IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2019-004-004171
[2020] NZDC 2655

COMMERCE COMMISSION
Prosecutor

v

CALLPLUS SERVICES LIMITED
FLIP SERVICES LIMITED
ORCON LIMITED
Defendants

Hearing:	12 February 2020
Appearances:	A McClintock and A Luck for the Prosecutor O Welsh for the Defendants
Judgment:	12 February 2020

NOTES OF JUDGE K J GLUBB ON SENTENCING

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[1] The defendant companies collectively face 13 charges of making false or misleading representations. CallPlus Services Limited, known as CPL, faces six charges, Flip Services Limited, FSL, faces five charges and Orcon Limited, OCL, faces two charges. Of those charges faced by CPL two of them relate to offending when the maximum penalty was $200,000. The balance, four charges are all relating to offending where the maximum penalty is $600,000 maximum. Of the charges faced by FSL, two relate to offending when the maximum penalty was $200,000 and the balance, nine charges, are all relating to offending where the maximum penalty is

$600,000. The defendants have pleaded guilty to those charges and are for sentence today.

[2] There is a detailed summary of facts which is agreed and annexed to the Commission's sentencing submissions. However, I do not propose to read that into the record as we would be here for some time. I propose to summarise it and cherry-pick, if you like.

The facts

[3] The companies are separate legal entities but since 2016 they have been operated by the parent company Vocus and under a multi-brand strategy. Vocus is a major provider of mobile and broadband services to New Zealand consumers. It had an operating revenue of $323 million and a profit of $61 million as at 2018. It is a subsidiary of an Australian publicly listed company on the ASX 200.

[4] The issues which bring the companies before the Court are referred to as 'beyond billing termination' misrepresentations, or BBT issues. These BBT issues arose for customers who requested termination at a date in the future which fell within a subsequent billing period and beyond the required notice period. The issue arose because the defendant's systems did not automatically pro rate monthly invoices. Instead the defendants relied on customer services staff to manually adjust the invoices of terminating customers who had given more than the contractually required 30 days of notice period. In practice this meant that the defendants would automatically generate a bill for the whole of the billing cycle, even in circumstances where the customer had previously given notice to terminate and where the customer's service was scheduled to end part-way through the cycle. Unless manually adjusted the automatically generated bill, which included charges for time past the termination date, would be the ones sent to the customer and it follows, paid.

[5] What I recognise is that at all relevant times the defendants' terms and conditions entitled them to charge customers for the specified period after the customer gave notice to terminate their contract. In essence, in a month when the customers charges ought to have ceased each defendant instead represented in the

customers invoice that it had a right to be paid charges for the entire billing month, including for time periods after the customer's termination would have taken effect.

[6] Once the defendants' sent the bills to the customers they would send a subsequent bill in the month after the account charges ceased. The bill would show a credit to the account for the BBT period which the customers had been charged for in their previous bill. Where customers had since left the defendant companies there was no immediate way for the customer to receive the credit to which they were entitled.

[7] Despite receiving customer complaints some of which related to BBT issues, the issue was not escalated internally beyond the call centre, who the defendants had authorised to resolve any billing issues. No steps were taken to determine the extent of the billing issues or whether the complaints were indicative of wider issues within the defendants' companies until the Commission became involved.

[8] Instructions were produced to start within the defendant companies outlining the processes required to manually pro rate invoices. Those instructions recorded that if the customer has given at least 30 days' notice and was cancelling part-way through their billing period, they are entitled to a pro rata credit for services not used in that time. Vocus senior management were not aware of the BBT issues until after the Commission's commencement of its investigation.

[9] In terms of the detriment resulting the defendants, in co-operation with the Commission, estimate the BBT issue resulted in $132,578 in incorrect charges being applied to the accounts of approximately 5951 customers who terminated their Slingshot, Flip or Orcon contracts during the charge period.

[10] Of the customers affected 4304 were Slingshot customers to whom CSL owed $83,717; 523 were customers terminating Flip accounts to whom CSL or FSL owed $11,858; and 1124 customers were terminating Orcon accounts to whom CSL or OCL owed $37,002.

[11] What is noted is that customers terminating multiple Slingshot, Flip or Orcon services would also be charged for the BBT periods for each service terminated.

Of that 5951 customers affected by this BBT issue, 1018 were overcharged multiple times for having terminated multiple services.

[12] In response to the Commission's investigation, Vocus advised that it was not aware its manual processes were failing and put in place remedial training for call centre staff to remind them to manually pro rate customer invoices. Three months later Vocus began working to automate the relevant aspects of the billing processes to avoid the BBT issue from recurring. This automated process has now been competed and is used across the brands.

[13] On 5 March 2018, following the Commission's intervention, the defendant sent emails to the 5951 affected customers inviting them to obtain a refund. As of 14 June 2019, 1350 customers had sought refunds after receiving that email. There is no further update today.

[14] In terms of the sentencing to be undertaken in Fair Trading Act 1986 matters, the Commission cite the legal authority of *Commerce Commission v L D Nathan and Company*.[1] In that case the Court identified a number of factors relevant to assessing the culpability of the offending. Counsel have also referred to a number of other authorities, specifically, *Commerce Commission v Steele and Tube, Commerce Commission v Vodafone New Zealand, Commerce Commission v Spark* and less relevantly although of interest in terms of publicity factor, *Commerce Commission v Vodafone*.[2] In my assessment both the Vodafone NZ and the Spark cases from 2019 are almost on all fours with the current offending.

[15] Turning then to the aggravating factors or what is referred to in the submissions that have been filed as the culpability factors in this area of sentencing. First and foremost, the objectives of the Act clearly designed to protect consumers and ensure that representations made by commercial entities can be and are trusteed by their clients as such. The misrepresentations undermined that necessary level of trust in this corporate entity and I see this as a significant factor.

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[1] *Commerce Commission v L D Nathan and Company* [1990] 2 NZLR 160

[2] *Commerce Commission v Steel and Tube* [2019] NZHC 2098, *Commerce Commission v Vodafone New Zealand* [2019] NZDC 15705, *Commerce Commission v Spark* [2019] NZDC 7801, *Commerce Commission v Vodafone* CRN 09004505626, 12 August 2011

The importance of the untrue statement

[16] Customers were entitled to rely on the statements and were misled in consequence by a material departure from the truth. Even if that departure was implicit, as opposed to an overt departure. Customers frankly had no reason to question the legitimacy of the invoice received and that would be consistent with earlier invoices which had been forwarded as well.

The degree of dissemination

[17] There is disagreement between the parties. The Commerce Commission says this is significant. The defence submits that it is more limited, relating as it did to existing customers seeking to terminate. However, that misconstrues the nature of the misrepresentation and while it was to a confined group and it was not made to the general public, it does not lessen the impact on that group. I categorise this as a moderate factor given it was continual and over an extensive period of time. Mr Luck has characterised it and said it amounted to effectively three a week, if broken down over that six-year period, which should have been sufficient to alert the companies to what was happening.

The resulting prejudice or what could be referred to as the harm resulting

[18] 5951 over charged and a total of $132,578, the majority of whom are yet to receive what was owed to them. This is significantly less than the amounts in both *Vodafone NZ* and *Spark*. I also note that in the affidavit of Mr Hamilton it amounts to 1.65 percent of all terminations over the period. That point is made by Mr Hamilton as in some way mitigation and that was reinforced by counsel in submissions to me. The danger with that submission is, and whilst disavowing it in submissions and orally, it appears to be an attempt at minimisation. Simply stated, while the percentage may be low the harm is not reduced by that in any way to those affected.

The characterisation of the representations

[19] Here I specifically make reference to the decision of the *Commerce Commission v Steele and Tube* where Duffy J teased matters out. The Commerce Commission submits that this is highly careless conduct citing the six-year period, the essential nature of the billing processes to the defendant's business and the indication of inadequate checks put in place given complaints had been received and whilst there was a manual system in place to pro rate, it seems to have been inconsistently applied. More significantly as Mr Luck in submissions pointed out was the fact that that was in place and required companies to take active steps to ensure that it was achieving the ends sought. He submits that in light of those factors, that the characterisation of highly careless is appropriate.

[20] The defendant submits that it is a lower level of carelessness. Again, they highlight the small number, that the manual system was in place and that automation was simply not commercially viable. On that point, and as Mr Luck points out, if that was the decision made at the time it runs the risk of suggesting some degree of deliberation and heightening the assessment. They also place reliance on the small number of complaints and the fact that there are no obvious signs of additional funds available. Mr Hamilton also deposes that there were no red flags while noting that there was no intention to manipulate the billing process. Importantly in this situation, there is no suggestion of such. That is simply the absence of an aggravating factor.

[21] I am satisfied that the approach taken is precisely as submitted by the Commerce Commission and that it is highly careless. If they were sufficiently aware of the fact that there was a need to pro rate and that these invoices were going out in that manner, then it was incumbent upon them to put in place checks and balances to ensure that the billing process was effective and did not result in that misrepresentation. It was not in essence. But when I look to that assessment I am satisfied that this contact on the part of the companies was not inadvertent but nor was it deliberate. Rather, it was a failure to implement and then ensure proper processes were operating in the billing system.

[22] Counsel, in submissions filed, have submitted the appropriate starting point. The Commerce Commission asks the Court to adopt a starting point of between $170,000 and $220,000. They acknowledge the five percent discount is appropriate for remedial action and mitigating factors and thereafter a 25 percent discount for plea.

[23] Defence takes a lesser starting point. They submit $100,000 to $150,000 starting point, 10 percent discount for remedial and mitigating factors and a 25 percent discount for plea.

[24] Both agree on the apportionment that is appropriate, and as is highlighted in the Commission's submissions at paragraphs 8.1 and 8.2. The defendants are related companies and are each wholly owned subsidiaries of Vocus. While each entity separately engaged in conduct all three of their consumer telecommunications brands are now operated by CSL. The primary consideration relevant to apportionment in this case are the number of customers affected on each of the three brands. In consequence of that the prosecution submit that CSL should be apportioned 70 percent of the total fine, FSL 10 percent of the total fine and OCL 20 percent of the total fine.

[25] What I acknowledge is that if I adopt that approach it will result in different amounts being imposed on identical charges across 13 charge documents. However, it is the lead amount which is critical, and counsel are content for that to be the outcome.

[26] When I look to the matters in the round and look to the aspect of totality on that basis, the starting point I adopt is one of $180,000. What I recognise is that the companies fully co-operated with the Commerce Commission once the investigation got underway and I factored it in and it is accepted that efforts at repayment are under way. However, I question the value of an email, particularly given all those affected have terminated the companies' services. The fact that only 20 percent have responded underscores that issue, and in my assessment, greater effort is required.

[27] It is also acknowledged that proper automated billing processes are now in place to pro rate. That was a matter that was put in place by the company soon after matters came to a head and that is a pleasing development. I also acknowledge that

Mr Hamilton the general manager of Consumer Business for Vocus New Zealand has in the affidavit filed, apologised and acknowledged the harm that has been occasioned to those who suffered loss. Ms Welsh too, in her submissions to the Court acknowledged that on the record as well, and the Court takes that into account.

[28] Whilst I acknowledge that CSL has previous compliance history, it is not extensive. There is one prior conviction and it has also had a letter from the Commission to deal with issues. However, FSL and OCL have not previously fallen foul of the Commission in any way nor been prosecuted. I factor that in.

[29] There was some discussion about how a discount for mitigating factors should be apportioned. Mr Luck for the Commission submits that five percent is the maximum and he makes reference to the High Court authority which set out that 10 percent was probably the maximum available; *Commerce Commission v Budget Loans Limited and anor*.[3] However, I am satisfied it is appropriate to recognise the good standing of both FSL and OCL and the limited history that CSL has. I also look to the other mitigating factors that I have detailed, and I am satisfied that, as the defendant has submitted, 10 percent is the appropriate discount to be given for those mitigating factors. Accordingly, on the $180,000 start point on the basis of totality, 10 percent is $18,000 which brings that total down to $162,000.

[30] I then turn to the guilty pleas. They came at the earliest opportunity and that is acknowledged. Twenty five percent on $162,000 is $40,500 which brings that total down to $121,500. Both counsel are content to apportion that fine across the three companies. What I recognise of course is that it is the same parent company over all three, but nonetheless rather than equally apportioning I will do so as submitted by counsel.

[31] Seventy percent of that fine of $121,500 I apportion to CallPlus Services Limited, CSL, that is $85,050. On each of the charges that CSL faces I convict and fine CSL the sum of $14,175. On the last charge in time which is CRN 795, I impose $130 Court costs.

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[3] *Commerce Commission v Budget Loans Limited and anor* [2018] NZHC 3442 46, Moore J.

[32] On the five charges that Flip Services Limited, FSL, faces 10 percent of that total amounts to $12,150, divided by five. Accordingly, I convict and fine FSL the sum of $2432 on each charge and on CRN 800 I Impose $130 Court costs.

[33] Finally, in relation to Orcon Limited, OCL, 20 percent of that fine I apportion across two charges. That amounts to $12,150 and I convict and fine the company on each of those charges $12,150. On the last in time I impose $130 Court costs.

[34] All that remains for me to do is to thank counsel for your submissions and the manner in which this has been dealt with. These are always complex, but the co-operative manner has assisted the Court in the determination of the matter.

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Judge KJ Glubb
District Court Judge

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