

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2018-004-003348
[2018] NZDC 27403**

COMMERCE COMMISSION

Prosecutor

v

NOEL LEEMING GROUP LIMITED

Defendant

Hearing: 14 December 2018

Appearances: N Flanagan and D Green for the Prosecutor
M Heron QC and D Street for the Defendant

Judgment: 14 December 2018

NOTES OF JUDGE NICOLA MATHERS ON SENTENCING

[1] The defendant, Noel Leeming Group Limited, has pleaded guilty to eight charges under the Fair Trading Act 1986 which relate to breaches of the Consumer Guarantees Act 1993. The maximum penalty was increased for offences occurring after June 2014 from \$200,000 to \$600,000.

[2] The offending is fully set out in the lengthy summary of facts which I propose to annex to the sentencing notes. Briefly put however, the charges relate to representations made by the group regarding faulty products purchased at various Noel Leeming stores throughout the country between March 2016 and October 2016. Again, put briefly, Noel Leeming staff represented to customers who complained about various purchases that they had no rights under consumer legislation when in fact they had.

[3] I accept that the purchasers and their purchases covered electrical goods of reasonably high value. There are eight instances which should not have occurred throughout New Zealand and which misled the public as to their rights under consumer legislation. I have read the various impact statements and the consequences to those victims, particularly in relation to the frustration, stress and time that was spent by them trying to deal with the issues and have things put right.

[4] Today, I have also had one of the statements read out by one of the victims and he expresses as the others have, the exasperation he felt at having to go back to the Noel Leeming store in Rangiora on a number of occasions, the time that he spent making phone calls and then just being dismissed out of hand. Also the disruption to himself, the cost to himself and all the inconvenience that went with that. I accept that the feelings are genuine and have caused particular stress to all the victims.

[5] I approach this sentencing, taking into account the provisions of the Fair Trading Act and the substantially increased penalties which I have already referred to and guidance from the case law of *Commerce Commission v Ticketek New Zealand Limited* in particular.¹ I have also had a number of other authorities referred to me. I agree with the factors set out in that case in particular and I have considered those factors very carefully.

[6] I agree with Mr Heron QC, counsel for Noel Leeming Group, in his submissions that the affected customers were not especially vulnerable. Nevertheless, as Mr Flanagan for the Commerce Commission submits, the various misrepresentations involved direct and significant departures from the truth in every case. It was not just salespersons who made the representations but where Noel Leeming's national call centres were involved. The Commission points to the fact that it may very well be the case, that the scale of misrepresentation is not represented by just the instances before me but I do not consider that I can speculate to that extent. Consumers were denied their rights, they had real difficulties in dealing with Noel Leeming and I accept that the general consumer legislation is important to protect customers.

¹ *Commerce Commission v Ticketek New Zealand Limited* [2007] DCR 910.

[7] I note that much of the case law referred to me relates to a previous penalty regime which has subsequently been substantially increased. I agree that the very significant increase in penalties reflects the seriousness with which the legislature regards this type of offending. Various Courts have acknowledged that a precise mathematical analysis cannot be applied.

[8] Mr Flanagan has referred me to a number of decisions. I take into account that Noel Leeming is a large nationwide company with, I believe, 77 outlets. The Commerce Commission seeks a very substantial starting point in a fine of \$400,000 to reflect the offending and the necessary deterrents looking at the case overall and the various authorities. Mr Heron submits that such a substantial starting point is not warranted in this case and he says it is not a case of systematic offending nor offending where the amount of goods is very high nor widespread.

[9] I am not satisfied that a starting point as high as \$400,000 is warranted or is appropriate. In my view, a starting point in the vicinity of \$275,000 more properly reflects the level of offending which I accept as being moderate and the remedial steps taken by the company. I also note the charges are not laid on a representative basis.

[10] The Commerce Commission accepts that Noel Leeming Group Limited has been cooperative and suggests a five percent reduction for cooperation. Mr Heron suggests that a discount of 10 percent should be given for the cooperation and previous good character. In my view, I agree with Mr Flanagan's submissions of a five percent discount. Although the present Noel Leeming Group Limited as is constituted, does not have previous convictions, it has been warned and I think a company under a different structure has previous convictions.

[11] From that, Mr Flanagan acknowledges a reduction for an early guilty plea of 25 percent and again, I accept that is appropriate. While not applying exact mathematics, I am satisfied that an end penalty of \$200,000 is appropriate to reflect the circumstances of the company, the offending involved and the subsequent cooperation of the company in the investigation and the steps it has taken in relation to trading and the necessity to avoid any further breaches of consumer legislation. The

fine must be applied across the eight separate charges to which guilty pleas have been entered.

[12] So accordingly, therefore, on each charge the group is convicted and fined \$25,000 along with costs of \$130 in relation to each charge. I will add that if the company is back before the Court again on charges of this nature then obviously the penalty will be more significant.

A handwritten signature in black ink, appearing to read 'Nicola Mathers', with a long horizontal flourish extending to the right.

Nicola Mathers
District Court Judge