IN THE DISTRICT COURT
AT DUNEDIN

I TE KŌTI-Ā-ROHE
KI ŌTEPOTI

CRI-2016-004-012775
[2018] NZDC 26000

COMMERCE COMMISSION
Prosecutor

v

CAVAN JOHN JAMES FORDE
Defendant

Hearing:	19 November 2018
Appearances:	S Lowery for the Prosecutor R Latton for the Defendant
Judgment:	19 November 2018

NOTES OF JUDGE M A CROSBIE ON SENTENCING

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[1] Mr Cavan Forde who is for sentence on three representative charges under s 10 Fair Trading 1986 (the Act). The three charges relate to a prosecution under Act relating to two building products, the first being autoclaved aerated concrete or AAC panels and the second, a Supercrete 50 cladding system. The three representative charges against Mr Forde relate to representations made between May 2009 and December 2012 that were liable to mislead the public.

[2] The summary of facts is extensive and a copy has been made available to the press. However, an abridged version is that Mr Cavan Forde was the founder and controlling mind of the Cavan Forde Group of companies known as CFG. During the period of the proceedings CFG operated as an importer, manufacturer and national wholesale supplier of AAC and related building products and the business included

the supply of cladding systems comprising AAC panels or blocks, mounting systems, coating textures and sealants.

[3] During the period May 2009 to December 2012 CFG used a network of regional distributors to sell its cladding systems and related building products. Two of those distributors, Messrs Campbell and Middleditch, have pleaded to and been sentenced separately in relation to charges under the Act concerning them. CFG was responsible for marketing the systems and products nationally.

[4] Initially all of CFG's AAC panels were the "Hebel" brand imported from CSR Limited in Australia. I record that there is a victim impact statement from the general manager of CSR before the Court that I will come back to. Hebel AAC panels were made under licence from the German Xella Group of companies which authorised the use of the Hebel brand. The CSR panels sold in New Zealand were manufactured in Australia by CSR under licence. The summary says that Hebel is a brand associated with quality AAC products with a point of difference being that during the charge period Hebel AAC panels were manufactured in Australia while competitors came out of China.

[5] The summary says that in the mid-2000s the CFG's market share was threatened by competitors selling 50 millimetre AAC panels made in China. Those panels were attractive because they were cheaper than the thicker Hebel panels, the thinnest of which was 75 millimetres. To deal with this market threat, CFG requested CSR Australia to manufacture 50 millimetre Hebel AAC panels. CSR declined. CFG then opted to obtain 50 millimetre AAC panels from China where some of its competitors' panels were manufactured. From 2007 to mid-1010 those 50 millimetre panels were manufactured in China and offered, distributed, supplied by CFG and branded as Supercrete 50, also a cladding system.

[6] In early 2010 CSR Australia began to manufacture 50 millimetre AAC panels meaning CFG was able to offer Australian made 50 millimetre AAC to customers for the first time. In around 2010 CFG imported these and distributed them and, with CSR's agreement, they were branded Supercrete 50 and also had the CSR Hebel logo on the packaging. In December 2012 CSR cancelled its supply agreement with CFG

although it offered to supply Hebel on a non-exclusive basis. From that point, CFG ceased to receive any supply from CSR and relied exclusively on its Chinese suppliers.

[7] The three charges that Mr Forde has entered guilty pleas to amount to admissions that he made representations liable to create the incorrect impression that, first, AAC panels that he or his company supplied or offered to supply were manufactured in Australia under the brand name Hebel when they were manufactured in China. Second, that the CFG Supercrete 50 cladding system was endorsed by Opus International Consultants when it had not been.

[8] The representations were made through design guides that were available to both the industry and consumers in hard copy and on a website Hebel.co.nz. I have been referred to the design guides and been taken to aspects of the earliest one in particular by Mr Latton today.

Charge CRN 5759

[9] Two versions of CFG Supercrete design guides contained material liable to mislead the public. The first is the 2009 design guide that I am told was published from at least 23 May 2009 till 14 March 2011. That accounts for the charge in CRN ending 5759. Parts of the guide create the impression that CFG Supercrete 50 cladding system contained Hebel AAC panels manufactured by CSR. While there is some dispute over the extent and characterisation of the misrepresentations, it is agreed that, first, the front page displayed a Hebel logo at the bottom. Second, it represented that the systems in the design guide, "Are only to be used with Hebel Supercrete products manufactured by CSR Hebel Australia and distributed by CFG Concrete Limited". It also stated "This literature is not permitted to be used for other types of AAC including Hebel Supercrete from other manufacturers". Further, that "The Supercrete 50 cladding systems vary from the 75 millimetre Hebel Supercrete panel cladding system in panel thickness, panel screw length and available panel lengths." It is also agreed that the guide contained an installation diagram that described the 50 millimetre AAC panel as Hebel Supercrete panel.

[10] Mr Latton spent some time stressing that this statement was the extent of the misrepresentations. He submits that when one sits back and looks at the overall context and size of the guide, they were very much in a minor category. The parties agree that the document, or at least parts of it, created a misleading impression about the types of panels in the Supercrete 50 cladding system.

Charge CRN 5766

[11] The second misrepresentation relates to the second design guide that covers two versions of the design guide (versions 1.9 and 2.2) published from 20 July 2011 until at least 7 February 2013. This was also on CFG's website. This relates to charge ending 5766, representing the logo of Opus, an independent appraiser, on the front page of the 2012 guide. This created an impression that Opus endorsed CFG Supercrete 50 cladding system when Opus had not in fact appraised that system. Opus had in fact appraised a Supercrete 75 system which is accepted had some elements in common with Supercrete 50.

Charge CRN 577

[12] The third charge is contained in CRN 577 and it relates to packaging. In late 2012 CFG used packaging on 18 pellets of Chinese 50 millimetre AAC panels liable to mislead the public by creating the impression that the AAC panels within were Hebel. They were not and featured 0800 HEBEL and the CFG Hebel website. The Court is told that Mr Forde was provided with the proof of the packaging while a director before its release. He sent an email on 24 December 2012 to distributors creating the impression that the product from Asian suppliers could be marketed as Hebel. However, the Commission accept that this could have been understood by some to refer to other CFG products as Hebel over which CFG did have a trademark.

[13] On my analysis, this charge is the least serious of all three. As I have commented, it relates to packaging for a product that had already been ordered. The packaging could perhaps be described more as gratuitous than inducing anyone into purchase the produce.

Approach to sentencing

[14] I am bound to take the standardised approach to sentencing and look at the aggravating and mitigating features of the offending in order to assess a starting point and then the aggravating and mitigating features of the offender. I also take into account the purposes and principles of sentencing.

[15] The Court has been provided with guidance in a decision of *Commerce Commission v L D Nathan & Co Ltd* which contains principles that largely mirror the relevant considerations under s 7 to 9 Sentencing Act 2002. Those principles were held to include: the objectives of the Fair Trading Act; the importance of any untrue statements made; the degree of wilfulness or carelessness involved in making such a statement; the extent to which statements depart from the truth, the degree of dissemination; resulting prejudice; whether efforts were made to correct statements and, if so, what efforts; and the need to impose deterrent penalties.[1]

[16] Both Mr Lowery and Mr Latton in extensive written submissions have dealt with all such aspects. They are agreed as to the level of fine. Where they disagree is on assessment of Mr Forde's culpability.

[17] The Fair Trading Act is, and has been, a cornerstone of consumer protection in New Zealand for three decades. It is designed to provide that the interests of consumers are protected to ensure effective business competition and enable consumers and businesses to participate in commerce effectively. The dominant purposes of sentencing Mr Forde today are therefore: to hold him to account; to denounce his conduct as in breach of the principles under the Act; and to provide a sentence that deters other companies and directors from acting in a similar manner.

[18] I accept that by his plea Mr Forde accepts accountability and his role in what, on any analysis, is a much larger misuse of the brand when one incorporates the conduct of Messrs Campbell and Middleditch.

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[1] *Commerce Commission v L D Nathan & Co Ltd* [1990] 2 NZLR 160

[19] The Commission submits, and I accept, that the representations made were important as they involve cladding on homes which are regarded as a principal asset of many New Zealanders. It is not lost on the Court that cladding is a matter of some importance and must be seen so against a background of enormous loss and suffering as a result of non-weathertight homes. It follows that builders and consumers ought to have confidence in what they are using, purchasing and know that they are dealing with accurate representations.

[20] The Commission points to four features of the misrepresentations being: branding of Hebel against non-Hebel; the country of origin; manufacture; and third party endorsement. As a result the Commission submits that Mr Forde's conduct should be viewed as highly careless or negligent. The Commission submits that, as the controlling mind of CFG, he knew that Chinese-manufactured 50 millimetre AAC panels that his company was supplying were not Hebel and that during the charging period Hebel AAC was viewed as a quality offering amongst the various AAC products in the New Zealand market. The Commission submits that, against that backdrop, it was important for Mr Forde to ensure that the products he and his company supplied or offered to supply were marketed accurately. I agree that it is important the products are supplied and marketed accurately.

[21] The Commission accepts in relation to the guides that, although Mr Forde had ultimate responsibility for them in his capacity as the controlling mind of CFG, he did not personally approve of each and every aspect. That oversight role needs to be viewed against the direct role he took on the other matters subject to the charges, including being provided with a proof copy of the misleading packaging before it was released and the 24 December email. As I have already stated, those facets relate to the charge that is less serious than the other two and that may, therefore, downgrade somewhat the level of culpability on Mr Forde's part. But it is important that those who control companies, large or small, do ultimately bear responsibility for the work of those that they employ including in marketing material.

[22] Both counsel have worked through the various factors set out in *Commerce Commission v L D Nathan & Co Ltd.* It is clear from the plea that the representations conveyed an impression in relation to the Hebel brand that may have been misleading.

[23] As to the degree of dissemination, the Commission submits this was significant. I would accept, at the very least, that it had the potential to be so, being contained not only in hard copy but on a website. The Commission notes that the representations were made over a three and a half year period.

[24] With respect to resulting prejudice, the Commission focuses on the groups of customers, competitors, the ultimate owner of the Hebel brand being Xella and further, all being affected in some way. As far as customers, tradespersons or consumers who made purchasing decisions in reliance on representations would not have received what they expected. AAC is not an everyday product for most people who had little or no ability to detect whether what they were receiving was what they expected.

[25] Mr Latton does not accept the Commission's viewpoint in terms of culpability. He stresses that there was a long-standing and legitimate contractual relationship between Mr Forde's companies and CSR and that the AAC products were components in different systems. He took me to the marketing literature, or descriptive literature, which he submitted must be viewed in the context of overall marketing and dissemination of literature on cladding systems. He submitted that the AAC panels were part of a cladding system involved a number of different products and materials all sold by CFG or related companies, and that the design guides at issue cover all aspects of the cladding system - not just AAC panels.

[26] Mr Latton submitted that a number of other Hebel branded products, predominantly coatings and plasters, were an integral part of the cladding system as well and some of these were manufactured by Mr Forde's companies who eventually owned the trademark that applied to them.

[27] Mr Latton noted the Commission's submission that the companies did not sell to the public. I am not sure that submission assists greatly. There is always a downstream effect. That is something that the Fair Trading Act looks to.

[28] Mr Latton notes the competitive pressure that the company was under and its inability to supply 50 millimetre panels. It therefore developed a cladding system initially using the 50 millimetre panels manufactured in China. They were very similar

to the Hebel Supercrete 75 cladding system. He says that the panels utilised were at least as strong as CSR Hebel panels and independently appraised as compliant with the New Zealand Building Code by the Building Element Assessment Laboratory. In terms of assessing culpability, Mr Latton submits that what the Court is looking at is an issue of effectively trading off a brand rather than purposely trying to cover up an inferior product or a product that was not fit for the purpose. The Court has been provided with the information showing the product as compliant with New Zealand Building Code and Standards.

[29] By 2010 CSR Hebel was in fact able to supply some 50 millimetre AAC panels and came to the market. Mr Latton submitted that the Hebel Supercrete 50 cladding system is proven to be a very effective system and has not been the subject of any substantiated complaint.

[30] Mr Latton focused on the design guides, stating that they are not sales documents but technical documents which contained few misrepresentations. He accepts they were an error but submitted that, read in context, did not affect the overall intent of the document. There were aspects of products in the document that had been appraised by Opus but not that which is the subject of the charge.

[31] Addressing the *Commerce Commission v L D Nathan & Co Ltd* factors including the importance of statements, Mr Latton submitted that the statements in the 2009 design guide were isolated in nature. It is accepted that four of them may have been misleading. However, as I have said, it was in the overall context of a much larger document and inconsistent with the overwhelming substance of the design guides.

[32] While I understand Mr Latton's submission in the context of design guides or standards or prospectuses, the devil is often in the detail. There ought to have been an opportunity earlier in the piece for an error, if that is what it was, to be remedied.

[33] It is accepted if one looks at the 2012 design guide that there is a prospect of being misled into thinking that Opus had appraised the entire system, rather than some

isolated aspects of it. The point is also made that there were aspects of what was contained in the guides that Opus had properly appraised.

[34] Mr Latton suggests there is no evidence that an appraisal by Opus is worth any more than an appraisal by BEAL and, if one reads the design guide as a whole, it is clear that Mr Forde's companies are only claiming BEAL appraisal for the overall Supercrete 50 cladding system. In Mr Latton's submissions this renders the statement concerning Opus unimportant.

[35] As I have said, the main issue between the parties is the degree of carelessness. The Commission submits that the offending was highly careless or negligent. Mr Latton does not accept this. He does accept there were four potentially misleading statements in the 2009 design guides. However, he submitted that the overwhelming majority of that document makes it clear that the AAC panel being used is Supercrete 50, not Hebel. The four minor errors do not impact on a clear message and do not amount to it being highly careless or negligent, he submitted. He made the same point in relation to the 2012 guide and submitted that there is a degree of ambiguity from looking at the front cover but that any ambiguity is clearly corrected by 75 pages that follow. He accepts that the statements at issue could have misled, but that all statements were isolated amongst material that could have left no one in any doubt as to the true situation.

[36] As to the degree of dissemination, Mr Latton distinguished the case from the significant degree of dissemination in *Zenith*.[2] As against that, the guide was both physically available and distributed. Further, it was on the web which gave it a potential to be disseminated to anyone interested in the product.

[37] I have a different view to that taken by Mr Latton. I accept that the offending might not fall in the category of highly careless or negligent. However, it is more approaching that category than the lower end as submitted by Mr Latton. I say that because I sit back and look at the overall offending before the Court. It is not just one design guide, but two. Although I have made by comments in relation to the limited impact of the packaging, when one looks at the overall context, use and representation

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[2] *Zenith Corporation Ltd v Commerce Commission* HC Auckland CRI-2006-404-245, 27 May 2008.

of the brand, it could hardly be described as a low level of culpability. The context was a highly competitive industry coping with a number of issues arising out of cladding issues and an infrastructure that was having to deal with natural disasters, et cetera. The representations overall can only be viewed as an attempt to convey the company's products in the best possible light, even if that meant incorrectly attributing origin of manufacture and an effective endorsement through Opus.

[38] Counsel have conferred, as is becoming a routine and helpful in these cases, on the level of fine. I have had a discussion with counsel in Court about where this offending sits in relation to Messrs Campbell and Middleditch. Both were distributors of CSR products but those businesses were owned independently and operated under licence, in much the same way as CSR did in relation to any upstream consequences. What Mr Latton has sought to do is disabuse the Court of any notion that Mr Forde was the controlling mind over what Messrs Campbell and Mr Middleditch did.

[39] I accept, and indeed Mr Lowery confirms, that the initial charges which were before the Court and which might have made some assertion in that regard are no longer before the Court. Of course Courts can and must only deal with charges and facts that are before them. It would seem that the Court is able to make a distinction in terms of Mr Forde's culpability from that of Campbell and Middleditch in that there were others, it is accepted, who were responsible for the content of the documents concerned. His pleas indicate his responsibility as the owner of the company. It also appears from the sentencing notes that I have read from the Campbell and Middleditch cases that those two individuals went out and actively marketed the products in a misleading way.

[40] Sitting back and assessing overall culpability, both counsel are of the view that Mr Forde's culpability is somewhere between the two. Mr Campbell saw an end fine of $151,875. That was off a starting point of $225,000. There were nine charges there and a 10 percent discount for co-operation and lack of previous convictions, and 25 percent for guilty pleas. Middleditch saw an end fine of $37,500 from an overall starting point of $50,000 from which 10 percent was deducted for lack of previous convictions and 17 percent for guilty plea.

[41] Here the plea came late in the piece although it has saved the Court from an estimated four weeks hearing time and a reserved decision. The Court has largely been able to fill that time with other work. Obviously the pleas represents a resolution from a large number of charges many of which were withdrawn today.

[42] The Commission suggests a starting point in the range of $110,000 to $120,000, submits that a discount of 10 percent for co-operation and remorse is appropriate. Mr Latton accepts that the end point should be at the lower point of that range. Applying the Commission's deductions of 10 to 20 percent, the Commission submits an end fine in the range of $65,000 to $105,000 after rounding. Mr Latton accepts that the end point should be within that range in the order of $85,000.

[43] I accept the starting point is around $110,000 to $120,000. I am going to give Mr Forde some credit for his plea and co-operation, give him a global deduction and arrive at the overall agreed figure which I accept is appropriate after careful analysis by the parties of $85,000.

[44] I intend to apportion that by levying the sum of $50,000 on the first of those charges which is CRN 759 and then splitting the balance of $17,500 on the two remaining charges with Court costs of $130 on each of the three charges.

M A Crosbie
District Court Judge