

**IN THE DISTRICT COURT
AT AUCKLAND**

CRI-2010-063-004397

COMMERCE COMMISSION

v

ECO-PAL LIMITED

Appearances: Ms McClintock for the Informant
Mr Fell for the Defedant

Judgment: 21 June 2013

RESERVED JUDGMENT OF JUDGE L I HINTON

[1] The Commerce Commission has charged Eco-Pal Limited with breaches of the Fair Trading Act 1986 arising out of the manufacture and sale of plastic bags containing an additive (or prodegradant) called d2w.

[2] The allegations against Eco-Pal are that the marketing of its plastic bags contains representations by Eco-Pal which are false or misleading, or liable to mislead the public. It is alleged that Eco-Pal's products do not, put broadly, have the environmentally friendly characteristics that Eco-Pal's marketing suggests.

[3] Specifically, the inclusion of the additive or prodegradant d2w is to make the plastic bags "oxo-biodegradable" and facilitate breakdown and conversion (ultimately) into a compost. This science is actually accepted as sound or, as one Commission witness was to put it, "elegant". However, it was the Commission's case that the science was sound only in the theoretical environment of a laboratory

and of no utility in the real world when end of life destinations under real conditions for plastic bags were considered.

[4] In that regard, the Commission's case as a general proposition is that there is no end of life advantage presented by use of an Eco-Pal plastic bag with the metallic additive d2w as compared with an ordinary plastic bag without the prodegradant. This is because the Eco-Pal plastic bags are not in fact recyclable, will not in fact decompose in a landfill, are not in fact compostable, and moreover if disposed of as mere litter, have no appreciable advantage or any advantage that is suggested in the Eco-Pal marketing material.

[5] Eco-Pal strongly deny the Commission's thesis that its bags are not environmentally friendly and do not have the beneficial features and characteristics which Eco-Pal markets. Eco-Pal denies that its marketing contains representations which are false or misleading, or liable to mislead the public. Eco-Pal resists the Commission's prosecution as flawed and failing to take into account the entire context of Eco-Pal's marketing and the actual possible end use and destination of Eco-Pal's product. Eco-Pal had, in any event, relied upon the science and wisdom of Eco-Pal's d2w supplier, Symphony Environmental Limited, whose research and claims were reasonably the genesis and basis of Eco-Pal's marketing. Thus if necessary s 44 of the Fair Trading Act affords Eco-Pal a statutory defence of reasonable reliance on information supplied by Symphony. So that on no account is Eco-Pal liable under the Fair Trading Act.

The charges

[6] There are 74 charges against Eco-Pal under s 13 and s 10 of the Fair Trading Act. The s 10 charges (involving representations alleged to be "liable to mislead") are laid in the alternative to those charges under s 13 (involving representations alleged to be "false or misleading").

[7] The charges relate to representations made by Eco-Pal in three media:

- (a) Eco-Pal's plastic bags (as at 10 separate dates specified). There are 32 charges here, including 28 under s 13 of the Fair Trading Act, and 4 alternative charges under s 10;
- (b) Eco-Pal's website as at 3 November 2008 and 7 April 2009. There are 28 charges here, 14 under s 13 and 14 alternative charges under s 10; and
- (c) Eco-Pal's promotional brochure dated 6 May 2009. There are 14 charges here, 7 under s 13 and 7 alternative charges under s 10.

The hearing

[8] The hearing of this matter extended over three weeks, and involved considerable evidence, including considerable expert evidence, some from the United Kingdom by video link.

[9] Ms McClintock appeared for the Commission and Mr Fell, the managing director of Eco-Pal, for the defendant. Mr Fell was assisted at times by his daughter Ms Shaw.

[10] Both Ms McClintock and Mr Fell filed written submissions which have been useful and for which I thank them.

Sections 13 and 10 of the Fair Trading Act

[11] Section 13 of the Fair Trading Act provides relevantly as follows:

13 False or misleading representations

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; ...

[12] Section 10 of the Fair Trading Act provides as follows:

10 Misleading conduct in relation to goods

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

[13] Under s 13 the question is whether representations by Eco-Pal in trade concerning its goods being of a particular kind, standard or quality were “false or misleading”.

[14] In *Marcol Manufacturers Ltd v Commerce Commission*¹, in relation to “misleading”, Tipping J stated:

What the Court must do is look at what the alleged representor has said or done and ask whether objectively a misleading representation was made . . . The correct approach in my judgment is to ask, (1) whether the material alleged to amount to a particular representation in a case such as this would be viewed as such by the average New Zealand shopper and, (2) whether such shopper would derive from it a message which is in fact misleading. The mind of the representee is likely to work more by impression than analysis and to be prone to some looseness of thought. . . The question for the Court is whether the mind of the representee, in the present case the average New Zealand shopper, would be misled. In my judgment the test can be put this way: the informant must establish beyond reasonable doubt that the mind of the representee would be misled in the sense that the representation is apt to mislead. It is not necessary to prove the representee would undoubtedly be misled so long as the representation can be said beyond reasonable doubt to be such as might well mislead the representee.

[15] At first blush there may be a disconnect between the Judge’s reference to an average shopper deriving a message “which is in fact misleading” and later reference to whether the representation might be “such as might well mislead the representee”. Certainly the question must be determined on an objective basis, however. It is not a question of whether, subjectively, a person has in fact been misled. The Judge noted too that the expression “average shopper” was intended to capture the synthesis that reflected a multi-cultural society, as “ordinary shopper” might not. There are many potential average shoppers or recipients of representations in trade – Tipping J

¹ [1991] 2 NZLR 502 at 507 and 508

referred to the description of Lockhart J in *Puxu Pty Ltd v Parkdale Custom Built Furniture*² of a wide category:

The astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, [and] men and women of various ages pursuing a variety of vocations.

[16] Under s 10 the essential issue here is whether Eco-Pal's "conduct" was "liable to mislead the public" as to the "nature, characteristics or suitability for a purpose" of Eco-Pal's plastic bags.

[17] As to that, in *Sound Plus Limited v Commerce Commission*³, Anderson J stated that:

It is relevant to note that the word "liable" is employed in relation to prescribed conduct concerning the public at large whereas there is no qualification by reference to the public in relation to s 13. . . I am inclined to the view that the legislature intended that where the public is concerned a lesser tendency for misleading than likelihood should be prescribed. . . Thus, in relation to ss 10 and 11, the question "is the conduct liable to mislead the public?" could equally be posed "looking at the issue sensibly "*could the conduct mislead the public?*" . . . In the result it connotes a potential which is less restricted in scope or likelihood or probability.

[18] To which could be added, it must be a "sensible" potential which is so less restricted.

[19] It should be noted that representations which are misleading or liable to mislead can also be true statements.

[20] For example, part of the Commission's case was that representing that the Eco-Pal product was recyclable to the New Zealand market conveyed something more than the simple fact that those things were technically possible somewhere.

[21] Of course, an assessment of what might be false or misleading first requires an assessment of what is in fact actually conveyed by the relevant representation. In that regard, there was a marketing survey and associated expert evidence which was material in relation to this prosecution. The offences are ones of strict liability and

² (1980) 31 ALR 73, 93

³ [1991] 3 NZLR 329 at 332 – 333

what is relevant is what is conveyed, not what the representor intended to convey. The question for the Court is whether the Commission has proved beyond reasonable doubt that the representations were in fact false or misleading or liable to mislead, irrespective of Eco-Pal's intentions and whether or not any particular representee was misled.

[22] In this regard causing confusion may or may not amount to misleading conduct. The Commission's response to my question on a confusing outcome is that the question simply does not arise here because Eco-Pal's representations were actively false, misleading or liable to mislead. Ms McClintock's closing submissions advised that causing confusion can in certain circumstances (but will not invariably) equate to making misleading representations. Whether that is the case or not will depend on the facts, not surprisingly. She noted that representations which caused confusion can obviously be liable to mislead under s 10 (being potentially less than a likelihood or probability).

[23] All of that seems sensible. It does depend on the facts. This was one of the primary planks of Mr Fell's submissions – the Commission, in Eco-Pal's view, has been unfairly selective here and taken in effect isolated statements without full context and without an adequate appreciation of the full message conveyed by Eco-Pal in its marketing materials.

[24] Of course context is very important. So is some level of understanding on behalf of the consumer which might be and usually is less than detailed knowledge of the precise meaning of a word or concept. That level of "understanding" derives from a shopper's intentions and expectations in relation to the product sought or being viewed, the use to which an article is to be put, all of the surrounding text and information on view, and some general (independent background) knowledge on the part of the consumer. That situation is a far cry from an unknown word plucked out of the dictionary causing a blank stare.

[25] This was all illustrated by Mr Fell's questioning of Professor Gendall, the Commission's marketing expert witness, in relation to whether or not someone can be misled by a term they do not understand. Professor Gendall allowed that if you

have no knowledge of something then you could not be misled but that (in re-examination by Ms McClintock) you can have some understanding because you draw some information from overall claims that are made.

[26] It seems rather obvious to state that you can draw an understanding from surrounding information, whatever your entry level of understanding. Equally it is sensible that the understanding so drawn could mislead you.

[27] In other words, you do not need to understand a term fully in order to be influenced by a description or a word or information which surrounds the word you do not fully understand. Consumers are approaching a purchase in good faith and I think attribute some virtue to the vendor or at least are not expecting to be misled.

[28] The “average shopper” member of the public who mainly is relevant here is an average New Zealand consumer purchasing a refuse bag in a supermarket which is intended for rubbish and disposal as such in New Zealand. As a general proposition that average shopper (common sense suggests) in 2009 and 2010 likely had some awareness and understanding of environmental issues.

The public

[29] One thing that should be noted is that under s 10 the proscribed conduct is that which “is liable to mislead the public”. In most cases, the reference to “the public” would not be problematic: where the general “public” is the target and the shopper and aware of or has available the claim or representations, it is going to be the general class of shoppers, average shoppers perhaps, that will be the public. I guess that situation is best illustrated by statements on the rubbish bags, available on supermarket shelves, self-evidently publicly available.

[30] There might be a question raised about Eco-Pal’s website, if it was designed for and had a limited audience in fact. But the website was nevertheless available (publicly) to the public, and it was advertised on the bag. So that Eco-Pal, whatever its intentions concerning viewers, was evidently making the website available to the public. Sensibly, content on the website is available to the public for purposes of

s 10. The section headings “For Normal”, and “For Dummies”, appeared to reflect the possibility of wide readership.

[31] The brochure was certainly not intended for general public view and it had a limited circulation. There were 1000 printed and these were intended for a limited, more knowledgeable audience with whom Eco-Pal was in direct and regular contact. Of course, this does not necessarily mean that audience would not constitute the “public”: the audience is after all a section of the public which might (on the facts) have less knowledge or enthusiasm to check or learn. But that might not always be the case. The audience might be, as Mr Fell suggested the brochure’s audience was, a knowledgeable and engaged distributor.

[32] Now here the acknowledged “audience” for the brochure was Packaging House, one of New Zealand’s largest distributors of packaging products, which began purchasing Eco-Pal’s products in 2006.

[33] Mr James Power, the purchasing manager of Packaging House from July 2002 to March 2011, gave evidence. He confirmed that various materials and background information were supplied by Eco-Pal, including scientific brochures and reports and including Eco-Pal’s brochure. He said that:

Packaging House saw Eco-Pal as an opportunity to get a good strong brand name on board, as the market was asking for a biodegradable plastic bag.

[34] He said he would have skimmed through these reports, and perhaps minimally understood them. He understood oxo-biodegradable to mean with oxygen it will biodegrade. He said “the reality is that there are so many green claims out there about breaking down”. Packaging House conducted no independent investigation themselves.

[35] He said that:

My impression from my dealings with John Fell was that he had a lot of information to back up his product. He had test reports, published studies and brochures to support his product range. Mr Fell was very confident in what he was saying. Packaging House’s sales representatives would pass the information from Mr Fell to Packaging House’s customers, if required by the customer.

[36] The Eco-Pal product range was incorporated into the Packaging House product catalogue in 2006. In relation to what is described as “Harvey’s Eco-Pal biodegradable rubbish bags” that catalogue stated that they were:

Environmentally responsible – they have been comprehensively tested and proven to be biodegradable as well as recyclable.

Effective in all waste management systems – they have been successfully used in all forms of waste management systems including landfill, windrow and in-vessel composting.

Strong – there is no compromise of product leaches or performance, they are indistinguishable from non-degradable alternatives during the useful life of the product.

[37] In cross-examination by Mr Fell, Mr Power confirmed that Mr Fell would have been invited to, and may have spoken at, Packaging House conferences. He confirmed that some Packaging House executives had in-depth knowledge of plastics. They had a much better understanding than the general public.

[38] The Commission’s position was that, irrespective of Eco-Pal’s intentions the reality was that a limited distributor audience, eager to get Eco-Pal’s product because the distributor had a market, effectively only skimmed the materials Mr Fell gave them and “took his word for it”. Moreover, that audience created a wider (public) audience by its own brochure, “incorporating” Eco-Pal’s brochure, and thus Eco-Pal’s brochure was out there for the wider public anyway, for purposes of s 10. Mr Fell’s supplementary oral advices apparently did not matter, because the bird had flown. The Commission’s position was that Eco-Pal’s contended analysis of the business to business relationship was fatally undermined by the reality check from Mr Power – that in fact there was a reliance on Mr Fell and no independent expert knowledge, checking and so forth.

[39] I did not share the Commission’s overall enthusiasm on this point.

Statutory defence

[40] Eco-Pal relies, to the extent it is necessary, on the statutory defence of reasonable reliance, under s 44 of the Fair Trading Act.

[41] Section 44 of the Act relevantly provides as follows:

44 Defences

(1) Subject to this section, it is a defence to a prosecution for an offence against section 40 of this Act if the defendant proves –

[...]

(b) That the contravention was due to reasonable reliance on information supplied by another person; or

(2) For the purposes of subsection (1)(b) and (c) of this section, the term another person does not include –

(a) A servant or agent of the defendant; or

(b) Where the defendant is a body corporate, a director, servant or agent of the defendant.

[42] Reasonable reliance by Eco-Pal cannot be on Mr Fell or any other employee or agent of Eco-Pal. The reliance must be on information supplied by another person, and that reliance must objectively be reasonable in the particular circumstances. The onus here is on Eco-Pal, on the balance of probabilities.

[43] Eco-Pal's position is essentially that it relied on science from a variety of sources, including the d2w manufacturer.

[44] As a general rule, taking no or few steps to verify information will be disqualifying⁴, and reliance on manufacturers or suppliers should desirably not be unquestioning, on occasions with particular care being needed.

[45] In *Commerce Commission v Health Pride*⁵ (dealing with advertisements for slimming products) the Court noted that the reasonable seller of weight loss remedies would be aware of a potential customer's drive to experiment with any potential assistance in the field. In those circumstances, more diligent inquiry than mere reliance on manufacturers' materials was called for. The Court noted that no legal advice had been sought, in circumstances which warranted it.

⁴ *Harcourts Real Estate Ltd v Commerce Commission* (1993) 5 TCLR 247

⁵ DC Christchurch, 18 June 1998

[46] Again, in *Commerce Commission v Ecoworld New Zealand Ltd* (marketing representations in respect of a water purification device) the defendant relied on information supplied by the manufacturer, which on its face, notwithstanding its volume, gave the impression of promising the improbable. The Court held that such claims required careful and thorough investigation, and that on the balance of probabilities, it was not reasonable for the defendant to have simply relied on the accuracy of the information from the device's manufacturer. Reliance by the defendant was aggressive and not reasonable in these circumstances.

The three media

[47] There are three media in which the relevant representations arise.

[48] The first is Eco-Pal's plastic rubbish bag. This bag had on it at the relevant dates the Eco-Pal logo with the lines:

BIODEGRADABLE PLASTICS
Here today..... gone tomorrow

[49] In addition the bag had on it in clear terms:

OXO BIODEGRADABLE
RECYCLABLE

[50] The plastic bag also has in smaller print a reference to the Eco-Pal website

www.eco-pal.co.nz.

[51] Then the second is Eco-Pal's website where the Welcome section begins with this:

Symphony has perfected the use of a pro degradent additive, called **d2w**® that is designed to cause flexible plastics to degrade completely and harmlessly in as little as 60 days or as long as 5 – 6 years.

[52] The section "How Does It Work" on the website is in these terms:

... the **d2w**® range does not need a biologically active environment to start degrading – this will happen even if the plastic is left in the open air! This is very important if we are to address the serious litter problems caused by waste plastic. For this reason in particular, **d2w**® 'totally degradable' plastic

is superior to 'bio-degradable' which requires the plastic to be in a biologically active environment (for example, by being buried in the ground) before the degradation process is initiated.

[53] Self-evidently the website overall addresses environmental concerns. Buried plastic for example is said to resurface "as an environmental hazard, either through littering our countryside and seas or through being eaten by animals to their detriment". There are said to be obvious problems caused by plastics "being improperly discarded as litter". A unique aspect of the d2w "totally degradable material" is said to be the controllable nature of the process of degradation.

[54] In the section headed "For Normal People" the following is contained:

Eventually even polymers like polyethylene and polypropylene will degrade – through oxidation and then bio-degradation but this will take decades of exposure to heat and light that will slowly break down the polymer molecular chains.

The technology behind d2w totally degradable plastics introduces a pro-degradant into the polymer that acts as a catalyst and causes a rapid breakdown of the long molecular chains. This pro-degradant is in the form of a metal salt that causes a breakdown of the carbon-carbon bonds in the molecular chains – i.e. chain cleavage, or scission is activated. The plastic product will become brittle and quickly disintegrate into tiny flakes. As the chains continue to reduce in size, oxygen is permitted to bond with the carbon and produce CO₂. The molecular mass quickly descends to below 40,000u and at that stage, the material effectively becomes water wettable and micro-organisms can access the carbon and hydrogen. Carbon is used for cell wall structure etc. And it is exhausted as CO₂ and the hydrogen as H₂O. This stage can accurately be described as bio-degradation.

...

Stabilisers are also included in the additive masterbatch that protect the pro-degradant throughout the melting process, and then determine the time scale to the onset of the degradation process. Therefore, different periods of 'fit for purpose' can be engineered depending on the final application of the material.

[55] Quite clearly there is an environmentally friendly message being conveyed. The website addresses the advantages of the d2w additive as a pro-degradant which will assist the breakdown of plastic, in layman's terms. The website notes quite clearly that there are different timeframes involved and that the science can engineer a breakdown within different periods. It appears inherent in these messages that Eco-Pal presently has something of use which is different from something you can

get without the d2w additive. It appears to herald a totally degradable plastic in the open air.

[56] Thirdly, there is the promotional brochure, which has on its front page the Eco-Pal logo with the statements "Biodegradable Plastics" and "Here today..... gone tomorrow."

[57] This brochure has statements described as "Facts" in small boxes on the opening summary page, following the front page. Those Facts include these statements:

Plastic bags kill 100,000 birds, whales, seals and turtles every year.

Plastic litter blocks drains and traps birds.

16 million bags end up on our beaches, streets and parks.

190,000 tonnes of plastic waste is disposed of to NZ landfills each year.

90% of all plastic ever made still exists somewhere today.

[58] The summary section of the brochure provides that the Eco-Pal plastic is:

➤ **Biodegradable**

It has been comprehensively tested by Europe's leading plastic research establishment and other specialized establishments around the world. It has also been successfully tested for soil safety and eco-toxicity.

➤ **Recyclable**

If it enters a waste recycling stream, the degradation process will be arrested. The additive (d2w) which makes it biodegradable is heat sensitive and is neutralized during the secondary extrusion process.

➤ **Effective in all waste management systems**

It has been successfully used in all forms of waste management systems including Recycling, Landfill, Windrow and In-Vessel composting.

➤ **Strong and practical**

It is indistinguishable from non-degradable alternatives during the useful life of the product in terms of strength, clarity and moisture resistance. There is no compromise of produce features or performance.

➤ **Certified food safe**

It is certified safe for direct food contact.

➤ **Cost competitive**

In many cases there is no additional cost involved in using our products.

[59] The brochure has two pages which summarise the Eco-Pal product range of bags, film and wrap and lists the types of refuse bags amongst other products. The brochure then has two final pages of broadly scientific description, under pages headed “Technology Summary” and “Chemistry and Degradation Process”.

The marketing and consumer survey

[60] Professor Philip Gendall is recently retired and a Senior Research Fellow at the University of Otago and former Professor of Marketing at Massey University, a position held from 1988. He gave evidence concerning consumer perceptions about marketing claims made by Eco-Pal and his survey of a representative sample of 1,000 New Zealand consumers. The purpose of the survey was to canvass understanding of the terms “biodegradable” and “oxo-biodegradable”, and to determine consumers’ perceptions of the implications of “biodegradable”, “oxo-biodegradable”, “recyclable” and “compostable” for the disposal of plastic bags with those labels.

[61] For Eco-Pal in this regard, evidence was given by Associate Professor Parsons, Head of Department of Marketing, Advertising, Retailing and Sales at AUT University and Associate Professor of Retailing. Professor Parsons’ evidence included a detailed critique of the methodology and results of Professor Gendall’s survey.

[62] Both experts were impressive witnesses who gave careful and detailed consideration to the issues. Of course, their evidence was important because consumer perceptions and understanding are highly germane here. We are dealing broadly with whether representations are false or misleading or liable to be misleading for the average shopper. So the results of a consumer survey could be relevant. In any event there were useful opinions of both these expert witnesses otherwise on matters at the heart of this trial.

[63] Professor Gendall summarised as key findings of his survey these matters:

- (a) Respondents most commonly described a 'biodegradable' product as something that degrades 'naturally on its own, without harming the environment, and 'disappears' in the sense that it is broken down into its constituent parts and returned to the soil.
- (b) Approximately 25% of respondents did not know how long it should take for a 'biodegradable' plastic bag to decompose. Among the rest, most of the estimates given were just a guess ("I don't know/I'm not sure, but I would guess ..."); however, 53% expected a 'biodegradable' bag to decompose within 12 months, 64% expected this to happen within two years.
- (c) Most respondents believe that something labelled 'biodegradable' will decompose in a landfill (84%) or in a compost heap (61%); half believe it will decompose in the natural environment, but only 29% believe it will decompose in water – 42% do not believe it will.
- (d) The large majority of respondents (84%) believe a plastic bag put out for domestic rubbish collection will be buried in a landfill. Small proportions believe it might be burnt in an incinerator (15%) or composted (8%).
- (e) Most respondents (62%) did not know what the term 'oxo-biodegradable' meant. Among those who offered an explanation, most assumed it meant that the product either breaks down in the presence of oxygen or requires oxygen to break down.
- (f) Most respondents (63%) assumed that an 'oxo-biodegradable' bag would be better for the environment than a bag that was not, but 24% did not know if it would be better, worse or make no difference.
- (g) To most respondents (73%) the claim "Here today ... gone tomorrow" meant that a bag labelled 'oxo-biodegradable' and promoted in this way would break down naturally in a very short period of time – possibly within 24 hours, but certainly within weeks or months rather than years – much more quickly than other bags not so labelled.
- (h) The large majority of respondents (89%) would expect a plastic bag described as 'compostable' to be disposable in a domestic compost heap.
- (i) The large majority of respondents (93%) would expect a plastic bag described as 'recyclable' to be able to be recycled with other plastic items.

[64] Professor Gendall referred in his evidence to "puffery" and hyperbole which a consumer would not take literally. General claims such as "safe for the environment" may be dismissed by people as puffery and not relied upon. However, he said that with more specific statements such as "oxo-biodegradable" and

“degradable”, consumers tend towards reliance on those more specific claims even if they don’t know what they mean. As referred to above, 62% of survey respondents said they did not know what “oxo-biodegradable” meant, yet a significant majority of 63% assumed it would be better for the environment. In that regard, in answer to my question, Professor Gendall considered that if somebody did not know a lot about the term oxo-biodegradable, it would still “register” as opposed to a search of the memory bank coming up with “I don’t know”, and it would, as he put it, “reinforce a belief that this was a better bag than one that didn’t have it on it”.

[65] Further, the phrase “Here today... gone tomorrow” was a product claim and not mere puffery in Professor Gendall’s view. That said, Professor Gendall did not expect the expression to be taken literally (perhaps surprisingly 14% of respondents did interpret it as something disappearing within 24 hours) but to be taken as meaning the product will break down or disappear in weeks or months rather than years (as 73% of respondents interpreted it).

[66] I asked Professor Gendall why “Here today... gone tomorrow” is not mere puffery. He advised that some people had interpreted the term quite literally, with some considering that it would not be much good having a bag that was here today gone tomorrow, because the groceries would fall out of it. Most people however did not take it literally but nevertheless it suggested to them a short timeframe. He said:

And that’s what I mean by the fact that puffed claims, although they seem to be innocuous and non-believable, actually do have an impression on people and create an impression which they may act on.

[67] He made the point that the use of the prefix “eco” along with an understanding of “degradable” or “biodegradable” would suggest environmental friendliness.

[68] There are attendant statements in Eco-Pal’s advertising too, which perhaps reinforce the idea of a short or quick breakdown timeframe. One cannot overlook the slogan “Here today...gone tomorrow”. There are phrases such as “a few months” or words such as “rapid”. The brochure advises that the product can be ploughed into the soil to become a source of carbon for “next year’s plants”. Professor Parsons fairly also accepted the relevance of these comments.

[69] Professor Gendall explained his methodology and the purpose of his survey and criticisms of it that had been raised by Professor Parsons. He considered his summarised conclusions a fair reflection of the (outcome) result of the (answers given in the) survey. He agreed with Mr Fell in cross-examination that those who would go to a website would be motivated to gain more knowledge. He agreed that very few people would actually understand “oxo-biodegradable”, but some people would understand it.

[70] Professor Parsons had numerous detailed criticisms of the methodology of Professor Gendall’s survey and in relation to specific questions in the consumer survey. He regarded some of the wording of the questions as flawed. For example, Question 1 of Professor Gendall’s survey was:

Please tell us in your own words what it means for something to be biodegradable?

[71] Professor Parsons took exception to the use of the expression “something”, as being too broad and inherently unreliable. It might be different if, for example, you were referring to an apple core versus a cardboard box versus a plastic bag, because the acceptable degree and time of biodegradability would differ. That is one example of the issues raised by Professor Parsons.

[72] Professor Gendall’s response was that the question was one designed to ascertain biodegradability or at least an understanding of it and not to describe timeframes, which was considered a separate issue. Professor Parsons’ criticism on this extended further to the unacceptability of proceeding from the general question to then refer to a “product”, in terms of its or something’s bio-degradability. This was all very detailed and relevant testing of the survey.

[73] Further, there were criticisms of the perhaps arbitrary classification of categories of response, which themselves were problematic, in Professor Parsons’ view. There was detailed criticism of the grouping of answers to the questions.

[74] Professor Parsons noted also that the claims in the Eco-Pal brochure and website do not, in his view, appear to be made to the undiscerning general public but

rather to business buyers as part of a business to business relationship. His view was that the nature of the website discussion lends itself to a business buyer or interested/sophisticated consumer rather than a casual consumer. Business customers would not, in Professor Parsons' view, be misled.

[75] Professor Parsons also usefully emphasised the importance of context:

Furthermore, it would be wrong to pick out "pieces" of a brochure (or website) and then assume there is a connection based on an inference drawn from only these pieces. Buyers and consumers do not do this when evaluating information. Their "pieces" will be the full brochure (or website) and other information from other sources – they will then draw their inference based on connecting the various pieces of different information, not on selecting bits from within one source and connecting only those.

[76] To me the consumer survey was useful. I allow that some of Professor Parsons' criticisms were relevant, but that did not detract from the useful and relevant themes that emerged from the results of the survey. Certainly the odd question might have been better phrased and some categories of response perhaps were not optimally presented, but the overall utility of the survey for me was unquestionable, aided by the contributions of both Professor Gendall and Professor Parsons. In addition, I found Professor Parsons' observations in particular on context and the business consumer section of the public very useful.

The charges

[77] Against that background, I address below the categories of charges in the manner these were grouped by the parties. The categories of representations are those concerning landfill and degradability, composting, recycling, biodegradability, oxo-biodegradability and the bags being environmentally friendly.

Landfill

[78] The charges in relation to landfill and degradation concern Eco-Pal's website and also the promotional brochure.

[79] In both cases the allegation is that Eco-Pal has represented by a variety of statements that its plastic bags will degrade in a landfill, when that is not the case.

[80] So far as the website is concerned, particular representations that are relied on include:

1. The degradation process commences with any combination of heat, light and stresses acting as catalysts and affecting the speed with which it progresses. Once the process is initiated it will continue even in landfill, if the plastics are caught on the branches of a tree or in a fence, or if they are under water.
2. With the oxidative action of d2w the molecular "backbone" collapses. The initial result is embrittlement and disintegration – the material can no longer be considered as a plastic. Ultimately, after microbial deterioration has completed, the overall degradation process will have resulted in the creation of some H₂O, some CO₂ and a small amount of biomass.

[81] In the case of the promotional brochure the three particular representations relied on are:

1. Our plastic is effective in all waste management systems. It has been successfully used in all forms of waste management systems including recycling, landfill, windrow and in-vessel composting.
2. In reference to oxo-degradation, "This process continues until the material has biodegraded to nothing more than CO₂, water and hummus. It does not leave fragments of petro-polymers in the soil.
3. When the packaging film is ingested by the microorganisms, the only residue is CO₂ and water.

[82] The Commission submitted that the overall degradation message appears in context alongside the product claim "Here today...gone tomorrow" and stated "Facts" such as "190,000 tonnes of plastic waste is disposed of to New Zealand landfills each year", and "90% of all plastic ever made still exists somewhere today". The Commission says the clear implication is that the Eco-Pal bags offer a solution to this, even in landfill, which is the destination of the vast majority of the refuse bags.

[83] Essentially the Commission's position was that the full oxo-biodegradable process will not occur in landfill due to insufficient amounts of oxygen.

[84] Eco-Pal's position was that Eco-Pal's bags will in fact degrade in a landfill. Eco-Pal put store on the tests conducted by Dr Graham Swift as constituting scientific proof of this. Dr Swift, currently a consultant in polymer science and

environmental biodegradation mechanisms, has over 30 years' experience in biodegradable polymers.

[85] Moreover, Mr Fell's submission and evidence was that neither the website nor the brochure states or implies that the bags will biodegrade where there is no oxygen present.

[86] Professor Mark Milke gave evidence for the Commission. He is currently an Associate Professor in the Department of Civil and Natural Resources Engineering at the University of Canterbury and has taught solid waste management for 20 years. He has led and presented research on landfill gas and anaerobic biodegradation.

[87] Professor Milke had been requested by the Commission to provide his opinion as to what would happen to Eco-Pal's "oxo-biodegradable" plastic bags if disposed of as rubbish in a landfill.

[88] Professor Milke advised that landfills are used in New Zealand to manage what is known in the industry as "municipal solid waste". That waste is a mixture of materials that have no value to society and need proper long-term management. They contain a mixture of post-consumer plastic, paper, metal, and glass, along with food waste and garden waste, and construction-demolition waste. Landfills are technically advanced waste management systems, far beyond a tip or a dump of one or two generations ago.

[89] At paragraph 17 of his evidence, Professor Milke stated:

All biodegradation, except for the initial aerobic phase, occurs in anaerobic conditions. An oxo-biodegradable bag will therefore behave in essentially the same manner as a normal plastic bag once placed in a landfill in New Zealand and becomes deprived of oxygen – that is, it will remain where it is placed.

[90] In terms of specifically oxo-biodegradable plastic bags in a landfill, Professor Milke stated:

In my opinion oxo-biodegradable plastic would not decompose appreciably in a landfill, because the plastics will be in an aerobic state for only a very short time and will quickly become anaerobic, in which state they will not

degrade. They will not decompose because there is no appreciable oxygen in an anaerobic state, and oxygen is essential to the oxo-biodegradation process.

[91] In fact Professor Milke's evidence was that after seven days only the top 100 mm of a landfill has any appreciable oxygen. There is cover and compaction with very heavy machinery within an hour or so of placement, limiting the ability of oxygen to return to the waste and after a week only about 0.1 – to 1% of the landfill waste will have any appreciable oxygen. That oxygen will then deplete within hours or days.

[92] In summary, Professor Milke's evidence was that there was extremely limited oxygen in a New Zealand landfill and for this reason oxo-biodegradable plastic will not behave any differently from conventional plastic in a landfill.

[93] Dr Swift for Eco-Pal referred to the experiment with which he was involved, described in the article "Environmentally Degradable Polyolefins". This experiment involved creating a cell within a landfill into which a plastic sheet was put. The sheet was kept at a depth of two metres for a period of 12 months. There was some decay visible in the plastic at the end of the experiment. From the defence perspective, this fulfilled the proposition that plastic bags can degrade in a landfill.

[94] Dr Swift fairly accepted in cross-examination that his experiment did not replicate features of an ordinary or a New Zealand landfill. He accepted, in relation to the refuse bag, that the additive formulation, temperature and "condition" of the bag prior to entry to landfill would all be relevant, and were unknown. Pertinently, he accepted that access to sufficient oxygen is critical to the degradation process. In his experiment, oxygen access and levels may have been greater than in a landfill and were not measured and, moreover, decay could have been temperature related.

[95] Dr Swift and Mr Michael Stephens, Technical Director of Symphony Environmental, did suggest that degradation in landfill can occur if the plastic is sufficiently oxidised before reaching landfill. This is of course dependent on sufficient oxygen exposure in the first place. The level of additive loading would also be critical. Dr Swift did agree that the bags produced in evidence, which were

purchased in November 2009 and May 2010, had (in the intervening period) significant oxygen access and showed no sign of degradation.

[96] Dr Swift was asked by Ms McClintock to comment on Professor Milke's "measurements" in relation to minimal oxygen availability within weeks in a New Zealand landfill. He answered:

Oh I've also written reviews on landfills so I've read pretty widely on different landfills throughout the world and I know that that question available oxygen is a very questionable value, but it varies quite widely depending on how you compact it and so there's again no single answer. And it's sometimes you may have oxygen, yes, and I agree, sometimes you may not, depend on the compaction and everything else and the depth ...

[97] The Commission's submission on this was that:

Indeed on all the available evidence, the conclusion has to be that this is a very technical possibility with a "perfect storm" of circumstances occurring at best. But it simply cannot be said that the bags *will* degrade in landfill.

[98] I should note that at his interview with the Commission on 6 May 2009, Mr Fell stated as follows in relation to landfill:

If our product is buried in a landfill, there is no oxygen, there is no air, there is no light. The additive is not going to work. So the product won't work deep in a landfill. It will biodegrade over a number of years, but not in the timeframe that you expect a biodegradable product to biodegrade in.

[99] Mr Fell was asked at that time if he had done any research on where most packaging ends up in New Zealand. He answered that he had and the destination was landfill. Mr Fell stated:

If the product goes into a landfill as I said before, it's not going to biodegrade.

[100] Mr Fell accepted that most plastic ended up in landfill, and that the New Zealand situation would be similar to the United Kingdom where 80% of post-consumer plastic went to landfill. He accepted that there would be a higher percentage of refuse bags that went to landfill in New Zealand.

[101] Mr Fell accepted that what Eco-Pal was trying to convey in the brochure and on the website was that the degradation process will occur in a landfill. He accepted

that the "Fact" statement that "there were 190,000 tonnes of plastic waste in a landfill each year" meant that Eco-Pal's product was in effect beneficial in comparison.

[102] The unmistakable message of the representations is that Eco-Pal's bags are suitable for disposal to landfill, and that they will degrade within a reasonably short time. I accepted broadly the conclusions of Professor Gendall's survey on the relevant issues here – the meaning of or expectations in relation to relevant phrases and timing. I think overall that what the Eco-Pal message conveys is distinct advantage in relation to landfill over conventional plastic, in any event.

[103] That advantage is potentially not borne out by the science, on my assessment. Indeed, I rather thought Dr Swift to agree that is so, and to press the case for more science or experiment, in cross-examination:

I mean indicate, any scientist reading this with any, I think with any knowledge of the field would come to the conclusion like this oxo-biodegradable materials will oxo-degrade in a landfill and we should try some more and then I think they would work.

[104] I accepted, moreover, the evidence of Professor Milke. His first-hand knowledge and experience was extensive and relevant, and could not be overlooked. Dr Swift fairly acknowledged in any event that actual or local conditions and so forth were decisive.

[105] There is very likely a misleading message conveyed by Eco-Pal in relation to landfill and degradation. It is not (necessarily) a false message, in my view. Literally, the Eco-Pal refuse bags may actually degrade in a landfill and have advantages over conventional plastic or plastic without the additive. But it is very likely a misleading message because in effect the promised or represented solution is not evidently realistic. I think the average shopper will expect, with the Eco-Pal message, that the refuse bag will degrade swiftly in a landfill, and it will not.

[106] I was not satisfied however beyond reasonable doubt that the representations were actually misleading for the purposes of s 13, being objectively misleading in fact in context.

[107] In relation to s 10, I was satisfied to the requisite standard that the representations were “liable to mislead”. Whilst the representations were probably likely to mislead, they certainly “could mislead” and were liable to mislead, taking into account the evidence. Here also the question of the “public” that might be so misled must be considered.

[108] Regarding the website, it is available to the public and it is advertised as being available to the public. For s 10 purposes the charges in relation to the website are proven. It is untenable in the circumstances to limit readers on the website to the more sophisticated and knowledgeable (perhaps business distributor or purchaser) viewer seeking enhanced learning. The website contemplates wider consumption, was advertised as available to a supermarket shopper, and was in fact available to all. Sensibly, the representations on the website were thus liable to mislead the public, under s 10.

[109] Regarding the brochure, my inclination is that the limited audience of the brochure, notwithstanding any accretion, is not the wider public. Certainly the brochure was intended for a limited audience, but that is not necessarily helpful to Eco-Pal. Nevertheless, that limited audience was an industry player aware of relevant demand, and it had in-house expert knowledge. Moreover, it was acknowledged that Mr Fell was active and had provided supplementary advices at relevant meetings. This is relevant, in my view, notwithstanding not being in writing. Any accretion of the message via Packaging House’s catalogue should not be determinative either – I did not think it was wholesale, and it related to the Harvey’s product, but importantly Eco-Pal should not bear the risk of wayward accretion in the present circumstances. That is because Eco-Pal had supplied relevant information to an industry player with expert knowledge. I am inclined to dismiss the charges in relation to the brochure.

Composting

[110] The charges in relation to composting relate to statements on Eco-Pal’s website and in the promotional brochure. So far as the website is concerned the representations are:

1. The compostable version of this technology is engineered to completely degrade between 60 to 90 days in a commercial compost environment, where typically temperatures in excess of 60 degrees centigrade are maintained.
2. With the oxidative action of d2w the molecular "backbone" collapses. The initial result is embrittlement and disintegration – the material can no longer be considered as a plastic. Ultimately, after microbial deterioration has completed, the overall degradation process will have resulted in the creation of some H₂O, some CO₂ and a small amount of biomass.

[111] The particular representations from the promotional brochure are as follows:

1. Our plastic is effective in all waste management systems. It has been successfully used in all forms of waste management systems including Recycling, Landfill, Windrow and in-vessel composting.
2. In reference to oxo-degradation, "The process continued until the material has biodegraded to nothing more than CO₂, water and hummus. It does not leave fragments of petro-polymers in the soil.
3. Since oxo-biodegradable plastic releases its carbon slowly, it produces a high quality compost.
4. The d2w degradable additive in our polythene products, when exposed to sunlight will also result in photodegradation within a few months. Similarly exposure to composting temperatures will result in relatively rapid thermal degradation.
5. When the packaging film is ingested by the microorganisms, the only residue is CO₂ and water.

[112] The issue here really is whether Eco-Pal conveys a message that its refuse bag is suitable for domestic composting. For certainly there is reference to a commercial composting environment or a compostable version, but the Commission's issue is that this does not make clear the bag will not compost domestically.

[113] In Professor Gendall's survey, 89% of respondents stated that where a plastic bag was labelled as "compostable" consumers expected to be able to dispose of it in a domestic compost heap.

[114] There seemed no dispute that domestic composting was not suitable. Both Dr Swift and Mr Stephens, for Eco-Pal, agreed that domestic composting for bags such as Eco-Pal's refuse bags was not viable because of contact with food waste.

[115] It must be noted too (and this was acknowledged by Mr Fell in cross-examination) that Symphony stated in a March 2010 report, in response to the Loughborough report, that:

However as indicated above, oxo-biodegradable plastics are not intended for composting. They are intended to address the problem identified by Dr Jackson of plastic waste which escapes into the open environment.

[116] In the brochure Eco-Pal marketed composting as effectively a benefit. The product had been “successfully used” in composting and its bags were stated to be effective in all waste management systems.

[117] Envirofert (operator of a cleanfill and composting facility at Tuakau since 1998) conducted a trial (with Eco-Pal’s bags) in 2009 in a commercial compost operation subject to thermophillic cooking at temperatures of between 50-70 degrees celsius for six months. At the end of that trial, the bags appeared totally intact without breakdown. Mr McGuire of Envirofert, who gave evidence, did not consider the bags to be compostable and would not accept them for composting.

[118] It must be acknowledged that Envirofert used the European Composting Standard EN13432 as a guideline. Envirofert’s policy is not to accept for composting materials unless they either meet EN13432 or can be shown by Envirofert testing to actually breakdown.

[119] The practical outcome seemed to be that Eco-Pal’s bags will not be composted commercially in New Zealand.

[120] Eco-Pal’s position was that the bags are compostable and that Eco-Pal’s statements regarding composting contain correct factual information. Eco-Pal disputed the relevance of the strict European standard EN13432.

[121] Mr Fell also would not accept Mr McGuire’s expertise or skill in relation to the composting test. He said it was not a scientific trial. It was apparently irrelevant to Mr Fell what Mr McGuire came up with.

[122] Mr Fell's submission was that statements made regarding composting are made by way of background information in the brochure and website and not assertions that Eco-Pal bags will be composted – nor can the statements be construed this way. Again, the main purpose of the technology is to address the problem of litter and any reasonable person would realise that, Mr Fell advised.

[123] Mr Fell submitted that the website is extensive and technical and noted that the sole mention of composting was (in one paragraph) to the compostable version of the technology being engineered to completely degrade between 60-90 days in a commercial compost environment. He notes that just above that statement there is a statement that says d2w plastics can be engineered to start to degrade in as little as 60 days or as long as five to six years. His submission was that the viewer will realise there are different versions of the technology which serve different purposes.

[124] I did not overlook Mr Fell's statement in his brief of evidence that:

As to the allegations regarding composting, I have previously stated I am very much involved in this business, and I understand more than most about the process. Information provided to me has been consistent with my knowledge.

[125] I concluded that unquestionably the Eco-Pal refuse bag is not suitable for domestic composting. If an Eco-Pal bag had "compostable" on it, it would, in my view, probably be false and certainly would be "misleading". This is because I was satisfied the refuse bag is not compostable domestically and probably not commercially, having regard to the evidence.

[126] However, the charges do not relate to the statement "compostable" on the bag. They relate to the website and the brochure.

[127] The statement on the website concerns the "compostable version" of the "technology", with reference to a "commercial compost environment", in terms of the actual wording. At the very least the website suggests to the viewer (who may have been diverted there because of the bag) that the bag is compostable commercially, if it is the compostable version. I am not sure that viewer assumes that whatever Eco-Pal product the viewer has is necessarily compostable or a

compostable version, or assumes that the bag is domestically compostable. The viewer is not influenced by a statement on the bag it is “compostable”.

[128] In particular, I am not sure a viewer who reads about a “compostable version” (notwithstanding any surrounding text) is misled into thinking the bag is domestically compostable when it is not.

[129] The statements on the website are not false. Overall, I was not satisfied beyond reasonable doubt that the statements on the website were misleading, in terms of s 13 of the Fair Trading Act.

[130] As to whether the statements on the website were “liable to mislead”, I think they were liable to mislead the public in the sense of the average shopper. The representations “could mislead” – it should have been made clear industrial composting in New Zealand was not an option. Minimally too, the availability or rather non-availability of the compostable version should have been addressed. Neither were. The statements on the website, I was satisfied to the requisite standard, were (in terms of s 10) liable to mislead the public, being the persons who were the general public, and not a specialised knowledgeable few, who were invited to or could access the website.

[131] I was again not satisfied beyond reasonable doubt that the statements in the brochure were misleading. Although I considered they could mislead or were “liable to mislead” I was not persuaded, taking into account the relevant limited audience, that the s 10 charge was proven.

Recycling

[132] The recycling charges concern representations made by Eco-Pal on the website, promotional brochure and on the Eco-Pal rubbish bag.

[133] In relation to the website the representations are:

1. “Degradable plastics can be recycled and will not harm the post-consumer plastics waste stream”

2. "In any case, at the end of its useful life the degradable material may be recycled, either alone or as a blend with commercial resins and processing stabilisers."
3. "Will d2w material spoil recyclate if it is mixed in? In the event of some post-consumer waste containing d2w entering the recycling stream after cleansing, separation and re-extrusion, the degradation process is effectively arrested. The secondary extrusion process neutralises the action of the prodegradant. Interestingly, on the other hand, d2w additives can be added to recyclate and cause that to degrade in turn. For post industrial waste, the answer will depend on the specific materials and proportions involved."
4. "D2w totally degradable plastics are totally compatible with recycling. They can be added to the recycling chain at which time the degradation process becomes permanently arrested."

[134] In relation to the plastic bag, this had the representation on it that the bag is "recyclable".

[135] In relation to the brochure the relevant representations are:

1. "Our plastic is effective in all waste management systems. It has been successfully used in all forms of waste management systems including Recycling, Landfill, Windrow and In-vessel composting."
2. "Our plastic is recyclable. If it enters a waste recycling system, the degradation process will be arrested. The additive (d2w), which makes it biodegradable is heat sensitive and is neutralized during the secondary extrusion process."

[136] The Commission's case here was that Eco-Pal's plastic bags will not be recycled because there is no sufficient infrastructure in New Zealand to recycle plastic materials such as bags as opposed to rigid plastic. Plastic bags that are put out for roadside collection by local authorities are not accepted for recycling and end up dumped at landfill.

[137] According to Professor Gendall's survey, 92.7% of respondents would expect to be able to put a bag labelled as "recyclable" out with the plastic items they normally recycle. This contrasts rather, I note, with Mr Fell's view. Curiously, Mr Fell advised me that he doubts whether a bag purchased with "recyclable" on it would have the purchaser thinking "wow, this could go out with my recycling". He doubted that because people know that they can't put bags in recycling anyway: "perhaps they do, perhaps they don't".

[138] The Commission's position at trial was that while able to be recycled, technically speaking, a plastic bag bought by a New Zealand consumer will not in fact be recycled for lack of wide infrastructure. The Commission suggested that the charges here should be amended to reflect the relevant particulars.

[139] Those amended particulars would reflect that Eco-Pal's bags are not accepted as suitable for recycling in New Zealand because of concerns about stability of the end product, restrictions on post consumer waste and the "lack of infrastructure over much of the country". This was said to not disadvantage Eco-Pal, which had had adequate time to respond to the Commission's case, given the adjourned hearing. Further, there was not, in the Commission's submission, adequate evidence of any facilities for in fact recycling plastic refuse bags. The Commission submitted that to the extent that Eco-Pal now wish to say certain local bodies will recycle Eco-Pal bags, this too is ultimately irrelevant to the charges, falling outside the time period being considered and being unsupported by evidence from those councils. All of which had a self-fulfilling ring to it.

[140] Frankly, I was not sure I fully understood Eco-Pal's position or final position on this matter. Certainly, Eco-Pal submitted that the statements on the website and brochure are not statements regarding the actual availability of recycling in New Zealand. Rather, and perhaps surprisingly, they are apparently statements regarding the recyclable qualities of the type of plastic used in Eco-Pal bags. In addition, Eco-Pal referred to the prospect of some recycling availability in any event, in New Zealand and in China sourced from New Zealand. I noted that Mr Fell appeared to hold to the position that a bag labelled recycled would go to recycling:

If it goes to a recycling centre, they'll pull it out and they'll put it in a pile in a place where these guys pick it up from. They'll pay for it. It doesn't – because it's a rubbish bag doesn't mean it's going to always go to rubbish. I accept that most will, but there are going to be some that won't, so we have to put on the bag that it's recyclable.

[141] But overall it would be fair to say Mr Fell was aggrieved at what he viewed as the Commission's change of tack.

[142] Of course, it seems sensible to me to conclude that the word “recyclable” on a refuse bag purchased by an average consumer shopper would connote an available recycling option or facility in New Zealand, in relation to that particular bag. And there was some evidence that was not an available option. That leaves to one side any issues surrounding (perhaps) broader prose in the brochure or on the website.

[143] I suspect that Ms McClintock is correct that Eco-Pal was not disadvantaged by the course of the trial, or that no evidence is or rather will be available that as at the time of the representations recycling options were available in New Zealand that were relevant. And I do not overlook Ms Shaw’s acceptance in cross-examination that actual recycling enquiries were not made prior to the statement going on the bag. Nevertheless this is a criminal prosecution, with some history and background, and I have some unease regarding Eco-Pal’s ability to respond to the reformulated Commission case. It is no answer to say Eco-Pal failed to adduce sufficient evidence. The point is Eco-Pal may not optimally have been able to do so because perhaps some uncertainty surrounded the entire precise Commission’s case. And it may have been important too in relation to the statutory reasonable reliance defence.

[144] The fact I think “recyclable” on Eco-Pal’s refuse bag to be (patently) “liable to mislead” or worse is not relevant, because that is based on evidence I heard. And I do not consider Eco-Pal has had an adequate opportunity to respond to the case as it developed and was finally put. Further, my view on the refuse bag may not necessarily be the same in relation to the other representations, although I must say that based on the evidence I heard, statements in the brochure and on the website are likely “misleading” without a good deal more explanation. That said, the same s 10 point concerning the audience in relation to the brochure may have arisen to save Eco-Pal in part.

[145] I believe these charges should be dismissed in view of the concerns noted.

Biodegradability

[146] The relevant representations here concern statements on the refuse bag and in the brochure and website that Eco-Pal plastic bags are “biodegradable”. The Eco-Pal plastic bag has on it:

BIODEGRADABLE PLASTICS
Here today..... gone tomorrow

[147] The brochure includes the following statements referred to by the Commission:

1. “Biodegradable”.
2. “Biodegradable plastics” together with slogan “Here today... gone tomorrow”.
3. “Our plastic is biodegradable... it has also been successfully tested for soil safety and eco-toxicity.”
6. “Thus any mineral fillers, metal salts, and the like that were present in the plastic to start with will still be there after all the biodegradation of the oxidised plastic has occurred. Metals, for example, tend to end up as metal oxides, which is how they exist in nature in the first place. But note that any organic part of the metal compound will undergo biodegradation.”

[148] The relevant statements on the website include these:

The technology behind d2w totally degradable plastics introduces a pro-degradant into the polymer that acts as a catalyst and causes a rapid breakdown of the long molecular chains. The pro-degradant is in the form of a metal salt that causes a breakdown of the carbon – carbon bonds in the molecular chains – i.e. chain cleavage, or scission is activated. The plastic product will become brittle and quickly disintegrate into tiny flakes. As the chains continue to reduce in size, oxygen is permitted to bond with the carbon and produce CO₂.

However, it is now widely recognised that when a plastic material descends to below 40,000 molecular weight – due to oxidative degradation – the material becomes water wettable and can sustain a bio-film on its surface. This bio-film supports numerous micro-organisms that will feed off the carbon and hydrogen elements of the oxidising plastic.

[149] In essence, the Commission's position here was that technically the Eco-Pal bags are not biodegradable but will only biodegrade with the assistance of the science. Technically the bags with the additive d2w are oxo-biodegradable, and thus biodegradable. Without the additive they could not be said to be biodegradable. In addition there is an expectation on the part of the consumer or average shopper that the bags would degrade within a shorter time period than what is contemplated by the advertising material.

[150] Professor Gendall's survey is of course relevant here – 53% of respondents expected a “biodegradable” bag to decompose within 12 months and 64% expected this within two years.

[151] Of course the surrounding context here is important too. Certainly in relation to some statements there is reasonably close association in the text with a description of the science and oxo-biodegradability, such that any standalone representation concerning “biodegradability” simpliciter is perhaps minimised. In other parts of the text there are more perhaps unqualified statements concerning biodegradability.

[152] Frankly, I did not think the description “biodegradability” as opposed to “oxo-biodegradability” was of tremendous moment so far as the website and the brochure are concerned. To me what was important were the expectations that a consumer might have in relation to a representation that something was either biodegradable or oxo-biodegradable. The results of Professor Gendall's survey are certainly relevant here.

[153] So far as the plastic bag is concerned, it had an unqualified representation that the plastic bag is in the category of “biodegradable plastics” and is “here today ... “gone tomorrow”. There is no accompanying explanation or clarification (on the bag) that would assist the average shopper choosing this bag on the supermarket shelf.

[154] Sensibly however, the statement that the bag is biodegradable is attractive to an (eco-minded) average shopper. It is likely more attractive than a refuse bag without that or any relevant other description.

[155] The results of Professor Gendall's survey indicate that the average shopper would expect that something labelled as "biodegradable" will disappear within 12 months to two years, and of course the phrase "Here today ... gone tomorrow" also is relevant in this context as suggestive of a short timeframe, albeit not immediate. I do not overlook Mr Fell's closing submission that the percentage of respondents who so answered question 3 of the survey as indicating disappearance within 12 months was only 38.8%, below half the respondents. In fact, almost as many respondents, 35.1%, thought it would take longer than 12 months. So Mr Fell was to suggest this one year timeframe is completely irrelevant.

[156] At Mr Fell's interview with the Commission on 6 May 2009, in relation to the general enquiry of him as to the evolution of Eco-Pal's business and the accompanying product statements, Mr Fell stated:

When we first started we used Symphony's as a template – Symphony's plastic bag template and on our generic bags, our shopping bags, we used to have words like "this bag will disappear". That's been removed. Compostable has been removed from our bags. We have stopped using biodegradable, and we have started using oxo-biodegradable. That was a mistake. Peter Plimmer, the professor, the chap who I get advice from, and also because I'm on this working group that said we can't use the word "biodegradable".

[157] Further, in an email to the Commission Mr Fell stated:

Secondly, the public cannot be under the impression that our products will degrade in one year as we never make this claim. In fact we do not advertise as biodegradable because of this very assumption even though our products do biodegrade over a relatively short time.

[158] Overall it seemed to me that the general thrust of the evidence (mainly expert) was that a reference to biodegradability should always be qualified, to refer to time and "environmental" conditions. There were probably not sufficient references to that in the Eco-Pal materials.

[159] Mr Fell also noted that:

The brochure and website contain considerable detail which necessarily inform the meaning of words such as "biodegradable" and "compostable". However, Professor Gendall's evidence, and much of the Commission's case, seems to be that any use of the words "biodegradable" or "compostable" will lead consumers to expect the items to disappear within a

year unless there is an express statement to the contrary regardless of other contextual detail.

[160] Mr Fell referred to Mr Stephens' statement that:

Oxo-biodegradable is a subcategory of biodegradable.

[161] Thus Mr Fell submitted that the bags are biodegradable because you cannot be oxo-biodegradable without also being biodegradable. Of course that is true if the bags are oxo-biodegradable, because that is the true (complete) description of them. But logically, what that means is (in order to be properly qualified) they need to be described as oxo-biodegradable.

[162] The representations on the bag are very likely misleading. They are certainly in my view "liable to mislead" the average shopper. This is because the average shopper views the total message on the bag as one of inherently eco-friendly disposal reasonably swiftly, supported by Professor Gendall's survey results which I accept. The reality is different, whether or not (fine) distinctions are made between biodegradable or oxo-biodegradable.

[163] These bags will not biodegrade in a landfill readily or swiftly, or within the timeframe the average consumer or survey respondent expects (whether 12 months or 24 months or less) in my view. That view takes into account the expert scientific and marketing evidence I heard.

[164] I am satisfied beyond reasonable doubt that the representations on the bag were (in terms of s 10) "liable to mislead the public" represented by the average shopper, here in a supermarket. The same applies to the representations on the website, available to the public.

[165] Whilst the brochure is very likely "misleading" too, I was not satisfied to the requisite standard, for the purposes of s 13. So far as s 10 is concerned, I am inclined to view the statements on the brochure differently from the website, given the different audience, as referred to earlier in this decision.

Oxo-biodegradability

[166] The relevant representations here include statements in all three media that the plastic bags are “oxo-biodegradable”.

[167] In relation to the website the representations relied on are:

1. “With the oxidative action of d2w the molecular “backbone” collapses. The initial result is embrittlement and disintegration – the material can no longer be considered a plastic. Ultimately, after microbial deterioration has completed, the overall degradation process will have resulted in the creation of some H₂O, some CO₂ and a small amount of biomass.”
2. “However, it is now widely recognised that when a plastic material descends to below 40,000 molecular weight – due to oxidative degradation – the material becomes water wetttable and can sustain a bio-film on its surface. This bio-film supports numerous micro-organisms that will feed off the carbon and hydrogen elements of the oxidising plastic.

[168] In relation to the brochure the following statements are relied on:

1. “Biodegradable”.
2. “Biodegradable plastics” together with slogan “Here today... gone tomorrow”.
3. “Our plastic is biodegradable... It has also been successfully tested for soil safety and eco-toxicity.”
4. In reference to oxo-degradation, “This process continues until the material has biodegraded to nothing more than CO₂, water and hummus. It does not leave fragments of petro-polymers in the soil.”
5. “When the packaging film is ingested by the microorganisms, the only residue is CO₂ and water.
6. “Thus any mineral fillers, metal salts, and the like that were present in the plastic to start with will still be there after all the biodegradation of the oxidised plastic has occurred. Metals, for example, tend to end up as metal oxides, which is how they exist in nature in the first place. But note that any organic part of the metal compound will undergo biodegradation.

[169] In addition, there was the statement on the plastic bags that they are “oxo-biodegradable”.

[170] Of course so far as the brochure is concerned the first summary page states that the plastic is biodegradable and, under the “recyclable” heading, there is reference to the additive d2w which “makes it biodegradable”. In addition, in the Technology Summary under the heading “The Technology”, there is reference to the new technology producing plastic which degrades “by a process of OXO-degradation”. This is stated to be a technology based on a very small amount of prodegradant additive being introduced into the conventional manufacturing process, whereby the behaviour of the plastic is changed. Further, under a heading “Environmental Benefits” oxo-biodegradable plastic (unlike the starch-based alternative) is said to release carbon slowly and thus produce high quality compost. There is reference below to oxo-biodegradable plastics, as opposed to hydro-biodegradable polyesters.

[171] Under the heading “Agricultural and Horticultural” there is a statement that “oxo-biodegradable plastic sheets can however be programmed at manufacture to degrade soon after the harvest”, a sentence which Mr Fell submitted was the only use of the word “oxo-biodegradable” in the brochure. Mr Fell emphasised the use of the word “degrade” in that sentence. He emphasised the degradation process singly also in relation to the website.

[172] Overall there is reasonable use of “oxo-biodegradable” in the brochure and there is reasonable use of it in context taking into account surrounding other descriptions of the process. That might not necessarily be so at first blush at least in relation to the website.

[173] The issues here are similar to those involving biodegradability. Again, the Commission’s concern was that statements were unqualified or if qualified then inadequately so. There also were attendant incorrect impressions of oxo-biodegradability or biodegradability within a timeframe of 12 months to two years.

[174] On this, Eco-Pal’s position was the same. Eco-Pal took issue with Professor Gendall’s survey results and submitted also that oxo-biodegradability will occur in a landfill and that the bag will compost. Further, Mr Fell submitted that there was

nothing relating to oxo-biodegradability in the website and brochure in relation to composting or landfill. The words are never used together with any statements regarding composting or landfill. Eco-Pal put store also on Professor Jacobowitz's 2011 paper with respect to laboratory tests on plastic film as suggestive of shorter time frames for biodegradation for the plastic refuse bags.

[175] It seemed sensible to conclude however from the evidence, including from Dr Swift, that laboratory tests on plastic film did not equate appropriate results for Eco-Pal's refuse bags in the real world.

[176] I have not overlooked the Intertek report, on which Eco-Pal also relied. Again, however, it was my conclusion on the evidence, including based on concessions of Dr Swift, that there was nothing to support the shorter timeframe for oxo-biodegradation. What seemed to be material here was that the test additive loading (critical) was not specified. A known loading of 1% here had not assisted evident breakdown in the composting trial or indeed the refuse bags which were exhibits at trial.

[177] The Commission's case was that the highest Eco-Pal can really put the benefits argument is that the product offers *a potential* benefit if disposed of as litter. But the Commission submits Eco-Pal has still overstated the timeframe for the product to oxo-biodegrade as litter and this is the real issue taken by the Commission.

[178] Again, the representations on the bag regarding oxo-biodegradability (without qualification) are likely "misleading", but at the least are "liable to mislead" the public, the average shopper, in contravention of s 10.

[179] The statements on the website are in the same category, and the relevant public is the wide audience who can access the website.

[180] Again, the statements in the brochure I am inclined to view differently, for reasons similar to those previously stated.

Representations that the bags are environmentally friendly

[181] The Commission's case here is that Eco-Pal has represented by various statements that Eco-Pal plastic bags are environmentally friendly. In relation to Eco-Pal's bag, for example, the Commission points to the use of the name Eco-Pal, the frog logo and the slogan "Here today... gone tomorrow". In relation to the website the following statement appears:

Under licence ... we are able to bring to the New Zealand market a solution for the disposal of plastic waste – a solution that is consumer friendly, safe, inexpensive and that is available now.

[182] The Commission suggests that words like "oxo-biodegradability" and "recyclable" all suggest environmental friendliness, and that the message conveyed is that Eco-Pal plastic bags have enhanced degradability. There is a reference to rapid and quick, and "totally degradable". The Commission says that while it may be acceptable for Eco-Pal to say that its product *may* degrade in the environment faster than conventional plastic (with appropriate qualification) the constant implied representation is misleading or liable to mislead because enhanced degradability will not necessarily occur in landfill, the end-of-life point for the majority of the bags. The representations also generally overstate the timeframe of degradation without sufficient qualification.

[183] The Commission had put it, generally, this way in Mr Anthony's interim compliance advice letter to Mr Fell dated 9 October 2009:

The Commission is concerned that Eco-Pal makes a number of explicit and implicit environmentally friendly representations. These coupled with the product name all combine to create a powerful message about the products' environmental credentials.

[184] Eco-Pal says that the genesis of this technology is to address the environmental issues caused by plastic as litter. That is why the brochure refers to the scourge of litter, with respect to the boxed statements about plastic. Any reasonable person, it is said, knows that the environmental issue with plastic is when it becomes litter. And that is what a biodegradable plastic bag has been developed to address: any reasonable person apparently can see from the website that the main benefit of the Eco-Pal plastic bag is addressing litter. Eco-Pal submits that the

international scientific community has spent millions of dollars in coming up with a solution to the issue of plastic as litter, and one of the solutions that has been developed is the oxo-biodegradable technology.

[185] This appears to be consistent with Mr Fell's reply advices to Mr Anthony in his email dated 19 October 2009:

- (a) Eco-Pal's products will fragment but will remain inert in a landfill. This is exactly what landfill operators want. They do not want the contents of landfills to degrade and cause the fill to "slump";
- (b) under normal circumstances as litter Eco-Pal products will have biodegraded within three years, which is very fast when compared to standard plastic;
- (c) the Eco-Pal products have environmental advantages but only if they become litter; and
- (d) there is no real reason to use a degradable plastic product, unless there is a chance it may become litter.

[186] In his closing submissions before me, Mr Fell put it this way:

Again, the Commission has not proved beyond a reasonable doubt that oxo-biodegradable plastic has no known benefits over conventional plastic. The whole reason for this technology being developed was to address the environmental problems caused by plastic litter and the evidence has shown it does indeed have many benefits over conventional and starched based plastics.

[187] Quite obviously the message from Eco-Pal's marketing is that Eco-Pal has environmentally friendly products, beneficial to the environment. There likely is indeed "a powerful message about the products' environmental credentials", as Mr Anthony of the Commission put it. As Mr Fell points out, Eco-Pal has a response to a problem with plastic. It was a problem Mr Power of Packaging House referred to – he said the market "was asking for a biodegradable plastic bag". Eco-Pal considered that it had sound science to combat that problem and wished to promote it. Eco-Pal considered its product refuse bag had an advantage over the conventional plastic refuse bags.

[188] Mr Fell agreed with Ms McClintock in cross-examination that oxo-biodegradable is a point of difference and a marketing advantage. He agreed

that there is a general desire on the part of members of the public to do the right thing by the environment. In fact, Mr Fell referred to "Here today... gone tomorrow" as a humorous line:

I'd never thought a minute imagine people would think that a plastic bag would disappear in a day.

[189] However, he agreed with Ms McClintock that the phrase "Here today... gone tomorrow" with use of the phrase "relatively rapid" and reference to a source of carbon "for next year's plants" meant that a timeframe was formed in the mind of the consumer. That is a not surprising observation.

[190] Mr Fell accepted in cross-examination that Eco-Pal's position is that the whole point of the product surrounds getting into the environment as litter. He would not agree that there was no mention of that proposition in the brochure. He referred to the report by Dr Wiles on the back page in relation to the degradation process. But he agreed that there was no specific mention of litter.

[191] Ms McClintock asked him to agree that it was already established that in fact the chances of a bag like this refuse bag becoming litter are really quite limited in comparison to the majority which is going to landfill. Mr Fell agreed that a high majority are going to landfill.

[192] Mr Fell also agreed that nowhere in the advertising is there a statement included that the degradable plastic product is no use unless there is a chance it may become litter. Curiously again, Mr Fell said there is no such inclusion because:

I would take that as a given that people would know that. That's just something you would expect from a biodegradable plastic bag, that it will perform as litter.

[193] Simply, the question is what message was projected with respect to Eco-Pal's promotion of its products. It seems to me undeniable that Eco-Pal promoted a solution which was portrayed as and intended to be considered effective. That solution was portrayed as a counter to the failings or evils of conventional plastic, such as mentioned in the "Facts" boxes or understood by the average shopper

anyway. The solution, the Eco-Pal bag, had the prodegradant additive. That made it environmentally friendly.

[194] The science required some explanation and this is given. It is accompanied with a suite of features of Eco-Pal's product. The bag is stated to be biodegradable, compostable, recyclable and so forth. The surrounding scientific story is purposeful and relevant in context. It tends overall to assure and not detract, to an average reader.

[195] Mr Fell believes the Commission has not proved that there are no known benefits over conventional plastic but that is not quite the point. There may well be benefits. The bag may have benefits as litter compared with conventional plastic. The bag may be recyclable and compostable under certain conditions. But the point is whether what is conveyed in the relevant marketing as environmentally friendly is false or misleading, or liable to mislead.

[196] Mr Fell stated in final comments to me that he has to tell people what a bag does and putting a statement like "biodegradable" on a bag tells them what they are buying:

because if they're buying a bag they think will last for two or three years and it's not going to happen with this bag, so you have a responsibility to tell people exactly what they're getting.

[197] Indeed you do have to convey an accurate message, amongst other reasons to avoid running foul of consumer protection legislation.

[198] Here the average shopper without doubt believes the shopper purchases an eco-friendly, environmentally friendly product, from the supermarket shelf. This is because of what is displayed prominently on the bag. That is the message or impression that you get. In my view, that display is very likely misleading and is at the least "liable to mislead". The same applies to the website. The "public" in each case is the public I previously refer to.

[199] So far as the brochure is concerned, the message again generally is a "misleading" one, albeit to arguably a limited audience. To me the general

“environmentally friendly” message here is not in the same category as specific representations as to recyclability and so forth. I am inclined to the view Eco-Pal’s general message is “liable to mislead” the limited section of the public it reached. This is because the total overall environmentally friendly message could overwhelm with greater success than necessarily a component part. It could mislead, or be liable to mislead even the limited audience or an informed industry player.

Statutory Defence – Reasonable Reliance

[200] Eco-Pal relies on the statutory defence of reasonable reliance, under s 44 of the Fair Trading Act. The reliance must be on information supplied by another person and that reliance must be reasonable in the circumstances. The onus here is on Eco-Pal, on the balance of probabilities.

[201] Put generally, Eco-Pal’s position was that it relied on science that supported the merits of the d2w additive and the environmentally friendly response presented by Eco-Pal’s products. In addition, Eco-Pal’s position was that all steps taken by it were reasonable in the circumstances so that the contravention of the Fair Trading Act was in fact “due to reasonable reliance” on information so supplied.

[202] Of course the Court must consider all the circumstances and the market into which Eco-Pal entered with the promotion of its products and the attendant representations. The Court must consider the particular customer or segment of the public which is involved here. One could not overlook the nature of the particular product which is being sold and its intended deployment. Equally if there were an (especially) eager or informed market, or a motivated average shopper wanting to do that person’s best by the environment, perhaps the need for more caution might be all the more sensible and moreover required from a policy perspective.

[203] Some of those issues are raised by relevant authorities. Sometimes the claims of manufacturers in relation to their products merit particular or greater scrutiny. Sometimes testing might be required, depending upon the particular product involved. The relative informality of some advice might make reliance on it

unsatisfactory. Whether or not there are perceived legal issues, perhaps legal or professional other advice should be obtained.

[204] Overall there should be, generally speaking, some attempt made to verify information on which product claims, especially by the manufacturer, might be based. The wholesale translation into the New Zealand market without question of such a product would be considered not generally satisfactory.

[205] Eco-Pal proposed that it was entitled to the benefit of the reasonable reliance defence. The Commission disagreed.

[206] By way of background, Mr Fell advised in his evidence that Eco-Pal was formed in 2003 following on from a lengthy investigation by him into biodegradable plastic technology. He had been concerned about issues with plastic litter. He said he settled on the oxo-biodegradable technology being offered by Symphony Environmental after meeting the then chief executive in Auckland. His decision was aided by supporting scientific evidence provided by Symphony. The first order (shopping bags for a retail chain) was placed with Symphony Environmental in 2004. Mr Fell was Eco-Pal's only employee between 2004 and 2006. In 2006 he was joined by his daughter, Ms Shaw. All employees of Eco-Pal, who now include Mr Fell's son, have attended a relevant diploma course run by Plastics New Zealand (the plastics industry trade organisation).

[207] Mr Fell advised that in 2006 he was invited to become a member of a committee being established by Plastics New Zealand. The committee was to consider the consequences of the introduction of biodegradable and degradable plastics into New Zealand. He said that the idea was to then publish a guide to assist the general public and trade to understand the benefits and problems, to establish definitions, and explain how each technology worked in simple terms. The committee met once a month over about a three year period, and he did not miss one meeting. It was very important to him, he said, that Eco-Pal should hear and act on any concerns from other committee members.

[208] During that time Eco-Pal had changed some of the print information on Eco-Pal's bags to comply with recommendations from the committee.

[209] Mr Fell confirmed in his evidence that all information on the website (apart from the products and distributors pages) came from the Symphony website. At the relevant time, Eco-Pal's website was in substance Symphony's website. The Eco-Pal website simply took the reader to the Symphony website. In April 2009, the Eco-Pal website continued to take the reader to the Symphony site, but with an introductory page outlining Symphony Environmental, and describing Eco-Pal as the local contact in New Zealand.

[210] Mr Fell advised that all the information in the brochure, apart from a list of products, comes from the Symphony website or brochure.

[211] Mr Fell stated that he did not take the Symphony information at face value but had, as he put it, scientific evidence of the claims provided him. Further, he said he met with Dr Plimmer regularly, and he considered extensive scientific literature to which he referred.

[212] In addition, Mr Fell relied on information from the Oxo-biodegradable Plastics Association who regularly sent information to him. The Scientific Advisory Board of this organisation includes prominent scientists.

[213] In cross-examination by Ms McClintock, Mr Fell advised that the website was devised with all sorts of people in mind who might access it – the heading for “Normal” and the heading for “Dummies” recognised that.

[214] Mr Fell fairly agreed with Ms McClintock on the need for some caution with regard to information from Professor Scott, who was a consultant to Symphony. He accepted he did not get an independent expert to advise on New Zealand landfill in terms of likely oxygen levels and so forth.

[215] He insisted that he relied on offshore science but accepted that no modifications to it had been made in terms of the New Zealand situation and condition. He did not take legal advice because he did not think it was necessary.

[216] He agreed that the plastics working group committee of which he was a member had concluded that degradation would not occur in a landfill and that there was widespread misconception about biodegradable material. He said that Eco-Pal's marketing came from Symphony. He did say that he recognised Eco-Pal had a responsibility to the marketplace, but stated he took the time and care to make sure he read all scientific data available to him. He had also consulted Dr Plimmer.

[217] In answer to my questions, Mr Fell confirmed he had taken the website materials and the brochure from Symphony. In addition the small Facts boxes on the brochure (concerning plastic) all came from Symphony, except the one that refers to the amount of plastic in New Zealand landfill.

[218] I allowed Mr Fell the opportunity to expand in relation to the brochure. He said he took the brochure with him to meetings with distributors and their staff:

Well, Your Honour, all I can say is that I took the brochure with me to meetings with distributors and their staff. We had information to share with them, and the distributors are quite happy to receive the information so the reps knew what we were talking about. So I would discuss, I'd tell them what the product did, where it's strengths were. I always told them litter was the main strength, I've never deviated from that, Your Honour, ever. That's the main thrust of the benefit, and that was made clear to the distributors and their staff, and that we did have a biodegradable product and that we had a compostable product, and we had a product that was environmentally better than standard plastic. So I made that clear to them, and I told them the reasons why it was better. And they, in answer to the questions, that's basically what we did.

[219] Mr Fell said that he was in dialogue with the plastics committee and discussed scientific issues as matters arose. He said he was regularly checking the science. He said he had knowledge of competitors doing things overseas with plastic and landfill and he had knowledge of use in landfill.

[220] Ms Shaw confirmed in cross-examination that the Eco-Pal website was originally just a link to the Symphony website that was arranged by her father. She

said that she personally had put together the 2009 Eco-Pal brochure, but again this was a lift of Symphony materials – it was basically a copy of a Symphony brochure.

[221] In his closing submissions, Mr Fell referred to matters he had covered in his evidence. He submitted that it was reasonable for Eco-Pal to rely on a company that specialises in oxo-biodegradable technology for information on that technology. That reliance was moreover in circumstances where Eco-Pal, through Mr Fell, had made enquiries to satisfy itself on the information provided by Symphony, including by seeking further information from the Oxo-biodegradable Plastics Association. This, Mr Fell submitted, moves the enquiry beyond the superficial and subjective, and renders the reliance on Symphony's information reasonable.

[222] The Commission submitted that Eco-Pal may have relied on scientific reports as supporting the fact that the oxo-biodegradable process worked, but Eco-Pal's reliance was not reasonable. This was because steps taken to verify that information were inadequate and the information was not made applicable to the New Zealand marketplace. In addition, there were no precautions taken about the straight copy of Symphony material into the brochure and via the website link.

[223] The Commission submitted that any reliance by Eco-Pal was on the general scientific credibility of the d2w additive not the accuracy or legality of product marketing. This is said to tell against any relevant reliance and illustrates the unreasonableness of any reliance in the circumstances. For example, no independent landfill expert was consulted.

[224] The Commission submitted that no steps were taken to make the material relevant and applicable to the New Zealand marketplace. The product needed to be independently checked because Symphony had a vested interest in selling the product. While this does not exclude reliance on their material, it makes it all the more important in the Commission's view that it is properly checked. There should have been formal steps taken in relation to the Symphony material before incorporation into the brochure and via the website link.

[225] The Commission also submitted that Eco-Pal's reliance was at best selective in any event. In that regard the Commission pointed to Mr Fell's seeming unwarranted reliance on Professor Scott as a consultant to Symphony and, in the event, Eco-Pal's claims to things in excess of what its own expert Dr Swift might have agreed with.

[226] There was a need for caution to be exercised by Eco-Pal. Mr Fell knew there were concerns (the genesis of his investigations) with conventional plastic that he might have a solution for. He settled on science which was technically sound as the solution, having done his preliminary research.

[227] He certainly relied on the manufacturer itself. But he did also other research and investigation, and in fact considered a reasonable volume of scientific papers. He considered the science. He did a plastics course and he joined and attended regularly meetings of a relevant industry body.

[228] Mr Fell, I do not doubt, took some steps earnestly and in good faith to check out the science he was introducing into the New Zealand marketplace. Dr Plimmer's comments about Mr Fell's acting in good faith are relevant.

[229] But Mr Fell could have, and probably should have, done more in the circumstances. The science came from the (offshore) manufacturer and was going to be used in the New Zealand marketplace. It is doubtful that wholesale translation or repetition of the manufacturer's materials was appropriate for wide dissemination.

[230] For the reality is, and Ms McClintock made this point, it is not just the "elegant" science that is being promoted. It is the use, the outworkings, of it: its use in a plastic bag and the advantages then presented by that bag over conventional plastic. That Symphony might "market" those advantages elsewhere does not impress immediately as underwriting or assuring compliant marketing here, especially if merely wholesale.

[231] That is because, and it seems elementary, the New Zealand marketplace and conditions should ideally be taken into account. Moreover, it seems obvious, for

example, that the refuse bag has one destination in the main. Certainly everybody seemed to accept that as a general proposition. Thus checking out what happens in landfill here would (in New Zealand) be a reasonable inquiry to make. The same appears on the face of it relevant to other claimed attributes of the bag.

[232] So far as representations on the bags and on the website are concerned, any defence of reasonable reliance under s 44 must fail in my view. Eco-Pal should have taken more steps. The statements on the bags are plain and bold. The messages on the website may lack that unforgiving clarity, but they are too messages of assurance of environmentally friendly features at least, and certain specific other attributes or features also, in sub-optimal terms. The messages are, as I have found, very likely misleading and are liable to mislead. More needed to be done.

[233] Eco-Pal in fact relied substantially on Symphony in relation to the website. At one relevant point there was a simple re-direction, and thereafter direct duplication. That was not reasonable reliance in the circumstances. The same applies to the bag. It had relevant statements that were directly from the Symphony bag also. Irrespective of the actual origin, substantial reliance on Symphony again was not reasonable reliance in the circumstances.

[234] The brochure I think is in a different category. Certainly it is a lift of Symphony's materials, with additions of Eco-Pal product descriptions. However, its dissemination was accompanied also by other scientific and associated materials, relevant meetings, and was directed to a knowledgeable audience. I formed the view that reliance or partial reliance on Symphony in these circumstances was reasonable reliance under s 44 of the Fair Trading Act, on the balance of probabilities.

Conclusion

[235] The charges in relation to recycling, and under s 13 of the Fair Trading Act, are dismissed.

[236] I was satisfied that the charges against Eco-Pal under s 10 of the Fair Trading Act, in relation to the website and the refuse bag, were proven. The charges under

s 10 of the Fair Trading Act concerning the brochure are dismissed. The defence of reasonable reliance, on the balance of probabilities, was available to Eco-Pal under s 44 in relation to the brochure.



L I Hinton
District Court Judge