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29 May 2019

[redacted]
By email only: [redacted]

Dear [redacted]

Official Information Act request #18.201 - Cavan Forde

1. We refer to your Official Information Act 1982 (OIA) request received on 2 May 2019, where you asked the Commerce Commission (Commission) for the following information in relation to our prosecution of Cavan Forde and Mr Daryl Campbell:

   1.1 the final Summary of Facts presented to the Court by the Commission for the prosecution of Cavan Forde, and the final Summary of Facts presented to the Court by the Commission for the prosecution of Mr Daryl Campbell;

   1.2 the sentencing notes issued by the Judge related to the decision against Cavan Forde dated 19 November 2018, and the sentencing notes issued by the Judge related to the decision against Mr Daryl Campbell dated 3 October 2017; and

   1.3 any other documents or summaries seen as significant and enlightening but not covered by paragraphs [1.1] and [1.2] above.

Our Response

2. We have decided to extend the time limit for responding to paragraph [1.1] of your request and decided to grant paragraph [1.2] of your request.

3. We do not consider that paragraph [1.3] of your request meets section 12(2) of the OIA: in that your request is not sufficiently particular to enable us to enable us to understand the scope of your request.

4. In response to paragraph [1.1] of your request, the Commission will be extending the time limit to make a decision to **13 June 2019**.

5. The reason for the Commission's decision to extend the time for response is that consultations are necessary to make a decision on the request, such that a proper

response cannot reasonably be made within the original time limit (section 15A(1)(b) of the OIA).

6. In response to paragraph [1.2] of your request, the 19 November 2018 sentencing notes issued by the Judge in relation to Cavan Forde are available on the Commission's website: https://comcom.govt.nz/case-register/case-register-entries/cavan-forde.

7. The 3 October 2017 sentencing notes issued by the Judge in relation to Mr Daryl Campbell are **attached** to this letter.

8. If you are not satisfied with the Commission's response to your OIA request, section 28(3) of the OIA provides you with the right to ask an Ombudsman to investigate and review this response. However, we would welcome the opportunity to discuss any concerns with you first.

9. The Commission will be publishing this response to your request on its website. Your personal details will be redacted from the published response.

10. If you have any questions about this request, please do not hesitate to contact us at oia@comcom.govt.nz.

Yours sincerely

Mary Sheppard
OIA Coordinator

IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-012808
[2017] NZDC 22290

COMMERCE COMMISSION
Prosecutor

v

DARRYL ARTHUR CAMPBELL
Defendant

Hearing: 29 September 2017

Appearances: S Lowery for the Prosecutor
D J C Russ for the Defendant

Decision: 3 October 2017

SENTENCING DECISION OF JUDGE B A GIBSON

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[1] The defendant has pleaded guilty to nine representative charges laid under s.13(a) of the Fair Trading Act 1986 concerning misrepresentations made to at least 83 customers of his company Christchurch Lightweight Concrete Limited ("Christchurch Lightweight") in relation to the sale or the offering for sale of Autoclaved Aerated Concrete Panels ("AAC"). The panels were sold or marketed under the name "Hebel", an established brand with the panels predominantly used as non-structural, and exterior cladding for buildings. The brand was developed in Germany by the Xella Group of Companies and panels were manufactured in Australia. Hebel as a generic name was sufficiently established in the Canterbury region, where the defendant's company largely sold its products, so that builders and architects would specify particular panels by reference to the brand name of Hebel.

[2] The summary of facts, accepted by the defendant, notes that in relation to various other defendants being prosecuted by the Commerce Commission, the charges cover the period 17 July 2007 to 17 December 2013, although for the defendant, the representative charges only cover the period July 2007 to December 2010.

[3] The summary of facts describes the Hebel panels as being a premium brand associated "*with high quality AAC products*". One of the points of difference for Hebel panels and their sale in New Zealand is that its competitor's panels were manufactured in China whereas Hebel's were manufactured under licence in Australia. AAC panels were used extensively in the Christchurch re-build primarily for residential dwellings.

[4] Christchurch Lightweight, the company owned by the defendant and his wife, who were the sole directors and shareholders, was one of a number of companies trading through a group known as the Cavan Forde Group. The defendant's company, as with a number of the other companies which traded through that group has now been wound up so that Christchurch Lightweight is not itself charged with the misrepresentations.

[5] The false or misleading representations to which Mr Campbell has pleaded guilty were that he represented to his staff that 50 mm AAC panels were Hebel

panels manufactured in China, when he knew they were not, but instructed his staff to inform customers that this was so. Those instructions amounted to false representations of the type prohibited by s.13(a) of the Fair Trading Act 1986 which forbids a person in trade, in connection with the supply or possible supply of goods to:

> *"Make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style or model ..."*

[6] The other charges, all also representative charges, concern the sale of 50 mm AAC panels to various customers of Christchurch Lightweight who were led to believe they were Hebel panels, Mr Campbell's staff having been instructed by him to tell customers this when he knew they were not. Panels were supplied and offered for supply in relation to at least 83 properties on the false premise they were Hebel panels, when they were not. Consequently there are eight representative charges in relation to those misrepresentations which cover approximately 10 properties each and/or customers.

[7] The defendant is 56 years of age and has been involved in the building industry for in excess of 14 years. He worked for a number of years for the Cavan Forde Group. Relevantly for sentencing purposes he has no criminal convictions. Mr Russ, in his written submissions, submitted that the defendant's conduct was not deliberate but reflected a degree of carelessness, a submission I do not accept, but nevertheless accepted that the appropriate response from the Court ought to be a penalty that amounted to deterrence and denunciation. I agree. The legislature has provided for substantial financial penalties for this type of offending so as to protect consumers and to enable businesses to compete effectively, purposes set out in s 1(a) of the Fair Trading Act 1986. Although the maximum penalty for each offence for sentencing purposes for Mr Campbell is $60,000, that penalty has been increased, in the case of an individual, to a fine not exceeding $200,000.

[8] Counsel were agreed on the range of appropriate penalty level, although both, correctly, acknowledged the overarching right of the Court to reach its own decision in relation to the level of fine. They agreed the offending warranted a global starting point in the range of $200,000 to $250,000 with discounts for cooperation with the

Commerce Commission and for the entry of a guilty plea in relation to each charge collectively amounting to 35%. That approach has been endorsed by a full court of the High Court in *Commerce Commission v New Zealand Milk Corporation Ltd*[1] as being helpful in relation to guilty pleas as it enables the Court to take into account the benefit to the community of the early disposal of proceedings.

[9] CSR Building Products (NZ) Ltd which distributes Hebel products in the New Zealand market filed a victim impact statement noting that the known financial effect of the loss of sales in relation to the transactions the subject of the charges was approximately $210,000. The Commerce Commission did not seek reparation as part of the penalty to be imposed on Mr Campbell, nevertheless I accept CSR's submission through its victim impact statement that there has been significant reputational damage to its product in New Zealand, which undoubtedly would have led to lost business opportunities and in particular to the brand now being at a disadvantage in the Canterbury market as a result of potential customers being unsure as to the integrity of the Hebel AAC brand. I do not accept the submission on behalf of Mr Campbell that any loss of a share of that market has been caused by Hebel being unable to compete on price with Chinese alternatives. It was accepted by Mr Campbell, through his counsel, that the brand had a good and well-known reputation to the point that builders and architects would specify the product by name.

[10] It follows that as a result of the uncovering of the misrepresentation made by the defendant and, through him, unwittingly by staff at Christchurch Lightweight, there must have been significant reputational damage to CSR's product, particularly in the Canterbury region.

[11] Both counsel referred to a number of decisions. The Commission submitted that the facts of Mr Campbell's offending was similar to those in *Commerce Commission v Love Springs Limited and Phillip John Smart,*[2] a decision of Judge Collins which concerned door to door sales of water filters across the North Island and where the health effects of tap water were misrepresented in an attempt to

[1] *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730
[2] *Commerce Commission v Love Springs and Phillip John Smart* District Court Auckland CRI-2012-004-11695, 11 December 2013

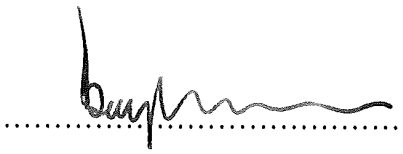
persuade consumers to purchase over-priced water filters. The offending was over seven months. The Court adopted a global starting point of $400,000 for the company and $200,000 for Mr Smart.

[12] Factually the case is not on all fours with this present case where the product was misrepresented in a sense that it was sold falsely under a particular brand name. I agree with counsel for the defendant that the more relevant authority is *Commerce Commission v Topline International and Jeffrey Bernard Cook*[3], a decision of Judge Dawson where bee pollen was sold as having been sourced in New Zealand when, in fact, it had been obtained from China. The starting point adopted by the Court was $180,000 for similar offending to that undertaken by Mr Campbell and committed prior to the increase in penalties on 17 June 2014. In that case, however, a corporate defendant who could bear part of the financial penalty was also sentenced, a distinguishing factor from this present sentencing as Christchurch Lightweight is in liquidation, and for that reason the overall starting point for Mr Campbell should be higher. Mr Campbell's culpability is similar, in my view, to that expressed for Mr Cook in the *Topline* decision where Judge Dawson noted his culpability was "*relatively high given his level of involvement in the management of the first defendant and in the marketing of the product*".

[13] I also accept the Commission's submission that Mr Campbell's conduct was deliberate. He very clearly knew the panels were not Hebel panels and he also knew, I am satisfied, of their reputation in the market. Therefore I am satisfied the penalty range suggested is appropriate and I have selected as a starting point, based on my view of Mr Campbell's culpability, a fine of $225,000 on a global approach. A fine of that level meets, in my view, the need for deterrence and denunciation of this type of conduct. Mr Campbell is entitled to discounts from that penalty. The discounts amount to 35% with which the Commission agrees, being 10% for lack of previous convictions and cooperation with the investigating authority, a matter that is significant in terms of the potential costs in prosecuting this type of offence to a conclusion, leading to a fine of $202,500 before a discount of 25% is applied for the pleas of guilty. That leads to an end sentence of $151,875 on a global basis which is

[3] *Commerce Commission v Topline International Limited and Jeffrey Bernard Cook* District Court Auckland CRI-2016-004-12802, 18 May 2017

to be apportioned as a fine of $16,875 on each of the nine charges. Court costs of $132 for each charge are also to be paid by Mr Campbell.



Gibson DCJ