IN THE DISTRICT COURT
AT AUCKLAND

CRN 09004505626
CRN 09004505621
CRN 09004505620
CRN 09004505617
CRN 09004505731

THE COMMERCE COMMISSION
Informant

v

VODAFONE NEW ZEALAND LIMITED
Defendant

Date of Hearing: 18 July 2011

Appearances: N Flanagan and IM Brookie for the Informant
B Gray QC and MR Harborow for the Defendant

Date of Delivery of Sentence with Reasons: 12 August 2011

SENTENCING AND REASONS OF JUDGE RODERICK JOYCE QC

Preliminary

[1] This matter came before me on 18 July 2011 when I heard careful arguments from both sides of the case concerning the sentencing of the defendant on the charges shortly to be identified. Having heard those arguments I adjourned the proceedings until 29 July for decision.

[2] Unfortunately, however, I was thereafter unavoidably absent from the courthouse for an appreciable period, which explains why the conclusion of the sentencing was further adjourned until today.

Charges

[3] On 9 May 2011 the defendant, Vodafone New Zealand Limited (Vodafone), pleaded guilty to five charges under s 11 of the Fair Trading Act 1986. Although on their face the charges had been laid on 25 September 2009, the fact was (and I will revert to this at the end) that the charges now remaining comprise those left (so I was told) of an original 44 Vodafone Live!: charges which were, on the day the guilty pleas were entered, amended so as generally to be representative of the acts or omissions that had been the subject of complaint.

[4] What the remaining (and the subject of guilty pleas) charges shared was a reliance on s 40(1) and s 11 of the Fair Trading Act 1986 (the Act), in that the allegation in each case (which the guilty pleas admitted) was that Vodafone, being in trade, had engaged in conduct that was liable to mislead the public.

[5] The charges (numbered one to five under tab 1 of the Commission's submissions) were now specifically related to:

- Charge 1: 23 May 2007 to 28 July 2008.
- Charge 2: 4 October 2007.
- Charge 3: 12 July 2007 to 28 July 2008.
- Charge 4: 3 April 2008.
- Charge 5: 3 June 2008 to 28 July 2008.

[6] The maximum penalty for each of these offences (where the defendant is a body corporate) is a fine of $200,000. So, given five charges and in a case so extreme as to justify the maximum penalties, cumulative fines could amount to $1,000,000.00.

[7] At the hearing on 18 July the Commission sought one further amendment to the charge with the CRN ending 5626 so as to change the date "2 July" to "23 May" as is reflected in [5] above as regards the charge first-mentioned. It was confirmed

that there was no objection to this amendment which I duly made. The previous guilty plea was then confirmed as applicable to the amended charge.

The short case for the Commission

[8] The Commission's position, shortly put, was captured thus in paras 1.3-1.5 of its sentencing submissions:

> 1.3 The charges relate to conduct and representations made by the defendant in relation to Vodafone Live!, which is a service that allows access to a range of internet based functions via Vodafone mobile phones. The defendant told consumers that Vodafone Live! was free to browse, and that they would be warned before incurring charges. In fact, what consumers could and could not use for free was unclear, and they were often not warned before incurring substantial charges for services that they thought would cost them nothing.
>
> 1.4 The representations were widely disseminated, over a long period of time. The primary means of dissemination was the defendant's website Vodafone.co.nz, during the period from May 2007 to July 2008 (the Charge Period), but the misleading messages given to consumers were reinforced by banners and related messages displayed on handsets supplied by the defendant.
>
> 1.5 While in this case it is not possible to quantify the losses to consumers, it is agreed that the detriment was likely to have been significant. Moreover, mobile telephony and mobile internet is a critical area both for consumers and the wider economy, and what was misleading about the advertising in question went to the very heart of it. As a result, this is serious offending, long in duration and broad in impact, with significant harm done to consumers. The only proper course is a substantial deterrent penalty.

Agreed facts

[9] The facts were agreed in terms of the caption sheet, the contents of which are now replicated:

> **Summary of Facts**
>
> **Introduction**
>
> 1 The Defendant, Vodafone New Zealand Limited ("Vodafone"), is charged with five offences for engaging in conduct that was liable to mislead the public regarding the nature and/or characteristics of services, in breach of the Fair Trading Act 1986 ("the Act") between July 2007 and June 2008. The conduct occurred in the course of

advertising "Vodafone Live!" which is an internet service offered by the Defendant via consumers' mobile phones.

The Fair Trading Act 1986

2 The Fair Trading Act 1986 is designed to protect consumers from false or misleading conduct and representations by traders.

3 The Informant is a statutory body established under section 8 of the Commerce Act 1986. The Informant's purpose is to promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality goods and services and greater choice.

4 The Informant is responsible for enforcing the Act, which is an important vehicle for promoting dynamic and open markets. The Act requires businesses to ensure the information they provide to consumers is accurate, enabling consumers to make informed choices about goods and services. The Act also protects businesses that comply with the Act. In this way, the Act promotes effective competition because honest businesses are disadvantaged when consumers are mislead into buying products or services from competitors by the provision of false or misleading information.

Offences

5 Section 11 of the Act prohibits a person in trade from engaging in conduct that is "liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services."

6 Section 40 of the Act makes it an offence to breach section 11 which is punishable on summary conviction to a fine not exceeding $200,000 for each offence where the Defendant is a company.

Vodafone New Zealand Limited

7 Vodafone is a duly incorporated company with its registered office at Level 1, 20 Viaduct Harbour Avenue, Auckland. Vodafone provides a variety of telecommunication services and is one of the larger mobile phone service providers in New Zealand.

Vodafone Live!

8 Vodafone Live! is a service that allows mobile phone users access to a range of internet-based functions offered by Vodafone via their handsets. It has been described by Vodafone as a "walled garden" in that users are accessing the internet to use the functions offered by Vodafone but are not actually using the wider internet, such as other websites external to Vodafone. The service was described on Vodafone's website in July 2007 as:

> Vodafone Live! is a great combination of products and services from Vodafone that enables you to take, send and receive PXT, download new arcade style Java games and experience fantastic full colour

pictures to go with your news, sports and entertainment news! With Vodafone Live! you'll be able to do it all!

9 Vodafone made a number of representations on its website about the nature and pricing of its Vodafone Live! service between 23 May 2007 and 28 July 2008. These included:

- "Vodafone Live! charging is clear and simple. You only pay for what you buy, not for browsing or for the download itself."
- "In addition, you'll always be notified before you incur a charge, so you can browse as long as you like looking for the perfect purchase."
- "**Free Browsing** Browsing on Vodafone Live! is always free. Look at every menu, check out all the previews and spend as much time online as you like – it's all completely free. You don't pay to look, and you don't pay for your time online."
- '"The only exceptions are some online services such as Chat and some Email services – but you can't enter these areas without agreeing to pay, so you always know exactly where you stand."
- "It's free to browse – you only pay for what you download or buy."
- "Vodafone Live! is completely free to browse."
- "If you do decide to buy something or subscribe to a service, we'll tell you up front what it costs so you won't be surprised."
- "Through your Vodafone mobile you can access a rich online world anytime..."
- "On Vodafone Live! you only pay for the services or downloads you use."
- "You can browse Vodafone Live! and pay nothing!"
- "Vodafone Live! is absolutely free to explore, and you won't pay any GPRS data charges."

10 The menus on some of the cell phones supplied by Vodafone were configured in such a way that led the consumer to believe that, by proceeding through the menu options, they had entered Vodafone Live! because the Vodafone Live! heading was displayed as a banner across the top of the screen. Users at that point could manually enter web addresses to go online to various web pages under the impression that they were in Vodafone Live! because the 'Vodafone Live' heading remained across the top of the screen, even when

typing in an external web address. That heading was no longer displayed once the external web page was reached.

11 Consumers were accordingly able to access what appeared to be Vodafone Live! from their mobile phones and from there visit external websites unrelated to Vodafone. At no stage were they advised that they would be charged for access to the websites.

12 Moreover, Vodafone Live! contained a link to the online encyclopaedia, "Wikipedia". Upon clicking this link, users were taken to "Wikipedia" but were at no stage warned that they would incur charges. This was because the "Wikipedia" site had been zero-rated in Vodafone's billing system so that users did not incur charges. However, users incurred charges if, having arrived at the "Wikipedia" site, that site called for, or used, data from websites that had not been zero-rated in Vodafone's billing system. Accordingly, consumers incurred charges by using "Wikipedia" without warning, while under the impression that they were using Vodafone Live! for free.

13 Vodafone charged consumers who accessed external websites (as described in paragraphs 10 to 12 above) for data downloads. The rate charged for such data on the Vodafone casual plan was $11.25 (incl. GST) per megabyte (MB)[1]. This is a high cost for data and has resulted in significant charges to consumers, in some cases several hundred dollars. These consumers believed that they were not liable for charges because Vodafone Live was 'free to browse'. This belief was based on the representations outlined above.

14 In explanation, Vodafone said that the consumers referred to in paragraphs 10 and 11 above had not even reached Vodafone Live! and could not have been until they had entered the 'homepage' which would then have taken them through to 'Vodafone Live!'. Vodafone further said that customers could access the internet from Vodafone Live! but not by manually typing in a website.

15 Vodafone has accepted that there have been 'customer misconceptions' in relation to the 'Free to browse' component of Vodafone Live! and as a result it has since changed the way it charges for data services and has also deleted the claim 'Vodafone Live! - Free to Browse' from its advertising.

Losses to consumers

16 It is not possible to ascertain the losses to consumers caused by the breaches, but the parties agree that they were likely to have been significant, given the number of consumers affected and the large amounts charged. The Commission has received numerous complaints (31) from consumers in relation to Vodafone Live! Complainants incurred significant costs when they mistakenly believed that they were in Vodafone Live! and were therefore not subject to any charges (examples of these complaints are below).

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1 By way of example, an average length pop song of about four minutes will total approximately 4MB in standard 'mp3' compressed format.

Complainants further stated that they have entered various web addresses and visited websites, some of which offer free downloads of music, or other services and have 'surfed the net' or 'browsed' through the various sites and all the time have been under the impression that they are in 'Vodafone Live!'.

17 The resulting charges, which are billed at the high cost for data noted above, have come as a shock to consumers who believed that they had browsed and downloaded data for 'free'. For example:

(a) In May 2007, Neil Watts complained to Vodafone about data download charges of $619.10. When Mr Watts first complained, Vodafone offered to halve the data charges. On 27 June 2007, $284.00 was refunded to Mr Watts. On 6 August 2007, a further refund of $372.00 was made.

(b) In September 2007, Christine Steeples complained to Vodafone about data download charges of $600, incurred as a result of downloading about 20 songs. At that time, Vodafone refunded $300 of the charges. In September 2007, following a further telephone call from Ms Steeples, a further $100 was credited to her account. After further contact from Ms Steeples, Vodafone declined to refund the remaining amount. On 31 October 2008, Vodafone advised the Commission that the balance of $200 had been credited and would remain on Ms Steeples' account if the Commission concluded that Vodafone had breached the Fair Trading Act. Vodafone has since confirmed that the $200 credit will remain on Ms Steeples' account.

(c) In October 2007, Josh Cullen complained to Vodafone about data download charges, which he incurred as a result of downloading songs from the internet. Vodafone refused to provide a refund and Mr Cullen paid the charges. In July 2011, Vodafone refunded Mr Cullen $1333.88, which was the amount charged for data download charges between June 2007 and September 2007.

(d) In November 2007, William Hemi complained to Vodafone regarding a bill for $613.60 for data download charges. On 5 December 2007, Vodafone refunded $509.10 of the charges.

18 As at June 2006, Vodafone had approximately 2.1 million active mobile phone connections. That figure included on account and pre-paid connections, both of which had the ability to access Vodafone Live! during the relevant period. As at June 2007, Vodafone had approximately 2.2 million mobile phone connections. In 2006 – 2007, approximately 68% of all Vodafone's mobile phone connections were pre-paid. The casual data rate applied to all pre-paid connections during the relevant period. The remaining users were on account users, of which 92% did not have a data plan and were also on the casual rate for data use. Even those with a data plan were potentially affected as they may have used up some of their data allowance with downloads that they thought were free.

19 Vodafone has been unable to ascertain the total number of complaints received and/or refunds given in relation to this matter. This is for two main reasons:

(a) Vodafone does not hold any copies of complaints received prior to December 2007; and

(b) Although all refunds are recorded, Vodafone's procedures did not require reasons to be recorded where the amounts were less than $200 (for front line staff) or $1000 (for team managers).

20 The following table records Vodafone's total data related revenue (which includes any income received in relation to data downloaded from the internet) and all data related refunds, for the period June 2007 to July 2008:

Month[2]	Total Data Revenue[3]	Refunds	Customers Refunded
June 2007	1,356,058	134,616	1452
July 2007	1,386,756	230,358	2045
August 2007	1,569739	213,385	2219
September 2007	1,436,407	78,854	465
October 2007	1,590,583	132,265[4]	785
November 2007	1,732,537	312,667	1655
December 2007	1,721,361	252,467	1571
January 2008	1,831,262	177,720	1285
February 2008	1,547,134	387,083	1333
March 2008	1,611,745	258,347	1403
April 2008	1,624,907	625,006	1805
May 2008	1,802,967	336,301	1457
June 2008	1,467,553	282,995	1841
July 2008	1,475,034	202,033	1535
Totals:	$22,154,043	$3,624,097	20851

False or misleading representations

21 Charges have been laid for engaging in conduct liable to mislead the public as to Vodafone's mobile internet service (s11), namely for the representations outlined above and for omitting to tell consumers when they would incur data charges.

Other matters

22 Vodafone co-operated with the Commission's investigation. Vodafone has not previously appeared.

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2 All figures are as at month's end. Data is not available for May 2007.

3 Figures include revenue derived from both "on account" and pre-paid customers. The term "data download" includes charges relating to a number of services, such as: accessing the Internet using a mobile phone; using a mobile phone to access company computer systems while out of the office (for example, checking emails); and telemetry (sending and monitoring meter data); and Automated Vehicle Logistics (eg, GPS systems).

4 Figures for October refunds capture from 14 October only.

The Commission's submissions

[10] The Commission's submissions included a sampling of the reaction of some of the victims of the admitted offending. Given the problems of identification of losses, and thus numbers of victims, adverted to in the summary of facts, the samples were few, but it was not suggested that they were unreliable. So I consider that I can take them as illustrations of the consequences of the offending.

[11] The sampling indicated that:

- Vodafone was slow off the mark in respect of – moreover limited in its useful response to – the complaints of customers who were taken by surprise by the bills that they got;

- The impact of those bills would have been especially traumatic to those of limited means. It was thought, at least by a section of consumers, that "free to browse" meant "free to browse without limitation";

- The impact was not simply on the uneducated, uninformed, or unguarded. A long-time (and obviously well educated) Vodafone customer found himself led into the territory of cost without any appreciation that he had stepped into that. And it was troubling that, in that respect, he should also say this:

> "Worse than the loophole itself was the reaction from Vodafone, who essentially implied that I was an idiot and should have visited their website to check terms and conditions. Their attitude suggested that it was I who was at fault, they felt they were implying that I was the one trying to rip them off. After years of loyal custom in which I had never missed a bill payment, this was extremely disappointing and even hurtful. The ongoing battle I had with Vodafone over this issue was in many ways more stressful than the financial implications of an excessive bill... This caused me a great deal of ongoing stress and sleeplessness which affected both my work and my relationship with my partner... This has ultimately impacted on my overall level of trust of Vodafone and other large corporations. I was made to feel like an irrelevant and expendable statistic – which I suppose is what I am – by the way Vodafone refused to consider their responsibility to fairness".

- And in similar vein from another longstanding customer:

> "I felt as though I had been tricked and treated badly by Vodafone who did not seem interested in my complaint or what had happened. I did not want to affect my credit rating and felt intimidated into paying the account by the threats of debt collectors even though I felt I was in the right, so I paid the accounts.

Sentencing principles

[12] I did not understand either side of the case to question the relevance of the factors to be taken into account in arriving at an appropriate penalty under the Act as set out by Greig J in *Commerce Commission v LD Nathan and Co Limited* [1990] 2 NZLR 160, 165.

[13] These included:

- The objectives of the Act;
- The importance of any untrue statements made;
- The extent to which the statement in question departed from the truth;
- The degree of dissemination;
- The prejudice to consumers;
- The degree of wilfulness or carelessness (either or both or any) involved in the making of any statements;
- Whether any, and if so what, efforts had been made to correct representations; and
- The need to impose deterrent penalties.

[14] Obviously that case preceded the advent of the Sentencing Act 2002, a state of affairs recognised by Abbott DCJ in *Commerce Commission v Ticketek* [2007] DCR 910 where, after considering *Nathan,* His Honour referred to other factors of relevance in light of the Sentencing Act by adding to the list:

- The financial circumstances of the offender;
- Any guilty plea;
- Previous record of the offender.

[15] In fact, of course, the purposes and principles of the Sentencing Act encompass more than those matters.

[16] The objectives of the Fair Trading Act include ensuring open, honest and full disclosure so that a consumer is fully and accurately informed. These respect the idea that proper knowledge allows good judgment.

[17] In the general context of current day purposes and principles of sentencing, the Commission submitted that the conduct and representations in this case were particularly important because:

- They related to a key aspect of mobile phone services, namely internet access;
- Representations as to price were very important to consumers. The Commission contended that the use of the term "free" was a marketing tactic to entice the customer with a hope of exposing them to other services or products on offer: and a significant and enticing draw card for customers to use browsing services;
- The language used led naturally to the conclusions customers in fact reached, in particular:
    - The language was of a kind commonly associated with the internet and blurred the line between Vodafone Live! and the internet;
    - Assurances were given that comforted the customer into believing they would always be notified before incurring

charges, and this comfort would have been highly influential both on customers' decision to use Vodafone Live! and the extent of such use;

- The layout of the Vodafone Live! menus on mobile phone handsets was such that customers could start incurring charges with little more than a touch of a single button or by typing a website address into a field which appeared under a Vodafone Live! banner; and

- All these factors conspire to create a situation where customers could – and easily did – incur significant data charges that took them unawares. For the pay-as-you-go segment of the market[5] (approximately 68 percent) there was the additional difficulty that they did not receive bills and thus had no way of quickly determining just how it was that they had spent what they had.

[18] As to the degree of culpability, submissions were that:

- Vodafone was reckless in its conduct over a 15 month period. Although the representations were literally true, i.e. Vodafone Live! - *was* free to browse - the efficacy of that representation was contingent upon customers having a clear idea of its boundaries and those Vodafone made, or at least left, blurred.

[19] Moreover, said the Commission, it was obviously apparent to Vodafone quite early in the piece that its approach was causing difficulties and what they were. Here the Commission referred to paragraph 17 of the summary of facts[6]. The Commission's submission thus was that what may have begun as simple carelessness evolved into a level of culpability encompassing much more than just that.

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5 As to the size of the overall market at the time see para 18 of the summary of facts at my para [9].

6 Para [9] above.

[20] As to the extent to which what was put forward departed from the truth, the Commission – while accepting that the representations in themselves were literally true – pointed to the ultimate effect of the language employed by Vodafone as being such that (as Vodafone's guilty pleas acknowledged) consumers were liable to be – and in fact were - misled and that as a natural and reasonable consequence of Vodafone's conduct.

[21] As to the extent of the dissemination of the statements, this dissemination was largely on the website – in other words, theoretically unlimited – but also reinforced within the menus of Vodafone mobile phones themselves.

[22] The Commission said that the extent of prejudice or harm to consumers (or Vodafone's competitors) was incapable of any kind of precise quantification (and that is self-evident) but it was likely to have been significant[7]: that because of the sheer accessibility phones allowed and of the quantum of costs incurred when consumers unwittingly began to browse external internet sites under the impression they were doing so for free.

[23] Beyond that the Commission could not go because of the inbuilt limitations of Vodafone's internal reporting systems as mentioned in paras 16 and 19 of the summary of facts.

[24] It might be that, in many cases, losses for individual consumers were relatively small, but the overall profit to Vodafone must have been significant. A standard Vodafone response to complaints about data bill "shock" was said to have been to "up sell them" to a data plan, thereby increasing its revenues by another avenue. However, that assertion does not appear to be supported by the facts actually admitted.

[25] The matter of Vodafone's remorse, co-operation and remedial action was covered by the Commission's submissions under the heading of "Aggravating and mitigating features of the offender" to which I shall shortly come.

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7 See Vodafone's concession recorded in para 16 of the summary of facts at [9] above.

[26] Turning then to deterrence, the initially short (and accurate) submission was that this was paramount on the authorities, particularly so where the defendant stood to make a lot of money if customers were misled. In such a case the penalty must of course be sufficiently meaningful as to amount to significantly more than a licence fee for highly profitable offending (see, for example, *Megavitamin* below).

Sentencing Act 2002

[27] Counsel for the Commission then reviewed ss 7 and 8 of the Sentencing Act submitting, accurately and reasonably I would hold, that the following purposes were relevant here:

- Ensuring accountability in the context of consumer protection legislation;

- Promoting a sense of responsibility for the harm done by a defendant which is a key player in the mobile phone telecommunications market;

- Deterring it, and any like-minded traders, from offending in the same or any similar way, the Commission saying[8] here:

  > The informant submits that the penalty must be at a level to act as a real deterrent to the offender and other like-minded traders involved in the provision of key infrastructure services. This is a well recognised principle under the FTA (for example, see *Megavitamin Laboratories (NZ) Limited v Commerce Commission*[9]). If the penalty for breaching the FTA does not outweigh the time, effort and cost of having to carefully vet advertising materials calculated to influence large numbers of consumers, or the potentially significant commercial gain that may flow from such a breach, then future offending by this offender or others is unlikely to be deterred.

- The gravity of the offending, including the degree of culpability – here the Commission submitted that this offending was serious having regard to the nature and size of the market, the large number of

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8 And see also para [26] above.
9 (1995) 5 NZBLC 103, 834

customers affected and the scale of potential detriment. (The point about the duration of the offending was rehearsed in this context:)

- Consistency between like cases - it was here that the commission foreshadowed its considerable reliance on the *Telecom* case as discussed below.

[28] In terms of aggravating and mitigating features of the offending, and in some rehearsal of what had already been put forward, the Commission contended that this was a case with:

- "Huge" potential for harm, particularly having regard to the revenue generated; and, that was to be viewed in the context of -

- Offending which extended over 15 months throughout which Vodafone was receiving complaints.

Authorities

[29] The Commission then referred to three cases but it soon became apparent that it sought particularly to lay emphasis on *Commerce Commission v Telecom NZ Ltd* (CRI-2008-004-003904, Auckland District Court 7 December 2009, Burns DCJ).

[30] The extempore remarks of counsel for the Commission were principally focused on this case and its relevance to the present case.

[31] The stance of the Commission was that *Telecom* was "highly analogous" to the present prosecution. But in its written materials there was this significant (and necessary) acknowledgement:

> As is often the situation, it involved a penalty recommendation agreed as between the parties. The Court was required to consider and approve the proposed penalty. In doing so, the Court considered a number of broadly comparable authorities ...

[32] On that topic and in *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) Rodney Hansen J said at [18]:

> Finally, in discussing the general approach to fixing penalty, I acknowledge the submission that the task of the Court in cases where penalty has been agreed between the parties is not to embark on its own enquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range – see the judgment of the Full Federal Court in *NW Frozen Foods v ACCC* (1996) 71 FCR 285. As noted by the Court in that case and by Williams J in *Commerce Commission v Koppers*, there is a significant public benefit when corporations acknowledge wrongdoing, therefore avoiding time-consuming and costly investigation and litigation. The Court should play its part in providing such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[33] All that said, and of course rightly respected, I also note and subscribe to the observation of Judge Burns in *Telecom* concerning that citation where he said at [9]:

> I do record, however, that if it continued for a significant number of cases it could become self-perpetuating, and at some stage the Court does need to bring its independent mind to bear on any agreed facts...

And I shall return to this subject before this judgment concludes.

Chasm between parties as regards penalty

[34] The present case is not one where the parties brought to the Court an agreed monetary penalty figure or even, for that matter, an agreed range of figures for monetary penalty. To the contrary, they were well apart on that score.

[35] The Commission contended that:

(a) A starting point in the range between $700,000 and $800,000 was appropriate in this case;

(b) A net discount no greater than 25 percent (should) be applied in recognition of all mitigating features of the offender; and

(c) A resulting appropriate sentencing range lay between $525,000 and $600,000.

[36] These contentions were put forward with a recognition of the principle of totality and of the fact that (in terms practical) whatever total sum the Court itself might ultimately decide upon, it would be of comparatively little importance how that was attached to, or (if the case) divided between or amongst, the various charges.

[37] It will not have gone un-noticed that, given there are now but five charges, the higher end of the suggested starting point represents 80 percent of the mathematically possible. One might, then, be forgiven for thinking that this indicated no better than a bid (too far) to regain the fiscal ground lost in the process of charge number reductions, a topic I discuss at [103]-[109] below. In stark contrast, the yet to be discussed submissions for Vodafone ended on the note that a starting point of $300,000 to $350,000 should be reduced by 30 to 35 percent, to reach a final sentence in the range of $195,000 to $245,000.

Comparison with Telecom

[38] The Commission came very close to asserting that it was implied in *Telecom* that the agreed $500,000 figure was derived from a starting point of $1,000,000 that was subjected to a discount of 50 percent. And Telecom, said the Commission, had refunded many millions of dollars to customers and pleaded guilty at the first opportunity. Moreover, it was a case decided before *Hessell* which has since capped the maximum discount for a guilty plea (as such) at 25 percent.

[39] The *Telecom* sentencing was on 17 charges relating to representations made over seven months across a wide media spectrum with the misleading statements being described as having reached "near saturation levels" (in terms of publicity) at the times in question.

[40] The misleading representations related to claims of "unlimited internet usage", "maximum download speeds" and to "Xtra Broadband has been unleashed". The reality was one of a specific traffic management policy with a proportion of customers receiving lesser speeds on the new package than on their old.

[41] Telecom had been exemplary in its co-operation with the investigation. Its efforts to reach and pay refunds to customers affected by the deficiencies of what was called the "Go Large" plan led to refunds close to $8,500,000 to nearly 70,000 customers.

[42] What is common to both cases is that they have related to a significant telecommunication infrastructure market used every day by many New Zealanders: what was then a just-developing market where misstatements had the potential to do much damage.

[43] In *Telecom*, so the Commission argued, the key appeal to consumers of faster and unlimited services was more peripheral than were central the misleading aspects of the statements conveyed by Vodafone to consumers generally, and to its own customers particularly.

[44] But as against that it was accepted that *Telecom* involved more media and may have had greater visibility to consumers even be it that its conduct only covered seven as opposed to the 15 months of Vodafone.

[45] What the Commerce Commission also acknowledged was that Telecom's misrepresentations had involved two separate (albeit closely linked) ones, whereas Vodafone's wrongdoing, while including more than one kind of misrepresentation, involved misrepresentations of largely the same character – hence, conceded the Commission, the justification on that account for a significantly lower starting point.

[46] But the Commission then went on to submit that, in contrast to Telecom's remedial efforts, Vodafone had fallen down badly in its treatment of customers who complained – it had been slow off the mark in terms of doing anything useful about the complaints. Its apparent attitude (for a large part of the period) was one of indifference to repeated expressions of customer concerns.

[47] The Commission did not seek to make too much of the substantial refunds made by Telecom: this, so I took it, because in the way that Vodafone's internal systems were then set up (and given that a large number of Vodafone's customers

were pay-as-you-go) the identification of individual customers entitled to compensation, let alone the implementation of payment of that, was less than easy – more often than not, in fact, quite beyond practicalities.

[48] Changing tack again, (or returning to an earlier lay line) the Commission said that Telecom had, broadly speaking, looked for solutions and thus to ameliorate the problems created by its conduct, whereas Vodafone had adopted, for a significant period at least, a staunch, if not obdurate, approach.

[49] I note here my view that affidavit evidence provided for Vodafone about steps it had taken to reduce the risk of what it called "bill shock" can readily be read as an attempt to elide the point that it was not "bill shock" of itself but, rather, the conduct creating the problems that was the issue. I agree that "bill shock" remediation was, as Mr Flanagan put it for the Commission, like having an ambulance at the bottom of the cliff.

[50] After referring to other authorities which I see no need specifically to discuss the Commission's written argument had closed in terms that:

> This was a serious and long-lasting breach of the Fair Trading Act by a major corporate defendant. The conduct was in relation to a key product central to the lives of most New Zealanders, mobile phones, at a time when the particular feature of it at issue (mobile internet) was in its infancy. Falsities went to the heart of what was advertised. While the harm to consumers cannot be precisely assessed, there is little doubt it was significant. Despite that, Vodafone persisted with the conduct long after customers complained.

Submissions for Vodafone

[51] Mr Gray QC began by noting that Vodafone and the Commission were in agreement that sentence was to be imposed on the basis of the facts in the summary of facts set out earlier.

[52] He also prefaced Vodafone's submissions with an unreserved public apology for its transgressions. It was a very real apology, unhedged by any "ifs" or "buts".

[53] He then explained that Vodafone Live! was Vodafone's first service offering internet-based functions on mobile phones as are now, of course, a commonplace. Vodafone had seen this initiative as a "walled" garden in that it was a portal to certain limited internet products and services.

[54] Vodafone's intention was said to have been to allow its customers to experience certain internet-type functions on a restricted basis in a "financially safe" environment. If that was so then, self-evidently, that did not prove the case.

[55] Vodafone acknowledged, through counsel, that the service had not proved "absolutely perfect". It had conveyed by its advertising that customers would be "free to browse" and would be notified before incurring a charge. The statements were, it was said, in the main true with the exception - one arising (was the suggestion) from a "technical oversight" - that Vodafone had failed to make sufficiently clear to users the distinction between Vodafone Live! and the wider internet. It had failed always to notify users at or of the point where they would begin to incur data charges if they ventured further.

[56] Vodafone sought to illustrate (with the assistance of a series of photographs) that some models of cellphones then in use on its network were so configured that the Vodafone Live! heading outstayed its proper welcome and that meant users might not appreciate that they had passed from, if you will, the free to the 'cost' zones.

[57] Charges could particularly be incurred when, per medium of hyperlinks or their cellphone equivalent, customers roamed from Vodafone Live! to Wikipedia and thence to its source sites so that "some consumers incurred high data charges which came as a shock".

[58] I was not persuaded that to describe the problem as being one of "technical oversight" was duly to recognise the level of mismanagement.

[59] It seemed to me when counsel was addressing, and remains my view, that it is extraordinary that a concern like Vodafone fell down in such an elementary way: fell down on account a failure to check that the entire range (all makes and models) of

phones it was selling and providing services to (which must surely have been identifiable to it) would be as one in terms of clarity of on screen demarcation of the line beyond which "free" ceased to be and "charge" became the case.

[60] As counsel was bound to concede, if Vodafone had taken the elementary step of checking, and in that respect vetting, its phones, the problem would surely not have happened. The accurate (literally speaking) message conveyed by the representations of Vodafone would have been accurate in useful and functional terms in every case.

[61] Of course, as has forever been said, hindsight is a wonderful thing. But it did seem – and still does – to me that Vodafone let itself down badly here and thus set the scene for what ensued.

[62] That is not to suggest at all that the error (of omission) in that respect was other than inadvertent, but it is to say that, in the Court's view, the level of carelessness was high for such an obviously sophisticated enterprise.

[63] However, a point well made for Vodafone was that taken from the remarks of Judge Mathers in *Commerce Commission v Clear Communications (NZ) Limited* (CRN 0044036015, District Court North Shore, 7 November 2001) where she said:

> Where there are large corporates it does not seem to me that the differences in the many different penalties cited to me will do much for deterrence. Of course there must be a penalty indicating teeth in the legislation but I also consider that the prosecution and conviction of a court is very significant and works as a significant deterrent. In these days of brand image and corporate identity, the publication of a corporate's breach of the Fair Trading Act cannot be underestimated.

[64] I respectfully agree. The media was very much present in court when I heard counsel's submissions and, during the time between the Court hearing those and its ability today to deliver the outcome, there has been media inquiry of the registry as to when that delivery would occur: in other words, there has never been any risk of Vodafone avoiding significant, (and obviously negative) publicity as a consequence of the present case.

[65] That undoubtedly shows that in this kind of case, at least, the Court may be confident that the outcome will not be lost on the public at large, not to forget the offender's competitors.

[66] There is, one might say, a very effective humiliation involved in the culmination of prosecution process and that must not be lost to sight in the final, fiscal, round-up.

[67] Vodafone was obviously very conscious of the value placed by the Commission on *Telecom* as a useful precedent. Counsel rehearsed the absence in *Telecom* (because of the level of agreement as to outcome) of any obvious starting point indicator.

[68] Counsel was right to say that any attempt to deduce what the starting point might have been was problematic – no better than a speculative (and so unproductive) exercise; reverse engineering of that kind was not practicable.

[69] Moreover Telecom had had prior convictions (whereas Vodafone had none) and thus it was conceivable that a starting point for penalty (had any been identifiable) would have been one increased on that account.

[70] It was, counsel submitted and I agree, in fact impossible to ascertain (in terms of anything like reliable figures) anything useful on that account from *Telecom*.

[71] In any event, Vodafone stoutly contested the suggestion that the two cases were "highly analogous". The misleading statements of Telecom had been aptly described as reaching near saturation levels - as overwhelming and widespread.

[72] In the case of *Telecom* a number not far short of 30,000 customers had been highly or moderately impacted.

[73] Here the statements were to be found on a page or section or two of Vodafone's website, nowhere else. (But the inadequacies of various phones in terms of their capacity safely to carry the then novel facility must not be overlooked here.)

[74] As I discussed earlier, it has not been possible to ascertain comparative numbers here (31 customers had complained to the Commission). One can reasonably and fairly infer (and it was a concession recorded in the summary of facts) that a significant proportion of customers likely suffered unexpected financial consequences, but one cannot say how comparable that proportion might have been with *Telecom*.

Agreed penalties

[75] I spoke earlier about agreed penalties. Vodafone drew attention to the observations of Finkelstein J in *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited* [2001] FCA 383 that:

> 6 ... decisions which sanction agreed penalties are not a good yardstick against which to measure whether what is agreed in later cases is within the range of appropriate penalties. This is because the agreed penalty need not be the penalty that would have been imposed by the Court, although the penalty was not inappropriate.

[76] I pay great respect to those observations knowing of the high reputation enjoyed by Finkelstein J in, relevant to cases of this kind, Australian legal circles. And what, with respect, His Honour says is plain and good common sense.

The Nathan principles

[77] Counsel for Vodafone moved on to canvass matters under the *Nathan* headings earlier used by the Commission, this as I now summarise:

> **Importance of statement/conduct**
>
> Under this heading there was an acceptance of an absence of clarity about the distinction between Vodafone Live! and the wider internet and that this lack of distinction was important given that, when the line was crossed, data charges were incurred.

Degree of culpability

Vodafone submitted that to be "about mid range". It was emphasised that it did not deliberately set out to deceive nor has it been suggested that that was the case. Here the presentation of the menus on some phones was rehearsed, that in the context of the problems they caused.

The submission was that Vodafone had done its best with a new technology to ensure that all (potential) users of the service were fully informed. (But, as I have already said, the fact is that it fell down in what surely was a rather rudimentary way. It may be that a fair number of customers were adept enough not to fall into the traps that were there, but I should have thought it obvious that one such as Vodafone must adhere to technological development practices incorporating comprehensive attention to achieving failsafe – or as near to as can be - outcomes.)

As to the time over which the problems subsisted, Vodafone accepted there was justification for an upward adjustment but, it said, to a level recognising mid-range (as opposed to the Commission's claim of high level) offending.

Extent to which conduct/statement departed from the truth

It was accepted that the statement that users would always be notified before incurring a charge was not always true. (I will not go over again what I have already rehearsed more than once on that account.)

Extent of dissemination

The statements were on the Vodafone Live! section of Vodafone's website and that the facility itself was available on most internet-capable phones at the time. But the representations had not been more broadly published in the print or electronic media.

Extent of prejudice or harm

Vodafone submitted that it was difficult – if not impossible – the level of actual harm to be assessed and that the Court should be cautious about the table at paragraph 20 of the summary of facts, notwithstanding the inclusion of its contents in what was an agreed in that respect document. The table included total data revenue and total data refunds, i.e. was not simply referable (I was told) to Vodafone Live!

(I have already agreed – see earlier – that there are real uncertainties in this area, and it would be quite wrong to assume the worst.)

Vodafone set about a comparison of its case with that of *Westpac* but I do not count it necessary to adumbrate that analysis here, nor either a comparison made with *Ribena.*

[78] Coming to the end of its submissions concerning the relevance of *Telecom*, Vodafone, through counsel, came back to the concerns expressed by Judge Burns – the "self-perpetuation" point. (Here I would renew, too, the wise caution of Finkelstein J and add that, in bringing an agreed penalty forward, parties to prosecutions of this kind may well factor in matters which would not be within the Court's sentencing jurisdiction province.)

[79] As foreshadowed at [37], Vodafone submitted that, in the present case, a "final fine" in the vicinity earlier mentioned of $195,000 to $245,000 was appropriate. It specifically summarised its contentions concerning the limited assistance provided by *Telecom* in these terms:

(a) The untrue statements were very important in *Telecom* as Telecom was promoting the plans as unconstrained - as fast and limitless: the impression given that this was a major change to the status quo.

(b) *Telecom's* culpability was high for reasons including that:

(i) The statements were very widely disseminated by mail, press, radio, television and in store;

(ii) The extent of harm to customers was significant and ascertainably so; and

(iii) Telecom had not been a first offender. Moreover, *Telecom* was a stand-alone sentence when contrasted with *Ribena* and *Westpac*.

Further discussion

[80] Circumstances do alter cases. In one of the early cases under the Fair Trading Act, *Inger v Commerce Commission* (HC Auckland, AP265/89, 5 April 1990), Wylie J sounded a note of caution at p 6 which, said Vodafone, was still apposite and I agree:

> ... the circumstances of cases will vary infinitely and while some degree of relatively should be preserved by the Courts, direct comparisons will seldom be possible and are likely to be misleading without a careful comparison of the facts.

[81] Vodafone emphasised the problematic nature of what I call comparison penalty shopping in these kinds of cases. Given the variety of the actual scenarios and the pattern of invitations to sanction agreed penalties, I agree that Vodafone had a sound enough point here.

[82] As already noted, Telecom was better able to identify the consequences for the benefit of the Commission than the systems of Vodafone allowed. Telecom's promotions apparently related to plans to which customers signed up, whereas a very significant proportion of the customers using Vodafone Live! were apparently unidentifiable and thus incapable of featuring in any comprehensive audit.

[83] The Crimes Act identifies a vast range of distinct offences. The charge itself will identify the category and the door is then open - save in the case of rare (in the sense of infrequently met) kinds of offending – to a range of quite similar cases.

[84] In other words, offending which is covered by the Crimes Act is, generally speaking, offending which is much easier to categorise and, with the right category established, to compare with other cases.

[85] But a prosecution of this type under the Fair Trading Act, where the elements of the offence itself are deliberately and necessarily writ large and wide, is much more likely to require, or at least justify, principal attention to particular to the case at hand facts (and their commercial context). But that said, simply and completely to ignore what has gone before would be quite wrong: that because those concerned are entitled to at least a general idea of the likely consequences of offending.

[86] I said at the beginning that the upper fiscal limit, given the number of charges, was $1,000,000: that, on a cumulative approach, is the maximum sentence available.

[87] For the reasons that I have discussed, arriving at a starting figure in this kind of case necessarily involves much that is in the nature of a value judgment. A sensible level of caution is called for, as one can never know what very much worse case may be waiting just around the proverbial corner. Hence the level of astonishment at least implied by my remarks at [37] above.

[88] As I have been discussing the respective submissions and arguments presented, I have from time to time offered my own observations (and I have expressed some conclusions) on those. I have kept those observations and conclusions in my thinking while working towards recognition of a starting point.

[89] I do count it particularly significant that the cause of much of the problem has been identified in terms betraying an error that was elementary: an error one would not have expected of what, in New Zealand terms, is a corporate giant in the telecommunications industry. At the same time, I do recognise that it was in that respect a 'sin' of omission rather than commission.

[90] I also recognise as a significant factor that, instead of getting on to the problem and quickly setting out to fix it, the impression is that over the time in

question – at least for much of that time – Vodafone turned Nelson's eye to the problem, or at least failed to take it anywhere near as seriously as it ought to have done.

[91] The human cost (the effect on customers or consumers) is incapable of anything like accurate measurement but the much earlier referred to victim impact statements (though not there in sufficient number as would justify statistical type conclusion) are, in light of the problem disclosed, certainly unsurprising.

[92] Vodafone's shortcomings must, in my view, have had a very real impact on many consumers or customers. The money sums in question might have meant nothing to someone of considerable means but pay-as-you-go customers are surely not in that category: nor either would be but a miniscule number of contract customers. And in any event, no-one – rich or poor – should ever have to pay what, properly pre-warned, they could avoid paying.

[93] However, and as already mentioned, the fact of its conviction (and the high level of publicity that will be given) will of itself be both a significant penalty and, hopefully, a very effective deterrent.

Starting point

[94] In the light of all I have touched upon, and making the best I can of the discrete elements of the case, as considered or discussed above, my judgment (reached with the necessary eye to the least restrictive outcome principle and its partner in sentencing, the totality principle) is that the appropriate starting point in this case is one of an overall fine of $580,000.

Discounts

[95] It was submitted that particular factors justified a stand-alone reduction in the vicinity of 5 to 10 percent. Here there was a return to the matter of this being Vodafone's first offending under the Fair Trading Act and thus to its entitlement to call in by way of mitigation its prior good record. I accept that.

[96] There was then the uncontested element of the level of co-operation with the Commission. I was told that, as well as complying with formal requests for information, Vodafone readily supplied other information when that was informally sought.

[97] Then, too, there is the unqualified apology to the public given by lead counsel for Vodafone at the beginning of his submissions and to be found in writing in its written materials.

[98] In my judgment those factors justify an overall allowance on their own of 7.5 percent before attention is given to the guilty plea credit, that being the final topic I must consider[10].

[99] *Hessell* in the Supreme Court says that the maximum allowance for guilty pleas as such is 25 percent. As to the discrete to any particular case percentage, McGrath J said at [62]:

> ... The only way in which the many variable circumstances of individual cases which are relevant to a guilty plea can properly be identified is by requiring their evaluation by the sentencing judge, and allowing that judge scope in light of the conclusion he or she reaches to give the most appropriate recognition of the guilty plea in fixing the sentence.

[100] Added at [65] was this:

> ... the policy reasons for giving credit for guilty pleas in sentencing do not justify an approach which treats as irrelevant, or of peripheral relevance, the circumstances in which the plea is entered and what they indicate about the acceptance of responsibility for the offending. The credit given should also legitimately reflect the benefits provided to the system and to participants in it. Overall, the sentencing task remains one of evaluation that leads to what the judge is satisfied is the right sentence for offending in light of the offender's acknowledgement of guilty and all other relevant circumstances.

[101] Those last observations might equally of course have been made in the context of pre-Sentencing Act sentencing principles. That should not surprise: the Act does not arise from scribings on a clean slate – in fair part it makes statute law of common law sentencing principles.

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[10] Applied after all other factors have been considered: see *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607. And see, most recently, *R v Clifford* [2011] NZCA 360 (delivered 3/8/11) at [60].

[102] The Court recognised (see para [70] of *Hessell*) that the timing of a guilty plea was a relevant circumstance, but only one relevant circumstance; likewise that the principle of plea at "the first reasonable opportunity" was flexible in the sense of being something "for particular inquiry rather than formalistic quantification".

[103] My understanding is that the Commission originally laid 412 charges alleging six discrete breaches of the Fair Trading Act across six different advertising campaigns (Vodafone Live! being one of those), summonses being served in October 2009. In relation to Vodafone Live! (and again so I understand) the charges laid were 44, 31 under s 13 and 13 alternative charges under s 11 of the Act.

[104] Vodafone considered from the outset that the Commission had overcharged. It wrote to the Commission expressing its concerns in that respect at the beginning of last year. The invitation was to withdraw 185 alternative charges. The Commission did not go along with that, so "not guilty" pleas were entered to all charges in late February 2010.

[105] There was then an application, not in the end pursued, for dismissal of charges on the basis, so I understand, that certain of them were duplicitous.

[106] I was also advised that charging in respect of Vodafone Live! had extended to individual charges for isolated individual sentences on the website pages, a form of dissection followed by tissue separation which is not to be encouraged.

[107] By mid 2010 there was still no resolution but, said Vodafone, it remained willing to explore one. It is obvious, and understandable, that discussions on this account should have been consuming of time over a significant period of that.

[108] By March this year Vodafone had advised the Commission that it would plead guilty to the Vodafone Live! campaign and defend the rest.

[109] Further discussions followed. A point was later reached, so I am told, where the Commission indicated a willingness to seek the amendment of some – and the withdrawal of a fair number of other – charges. That apparently set off another

round of lengthy discussions leading to the pleas entered here, as earlier recorded, in respect of the now remaining Vodafone Live! - representative as they then became - quiver of charges.

[110] I find nothing in that narrative, supported as it was by senior counsel in his submissions for Vodafone, such as should stand in the way of a discount set at the *Hessell* maximum of 25 percent for the pleas as such. After all, the pleas were entered immediately the parties had finally worked through their differences over the level of charging and, in that same process, so I deduce, reached a complete accord concerning the pertinent facts.

[111] I make the further point that, when a case like this goes to trial in this Court (that which is the workhorse of the Court system and so has innumerable cases to hear) it makes substantial inroads into time that would otherwise have been devoted to some number of other cases. So successful (even be they prolonged) efforts to reach an overall accord should clearly be recognised.

[112] Hence a 25% discount for the guilty pleas.

Resultant arithmetic

Starting point	$580,000
Less 7.5 percent discount for mitigating factors	($ 43,500)
	$536,500
Less 25 percent discount for guilty pleas	($134,125)
	$402,375

Final outcome

[113] As a matter of pragmatic convenience I allocate the overall penalty across the five informations equally, thus:

5617	$ 80,475
5620	$ 80,475

5621	$ 80,475
5626	$ 80,475
5731	$ 80,475
	$402,375

[114] So on each of these informations Vodafone is convicted and fined $80,475 plus Court costs on 5626 only[11].

Roderick Joyce QC
District Court Judge

[11] When I first announced the outcome in Court I attached the overall fine amount to one of the informations in terms that there would be a conviction and discharge on the rest. When it was pointed out that this was in error (the maximum penalty for any one of the offences being $200,000) I corrected that error in the terms set out in paras [113]-[114]. The jurisdiction for so doing is found in s 77 of the Summary Proceedings Act 1957.