

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CRI-2016-004-010-477  
[2017] NZDC 1956**

**THE COMMERCE COMMISSION  
PROSECUTOR**

v

**RECKITT BENCKISER (NEW ZEALAND) LIMITED  
DEFENDANT**

Hearing: 3 February 2017

Appearances: N Flanagan and MA Borrowdale for the Prosecutor  
M Heron QC, S C Keene, J Edwards for the Defendant

Judgment: 3 February 2017

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**NOTES OF JUDGE JELAS ON SENTENCING**

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**Introduction**

[1] The defendant company Reckitt Benckiser (New Zealand) Limited (RBNZ) has pleaded guilty to ten representative charges under s 10 of the Fair Trading Act 1986. The prosecution relates to misleading representations made by RBNZ on produce packaging and web pages for four supposedly different Nurofen pain medications that were misrepresented to treat four different types of pain.

[2] Pleas of guilty were entered to all ten charges when the prosecution was first called on 7 November 2016. Sentencing was adjourned until today. The Commerce Commission and RBNZ jointly submit a fine in the range of \$1,000,000 would be the appropriate sentence to impose today.

## The Facts

[3] RBNZ, along with its Australian counterpart, Reckitt Benckiser Healthcare Australia Pty Limited (RBA) is part of the international multinational Reckitt Benckiser Group plc which has its head offices in the United Kingdom.

[4] RBNZ distributes and markets a variety of health, hygiene and home products. They include well known household brands such as Nurofen, Dettol and Mortein. In 2015 RBNZ's revenue disclosed in its annual statutory accounts was \$126.784 million.

[5] RBNZ is one of the main distributors of non-prescription pain killers in the New Zealand market. This prosecution relates to well known Nurofen products. Between February 2006 and March 2008 RBNZ launched four new products into the New Zealand market described as specific pain range products under the brand Nurofen. These new products were an addition to the pre-existing Nurofen pain relief products. The four new products were readily available in supermarkets, pharmacies and grocery stores. The products were:

- a) Nurofen Migraine Pain.<sup>1</sup>
- b) Nurofen Tension Headache.<sup>2</sup>
- c) Nurofen Period Pain.<sup>3</sup>
- d) Nurofen Back Pain.<sup>4</sup>

[6] The packaging for all four of the new specific pain products was of a similar format. On the front of the package, under the brand name Nurofen appeared a clear statement of the particular type of pain the product was being marketed as relief for. For example, migraine pain, tension headache, period pain or back pain. The front

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<sup>1</sup> This product has been available since February 2006.

<sup>2</sup> This product has been available since February 2006.

<sup>3</sup> This product has been available since June 2007.

<sup>4</sup> This product has been available since March 2008.

of the package for all four products also stated “fast *targeted* relief from pain”.<sup>5</sup> The type of specific pain the particular product was intended to relieve also appeared on two other sides of the packaging. On the back of the package a section was dedicated to specifically stating the type of pain the product would relieve. The type of pain stated only referred to the particular pain identified in the name of the product. For example

Nurofen back pain is fast and effective in the temporary relief of pain associated with: Back Pain.

[7] The specific pain products had different coloured packaging and were frequently sold side by side on stall shelves.

[8] RBNZ also used a website to market its products (nurofen.co.nz). The website contained a page headed “Specific Pain Relief”. On that page appeared the following representation:

With so many products available, discovering what type of product you need to relieve pain can be confusing. It’s important to ensure you are using the right product for your symptoms. Nurofen has developed a range of products to target and relieve pain. If you are looking for back pain relief or relief from period pain, tension pain and migraine, you can find the right product for you from the list below.

[9] Other representations then made on the web page included representations relating to the specific pain range of products. Those representations included:

Whenever you feel a tension headache developing, reach for Nurofen tension headache caplets for targeted pain relief.

If you need back pain relief, Nurofen back pain caplets provide targeted relief.

Nurofen period pain caplets are designed for period pain, with fast-acting ingredients that help to target the source of pain and provide soothing pain relief.

[10] On a separate web page headed “Relieve Pain With The Right Types Of Pain Medication” a Nurofen product comparison was displayed. The specific pain

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<sup>5</sup> Emphasis added.

products were compared to other products in the Nurofen range including the standard Nurofen pain relief. While the more standard Nurofen products were identified as being suitable for nearly all types of pain, the specific pain products were only identified as being suitable for the pain identified in the product name.

[11] It was the representations on the product packaging and website that has resulted in the Commerce Commission laying ten charges against RBNZ. Eight of the charges relate to each of the four specific pain products. Two charges for each product has been laid to reflect the period of offending. Two charges were required due to a law change during the offending period which resulted in the maximum penalty available substantially increasing. The final two charges relate to the RBNZ website and the misleading statements contained there. All charges are representative offences.

[12] The representations on the packaging of each of these products and how the products were presented to consumers at point of sale gave the misleading misrepresentation to the consumer that the product was specifically formulated to target the type of pain specified in the product name, and was not suitable for other types of pain relief. These misleading representations were repeated in the RBNZ website where again an impression was created that the specific pain range products were specifically formulated and targeted to relieve a particular type of pain. Further, those products were not formulated to provide relief for other kinds of pain not specified in the product name.

[13] All of these misrepresentations were highly misleading as all of the specific pain products were not specifically formulated or targeted to relieve specific types of pain. All four products had the same operative ingredients as other products in the Nurofen pain range and were therefore suitable to relieve all types of pain other than those specified in the products names.

[14] The specific pain products were functionally comparable to other Nurofen products particularly the Nurofen Zavance product. All of these products contained an equivalent dosage of the anti-inflammatory drug Ibuprofen, and operates in the same way to treat pain.

[15] The period of offending for the product Nurofen Tension Headache ended when the product was withdrawn from the market by RBNZ.<sup>6</sup> RBNZ removed the three remaining specific pain products in December 2015 following investigation by the Commerce Commission.<sup>7</sup> The offending pages on the RBNZ Nurofen website were removed in July 2015.

[16] In summary, the charges represent the misleading promotion of pain relief products by RBNZ that purported the products were specifically formulated to target distinct types of pain. They were not.

### **Principles and Purposes of Sentencing**

[17] The relevant purposes and principles of sentencing include the need to deter and denounce the type of blatant misleading conduct this prosecution is an example of. The company RBNZ needs to be held accountable for misleading acts and regard must be had to the gravity of the offending. As in all sentencing cases, the need to ensure that comparable offending receives comparable sentencing is necessary to ensure consistency and the integrity of the sentencing process.

### **Aggravating and Mitigating Factors of the Offending**

[18] The Commission's submissions helpfully set out the general approach to sentencing under the Fair Trading Act. No issue was taken with that approach in the written submissions filed by the defendant company.<sup>8</sup>

[19] The Commerce Commission submits the following factors should be considered when assessing the appropriate penalty under the Fair Trading Act.

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<sup>6</sup> In January 2015 RBNZ removed from the market the product Nurofen Tension Headache.

<sup>7</sup> In December 2015 RBNZ undertook to remove from sale Nurofen Back Pain, Nurofen Period Pain and Nurofen Migraine Pain.

<sup>8</sup> The general approach was considered in *Commerce Commission v LD Nathan & Co* [1990] 2 NZLR 160, and expanded upon in *Commerce Commission v Ticketek New Zealand Limited* [2007] DCR 910.

*The objectives of the Fair Trading Act*

[20] The objectives of the Act are well known. Its statutory purpose includes contributing to a trading environment in which consumer interests are protected. To that end the Act prohibits unfair conduct and practices in relation to trade. Unfair conduct includes misleading and deceptive conduct, unsubstantiated claims and false representation. The circumstances of the present case are clearly an example where the purposes of the Fair Trading Act are being fulfilled.

*The importance of the untrue statements*

[21] I accept the Commission's submission that RBNZ's marketing claims for the four specific pain range products was grossly misleading. I also accept the misleading statements were of central importance to the product. The basis on which the specific pain range products were marketed was the claim each of the four products targeted four different types of pain. However, the products, as I have stated, did not have that quality and were functionally comparable to other standard Nurofen pain reliefs that retailed at a lower price. Without the interim misleading statements, the very reason for the products existence disappeared. There would be absolutely no reason for the consumer to choose one specific pain product over another.

*The degree of wilfulness or carelessness involved in making these statements*

[22] RBNZ responsibly accepts the overall impression created by packaging a product that specifically nominated a type of pain was liable to mislead consumers.

[23] RBNZ also accepts its website was similarly misleading and failed to state that specific pain products were in fact suitable and equally effective to treat all pain types. RBNZ also submits there was no attempt to deliberately mislead consumers and points to other statements of facts on the packaging in support of this submission. For example RBNZ relies on the fact the front of the packaging for each of the four products lists the ingredients; the ingredients are the same for each product. RBNZ submits the ingredient information enabled the interested consumer

to make comparisons. In addition the statement on the packaging that the product would “provide fast pain relief” was not misleading.

[24] A consumer is entitled to accurate packaging and marketing of products; particularly products a consumer is more likely to purchase when unwell and in a vulnerable state. In addition, the very nature of pharmaceutical products is such that the majority of consumers would not have known how to make the detailed product comparisons RBNZ refers to. A high level of trust is placed upon the marketing claim of such products. That trust was breached by RBNZ. The accurate statements pointed to by RBNZ in my view don't detract from the significant impact the misleading and false statements would have had. The Commission's submits RBNZ was highly careless. RBNZ accept it was careless. While the degree of carelessness is in part a matter of emphasis and semantics, I accept the Commission's submission RBNZ was highly careless.

[25] A logical conclusion for the specific pain range products was a commercial strategy designed to encourage consumers to purchase a higher value product and to increase the quantities of product purchased. RBNZ submit the purpose of the product line was to educate the consumer on the different types of pain the specific products could treat. In my view that explanation falls short of explaining the premium price charged for the specific pain product range. The pricing structure of the Nurofen pain relief's specific product range strongly suggests a profit was a more significant motivating factor.

[26] Further, RBNZ was aware during the period of the offending of substantial criticisms made of their marketing claims for the specific pain product range. These criticisms included misleading representations. In 2011 the New Zealand Herald on Sunday ran an article about the Nurofen special pain range products. RBNZ had been contacted about the article prior to its publication. Within the article were highly critical critiques of the products that were described as being “misleading” and “the same product within different packaging”.

[27] During the relevant time, the New Zealand products were identical to the Australian products of RBA. This is relevant as RBA's specific pain range was the

subject to scrutiny. In 2013 there was an examination of RBA's website the result of which saw RBA being requested to withdraw representations relating to their specific product range. Further, there have been proceedings brought in the civil jurisdiction by the Australian Competition and Consumer Commission.

[28] In my view, the Commission's assessment that RBNZ has been highly careless is warranted in light of the obviously misleading nature of the statements in question, and its failure to respond in a more prompt way to significant criticism of its marketing statements and the Australian findings of the RBA equivalent product.

#### *The degree of dissemination*

[29] The total charge period for the eight charges relating to the specific pain range products is 1 January 2011 to 23 December 2015. The period of offending in respect of the website is shorter being February 2013 to July 2015.

[30] There was extensive dissemination of the product by virtue of its widespread availability in all pharmacies, supermarkets and grocery stores. The misleading nature of the representations was compounded by each product being displayed beside each other having the effect of emphasising each product's point of difference from the other. While I accept RBNZ's submission that only a small amount of advertising through television, radio and print occurred in 2011 the widespread availability of the product and its packaging has had the effect of widespread dissemination of the misleading statements.

#### *The resulting prejudice to consumers*

[31] The prejudice suffered by consumers as a result of the offending is unwarranted expenditure. This occurred in two ways. Firstly, as a result of the consumer paying more for the specific pain product, in reliance of the misleading statements that sold for a greater retail value than the functionally equivalent standard Nurofen product. Secondly, consumers may have also incurred unnecessary expenditure through the purchase of additional unnecessary pain specific products as



a result of the misleading statements that each product was specifically designed to treat a particular pain type.

[32] RBNZ accepts these detrimental financial effects on consumers and corresponding benefit to RBNZ.

[33] The Commission has helpfully undertaken different calculations to try and evaluate the financial benefit to RBNZ as a result of the misleading statements during the four year period of offending. The Commission readily accepts the calculations are crude measurements, are subject to criticisms and margins of error. Both of the calculations undertaken by the Commission estimate the potential financial benefit to RBNZ to be over \$1,000,000.

[34] Despite the shortcomings in the Commission's calculations, they do provide a level of indication of the extent of potential financial benefit to RBNZ and corresponding potential financial prejudice to the consumer. Further, I note there is no agreed upon methodology by which a more accurate calculation could be made.

[35] I proceed with sentencing today on the basis RBNZ sold a large volume of specific pain products and significant profits were made from those sales to the detriment of the consumer.

*RBNZ's efforts to correct their misleading statements*

[36] As already noted, RBNZ took no steps when severe criticisms of their advertising first arose in May 2011. Nor were steps taken when RBA's website was under scrutiny in June 2015. The equivalent pages on the RBNZ website was not withdrawn until over two years later in July 2015. Further RBNZ was unresponsive to the Australian Secretary of the Department of Health directions to RBA to withdraw misleading representations from the packaging of the specific pain product range despite the packaging being the same in both countries.

[37] RBNZ continued with its misleading advertising despite events which it would have been aware of that made it blatantly apparent that it was in breach of its

lawful obligations to the New Zealand consumer. RBNZ submits it did have in place during the relevant time, compliance policies and procedures and staff training on those procedures and programmes. It would appear however that whatever measures were in place were inadequate and ineffectual. RBNZ is however responsibly reviewing its procedures, policies and training as a result of the Commission's investigation.

[38] Positive steps to remedy the misleading statements only occurred after the Commission commenced its investigation.

#### *The need to impose a deterrent penalty*

[39] It is trite to reiterate the need to deter and denounce grossly misleading statements that has the effect of consumers purchasing higher retail products or more products. Further, a high level of care is required with pharmaceutical products.

[40] I record RBNZ's submission that negative publicity has associated this prosecution. However, I have no evidence on the impact that publicity has had upon the Nurofen brand or its products. It is not a matter I intend to draw an inference on. It is not possible to accurately estimate the effects and there is no financial information that had been made available from which significant weight could be given to that submission.

#### *Mitigating factors*

[41] There are no mitigating features of the offending.

#### **Starting Point**

[42] The Commission have helpfully provided numerous cases from which it submits the appropriate starting point range is in the vicinity of \$1,550,000 to \$1,650,000. As part of the starting point range submitted the Commission has properly taken into account the increase in the maximum penalties under the Fair Trading Act during the offending period.

[43] RBNZ responsibly agrees with the Commission's submission as to the starting point range. In light of the consensus between counsel, and after consideration of the cases submitted, it is not necessarily for me to evaluate the authorities and refer to them in detail. I accept the starting point range submitted.

[44] There are no factors in relation to RBNZ that could be viewed as aggravating which would warrant the starting point being increased.

[45] There are however mitigating factors for which RBNZ is entitled to credit.

[46] The Commission records RBNZ has cooperated fully with the Commission's investigation including voluntarily providing information. I accept this is a significant factor. Investigations of this type by their very nature are time consuming and costly. Corporate cooperation with the Commission's requirements to enforcing the Fair Trading Act should be encouraged.

[47] In addition, RBNZ has expressed its remorse in its written submissions and through its counsel today. I record RBNZ sincerely regrets some of the representations it made may have misled consumers. The RBNZ written submissions include the following paragraph:

RBNZ apologies to New Zealand consumers and further advise that senior representatives of RBNZ are present at today's sentencing to acknowledge RBNZ will accept the outcome of the sentencing process of today and as a further display of its remorse for the Company's wrongdoing.

[48] RBNZ's general legal counsel is present in Court today.

[49] RBNZ point to the positive steps it has taken to demonstrate its genuine remorse for the offending. Those steps include:

- (a) Removing the relevant website content.
- (b) Providing Court enforceable undertakings to the Commission to rectify its packaging on specific pain products. Fully amended new packaging has now replaced the initial over labelling that occurred to ameliorate the earlier situation.

- (c) Cooperating with the Commission.
- (d) Entering guilty pleas to all charges at the earliest available opportunity.

[50] I accept RBNZ's expression of remorse which includes significant cooperation with the Commission investigation warrants a discreet credit in the range of 10 percent.

[51] The Commission also accepts that a further level of credit of 25 percent is warranted being the full level of credit available for early acknowledgement of wrong doing. I accept that level of credit is appropriate. There has been considerable savings to the criminal justice system and the Commission's resources by the prompt guilty pleas.

### **The Final Sentence**

[52] I adopt a starting point sentence of \$1,650,000. I accept a 10 percent credit shall be given for the factors stated. This equates to a reduction from the starting point of approximately \$160,000.

[53] I further accept that RBNZ is entitled to the full credit available of an additional 25 percent credit for its early guilty pleas accepting its wrong doing.

[54] The final total sentence that will be imposed is fines totalling \$1,080,000.

[55] I note when imposing this sentence it is slightly higher than the sentence jointly submitted by both the Commission and RBNZ. I readily acknowledge the authorities they have provided which sets out a process by which jointly recommended penalties are submitted in cases of this type. However, as both parties acknowledge it is appropriate that judicial discretion is not fettered by the recommended penalty approach. The penalty I have settled upon is within the range of that proposed and I therefore do not view my determination as undermining in any way or departing from the case law on recommended penalties.

[56] RBNZ will be sentenced as follows:

Charging Document Number	Fine Imposed
4848	\$73,000
4849	\$143,000
4839	\$73,000
4843	\$143,000
4836	\$73,000
4837	\$143,000
4844	\$73,000
4845	\$143,000
4845	\$73,000
4847	\$143,000
<b>Total</b>	<b>\$1,080,000</b>

[57] All fines are to be paid within the normal 28 days. In addition, against charging document 4849 will be Court costs in sum of \$1,500.



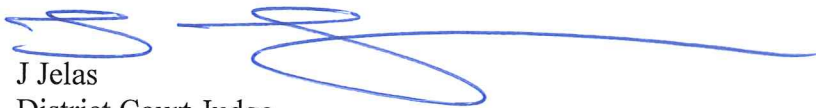
J Jelas  
District Court Judge

**Addendum**

[55] At sentencing, the fines I imposed on each of the charges was as follows:

Charging Document Number	Fine Imposed
4848	\$36,000
4849	\$72,000
4839	\$36,000
4843	\$72,000
4836	\$36,000
4837	\$72,000
4844	\$36,000
4845	\$72,000
4845	\$36,000
4847	\$72,000
<b>Total</b>	<b>\$540,000</b>

[56] The above amounts were wrongly calculated and only equate to a fine of \$540,000 which was not the intended final sum to be imposed as expressly stated in paragraph [54]. In reliance on rule 1.6 Criminal Procedure Rules 2012 the error has been rectified and the amounts specified at paragraph [56] imposed.

  
J Jelas  
District Court Judge