

**COMMERCE COMMISSION  
Informant**

v

**TEL PACIFIC NEW ZEALAND LIMITED  
Defendant**

Hearing: 1 September 2011

Appearances: J G Donkin for the Informant  
M C Donovan for the Defendant

Judgment: 1 September 2011

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**NOTES OF JUDGE G DAVIS ON SENTENCING**

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[1] Tel Pacific New Zealand Limited has pleaded guilty to 33 charges that it breached the provisions of s 40(1) and s 11 of the Fair Trading Act. The specific details of the charges are that between 28 November 2008 and 31 January 2010 there were seven charges alleging that there were representations on posters that the Hello Asia Pacific pre-paid phone card allowed customers to call locations for a specified number of minutes when those minutes were not achievable. In addition to that there were eight charges that arise out of similar allegations that occurred between 27 November 2008 and 26 March 2010 in respect of the Hello India pre-paid phone cards.

[2] Further to that, there were five charges in respect of the Island Talk pre-paid phone cards that are alleged to have arisen between 14 July 2009 and 26 March 2010. There were a further five charges in respect of the Friends pre-paid phone card that are alleged to have occurred between 26 June 2009 and 26 March 2010.

[3] Lastly there were eight charges in respect of the Joy pre-paid phone cards in respect of the representations that are alleged to have occurred between 26 December 2008 and 26 March 2010.

[4] Each of the charges carry a maximum penalty upon conviction of a fine of \$200,000.

[5] The defendant made a series of representations and they are set out at paragraph 17 of the caption summary as follows:

- (a) The phone card will provide the purchaser with the advertised number of calling minutes to the advertised destinations, and
- (b) The calls made on the phone card to the advertised destinations will be charged at the advertised headline rates.

[6] The Commission allege that those representations were not correct because the advertised number of minutes were not practically achievable unless the purchaser of the card made one continuous phone call to the destination that was advertised in the posters. They provide by way of example in the caption summary that a single 102 minute call to Fiji using the Hello Pacific Asia call card would be required if the maximum benefits that the card contained were to be achieved. In contrast, however, if the calling card was used on more than one occasion then there would be a range of other charges that would consume the calling card's credit.

[7] At paragraph 18 of the summary those additional charges were set out. Not all of those charges would necessarily apply to any calls that were made but those additional charges included:

- (a) A daily service fee applicable from the first use;
- (b) Surcharges incurred after the initial charging period;
- (c) Disconnection fees;
- (d) An exchange rate levy;

- (e) Final charges rounded up to the nearest five cents;
- (f) Charges called in blocks of multiple minutes with a minimum charge of four minutes;
- (g) Expiry dates running from the first use of the large recharge;
- (h) Calls made without a local access number incur additional charges, and
- (i) Calls generated from particular regions incurred additional charges.

[8] In respect of all of those additional charges, other than the exchange rate levy, it appears to be accepted that those other charges were disclosed in some form or other. It is accepted by both of the parties that that did not apply, however, to the exchange rate levy.

[9] Tests were conducted by the Commission which showed that the advertised calling cost per minute was somewhere in the order of 5.97 cents per minute and in an appendix to the submissions for the defendant a call that was made as a test call by the Commission to China on 10 February 2010 recorded that a call which could have otherwise cost or should have otherwise cost \$1.79 in fact cost the Commission \$4.19. There was some dispute as to whether or not that call attracted a surcharge and a disconnection levy, each of \$1 such that the call cost \$6.20 rather than \$4.19 but I did not place a great deal of stock in the dispute as to the cost of the call because what was not in dispute was that the call in any event cost more and significantly more than a discerning customer, having purchased the phone card, would otherwise have expected to pay.

[10] There has been discussion between the parties as to plea and the appropriate fine. I have had helpful submissions filed from each of the Commission and the defendant who have arrived at an agreed fine of \$100,000. That is of course subject to the approval by the Court, a point that is accepted by each of the parties to the prosecution.

[11] In coming to sentence there are a number of factors that I need to consider and those include keeping in mind the scheme of the Fair Trading Act including:

- (a) The objectives of the Act;
- (b) The importance of the untrue statement which is made or published;
- (c) The degree of culpability in the context of wilfulness or carelessness which would generally involve a consideration of the circumstances in which the statement was made or published;
- (d) The extent to which the statement departed from the truth;
- (e) The extent of dissemination of the statement;
- (f) The extent of prejudice or harm to consumers or other traders;
- (g) The attitude of the offender in respect of remorse, co-operation with authorities, remedial action in respect of the particular correction that is sought by the Commission;
- (h) The importance of deterrence both particular and in general;
- (i) The financial circumstances of the offender;
- (j) Any guilty plea;
- (k) Any previous record;
- (l) Any effect any publicity regarding the prosecution and/or the defendant's activities are likely to have, and
- (m) When there are two or more charges the totality principle.

[12] Those principles were set out in more detail in the *Commerce Commission v Ticketek* (Christchurch DC, 31 October 2003, Abbott J).

[13] What is clear in this case is there is some argument between the Commission and the defendant as to the level of culpability. The Commission say that the advertising and the misleading statements were such that the culpability should be assessed as being high. There was a notice sent by the Commission in accordance with s 47(e) of the Fair Trading Act pointing out the errors in the posters, as I understand it, and requiring remedial action to be taken. The Commission says that those actions were not properly taken and that has resulted in the prosecution that I have before me.

[14] The defendant says that none of the statements that it made in the posters were untrue. It accepts, as I have indicated, that the exchange rate levy was omitted from the posters. It says that it has taken remedial steps in the period since these prosecutions have been undertaken and the posters have been changed. In addition, the nature of the changes to the posters include changes to the fine print. If I may describe it in a general sense, part of the fine print is now in a bold font and in addition to that there is a box that has been inserted into the top of the posters that signal to any person looking at the poster that all fees are now clearly shown below. There is also specific reference to a daily service fee from the first use of the calls and that the calls are charged in three minute blocks with final charges being rounded up to the next five cents.

[15] There is some disagreement, as I understand it, between the Commission and the defendant as to whether those posters are yet satisfactory but that is not a matter that this Court needs to look into in any detail today.

[16] As I have indicated the parties have been in discussion as to an appropriate penalty. The practice of the parties agreeing to settlement in criminal matters that carry with them an inherently civil flavour was acknowledged by the High Court in the *Commerce Commission v New Zealand Milk Corporation Limited* [1994] 2 NZLR 730 by His Honour Chief Justice Eichelbaum. There are clear benefits to society and in general when criminal and civil proceedings are dealt with in an expeditious fashion.

[17] This is a matter that would have required significant hearing time, in my view, to deal with the complexities and the divergent view between the Commission and the defendant as to the level of compliance or non-compliance as the case may be with the appropriate standards set out in the Fair Trading Act.

[18] Clearly, the co-operation by the parties has resulted in a significant saving to society in general by not having to have that matter resolved and it appears to me that that level of co-operation has been undertaken in a very responsible fashion by each of the Commission and by the defendant. That of course will flow through into the sentencing.

[19] The key point with regard to the cards themselves and the representation is that the effect of the representation, in my view, meant that customers would not receive the full benefit of the calling minutes that they purchased unless those calling cards were used in one continuous phone call and that call continued until all the credit was exhausted. The manner in which the posters have been displayed in various shop fronts leads me to think it would have been difficult for any discerning customer to have apprised themselves of the limitations of the cards as well as any benefits that those cards would have bought to them.

[20] In my view the proposed settlement of a fine of \$100,000 has been arrived at by each of the parties in a principled fashion. There is some disagreement as to the appropriate starting points between the parties and the range. What is not in dispute, in a general sense, is the appropriate discounts that the defendant is entitled to. The discounts, it is accepted, include a provision of five percent discount on any penalty that I impose as a consequence of the co-operation that the defendant has engaged in addition to any discount for early guilty plea.

[21] In terms of the financial position of the defendant I am told that the defendant has not made a profit from their operations in New Zealand. The only written evidence I have is the Commission's estimate of revenue of some \$3.7million for the 12 month period from November 2008 to November 2009. It is based on approximately 440,000 pre-paid cards being sold.

[22] In my view I will, for the purposes of sentencing, adopt the submissions of the defendant insofar as setting the penalties are concerned, with the one caveat being that I will arrive at the total penalty of \$100,000 across the charges. I do not say that out of any disrespect to the Commerce Commission's submissions because they are largely or broadly similar to those that the defendant is proposing.

[23] The defendant says that a starting point of somewhere between \$125,000 and \$145,000 is appropriate, taking into account the totality of the offending and I adopt that range.

[24] Taking into account the mitigating factors that I have touched on earlier, namely the five percent for co-operation, leaves a second range of between \$118,750 to \$137,750 in the range. Then to be applied as a further discount of 25 percent for the early guilty plea which leaves an end result of a range of \$89,062.50 to \$103,312.50.

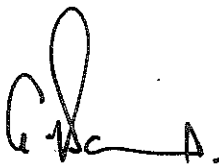
[25] In my view, as I have indicated, a final fine of \$100,000 across all of the informations is an appropriate end fine in respect of these matters.

[26] Dealing with that practically in respect of CRNs ending 0348 to 0739 there will be convictions entered and a fine of \$3,030.30 imposed.

[27] In respect of the final CRN ending 0380 there will be a conviction entered and a fine imposed of \$3,030.40. By my calculations that should arrive at an even sum of \$100,000.

#### **ADDENDUM**

I have been told by the Commerce Commission that my reference earlier to the compliance letter did not require the defendant to undertake any course of remedial action. It simply had a number of recommendations in that letter. I can assume from the fact that we are confronted by prosecutions today that those recommendations were not adopted.

A handwritten signature in black ink, appearing to read 'G Davis', with a stylized flourish above the 'D'.

G Davis  
District Court Judge