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31 July 2020

[redacted]

By email only: [redacted]

Dear [redacted]

Official Information Act #20.013 - Kiwipure Sentencing Decision

1. We refer to your request received on 21 July 2020 for a copy of the Commerce Commission (Commission) v Kiwipure Limited (Kiwipure) 12 February 2020 sentencing decision.

2. We have treated this as a request for information under the Official Information Act 1982 (OIA).

Our response

3. We have decided to grant your request.

4. We have **attached** the Kiwipure sentencing decision to this letter. The decision is also now available on the Commission's case register.[1]

5. Please note the Commission will be publishing this response to your request in the Official Information Act register on our website.[2] Your personal details will be redacted from the published response.

6. Please do not hesitate to contact us at oia@comcom.govt.nz if you have any questions about this request.

Yours sincerely

Mary Sheppard
OIA Coordinator

[1] https://comcom.govt.nz/__data/assets/pdf_file/0025/222397/Commerce-Commission-v-Kiwipure-Limited-Sentencing-notes-12-February-2020.pdf
[2] https://comcom.govt.nz/about-us/requesting-official-information/oia-register

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2018-004-004795
[2020] NZDC 9757

COMMERCE COMMISSION
Prosecutor

v

KIWIPURE LIMITED
Defendant

Hearing:	12 February 2020
Appearances:	A McClintock for the Prosecutor J Donkin for the Defendant
Judgment:	12 February 2020

NOTES OF JUDGE B A GIBSON ON SENTENCING

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[1] The defendant company was found guilty of seven charge of making unsubstantiated representations about the benefits of a water filtration system it designed and manufactured following a Judge-alone trial before me last year. The prosecution was brought under s 12A Fair Trading Act 1986 which was enacted in June 2014, after the company itself had begun to develop and market the system which occurred in 2010 or 2011.

[2] My reasons were given in a decision in writing released on 5 September 2019 and I do not propose to repeat the facts I found proved in relation to each of the charges but briefly, the defendant developed a water filtration system and made a number of claims or representations about it on its website, principally representations concerning the ability of the system to soften water, remove chlorine from water which

would help skin conditions such as eczema and a number of other representations. The representations were not substantiated as the Act required when it was enacted in June 2014. In other words, the defendants on my findings did not have reasonable grounds for making the representations they made. Whether those representations were true or misleading is irrelevant in terms of culpability under the Act. As it happens, no evidence of misleading consumers was put before me and there was no evidence to suggest that any of the purchasers of the product found the product unsatisfactory. That essentially is a neutral factor. Had there been such evidence then obviously that would have been an aggravating feature in sentencing.

[3] The legislation provides for significant fines, a maximum of $600,000 on each charge. The prosecutor's submission was that the representation was highly careless, made over a considerable period of time without any reasonable basis for doing so. The virtual ioniser as it was called was never tested in any scientific sense. The defendant company and its directors relied on a concept for an ioniser described in literature and in what might be described as 'marketing bumf'.

[4] It made a conscious decision to avoid the need to undertake testing to substantiate the representations it made about its product and it did so because of the financial costs of doing so. That of course placed it in an advantageous position as in relation to other manufacturers of similar material who do undertake such scientific testing and for those reasons the Ministry seeks a deterrent penalty and suggests a starting point for sentencing of a global fine of 200 to $250,000. They allow a discount for co-operation with the Commerce Commission of approximately 5 percent.

[5] For the defendant, Mr Donkin submits that the scale of the offending when compared to the relatively few numbers of defendants sentenced under the section was not as significant as in those cases, that only a relatively small number of products were sold in the life of the company from the time it commenced selling the product until the prosecution was initiated. Mr East, one of the directors of the defendant company, gave evidence at trial that the company had probably sold between 250 to 300 product items or water filters from the time they were offered to sale until February 2015. Only about 100 to 150 units were supplied after the beginning of the charge period, so in terms of overall commerciality this was not significant offending.

The defendant also submits that there was no identifiable detriment to consumers, no evidence was called to say that the product did not work and in fact the prosecutor did not arrange for the product to be tested itself. As I have said, that really is a neutral factor, what it means is that what might have been an aggravating factor had detriment been identified other than the fact that consumers presumably were in many cases relying on representations that had not been substantiated, then that would have been taken into account in sentencing.

[6] It is also submitted that the company has ceased trading and does not have the ability to pay a fine. There was evidence at trial that the company did not employ staff and that it had few if any assets. Means to pay a fine is of course a relevant factor but I am not satisfied with the evidence. I would normally require balance sheets and a set of accounts, which are not available so the discount is not available either on my view of matters.

[7] I accept that the defendants were careless in the way they went about marketing of the product. There was no evidence that they knew of the change of the law in 2014 and they had already commenced the manufacture and sale of the product before then but nevertheless the need to have the product scientifically tested ought to have been obvious and there was a conscious decision not to do that. Consequently there is a reasonably high degree of carelessness but not gross carelessness as identified in one of the other cases relied on as comparable sentencing indications.

[8] Overall I think the matter is best summarised by a submission made by Ms McClintock that the absence of objective testing meant that the defendant's activities fell somewhat short of being substantiated to the level required by s 12A of the Act. The extent of dissemination of the statements is difficult to gauge, certainly they were on the company's website but given not a substantial number of products were sold over the several years they were available for sale, it may be that not a great amount of dissemination took place.

[9] Fines however cannot be simple licencing fees for business and in setting the fines so high Parliament clearly intended to protect consumers and the principles in

sentencing identified in the Sentencing Act 2002 of denunciation and deterrence are necessarily to the fore.

[10] Ms McClintock for the prosecutor referred to the report of the Commerce Committee in relation to the Consumer Law Reform Bill which amended the Fair Trading Act to incorporate s 12A where it said, "We recommend amending clause 22 which would amend s 40 Fair Trading Act to increase the fines for contravention of parts 1, 3 and 4A Fair Trading from $60,000 to $200,000 for individuals and from $200,000 to $600,000 for bodies corporate. We consider that increasing the penalties would act as a deterrent and bring the penalty regime closer to that of comparable consumer laws and the Australian consumer law".

[11] So not only the need to align the New Zealand consumer laws with those of Australia was identified, but deterrence and by implication denunciation of conduct were very much to the fore in Parliament's intention in enacting the legislation as expressed by the report of the committee.

[12] The defendant itself has no previous convictions. Ordinarily defendants might expect a discount for an absence of previous convictions as indicating previous good character. I intend to allow a small discount simply because although I accept Ms McClintock's point that the only purpose of the company being set up and trading was to market this particular product, the company did trade and develop and offer for sale the water filtration system for a period before the law was changed by Parliament in mid-2014. However the discount I propose to allow will be modest.

[13] There are a number of decisions for sentencing under the Act which have been brought to my attention, three in number. The first is a decision of Judge Macdonald given in the matter *Commerce Commission v HRV.*[1] That case involved 11 representative charges under the Fair Trading Act. Counsel had agreed a starting point of $650,000. Nine of the 11 charges were laid under s 12A Fair Trading Act, the others under s 13H. All charges in the matter on which I am sentencing the defendant are in fact under s 12A.

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[1] *Commerce Commission v HRV* [2018] NZDC 22699

[14] The facts are somewhat similar in that the water filtration system offered for sale was licensed from the defendant company to HRV initially and was said to be able to soften water and reduce skin conditions such as eczema. The defendant company and HRV entered into a licensing agreement in 2012. The product itself was sold at a higher sum than that the defendant offered its product for sale. They were essentially the same product. In HRV the water filtration system was sold for $2795 for each unit, the defendant sold its units at $1395. The difference may reflect in part the licensing costs or fee that HRV incurred but there still seems to be a significant difference in the cost of the two items.

[15] HRV also was involved in a number of other activities and operated on a larger scale than the defendant. It sold more units, 4298 units and generated considerable revenue over the three years it offered the units for sale, some $9 million. Consequently, it was a far bigger and more sophisticated operation than that conducted by the defendant and it had also commissioned some testing of the unit.

[16] So Judge Macdonald accepted that the defendant was not motivated by financial gain at the expense of complying with the legislation. The starting point of $650,000 was a global basis for charges both under s 12A and the two under s 13H and the end sentence after discounts was $40,000 for each charge. There was a discount given for co-operation, absence of convictions and in contrast to the defendant company, HRV pleaded guilty when it was charged.

[17] The sentencing decision of Judge Mill in *Commerce Commission v Fujitsu General New Zealand Limited* is also of assistance.[2] That company also pleaded guilty rather than taking the matter to a hearing. It was charged with five representative charges under s 12A Fair Trading Act and two further charges under s 13E. It sold over 75,000 heat pumps, the sales generated in excess of $104 million and the scale was significantly different to the scale of the operation of the defendants in this case and also HRV. His Honour saw the unsubstantiated representations as exaggerations rather than a deliberate representation which might influence buyers and a starting

[2] *Commerce Commission v Fujitsu General New Zealand Limited* [2017] NZDC 21512

point for the five s 12A charges was taken as a global starting point of $240,000 or $40,000 for each charge.

[18] In *Commerce Commission v Timber King Limited and NZ Steel Distributor Limited*, Judge Ronayne sentenced the defendants, where there were three charges laid under s 12A Fair Trading Act, all prosecuted as representative charges and two of those charges were against New Zealand Steel and one against Timber King.[3] The case involved steel mesh used for reinforcing concrete which had been imported from China, it was sold as a higher grade than it actually was and there were also representative charges laid under s 13 of the Act. The material supplied was not substantiated, there were in addition forged certificates of compliance and a number of aggravating factors that were not present in this case. The non-compliant steel mesh was used in building and consequently the potential economic consequences were very significant. There was also a finding of gross negligence in relation to the representations under s 13 and the unsubstantiated representations prosecuted under s 12 of the Act.

[19] His Honour took $600,000 as a global starting point for the number of charges he had before him and used the culpability factors identified in *Commerce Commission v L D Nathan* and concluded that the objectives of the Act had been undermined, the representations were almost wholly unsubstantiated and were plainly careless to the point there was a very high degree of carelessness.[4] He accepted that the company believed in the product so there was no deceit in that respect but representations were made on the company's website but he was unsure of the degree of dissemination and the Commission itself accepted that there was no widespread dissemination of the representations. There was a significant degree of prejudice to customers who had purchased 300 to 400 items of steel mesh. There was no evidence that the steel mesh did not work but the failure to comply with s 12A placed other manufacturers at a substantive and significant disadvantage to the defendants in that case. Overall, the starting point taken there was $600,000 for the number of charges which were before the Court, seven in total.

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[3] *Commerce Commission v Timber King Limited and NZ Steel Distributor Limited* [2018] NZDC 510
[4] *Commerce Commission v L D Nathan* [1992] NZLR 160 HC

[20] In terms of the starting point to be applied here, the Commission seeks a starting point of $200,000 to $250,000. Mr Donkin initially was unwilling to proffer a starting point, on instructions from his client, but when pressed submitted that an appropriate starting point would be $100,000. He noted that HRV was a bigger operation and that in *Fujitsu* the representations were across a number of different media outlets and the scale of the dissemination was significant.

Taking those matters into account and the relative small scale of the defendant's operation in terms of the sale of the product for which unsubstantiated representations were made, it seems to me that an appropriate starting point would be $180,000. I am, as I have indicated, unwilling to allow a discount for the financial position of the company as that has not been proved to my satisfaction but the defendant is entitled to 5 percent from the starting point for co-operation, as the Commission conceded, and I allow a further 5 percent for previous known good character. That leads to an end sentence of $162,000 as a global sentence which will be apportioned equally across the seven charges, leading to a fine of $23,142.85 on each charge and in addition Court costs of $130 will be imposed on each charge.

B A Gibson
District Court Judge