IN THE DISTRICT COURT
AT AUCKLAND

CRI-2013-004-001812

COMMERCE COMMISSION
Informant

v

CALLPLUS SERVICES LIMITED
Defendant

Hearing: 12 December 2013

Appearances: N Flanagan and K Mills for the Informant
B Gray QC and S Nicholson for the Defendant

Judgment: 12 December 2013

NOTES OF JUDGE R COLLINS ON SENTENCING

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[1] This is a sentencing decision in relation to proceedings the Commerce Commission has brought against CallPlus Services Limited trading as Slingshot.

[2] The defendant company has pleaded guilty to 50 informations which can be broken down into three categories or have been so categorised by the parties.

[3] The first seven informations relate to offending which can be said in broad terms to involve misrepresentation about the nature of Slingshot's products or in relation to matters pertinent to a transfer from another telecommunications provider to Slingshot.

[4] The next 20 charges can be broadly categorised as cases where without the wish or the authority or the fully informed permission of the customer, the customer was transferred by Slingshot to itself from Telecom.

[5] The remaining 23 charges are where misrepresentations were made by Slingshot to the individual customers. Those misrepresentations were consequential upon the position taken in the second category of offences, that is that the customers or the individuals had become clients of Slingshot.

[6] The summary of facts contains all those matters and runs to over 12 pages and it would not be appropriate in the context of what is this oral decision to attempt to summarise it further other than to say this. In this particular market, that is the provision of telecommunication services, the defendant operated effectively as far as this case is concerned by the use of an agent. No more need be said about that in this judgment because proceedings in relation to that party are still to be heard and determined. However, as between the parties in this hearing the actual role that the defendant played is accepted and its culpability is to be seen in light of just exactly what it did and what it has accepted doing for the purposes of sentencing.

[7] The Commission points out that the offending is inherently serious and the sample victim impact statements that have been provided to me show how very real and disturbing the impact on individual customers in the marketplace has been.

[8] This sentencing is very much in my view unique to the very unusual facts of this particular case for reasons that I will expand on a little later. Counsel and parties in future cases should rely on this case as a comparator case with the utmost caution.

[9] I should simply record that I am cognisant of the purposes of the Fair Trading Act 1986. In very broad terms it operates to protect consumers in New Zealand and it also operates to create a fair playing field for competitors in the marketplace. This case is an excellent illustration of the need for the Act and of the Act in operation.

[10] The factual situation here which gives rise to greater culpability than what might be described as the "run of the mill misrepresentation cases" is the switching of customers from one provider to the other without the customer agreeing. There is no dispute between Mr Flanagan and Mr Gray in their most helpful submissions that this creates a high degree of culpability and that the penalty to be imposed recognises that.

[11] This is also a situation where the parties have agreed on the penalty.

[12] I need to note what the High Court in not exact but analogous commercial regulatory proceedings has said about that[1]:

> Finally in discussing the general approach to fixing penalty I acknowledge the submission that the task of the Court in cases where penalty has been agreed between the parties is not to embark on its own inquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range. (See the judgment of the full Federal Court in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285).

[13] As noted by the Court in that case and by Williams J in *Commerce Commission and Koppers v Wood Protection (NZ) Limited*[2]:

> There is a significant public benefit when corporations acknowledge wrongdoing thereby avoiding time consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement would be rejected on any substantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[14] It is the position of both parties in this case that I am bound by that view of the High Court. I agree that I am bound by the agreed penalty (which I will come to in a moment) as it is in my view, within the proper range but very much towards the bottom of that range.

[15] I have been referred to a very finite number of other cases for assistance. I observed in the course of submissions that I questioned the assistance of those cases or the applicability of those cases to these proceedings.

[16] My preliminary thinking was that as none of those cases involved a situation directly where customers had been switched from one provider to another without their knowledge or agreement, those cases were of limited assistance. However, I accept there is much in Mr Gray's submission which I paraphrase as follows and I apologise if I do not express it as well as he did.

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[1] *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) Rodney Hansen J at [18].
[2] (2006) 11 TCLR 581 at [30].

[17] As I understand the submission, other cases which have been referred to me and which I will set out in an appendix to the sentencing notes, nevertheless deal with behaviour that breach the Fair Trading Act to give the particular operator, normally a telecommunication company, an unfair advantage in the marketplace and that may have been by advertising which was false and thereby unfairly attracted customers to that particular telecommunications provider.

[18] In that sense Mr Gray says that this case then is no different because it was just another means by which, contrary to the Act, a telecommunications operator attracted or gained customers to itself. As I say I accept the logic of that argument. However always to be set against that for future reference is the particular way in which this defendant did operate through its agent to secure customers.

[19] I understand also the reasons that the defendant puts forward in this particular market as to, "not how it acted, but how it came about that the overall offending is said to have occurred." The unfortunate outcome of that of course is that by acting in the way it did it probably only encouraged more barriers to competition or more barriers to customers switching from one provider to another.

[20] However, accepting as I do the thrust of Mr Gray's submission that there is far greater assistance to be gained by reference to the cases that have been provided, in particular the decision of Judge Joyce in the decision he gave in relation to *Commerce Commission v Vodafone New Zealand Limited* [2012] DCR 291 (DC) and the decision of Judge Rea in *Commerce Commission v Energy Online* I can quite comfortably come to the view that the agreed penalty in this case is within the available range.

[21] I do note, additionally, Australian authority that Mr Flanagan has referred to me and that provides assistance. If and when maximum penalties in this Act are increased that decision may become of even greater applicability in years to come.

[22] At the end of the day, as I say, this is an Act to create a fair playing field and protection of consumers. It is commercial legislation in the sense that when there is commercial offending then that commercial offending is met with commercial penalties.

[23] Both sides have referred to the criteria that should be used to assess culpability in these situations. That criteria has emerged out of decisions such as *Commerce Commission v L D Nathan & Co Ltd* [1990] 2 NZLR 160 and *Commerce Commission v Ticketek* [2007] DCR 910 and has been approved relatively recently in the High Court in *Commerce Commission v Zenith* HC Auckland CRI-2006-404-245, 27 May 2008.

[24] I do not need to repeat it here. The parties are agreed. Mr Gray says "Look the defendant accepts the seriousness of the offending, its culpability by the level of penalty that it is prepared to accept."

[25] The Commission says that the starting point for the offending viewed globally is between 350,000 or 390,000 and that 375,000 is an appropriate midpoint.

[26] Thereafter discount for the cooperation which has been provided in a very meaningful way in this case (and in that I include the way that counsel on both sides have conducted the proceedings and obviously conducted the negotiation between themselves) is to be a meaningful discount, somewhere in the order of seven percent. However there is no need to be precise about the percentages in this particular case.

[27] Thereafter the full discount for guilty pleas as envisaged by the Supreme Court in *Hessell v R* [2010] NZSC 135 can be given. I easily accept that submission in this case.

[28] Had the defendant not pleaded guilty at the earliest opportunity which it has done and had this matter gone to a defended hearing, it would have occupied several weeks of Court time. Not only would that have involved a very significant use of judicial resource it would have taken up a significant amount of counsels' time and that of a number of other people. Unquestionably then the defendant is entitled to

the full discount for the plea. And that brings the final penalty to one of $250,000 which will be apportioned in a way which I will conclude in a moment.

[29] I will just add one final matter. In submissions there was discussion around the applicability of s 32 Sentencing Act 2002 and the provision of reparation to individual victims for emotional harm.

[30] The absence of making amends, and I accept that to some extent the defendant has made some amends to a varying extent with different victims, but the absence of steps which I consider the defendant might have gone to is in no way an aggravating factor, and that is trite sentencing principle.

[31] I am not going to interfere with the decision which has been reached between the parties simply because I consider that the defendant may have done more with respect to individual victims, many of whom are people who, by their age and other circumstances, are quite vulnerable to the disruption, concern and the heartache that what happened here caused them. That will be a matter for the defendant to consider voluntarily in the future of its own volition.

[32] So therefore in all circumstances I conclude by apportioning the penalty this way:

(a) On information ending CRN 0611 the defendant will be fined $50,000. That is the first CRN number as I see matters in relation to the seven charges which fall within the first category of the charges.

(b) For information ending CRN 0621 the defendant is fined $100,000.

(c) On CRN ending 0655 the defendant is fined $100,000.

(d) On all other informations the defendant is convicted and discharged.

[33] The apportionment of the fines in that way reflects where I consider the greater culpability lies in the actions of the defendant here.

[34] I should, finally, record in the notes my gratitude for the quality of the written submissions and oral submissions today.

R Collins
District Court Judge

APPENDIX

1. Commerce Commission v Ticketek New Zealand Limited
   Christchurch District Court, CRN: 2009031178, 2009031181-83
   Judge TM Abbott, 31 October 2003.

2. Commerce Commission v Vodafone New Zealand Limited
   Auckland District Court, CRN: 09004505617, 5620, 5621, 5626, 5731.
   Judge R Joyce QC, 12 August 2011.

3. Commerce Commission v Vodafone New Zealand Limited
   Auckland District Court, CRI-2012-004-012339
   Judge David Harvey, 10 September 2012.

4. Commerce Commission v Vodafone New Zealand Limited
   Auckland District Court, CRI-2011-004-014759
   Judge Kiernan, 21 November 2011.

5. Commerce Commission v Energy Online
   Napier District Court
   Judge Rea, 16 October 2006.

6. Australian Competition and Consumer Commission v AGL Sales Pty Ltd
   [2013] FCA 1030