of \$5 per MB (1MB is equal to 1024KB), until you use \$1 worth. This will be at around 205KB (about 5 to 10 Vodafone live! Pages or around 4 standard web pages).

[44] The company also stated in answer to a further questions from the Commission:

7. **Does Vodafone advise users that .2MB (\$1 worth of data) is equal to 1/50th of the total daily data allowance of 10MB if they are on the casual data rate?**

No.

8. **If not, why does Vodafone not advise the customer of this?**

Vodafone's casual data rate is promoted as a charge capped at \$1 a day. For that \$1, customers know they get up to 10MB of data. We

do not sell casual data at \$0.10 per MB, or \$10 per 10MB. We sell a daily bundle of 10MB for which we cap the charge at \$1. Our customers expect to spend \$1 when they use mobile data. We inform our customers that if they use small amounts of data they may be charged less than \$1 per day. We do not believe that we need to explain to our customers that 0.02 is 1/50th of 10. We do believe that some customers may not understand how much internet activity 0.2MB represents, and we do believe it important that our customers understand how quickly they will reach the \$1 threshold. That is why we spell it out on our web page that \$1 worth of data is “about 205KB (about 5 to 10 Vodafone live? pages or around 4 standard web pages)”.

9. **Given the representations made ‘you can enjoy a casual rate of only \$1 a day, with a daily allowance of 10MB’ and “If you use less than \$1 worth of data in one day, we’ll only charge you for what you use’ - if a customer uses 5MB of data - why would a customer not expect to pay only 50 cents?**

The casual rate is the core rate of \$5 per MB capped at \$1 a day for up to 10MB. Customers who use less than the cap should not expect the charge to be pro rated.

[45] Further there was an inquiry about the core charge for internet as follows:

13. **If the core charge for Internet is/was \$5 per MB why does Vodafone only charge \$1 for 10MB?**

The \$1 a day casual rate plan is a specific data plan designed to make mobile internet cheaper for our customers and drive data usage. Once a customer reaches the threshold limit of 204.8KB in any one day, they are not charged any more for the remaining 9.8MB. Customers can be confident using the data because they know that then cost of up to 10MB is capped at \$1. Usage above 10MB is charged at \$1 per MB because our aim, as stated, is to drive data usage.

14. **With reference to Vodafone’s letter of 14 November 2008 responding to Question 8, please advise:**

- a. **How was the explanation “over simplified” on the website?**

Our initial web page on our \$1 a day casual pricing focused primarily on the key message that our customers could perform a range of mobile internet functions (web browsing, email, sending photos etc.) for the very reasonable charge of \$1 per day. However we accept that we could have been clearer on how very low data usage would incur charges - so we rectified it.

b. What were the changes made to the website to rectify this over simplification?

We deleted the line “if you use less than \$1 worth of data in a day, we’ll only charge you for what you use”. We also added the qualification noted in our response to item 3(b) above.

In preparing our response to this notice, we became aware that one instance of the line “if you use less than \$1 worth of data in a day, we’ll only charge you for what you use” (on our FAQ page) had been overlooked when these deletions were made. This oversight has been corrected.

c. When were those changes made?

The changes to the website, the oversight excepted, went live on or before 14 November 2008.

d. Were any other changes made to the web page dealing with \$1 per day casual rate charges? If so please explain the changes that were made, when they were made and why.

The changes were made on our key pages that refer to Mobile Internet, as noted in our response to question 15, below.

[46] As is apparent from the responses from Vodafone quoted above, the thrust of the 2008 webpage was to drive data usage. What is spelt out in these (later) responses to the Commission’s enquiry is that Vodafone intended that to sell a daily bundle of data usage for which they capped the charged.

[47] As explained by Vodafone, once a customer reached the threshold limit of 204.8KB in any one day they were not charged any more for the remaining 9.8MB.

[48] The statement that Vodafone charged \$1 for 10MB of data usage a day was true. The statement “If you use less than \$1 worth of data in a day, we’ll only charge for what you used” did not make clear that data usage up to the threshold 204.8KB was charged at \$5/MB.

[49] Clearly, once aware of the Commission's concern and the complaints received, Vodafone did indeed amend the website wording.

[50] Between 11 July and 13 November 2008, however, customers were, I find, liable to be misled, looking at the website as a whole. This was not an allowance type deal in the sense of a flat rate car park offer or a two for one product offer. This was a capped charge rate which failed to explain to the customer how rates less than the capped rate would be charged. This omission led customers into error because they were obliged to speculate about the charging rate.

[51] The statement "If you use less than \$1 worth of data in a day we'll only charge you for what you used" was liable to mislead the public about the charging practices of the company regarding the \$1 a day offer for casual data usage.

[52] I am satisfied beyond reasonable doubt that the charge has been proved.

Signed at Auckland this 28th day of September 2011 at 7.15 ~~am~~ pm

A handwritten signature in black ink, appearing to read "A E Kiernan". The signature is fluid and cursive, with a large initial "A" and "K".

A E Kiernan
District Court Judge