IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2018-004-004795
[2019] NZDC 12149

Under the Fair Trading Act 1986

BETWEEN **COMMERCE COMMISSION**
Prosecutor

AND **KIWIPURE LIMITED**
Defendant

Hearing:	23, 24, 27 and 28 May 2019
Submissions:	13 and 18 June 2019
Appearances:	A McClintock and J Barry for the Prosecutor J Donkin for the Defendant (as stand by counsel)
Decision:	5 September 2019

DECISION OF JUDGE B A GIBSON

Introduction

[1] Kiwipure Limited ("Kiwipure") is a closely held company with its registered office at Tauranga. It was incorporated in November 2006 and developed a water filtration system, which it claimed to be a "world first" product and which it supplied to a number of consumers between 10 February 2015 and 31 May 2018.

[2] The defendant made a number of representations about the benefits to purchasers of its water filtration system. These were made on its website and in various other ways. The water filtration system, developed by it in 2011, was said by

the defendant to be able to "soften" water, meaning the filtration process would not cause scale or scum build-up in water used by residential households which would in turn produce a number of benefits including savings in electricity consumption and also to household cleaning and gardening products.

[3] The process was said to use magnetism to achieve the stated benefits. These included the ability of the filtration system to remove chlorine which the defendant claimed would assist with the treatment of skin conditions.

[4] The water filtration system was sold by the defendant through its website to various members of the public and was also sold wholesale to HRV Clean Water Ltd ("HRV"). In selling directly to the public Kiwipure sold the water filter for $1,395 per unit (excluding installation). It estimated it sold between 300 and 400 systems to various members of the public between 10 February 2015 and 31 May 2018.

[5] Kiwipure had two active directors, Murray Falloon and Warren East. Prior to their involvement in the company Mr Falloon had been an Accountant in practice in Tauranga. Mr East, who gave evidence at trial, was a qualified electrical service technician and radio serviceman and had previously been a senior engineer with Philips Medical Systems, mostly dealing with medical equipment. Neither director had any formal training or qualification relating to water treatment.

Applicable legislation

[6] Section 12A(1) of the Fair Trading Act 1986 ("the Act"), was enacted in June 2014. It provides that a person in trade must not make an unsubstantiated representation. It was accepted by the defendant that at the material times it was in trade.

[7] The prosecutor claimed the various representations it made in relation to the filtration device were unsubstantiated representations. The representations on the company's website, each the subject of an individual charge, seven in total, were as follows:

(a) "No scum build-up."

(b) "No scale build-up in hot water systems and pipes, saves electricity and maintenance."

(c) "Use less washing powder."

(d) "Water that invigorates your garden."

(e) "Less concentrate needed when spraying for weeds."

(f) "The Kiwipure 'ionizer' then softens the water. Compounds in water that normally would produce scale in pipes and appliances are altered so they no longer form scale. The ioniser will also slowly reduce existing lime scale deposits within the pipes and fittings."

(g) "Reduction in skin irritations and eczema."

[8] Section 12A(2) of the Act provides as follows:

> A representation is **unsubstantiated** 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.

[9] The defendant accepted the representations were made. It did not accept the representations were false or misleading, although that is not an element of the charge, as all the section requires is that the maker of the representation, at the time it was made, must not have reasonable grounds for making it, which the defendant maintained it did.

[10] Further, s 12A(3) of the Act provides that the provision does not apply to a representation that a reasonable person would not expect to be substantiated. The defendant accepted the representations made were ones that a reasonable person would expect to be substantiated although the extent it was required to substantiate each representation, it submitted, may differ.

[11] Consequently, the defendant conceding it was a person in trade within the meaning of such in the Act, that it made the specific representations the subject of the

charges in connection with the supply or possible supply of the goods and the representations were such that a reasonable person would expect them to be substantiated.

[12] The Commission, to establish the charges, must prove beyond reasonable doubt that the representations made were unsubstantiated, that Kiwipure did not have reasonable grounds to make them and that a reasonable person would expect them to be substantiated.

[13] The statutory defences available under s 44 of the Act were not relied on by the defendant. Reasonable mistake (s 44(1)(a)) and reasonable reliance on information supplied by another person (s 44(1)(b)) are defences available under this section but notice of a defence of reasonable reliance on information supplied by another person is required to be given prior to the hearing. It was not and so neither defence is available to the defendant.

[14] In considering whether a person had reasonable grounds for representation s 12B of the Act provides that:

> ... a court must have regard to all of the circumstances, including -
>
> (a) the nature of the goods, services, or interest in land in respect of which the representation was made:
>
> (b) the nature of the representation (for example, whether it was a representation about quality or quantity):
>
> (c) any research or other steps taken by or on behalf of the person before the person made the representation:
>
> (d) the nature and source of any information that the person relied on to make the representation:
>
> (e) the extent to which the person making the representation complied with the requirements of any standards, codes, or practices relating to the grounds on which such a representation may be made, and the nature of those requirements:
>
> (f) the actual or potential effects of the representation on any person.

Section 12A of the Fair Trading Act – unsubstantiated representations

[15] The legislation has no direct parallel in Australia, or for that matter the United Kingdom or Canada. In Australia the regulator can issue a substantiation notice to a trader requiring substantiation for representation or representations; see the Australian Competition and Consumer Act 2010, Schedule 2, Section 219. There is no separate offence of making an unsubstantiated representation, the matter being dealt with, as was previously the case in New Zealand, under misleading and deceptive conduct.

[16] The purpose of s 12A was noted by Judge Mill in *Commerce Commission v Fujitsu General New Zealand Ltd*[1] when he referred to submissions made by the Commission saying:

> 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. 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.

[17] The report from Parliament's Commerce Committee on the Consumer Law Reform Bill explained the policy for the legislation. Under the heading 'Unsubstantiated Representations' pages 2 and 3 of the report said:

> The proposed new provisions on unsubstantiated representations are intended to target traders who make representations without reasonable grounds. We recommend adding new subsection 12A(2A) … to make it clear that the provision does not include representations that a reasonable person would not expect to be substantiated so that creativity and advertising would not be stifled. …
>
> Under the existing scheme the Commerce Commission must disprove such representations, which can be difficult and costly. No direct harm may necessarily occur from representations that are true but nonetheless unsubstantiated, but there can be indirect harm. Traders that incur the cost of undertaking relevant research before making claims are disadvantaged relative to traders willing to make unsubstantiated claims. There can also be indirect harm to consumers, such as paying a premium for goods when additional benefits are not substantiated, or buying goods in the expectation they will deliver particular outcomes that are not substantiated.

---

[1] [2018] DCR 200, 2005

[18] In December 2012 at the second reading of the Consumer Law Reform Bill, the Minister of Consumer Affairs, then the Hon Simon Bridges, paraphrased the select committee's report saying:

> The Fair Trading Act is also an important part of our consumer law framework. A major new provision in the Bill is to ban unsubstantiated representations. These are representations made without the manufacturer or trader having any reasonable basis for making them. This type of claim disadvantages responsible businesses that do their research and evidence their representations. People may pay a premium for goods that "prevent asthma" or are "environmentally friendly" and it is only fair that we can trust that these claims are made on reasonable grounds. At the select committee, many submitters raised concerns about the application of the new provision to creative advertising. Regulation at the cost of creativity is not the intention. As a result, a new subsection has been added. The rules will not apply to claims that a reasonable person would not expect to see backed up by research and evidence.

[19] While there is little comparable legislation in the Commonwealth jurisdictions already mentioned, Ms McClintock referred to a body of law developed in the United States through the Federal Trade Commission which has distinct similarities to the unsubstantiated representations regime enacted in New Zealand in 2014 by s 12A of the Act. She submitted the claims about the water filter were credence claims as classified in *Gault on Commercial Law* (online edition) at FT12B.01 which concern goods difficult or impossible to evaluate because of the consumer's lack of knowledge or expertise. The difficulty this presents for consumers was referred to in *American Home Products v Federal Trade Commission*[2] where at 698 it was said:

> Because consumers cannot accurately rate the products for themselves, advertising, and the expectations which it engenders becomes a significantly more influential source of consumer beliefs than it would otherwise be.

The Evidence – Commerce Commission

[20] Mr Z A Walker, a senior investigator at the Commerce Commission gave evidence for the prosecutor. He said the Commission's interest in the defendant arose in the context of an investigation of HRV, a company to which Kiwipure supplied water filters in August 2016. HRV had received a complaint from a customer who had purchased a water filter and had relied on a representation that there would be a skin

---

[2] 695 F 2d 681 (3rd Cir 1982)

improvement benefit. Consequently Mr Walker was led to Kiwipure and examined its website which made a number of representations in relation to the water filter supplied to HRV and which was available for purchase by members of the public.

[21] HRV was itself prosecuted by the Commission for making unsubstantiated representations similar to those made by the defendant. It pleaded guilty; *Commerce Commission v HRV Clean Water Limited*[3] although its plea is not relevant to nor determinative of the defendant's culpability in these proceedings.

[22] Kiwipure's website included a number of testimonials from purchasers and stated in general terms and under the heading "Kiwi Entrepreneurs" the following:

> Kiwipure is the culmination of two bright Kiwi minds getting together and inventing a whole house filtration system that not only removes sediment, heavy metals and chemicals like chlorine from your incoming household water, but also softens the water resulting in clean pure water from every tap in your home. ... The Kiwpure ioniser requires no electricity and works without adding chemicals like salt, making it environmentally friendly. ...

and

> The Kiwipure water filter system is supplied with a water softener device which we call an ioniser. The ioniser not only reduces the formation of lime scale in pipes, kettles, water heating systems, bathroom fittings, appliances like dishwashers and laundry machines etcetera but also will slowly remove existing lime scale from pipes. The Kiwipure ioniser is only a third of the cost of the older salty ioniser and unlike them, does not require electricity or salt. An additional and very important benefit of having a Kiwipure ioniser is the water now behaves as if it were soft and lathering and cleaning is much improved. ... The health conscious will quickly realise the benefits of removing chlorine and heavy metals from all the water in the house especially the shower, a dramatic reduction in dermatitis and eczema has already been demonstrated in the Bay of Plenty during an ongoing clinical trial.

[23] There were other representations which are the subject of the charges including "reduction in skin irritations and eczema" ... "no scale build-up in hot water systems and pipes" ... "saves electricity and maintenance" ... "laundry, use less washing powder" ... and "water that invigorates your garden as ... when spraying for weeds etcetera less concentrate will be needed".

---

[3] [2018] NZDC 22699

[24] The Commission wrote to Mr Falloon, a director of Kiwipure on 2 October 2017 confirming its ongoing investigation into the representations and stating its initial view that the claims made by Kiwipure about its water treatment system were likely to be unsubstantiated representations in terms of the Act. It sought further information concerning those representations. Kiwipure's reply on 13 October 2017 enclosed a number of testimonials from customers and referenced a 2006 article concerning tests at Shinshu University, Oseki, Japan in 2005, as demonstrating that there was an effect in treating water with a magnetic field. Mr Fallon wrote, *inter alia*:

> 1. The Shinshu research paper was obtained by me prior to the development of our system but was not given to Warren [a reference to Mr East] until after we had developed a prototype. That gave him the confidence that we were on the right track.
>
> 2. Prior to selling the present system we sold whole house systems with two filters that did a limited function.
>
> 3. The Shinshu paper was used to confirm our thoughts. We decided that we needed to test it on a house and we preferred Wanganui. We both went back after three months … the system had proved very effective.

[25] Mr Falloon also wrote that Kiwipure believed it had reasonable grounds for the representation relying on testimonies from customers, the Shinshu report and:

> We have contracted a reputable manufacturer who has previous experience in making a similar device. They were able to ensure that the strength of the magnetic field required in the pipe was up to our requirements and strength. We have a tool that we purchased to check polarity and magnetic field strength.

[26] He also referred to the hundreds of systems which had been sold without complaint.

[27] Both Messrs Falloon and East were interviewed by the Commerce Commission. Subsequently Kiwipure was able to provide a copy of a report, which Mr East described as a 'clinical trial', undertaken by a registered dermatologist, Dr B Tallon, on the effect of use of a Kiwipure filter on household domestic water supply which showed a trend of improvements to patients' dermatitis. However, the 'trial' only involved four people, self-evidently insufficient to provide any scientifically acceptable conclusions.

[28] The prosecutor also called an expert witness, Dr C R Fricker from the University of Reading in the United Kingdom, a Fellow of the Royal Society of Biology and the Royal Society of Public Health. He provides consulting services internationally on water quality issues, mainly for municipal water systems, and also on new methods of detection of contaminants in drinking water.

[29] Dr Fricker, who did not examine the defendant's water filtration system, offered opinion evidence concerning the claims and the underlying science purported to be relied upon by Kiwipure in making the various representations it did, including those the subject of the charges.

[30] Dr Fricker, in his evidence said the main rationale for the efficacy of magnetic water treatment devices is that scale is reduced by

> ... treatment by a sufficiently strong magnetic field causes the formation of aragonite rather than calcite in water systems and that aragonite is "softer" and less likely to form a hard deposit.

[31] Dr Fricker considered the hypothesis that aragonite is less likely to form a hard deposit to be debatable as the limited scientific literature available is unsettled on the point with the process of magnetic treatment lessening scale build-up in domestic situations untested in controlled conditions.

[32] His expert view was that there was little, if any, credible scientific evidence that hardness in water was reduced by magnetic fields.

Evidence – the defendant

[33] Evidence for the defendant was given by Mr W L East, one of the directors of the defendant. He gave evidence of his background working as a service manager and machine engineer for companies specialising in the provision of scientific and medical instruments and systems which led him eventually to establish his own company, Electronic Diagnostics Ltd, which serviced medical equipment in the lower North Island and South Island. He met Mr Falloon who was interested in treating water using electromagnets. Eventually Kiwipure was set up. Mr East said through computer searching he read a considerable amount of literature dealing with the subject and

eventually identified a company based in Pipersville, Pennsylvania, United States, known as Magnetiser Inc and he and Mr Falloon visited the company in July 2008. He said he was given a number of technical papers including a short article by Dr Klaus J Kronenberg, a German scientist working in the United States which referred to the physical treatment of water with magnetic fields in the former USSR and China, and another short unattributed article which appears to have been published by Cranfield University in the United Kingdom referring to the anti-scale magnetic treatment ('AMT') of water. That article noted it had a long and controversial history and "*has been reported as being effective in numerous instances. ... Its effect is to reduce scale deposition, remove existing scale or produce a softer and less tenacious scale.*" It also observed that reported effects varied widely with a paucity of systematic studies independent of device manufacturers opining "*the scientific literature is still unable to explain confidentially why AMT works in some applications and not in others*".

[34] While at Magnetiser he said he met with someone whom he called 'the professor' but was unable to recall his name, and discussed technical aspects of what the company was doing while Mr Falloon spoke with a company employee dealing with marketing. He said he drew comfort from a document given to him, which appeared to have been produced by the United States Department of Energy and which speculated that as many as a million general magnetic device units had been installed "in the field". When asked about the anecdotal nature of the written material provided to him by Magnetiser and the other documents he identified he said:

> Well this is something that's very, very difficult to prove scientifically, because you're talking enormous resources, well beyond our capacity. And I wonder, you know, what is wrong with anecdotal.

[35] In any event Messrs East and Falloon returned to New Zealand and Mr East designed a water control system for domestic water supply which was said, *inter alia*, to purify water and "*hugely reduce the effect of lime scale and silica build-up on kitchen appliances*". The device was described as a 'virtual ioniser'. After constructing the device he said it was installed in properties in Wanganui with periodic observations being taken of its performance and, secondly there was a small trial in 2010 involving one row of kiwifruit vines, which was satisfactory.

[36] Dr Fricker's criticism of the defendant's approach was that it was entirely subjective and unscientific. The Shinshu paper was, he said, inappropriate for the type of testing required given that it relied on the use of oxygenated water in a laboratory environment when the process involved in the defendant's device concerned the domestic treatment of water. Secondly, the Shinshu paper noted that any effect was lost at temperatures greater than 50 degrees Celsius which led him to draw the conclusion that treatment would be ineffective for domestic hot water systems. Finally, the Shinshu paper indicated that any effect through magnetic treatment of water was time limited whereas in domestic water systems water is often left sitting in pipes for extended periods. He was also of the view that persons with a non-scientific background, alluding to Messrs Falloon and East, would need expert assistance in properly understanding the conclusions to be drawn from the Shinshu study and how they might be applied to a different product. As for the remaining material relied on, some of it referred to conclusions drawn from laboratory testing but substantial further study and field trials were necessary to determine the effect of magnetised water treatment in a domestic setting.

Prosecutor's Submissions

[37] In closing, Ms McClintock for the prosecutor, submitted Kiwipure had no objectively reasonable basis for the representations made that are the subject of the charges. It had not undertaken any acceptable due diligence before marketing its product with the claims for the benefits. It had placed substantial reliance on an article published in the *Journal of Physical Chemistry* in 2006 which was published on the web on 1 June 2006, entitled *Does magnetic treatment of water change its properties?* The article reported on some tests carried out at Shinshu University, Japan, in 2005 which observed the effect of magnetic treatment on water and noted that when carried out after distilled water was exposed to O_2, water properties such as vibration modes and electrolyptic potential were changed.

[38] Kiwipure had little more than this paper which it downloaded from the internet. Ms McClintock submitted it stretched its reliance on portions of the paper helpful to the theory underpinning the device it constructed, but ignored all sorts of differentiate portions that were not helpful. It represented, largely on the basis of this paper, that

the device it constructed softened water which also had other benefits including improvement to skin conditions.

[39] The prosecutor submitted that Kiwipure did not test its own product – either in a laboratory setting, or by controlled testing in a domestic setting, and did not do so because it was not prepared to meet the cost required. Instead it relied on anecdotal accounts from customers and its own observations and then made assumptions as to how the product worked. That process and the assumptions that followed did not, in the prosecutor's submission, meet the required test for proper substantiation providing reasonable grounds for the representations at the time they were made. The evidence was, accordingly, sufficient for the Commission to have proved its case to the required standard, namely the criminal standard, beyond reasonable doubt.

[40] Ms McClintock noted the approach of the American jurisdiction under the Federal Trade Commission in separating representations into establishment and efficacy claims as in *Pom Wonderful v Federal Trade Commission*[4]. Establishment claims are representations containing express or implied statements that the advertising claim is supported by research, such as scientific or medical studies, or opinions as opposed to efficacy claims where the representation is an assertion that the good does something, without there being any suggestion of "establishment" with the reasonable basis to make the representation being determined by the factors set out in the 1972 FTC case *Re Pfizer Inc.*[5] Those factors closely resemble the circumstances the Court is obliged to have regard to in s 12B of the New Zealand Act.

[41] An example of an establishment claim is that represented by charge 7, the charge alleging an unsubstantiated representation about the purported benefits of Kiwipure's water filtration system with the particulars for that representation, made on the company's website, being *"the Kiwipure 'ioniser' then softens the water. Compounds in water that would normally produce scale in pipes and appliances are altered so they no longer form scale. The ioniser would slowly reduce existing lime scale deposits within the pipes and fittings.* Kiwipure's website, when referring to its 'ioniser' unit and its use of *"the most powerful rare earth magnets in the world"* stated

[4] D.C. Cir 2014, 13-1060, January 30, 2015
[5] 81FTC23 (1972) at 64

the principle had been proven by Shinshu University, Japan as successfully treating the compounds contained within water and altering their physical properties.

[42] Ms McClintock, in submissions which I accept, submitted that the Shinshu paper did not establish that its observations as to the effect of magnetic water treatment would be the same in a domestic situation, and Kiwipure's 'ioniser' device was never tested. Further Dr Fricker, the expert witness for the Commission said that no principle had been established by the Shinshu University experiments, merely observations.

[43] Regardless of how the claims are categorised, either as establishment claims which consumers would expect to be properly established scientifically or as efficacy claims, the Commission submitted the claims were never properly substantiated, the directors of Kiwipure relying, in some instances, such as with the Shinshu report, on observations, that neither were qualified to assess, or on anecdotal reports and on conclusions Messrs East and Warren, the directors of Kiwipure, drew themselves. Testimonials from consumers cannot amount, in themselves, to substantiation as illustrated by an answer, the logic of which is compelling and irrefutable, given by Dr Fricker in evidence when he said:

> ... Most manufacturers of any product rely on, utilise testimonials but it doesn't actually tell you whether the product works or not and I do not know whether every customer thinks it works and I'm not sure, what "works" means either. You know, do customers actually measure how much washing powder they add to their load? Probably not? So testimonials, they're commercially valuable and used for sales and marketing but scientifically, they don't mean anything.

The defendant's case

[44] For the defendant, Mr Donkin said the defendant had spent considerable time, energy and its limited financial resources on developing its water filter system. Mr East had been frank in his evidence that the company did not have the financial resources to engage in the detailed studies and evaluations that Dr Fricker considered necessary. Mr Donkin accepted a reasonable person would expect the representations made by Kiwipure to be substantiated, although the extent to which the company was required to substantiate each representation may differ. He submitted the Court had to be satisfied as to whether Kiwipure had reasonable grounds for making the

representation and an unduly technical or academic approach to the question did not reflect the reality of how a reasonable person would approach that issue.

[45] The defendant, through Mr Donkin, submitted that it would have a chilling effect on the development of new products and marketing generally if traders could only make representations founded on unimpeachable science. He submitted the Commission could have tested Kiwipure's product and, if its performance did not match the representations then a prosecution under other sections of the Act, as for instance ss 10 or 13 could have followed.

[46] Nevertheless it is clear the thrust of the legislation is not that the Commission should have to undertake tests to ensure that representations made are accurate but rather the trader itself, in making its representations, must ensure they are substantiated at the time they are made, not later when they might be tested. It does not matter whether the representations are true or not, the legislative focus is on what was said at the time and whether what was said could at that time be substantiated.

[47] Overall Mr Donkin said the Court, in applying s 12B to see whether there were reasonable grounds for the representations had to have regard to all the circumstances meaning that everything Kiwipure relied upon needed to be viewed together or collectively as a whole. Mr Donkin accepted that in the absence of New Zealand or Australian authority, this being the first occasion on which the 2014 legislation has been subjected to scrutiny, the *Pfizer* factors and the approach of the Federal Trade Commission was helpful, referring to the summary of factors given at p 91 of that case set out as follows:

> The question of what constitutes a reasonable basis is essentially a factual issue which will be affected by the interplay of overlapping considerations such as:
>
> (1) the type and specificity of the claim made – eg, safety, efficacy, dietary, health, medical;
>
> (2) the type of product – eg, food, drug, potentially hazardous consumer product, other consumer product;
>
> (3) the possible consequences of a false claim – eg, personal injury, property damage;
>
> (4) the degree of reliance by consumers on the claims;

(5) the type, and accessibility, of evidence adequate to form a reasonable basis for making the particular claims. More specifically, there may be some types of claims for some types of products for which the only reasonable basis, in fairness and in the expectations of consumers, would be a valid scientific or medical basis. The precise formulation of the 'reasonable basis' standard, however, is an issue to be determined at this time on a case-by-case basis. This standard is determined by the circumstances at the time the claim was made, and further depends on both those facts known to the advertiser, and those which a reasonably prudent advertiser should have discovered.

[48] His submission was that the system sold and advertised by Kiwipure was an experience good in terms of the *Gault* classifications, meaning customers could assess for themselves whether it produces the results as promised by Kiwipure, and if unhappy, can seek a refund. Of the three or four hundred systems sold directly to customers Mr East said none had complained. Mr Donkin submitted that in the circumstances of the case Kiwipure should not be required to substantiate its representations to the same degree as goods such as a supplement said to deliver 500 mg of vitamin C or similar.

[49] Mr Donkin accepted that the representation of scale build-up in hot water systems would not be so easily determinable by a customer but the benefits in terms of power savings were determinable. As for the benefits in relation to the skin conditions his submission was that customers might notice a change in skin conditions themselves.

[50] Mr Donkin said that to the extent Kiwipure's representations could be said to be establishment claims, it could rely on the principle established in the report from Shinshu University and explained on the defendant's website. Further, in terms of steps taken by Kiwipure before it made the representations, he referred to the directors, Messrs East and Falloon travelling to Pennsylvania in the United States to visit Magnetiser Inc, a company engaged in the magnetic treatment of water. Their success, and the clients of that company who had sent testimonials as to the functioning of the Magnetiser device, encouraged Kiwipure to offer a product that utilised the magnetic treatment of water. He said Kiwipure had field tested the ioniser it developed by installing the same in a residence in Wanganui and observing the results over several months. Similarly a trial had been undertaken at Katikati with kiwifruit. Mr East observed that the device in the Katikati trial had successfully prevented a build-up of

'scale'. He also submitted that as well as the Shinshu University paper the directors had relied on a number of other articles or papers produced by academic or reputable institutions, as well as information supplied by Magnetiser.

[51] Overall, he submitted Kiwipure had not relied on any single piece of information but had instead considered all relevant sources and had taken reasonable steps to ensure that its product worked. It had the support of the Shinshu University report that magnetic treatment of water could cause a change in the physical properties of water so the defendant's device could then confer the benefits claimed. It also had more general accounts as to how the treatment affected physical properties and performance of water as well as observations made, as for instance by Dr Tallon, in his limited experiment, as to the effect of use of the water filtration system on skin inflammation and eczema. The submission on behalf of the defendant was that as a result of Kiwipure's investigations and research before it launched its product it could not be said it did not have reasonable grounds to make the representations it did, so it followed the Commission's case for each of the charges had not been proved to the required standard.

Analysis

[52] In terms of the circumstances the Court must have regard to under s 12B of the Act the goods in respect of which representations were made by the defendant, namely the water filter with its 'ioniser' were clearly not tested in any scientific sense. Mr East, in his evidence, stated this was because the defendant did not have the resources to be able to undertake the scientific analysis and field tests required of the type Dr Fricker described in his evidence as being necessary. What he did was investigate the literature, much of it marketing and little of it containing scientific analysis, as well as visiting a company in Pennsylvania to satisfy himself and his fellow directors that the electromagnetic treatment of water to produce the results claimed was possible. However little of the literature referred to the use of the process in domestic settings and the Shinshu University paper, which seemed to have a seminal impact on Mr East's thinking, was simply a record of a university experiment in a controlled laboratory setting which could do no more than lay a foundation for the idea that the process might be useful in domestic applications. The process, and the device offered

for sale to the public as representing it, still needed to be thoroughly tested and verified.

[53] The research undertaken by Mr East was simply research into the underlying idea, and not research into the product Kiwipure developed and the claimed benefits deriving from its use. He did not, as Dr Fricker said, have the necessary background to understand the conclusions that might be drawn from the Shinshu study and how they could be applied to the defendant's own product. The experiments and testing that were undertaken were simply inadequate. The 'clinical trial' undertaken by Dr Tallon suggesting an improvement to skin conditions through use of the device was simply too small in the number of participants to be of any value in allowing any conclusion to be drawn. Only four people were involved. Mr Fallon in his letter to the Commerce Commission of 13 October 2017 referred to the test of the system undertaken in a house at Wanganui, which Mr East, in his evidence, confirmed was kept under observation. That was plainly insufficient as a field test, as Dr Fricker said in his evidence. The scale of the experiment was inadequate, far more than one house needed to be involved and there needed to be a controlled sample with appropriately qualified persons analysing the results.

[54] Mr Falloon did not refer in his letter to the Commission to the trial of a row of vines in Katikati in 2010/2011 where various devices including the defendant's ioniser model 1ZC-20 were fitted to the outlet side of a water system to prevent scale build-up in pipes. Neither was the result of that experiment, as reported by Mr East, put to Dr Fricker in cross-examination but nevertheless Mr East's evidence on the test not only illustrates the absence of controls and comparisons for the experiment, but also references an assumption he made that light scale deposit on the spray heads had to be due to existing deposits in the lime. He did not have any way of establishing this, but made an assumption that it must be so. The designer and marketer of the product reporting on the success of the product in a limited and unscientific trial carried out by himself is not, in these circumstances, sufficient to establish reasonable grounds in terms of s 12B(1)(c) of the Act, namely 'research' or other steps taken by or on behalf of a person before the person made the representation. The defendant needed to do more and undertake relevant research to substantiate its claims.

[55] I accept Ms McClintock's submission that the point of controlled testing is to remove the inherently unreliable subjectivity from scientific matters that customer testimonials produce, as well as subjective analyses by unqualified persons that the device, the 'ioniser' is 'scientifically proven', which it was not. The defendant simply did not have the resources nor the willingness to undertake the necessary research, Mr East himself saying in his evidence-in-chief:

> Generally, there's a lot of science and information out there and to me it's fairly mindboggling if you started to try and study it, you'd probably want to walk away and take up another job.

[56] Consequently the claims for the system as being "novel" and "a world first" are plainly unsubstantiated.

[57] Dr Fricker in his evidence made mention, in cross-examination, of the size of the water softening market worldwide, describing it as massive. He opined the reason large companies had not become involved in the domestic water softening market was the results were not consistent which reflects the observations in the Cranfield University paper. Substantial research into treatment systems would be required. Those observations from Dr Fricker touch on the mischief the select committee was referring to in its report when it stated "*traders that incur the cost of undertaking relevant research before making claims are disadvantaged relative to traders willing to make unsubstantiated claims*". The defendant made its claims but did not undertake relevant research to substantiate them.

[58] Neither do I accept Mr Donkin's submission that substantiation of the claims could be inferred from the fact that no-one to whom the systems had been sold had complained. That is not the test. The section makes it clear that it is irrelevant whether the representation is false or misleading. The section is not aimed at a post-sale analysis of the product and the representations made to support it but at whether the representations were substantiated at the time they were made and whether the person making them had reasonable grounds for those representations. Post-sale satisfaction based on the representations plainly cannot afford reasonable grounds for making them at the time they were made.

Charges

[59] In terms of the classification of the goods s 12B(1)(a) of the Act compels the Court to consider the nature of the goods, in this case, the water filter system devised and marketed by the defendant. The representations made were credence claims, namely goods that were difficult or impossible to evaluate by the consumer. Many of the representations, such as a reduction in washing powder and herbicide use would, as Ms McClintock submitted, be difficult for a consumer to make a realistic evaluation whether the benefits had been achieved. Reliance on controlled experiments was therefore important. Other representations, such as the 'no scum' representation, would only be able to be evaluated by the consumer after a purchase had been effected, again illustrating the need to ensure that there was a substantiated basis for the representation itself. The nature of the representations are also relevant in the analysis the Court is required to undertake. Many, as the defendant accepts, are representations that contain express or implied statements that the claim is supported by research as for instance representations concerning the ioniser found on the defendant's website which stated that the system used a scientifically proven water softener (ioniser). Overall the representations are therefore ones about quality.

[60] The research or other steps taken by or on behalf of the defendant has already been discussed in this decision. The information relied on was principally the Shinshu paper but also testimonials, various articles of a marketing nature and the personal observations of Mr Falloon and in particular Mr East. There is, in terms of s 12B(1)(e) no standard, code or practice relevant as part of the circumstances and in terms of s 12B(1)(f) given the representations promoted the system on the basis, in part, of benefits to health, as in a reduction in skin irritations and eczema, a far higher degree of substantiation for those was required beyond the anecdotal evidence obtained and the limited research undertaken by Dr Tallon, before it could be said there would be reasonable grounds to make the representation. As Ms McClintock submitted there was obviously the risk that persons utilising the product for those purposes would do so in substitution of appropriate medical advice and attention and so particular care was required in ensuring that particular representation was substantiated.

[61] The majority of the other representations were directed to the improvement of consumers' lives through the removal of occurrences associated with hard water such as difficulty in lathering. The product was first marketed in Wanganui, an area noted for the hardness of its water. The defendant was required by the statute to do more than point out the benefits of softening of water, rather it had to ensure the representations made with respect to the water filtration device developed and sold by it were ones that had been substantiated as being capable of producing the benefits claimed.

Charge 1

[62] This charge concerned a claim made on the defendant's website between 10 February 2015 and 31 May 2018 that use of the defendant's water filter would result in "[No scum build-up]". The defendant accepted the claim was made and that it did, indeed, need to be substantiated. At interview with the Commerce Commission the directors, Messrs Falloon and East, accepted there was nothing in the scientific literature they had obtained and relied on that addressed the issue of "scum build-up". Their grounds for making the representation on behalf of the defendant arose from their discussions in Pennsylvania with employees of Magnetiser Inc and customer testimonials. Dr Fricker's view was that the purported magnetic effect of water treatment was unlikely to alter the calcium concentrations in the water so as to diminish the amount of scum. Admittedly he did not examine the defendant's water treatment system but then neither did the defendant, on whom the obligation lay, undertake any scientifically acceptable analysis of the device before the claims were made. Accordingly, given that the issue as to whether the representation is false or misleading is irrelevant, I accept the defendant did not have reasonable grounds for making the representation at the time it was made. It was, as the defendant conceded, a representation that a reasonable person would expect to be substantiated and consequently I find the prosecutor has proved the charge to the required standard, beyond reasonable doubt, and the defendant is guilty of the same.

Charge 3

[63] This charge relates to a representation made on the defendant's website that use of its water filter would result in "no scale build-up in hot water systems and pipes, saves electricity and maintenance". The representation was made over the same period as charge 1, as were most of the representations the subject of charges. Charge 2, an alleged representation concerning ceramic mixers was withdrawn by leave at the hearing. The statement that the absence of scale build-up in hot water systems and pipes would save electricity and maintenance is, as Dr Fricker said, an uncontroversial and self-evident proposition. Whether the magnetic treatment of water, and in particular the defendant's device achieved that, as claimed and whether it was substantiated is the issue.

[64] Mr Donkin submitted that the defendant relied on the various testimonials and reports, and particularly the Shinshu report showing the magnetic treatment of water would cause the formation of aragonite instead of calcite, aragonite being less adherent and therefore reducing the amount of scale present in hot water systems and pipes. However I have already commented on the inherent flaw in the defendant relying on the Shinshu University study without further research and field trials in relation to magnetic treatment of water in general and its device in particular. The material relied on for what, in effect, is a scientific representation was not substantiated before the representation was made by the defendant. It did not inspect any hot water systems said to have used water treatment with the Kiwipure device and in any event Dr Fricker observed the Shinshu paper noted any effect was lost at temperatures greater than 50 degrees.

[65] Again this was a representation of a scientific nature that needed substantiation and which a reasonable person would expect to be substantiated. The defendant had no reasonable grounds for making it and accordingly the prosecutor has proved the elements of the charge to the required standard, beyond reasonable doubt, and the defendant is guilty of the same.

Charge 4

[66] Charge 4 concerns a representation on the defendant's website that use of the water filter would lead consumers to "use less washing powder". Again, as with both earlier representations this was linked to the 'ioniser' Kiwipure showed on its website. The representation is one of a scientific nature. Consumers would not be able to ascertain the truth or otherwise of the representation before purchasing the defendant's products so it was important that it be substantiated. There was no scientific basis for this statement or testing of the device to see whether the representation was true. All the defendant had were testimonials and conclusions it drew from the Shinshu University paper and from Dr Kronenberg's general analysis of water treatment programmes. Mr East said in his personal experience use of the water filter led to less washing powder. The representation was one about quality and other than post-purchase testimonials and Mr East's own evidence as to what he observed there was nothing particularly relevant to the representation. No measurement of the purported reduction in washing powder was offered in evidence and no analysis was undertaken by the defendant. It was accordingly unsubstantiated and the defendant did not have reasonable grounds for making it.

[67] Consequently the charge is proved to the required standard, beyond reasonable doubt, and the defendant is guilty of the same.

Charge 5

[68] This charge concerns benefits claimed through the defendant's website that use of the water filter would produce "water that invigorates your garden". The representation is based on the removal of chlorine from the use of the water filter, rather than magnetic treatment of water. The general material the defendant relied on was the Shinshu University study, a report from the Israeli Institute of Technology, and a report into the use of water, with chlorine removed, on lemon trees. Mr East's view, based on his own experiences as a farmer, was that in spraying a large area the water ought to be as clean as possible and the more chemicals present in the water the less effective it is. Consequently much of the evidence supporting this representation was anecdotal and based on assumptions drawn from the reports already mentioned. The

representation was one of quality. Dr Fricker's view was that scientific studies have shown that watering plants with chlorinated water has no detrimental effect. There was therefore virtually no substantiation for the claim and at interview on 9 June 2017 Mr Falloon, when answering a question as to how the claim came about, said "*it's probably one that not many people take much* – ", presumably meaning to end "*notice of*". Plainly not much thought had gone into the basis for the representation at the time it was made. The defendant conceded it was one a reasonable person would expect to be substantiated. Accordingly there were no reasonable grounds for making it as it was unsubstantiated.

[69] The prosecutor has, I am satisfied, proved the elements of this charge to the required standard, beyond reasonable doubt, and the defendant is guilty of the same.

Charge 6

[70] This claim concerns a representation on the defendant's website that use of its water filter would result in "less concentrate needed when spraying for weeds".

[71] Again this claim derives from Messrs Falloon and East's belief, and in particular Mr East, of the principles that could be derived from the Shinshu paper and their application to the use of concentrate when spraying for weeds. No testing was undertaken. It was simply an assumption Mr East made as a result of his understanding of the Shinshu University paper and the conclusions to be drawn from it. Accordingly the representation was unsubstantiated when it was made.

[72] The prosecutor has proved the elements of this charge to the required standard, beyond reasonable doubt, and the defendant is guilty of the same.

Charge 7

[73] The penultimate charge concerns a representation on the defendant's website that appeared between 10 February 2015 and 2 February 2017 stating:

> The Kiwipure 'ioniser' then softens the water. Compounds in water that normally would produce scale in pipes and appliances are altered so they no

> longer form scale. The ioniser will also slowly reduce existing lime scale deposits within the pipes and fittings.

[74] I accept Mr Donkin's submissions that there was no evidence as to what a consumer might understand the term 'softens' to mean in terms of water, clearly a quality representation. The representation is also of a scientific nature. The defendant accepts it needed to have been substantiated at the time it was made. Consequently, what the consumer might understand by the term 'soft' in relation to water quality is not the point. The representation was made by the defendant. It was made without any controlled testing of the device comparing its magnetically treated water system with one that was not so treated. I accept Dr Fricker's evidence that a number of replicates would be required before any scientifically valid conclusion could be drawn.

[75] All the defendant relied on was the academic material already referred to, testimonials obtained from customers or consumers after they had purchased the device, and reports satisfactory to the defendant received from a plumber in Wanganui and one in Tauranga. This was an entirely subjective process coupled with assumptions made by the defendant, principally it seemed by Mr East. Mr East posed the question in his evidence "*what is wrong with anecdotal?*" What is wrong with anecdotal evidence is that firstly it is not scientifically based which, in the circumstances of the sale of the defendant's water treatment device and the representations made to consumers was necessary given they would not have had the knowledge or experience to be able to ascertain for themselves whether the representations made were accurate. Secondly, anecdotal evidence of successful use necessarily can only arise after a consumer has acquired the water treatment unit and after the representations have been made. That will usually be well after the point in time when the representations need to be substantiated, namely by the time they were made.

[76] The prosecutor has proved each of the elements of this charge to the required standard. At the times the defendant made this representation it did not have reasonable grounds for making it and so it was unsubstantiated. Accordingly the defendant is guilty of this charge.

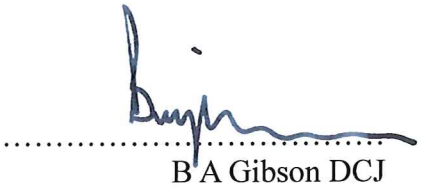
Charge 8

[77] The final charge concerns representations made between 10 February 2015 and 31 May 2018 by the defendant on its website that use of the water filter would lead to a "reduction in skin irritations and eczema". This is a claim concerning quality and is a health claim which because of the possibility of consumers relying on it instead of seeking proper medical attention, needs to be substantiated to a higher degree. I accept the defendant did attempt to substantiate its claims. Mr East had the reported benefit obtained by his grandchild after he installed a unit at the child's home in Brisbane, Australia as improvement to the child's eczema was noted. The company also sought to have Dr Tallon conduct a test. Unfortunately the number of patients involved in the test meant the result was scientifically meaningless and Dr Tallon himself accepted that further study with larger numbers was required to establish the validity of the findings he made after examining the four patients in the trial. As the prosecutor noted, the testing report was dated 23 July 2012 and little more appeared to have happened after that date yet the defendant continued to represent, at least as at January 2016, that the trial was ongoing, notwithstanding that it appeared to have concluded four years earlier.

[78] The defendant's position was that Dr Tallon's report and the New Zealand Medical Journal articles which reported that chlorine can exacerbate eczema and skin conditions, so *ipso facto* chlorine if is removed from water, customers can expect a reduction in skin irritation and eczema. Because the water treatment device contained a filter with granular activated carbon and kinetic degradation fluxion, filters known to remove chlorine, the claimed improvements must follow. The issue seems to be was the limited range of testing the defendant undertook and the anecdotal evidence and testimonials it obtained sufficient to conclude that the defendant had reasonable grounds for making the representation? The representation at the time it was made was little more than an assumption. The limited range of material the defendant had available to it at the time it made the representation pointed to the assumption being possibly accurate but it could not be said to be conclusively so. More testing of the system needed to be undertaken and a larger sample of persons with skin defects using the magnetised water system needed to be used, as Dr Tallon suggested, before any

conclusive result could be obtained and the representation could be said to be substantiated.

[79] The defendant did not go far enough in its testing and research before it made this representation. That was, as with the other representations, likely to be because it did not have the resources for the necessary tests and trials. It accepted a reasonable person would expect the representation to be substantiated. It was not at the time it was made and consequently I accept the prosecutor has proved the elements of the charge against the defendant to the required standard of proof, namely beyond reasonable doubt, and so the defendant is guilty of the same.



B A Gibson DCJ