

**IN THE DISTRICT COURT  
AT CHRISTCHURCH**

**CRI-2013-009-010152**

**COMMERCE COMMISSION**  
Informant

v

**ROGER SUTHERLAND**  
Defendant

Hearing: 06 December 2013

Appearances: J Dixon for the Informant  
A Riches for the Defendant

Judgment: 06 December 2013

---

**NOTES OF JUDGE P R KELLAR ON SENTENCING**

---

[1] Mr Sutherland is for sentence on a number of charges under the Fair Trading Act. He has not appeared in person, Mr Riches has obtained some limited instructions from him and has made as helpful submissions as he is able. Mr Riches sought an adjournment of the sentencing. I declined the application on the basis that Mr Sutherland has had every and many opportunities to participate in this process and, for various reasons, has not.

[2] The charges were formally proven on 14 October 2013. Hence Mr Sutherland is for a sentence on five charges under s 11, four laid under s 21 and two laid under s 13(1) Fair Trading Act 1986. Each of the charges carries a maximum penalty of a fine of \$60,000.

[3] Mr Sutherland was the sole director and employee and principal shareholder of a company trading as Rail Tours. He offered chartered rail services to customers.

He had a history of being unreliable and hence Kiwi Rail had put in place a formal protocol which Mr Sutherland was obliged to follow before he could charter a train. Beginning in February 2011 Mr Sutherland began to advertise a return rail service between Christchurch and Dunedin to take customers to an Elton John concert that was to be held in late November. On 31 January 2011 he contacted Kiwi Rail to organise hire of a carriage. He was provided with an estimate and a clear warning that the estimate did not guarantee the supply of carriages or staff. Notwithstanding this and the protocol that had been put in place, Mr Sutherland did not begin the formal steps which the protocol required. On 28 February 2011 he called Kiwi Rail again to ask about the availability of carriages. During the call he said that he had already sold tickets for the tour. Kiwi Rail emailed him later that day and told him that he should be aware, and also that he should make his customers aware, that no carriages had been allocated. This is an important point in terms of assessing culpability. Just to repeat, he was made aware that he should inform his customers that no carriages had been allocated. Notwithstanding that he still did not begin the formal steps which the protocol required. He did, however, continue to advertise the rail service for the concert.

[4] On 21 March 2011 he contacted Kiwi Rail again and was advised Kiwi Rail would not be able to estimate the number of seats available for the charter until as late as September or October 2011. He would have understood that this was because the period he was asking about, this is November 2011, is during a particularly busy season for Kiwi Rail charters, apparently because of cruise ships calling into Dunedin and that availability at that time was very limited. Mr Sutherland still had not commenced any of the formal steps he needed to take but nonetheless he continued to advertise the service for the concert.

[5] Mr Sutherland did not make any further contact with Kiwi Rail until 7 July 2011. He emailed Kiwi Rail saying that he had over 200 bookings for the package. Kiwi Rail responded by saying there were no carriages available for the requested date due to cruise ship charters. From February to November Mr Sutherland continued to advertise for customers and he accepted payment from them after 7 July despite knowing that no train was available. Ultimately, in November 2011 he sent his customers a letter. Despite customers phoning and emailing asking when their

package tickets would be sent to them, it was not until just three days before the concert that they were notified a train was not available. This late notice meant that customers could not make alternative arrangements. I know from my own experience that accommodation in Dunedin is extremely scarce and it was hardly surprising that at that late stage the passengers were unable to find accommodation. Some sought refunds but were told by Mr Sutherland that the bookings were non-refundable. Some customers chose not to travel by bus because of health issues. A small number were able to make alternative arrangements.

[6] In all Mr Sutherland obtained funds from some 223 passengers amounting to \$48,476 in revenue. That amount excludes sums he received for concert tickets which he then remitted to the promoter of the concert. It seems that he incurred costs of arranging for transport by bus of \$9643 together with another \$2900 paid to the Oamaru Working Mens Club for meals for the passengers. The total of that expenditure is some \$12,543. Although he may not have been aware of it the cost of providing rail carriages would have been \$33,125. Therefore on the face of it Mr Sutherland has made a not insignificant profit, although his instructions to Mr Riches are that he made no profit.

[7] In terms of the way that a sentencing Court should approach sentencing of offences under the Fair Trading Act, the late Judge Abbott very helpfully set out relevant factors in *Commerce Commission v Ticketek* [2007] DCR 910.

[8] The first thing to consider is the objectives of the Fair Trading Act. The Act is designed to protect consumers and also to promote fair competition. It is the aspect of consumer protection that is paramount in this case.

[9] It is clear that the misrepresentations that the travel was to be by train was critical to consumers and their decision to purchase the package. It must have seemed particularly attractive to customers to travel in the relative luxury of a train to Dunedin, attend the concert and return to Christchurch by train without having to incur the cost of obtaining accommodation in Dunedin.

[10] Consumers, I think it is fair to say, were drawn by the novelty of travelling by train and there was considerable cost saving for them to do so. I think it is reasonable to note also that travelling by train between Christchurch and Dunedin is significantly more comfortable method of travelling than by bus. Indeed a number of the victims of the offending say they would not have booked the package had they known that the travel to and from the concert would be by bus. It is reasonable to say that Mr Sutherland would have been very well aware of that.

[11] Likewise the representation that celebration class ticket holders would receive an upgrade to guarantee tabled seating and a drinks and dinner service, that was undoubtedly very important to them.

[12] It is also apparent that the representations about price, which incidentally omitted references to credit card and other fees, would also have been important to passengers. They were entitled to know the total cost of any promotion prior to purchase, as it is likely to have had an effect on their decision to purchase. The statement that consumers could not cancel and they could not obtain a refund when indeed they would have had a right to do so under the Consumer Guarantees Act 1993 was also important because it had a significant impact on their decision whether to continue with the package or cancel it or make other arrangements. So, having been told that they could not cancel and get their money back, those consumers felt they had no choice but to accept the transport that Mr Sutherland had arranged.

[13] One important consideration in assessing culpability is to determine whether the conduct is deliberate. Mr Riches submits on Mr Sutherland's instructions that from analysis of the fact he has been reckless. With respect I cannot agree. The offending must be characterised as deliberate for these reasons. He had made no booking for the hire of train carriages. He was well aware of the procedure that Kiwi Rail required him to follow before it would confirm a booking. At no stage during the period that the rail package was advertised had he booked any trains, nor had he taken any of the required steps to do so. Furthermore he was aware that at that time of the year he needed the trains, was a particularly busy period on account of cruise ship arrivals. He was repeatedly told that no train had been set aside for

him and from July 2011 he was plainly aware that there was no availability. That is beyond reckless. That is deliberate misleading conduct. Despite that he continued to accept payment from consumers for the rail package. He continued to advertise the package as involving travel by train and he did not make any further inquiries of Kiwi Rail until very close to the date of travel, even though he had been in contact with them about other charters. As Tipping J said in *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 5 NZBLC 103,834, deliberate conduct warrants a stern response from the Court.

[14] One of the key sentencing objectives in this area is both to denounce the conduct and to act as both specific and general deterrence. This is so to reflect that at least from 7 July 2011 Mr Sutherland continued to advertise and accept payment from customers knowing that he could not supply a train as he was promising to do.

[15] It is relevant also that the statements made are untrue. The statements that the travel would be by train carried an implicit representation that Mr Sutherland had actually booked a train or at least would be able to secure one. That statement was untrue. Likewise the representation that celebration class tickets entitle the ticket holder to guarantee table seating on the train and food and drinks, also carried an implicit representation as to the type of train carriages that have been booked. Again that statement was simply untrue. The statement as to the price of services was also untrue as customers were charged additional undisclosed fees if they paid by credit card or courier fees if they had tickets delivered.

[16] It is relevant too in the assessment of culpability that the statements were widely disseminated. He advertised his rail package through the Rail Tours website on a number of newspapers and facsimiles to various businesses. The statement on the website was available to a wide range of consumers throughout New Zealand and indeed some of the customers were located in Australia. Newspaper advertising occurred on a number of dates in the *Timaru Herald*, at least on one date in the *Sunday Star Times* and on numerous occasions in *The Press* in Christchurch. In addition to that facsimiles were sent to a number of businesses in February and on one occasion June 2011.

[17] There has been prejudice to consumers as a result of these misrepresentations. A number of the consumers were elderly and bus transport is quite harrowing between Christchurch and Dunedin, certainly it is much less comfortable than the customers would have expected to receive. Had customers been aware that the transport would not be by train and instead by bus, it is quite likely that a number of those would not have purchased the package at all. In addition had the travel originally been by bus the cost of the package would have been considerably less.

[18] The fact that it was only a matter of three days before the concert itself that customers were notified that travel would have to be by bus made it virtually impossible for them to make alternative arrangements. Those that were able to do so incurred the additional expense of overnight accommodation that they had not expected to meet, would surprise me that any were able to obtain alternative accommodation at that late stage.

[19] Mr Sutherland eventually placed a note on his website on or about 21 November advising that the mode of transport had changed, although he did not say how or why. He did send a letter that was dated 17 November 2011 advising them about the change in method of travel but curiously ticket holders did not receive those letters until 22 November, just a matter of days before the concert which I think was 25 November. It seems that Mr Sutherland deliberately concealed the fact that he would be unable to provide a train. A number of customers attempted to contact him on numerous occasions unsuccessfully. They were inquiring about when they had received their package tickets. At a relatively early stage, I should say when consumers were successful Mr Sutherland did not disclose that the transport method had changed.

[20] The informant submits and I agree that both specific and general deterrence is a priority in this case. It seems at face value Mr Sutherland made a profit of over \$26,000 from the advertising package that he knew he could not deliver. I agree with counsel for the Commission that profiteering from deliberately false statements must be discouraged.

[21] There is no tariff case for offending under the Fair Trading Act. Mr Dixon has helpfully referred me to a number of decisions I will mention them by name only. They are *Commerce Commission v Day* DC Christchurch CRI-2010-009-004417, 1 September 2010, *Commerce Commission v Ross* CRN 5004504283 DC Auckland, 6 April 2006, *R v Read* and also *Commerce Commission v Probatas Ltd* and another. Those cases are helpful, albeit none of them being on all fours.

[22] The informant submits that having regard to the penalties imposed in those cases a starting point in the region of \$50,000 to \$60,000 would be appropriate. In addition to that reparation is sought of \$5786 for those consumers who cancelled the rail package and made alternative arrangements but did not receive a refund from Mr Sutherland. Reparation of \$20,582 is also sought to compensate those consumers who continued with the rail package. This has been calculated by working out the difference between what they would have paid if the travel had been by bus compared to what they actually paid.

[23] I understand that Mr Sutherland is 72 years of age. Mr Riches informs me and I have no reason to doubt it that alas Mr Sutherland is not in good health. It seems he may have prostate cancer for which he is receiving treatment. He also informed is of extremely limited means. His sole source of income is the Government superannuation. Unfortunately I do not have the benefit of a statement of means and I take Mr Riches' submissions in that regard at face value.

[24] Having regard to the culpability factors to which I have referred, I am of the view that a global starting point of \$60,000 fine is appropriate. In terms of discounts Mr Sutherland is entitled to credit for the fact that having no prior convictions whatsoever he is to be regarded as a person with good character. That is, however, tempered by his history of cancelling rail charters and replacing them with bus travel at a relatively late stage. Overall I have allowed a discount of 10 percent or \$6000 from the starting point. That would leave an overall fine of \$54,000.

[25] I am going to order reparation in those two sums, \$5786 and also \$20,582.

[26] I am required to ensure that the overall penalty is not wholly out of proportion to the gravity of the offending. That principle dictates that I reduce the overall fine to take account of the overall penalty.

[27] I will enter convictions in respect of each of the informations. As a global fine, Mr Sutherland is fined \$45,000 and I will order reparation in those two sums, \$5786 and \$20,582. Mr Dixon I will not do it now but I will simply apportion the fine as between the informations evenly.



P R Kellar  
District Court Judge