IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-001041
[2021] NZDC 19084

COMMERCE COMMISSION
Prosecutor

v

MASONS PLASTABRICK LIMITED
First Defendant

CERTMARK INTERNATIONAL PTY LIMITED
Second Defendant

Hearing: 13 & 14 May 2021

Appearances: N Flanagan & B Lorrison for the Prosecutor
I Thain & M Henaghan for the First Defendant
C Patterson for the Second Defendant

Judgment: 24 September 2021

DECISION OF JUDGE N J SAINSBURY ON DISPUTED FACTS HEARING AND SENTENCING

A brief summary as to why charges were laid and guilty pleas entered

[1] The first defendant, Masons Plastabrick Limited ("Masons") supplies building products within New Zealand. Amongst the building products it supplies is building wrap. This case involves a type of building wrap Masons marketed under the name "Barricade Plus".

[2] One of the purposes of building wrap is it can act as an air barrier. That means it can help prevent wind driven moisture from entering through the outer cladding to the structural components of the building or even into the interior of the building. Barricade Plus was marketed as having qualities of air resistance that made it suitable as an air barrier.

[3] In order for Barricade Plus to be acceptable as an air barrier under the New Zealand Building Code (the "Building Code") it needed to have certain qualities and meet appropriate standards. One method of showing that a product such as Barricade Plus was of a particular kind, quality or standard under the Building Code was to have it pass appropriate testing.

[4] New Zealand has what is known as a Code Mark production certification scheme ("the Code Mark scheme") that provides a method by which building products can be demonstrated to comply with the Building Code. This scheme is governed by the Building Act 2004 and the Building (Product Certification) Regulations 2008. Products that are certified under the Code Mark scheme are deemed to comply with the Building Code.

[5] The second defendant, Certmark International Pty Ltd ("Certmark"), is a company that provided product certification services under the Code Mark scheme.

[6] In December 2012 Masons asked Certmark to provide them with code mark certification for Barricade Plus. In support of this request Masons sent to Certmark information about Barricade Plus. With the information provide by Masons were test results carried out by the Building Research Association of New Zealand ("BRANZ") about the air barrier qualities of another Masons' product with a deceptively similar name, "Barricade".[1] Barricade and Barricade Plus are not the same product and do not share the same air barrier characteristics. "Barricade" is suitable as an air barrier and Barricade Plus is not.

[7] Certmark provided Masons with the Code Mark certification for Barricade Plus on 19 February 2015. The Code Mark provided by Certmark did not cover the

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1 BRANZ is an independent research organisation that, amongst other work, tests building products.

suitability of Barricade Plus as an air barrier. But in addition to the Code Mark certification, Certmark provided to Masons a document called an "assessment brief". That document did address the issue of suitability as an air barrier. There were a number of drafts of or updates to the assessment brief over the period of the offending. The version produced as prosecution exhibit 2, which I refer to in the decision, is the one dated 4 June 2015.

[8] All the versions of the assessment brief provided by Certmark represented that Barricade Plus was:

(a) Suitable as an air barrier on walls that are unlined;[2] and

(b) Had passed the testing for air resistance in accordance with the New Zealand Building Code.[3]

[9] This representation by Certmark was false. Barricade Plus was not suitable as an air barrier and had not passed the appropriate testing.

[10] Meanwhile, Masons was marketing Barricade Plus to the building industry and through them to the wider public. It represented that Barricade Plus was:

(a) Suitable as an air barrier on walls that were not lined; and

(b) Had passed the appropriate testing required by the building code.

[11] Those representations by Masons were false. That was because they were based on Certmark's false representations in its assessment brief.

[12] As a result of this, Masons faces six charges brought by the Commerce Commission (the "Commission") under the Fair Trading Act 1986 ("FTA"). Five of those charges are offences of making false representations that Barricade Plus building wrap was of a particular kind, quality or standard.[4] The sixth

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2 Exhibit 2 Prosecution exhibits, p4 "3. Description".
3 Exhibit 2 Prosecution exhibits, p4 "4. Assessment and Technical Investigations".
4 Fair Trading Act 1986, ss 13(a) and 40(1).

charge was an offence of engaging in conduct that was liable to mislead the public.[5] Specifically, the sixth charge related to a chart comparing the product specifications of Barricade Plus against competitor's products. Errors about the qualities of competitors' products gave the appearance that Barricade Plus had better performance by comparison.

[13] Certmark was charged with making a false representation that Barricade Plus was of a particular kind, quality or standard.[6]

[14] On 11 August 2020, both Masons and Certmark pleaded guilty to the charges set out above. They each did so on the basis of agreed summaries of facts.

What facts should the Court take into account in determining the sentence?

[15] The sentencing process is informed by the provisions of the Sentencing Act, augmented by the guidance found in the Court of Appeal decision *Commerce Commission v Steel & Tube Limited*.[7] That case was the first sentencing decision under the FTA to reach the Court of Appeal. While the decision is not a guideline judgment, it provides useful guidance in the approach to be taken on sentencing.[8] Assistance is also found in the comparable sentencing decisions for offences under the FTA, which counsel have usefully referred to in their submissions.[9] All of that said, the particular factors that have greatest weight in any particular case vary depending on the circumstances of that case. The facts that inform the sentencing process in this case can be placed in three categories.

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5 Fair Trading Act 1986, ss 10 and 40(1).
6 Fair Trading Act 1986, ss 13(1) and 40(1).
7 *Commerce Commission v Steel & Tube Limited* [2020] NZCA 549.
8 *Steel & Tube Holdings Limited* at [106].
9 As required by s8(e) of the Sentencing Act 2002. The cases being *Steel & Tube*, *Commerce Commission v Timber King Ltd* [2018] NZDC 510, *Commerce Commission v Brilliance International Ltd* [2018] NZDC 7359, *Commerce Commission v Euro Corporation Ltd* [2020] NZDC 13297, *Commerce Commission v Carter Holt Harvey* DC Ak CRI 2005-004-18578, 12 October 2006, *Commerce Commission v Sales Concepts* [2017] NZDC 16387, *Commerce Commission v Argyle performance Workwear Ltd* [2018] NZDC 9443, *Commerce Commission v LD Nathan & Co Ltd* [1990] 2 NZLR 160, *Commerce Commission v Gate Solutions Ltd* [2020] NZDC 10193, *Commerce Commission v Budge Collection Ltd* [2016] NZDC 15542 and *Commerce Commission v Binns* DC Ak CRN 2009-004-506857-93, 28 April 2010.

[16] First, the Court must take into account facts essential to the plea of guilty. In other words, the facts necessary to make up the legal ingredients of the charge.[10] In this instance, both defendants are charged with breaching s 13(a) of the FTA. In addition, Masons face a further charge under s 10 of the FTA.

[17] For the purposes of the disputed facts hearing and sentencing, the legal ingredients of the charges under s 13(a) and s 10 of the FTA are self-evident from the wording of the section and the charges themselves. For the purposes of the offences under s 13(a) of the FTA, they are framed as follows for both defendants:

> Being in trade, in connection with the possible supply of goods or with the promotion by any means of the supply or use of goods, made false representations that Barricade Plus building wrap was of a particular kind, quality or standard.

[18] The false representations that lie at the heart of the offences are those that I set out in the summary at the beginning of this decision.[11]

[19] In relation to the charge under s 10 of the FTA, that is framed as follows:

> Being in trade, engaged in conduct that was likely to mislead the public about the nature, characteristics or suitability for purpose of goods, in a chart comparing product specifications of Masons Barricade and Barricade Plus products against competitor products.

[20] The representations found in the comparison chart were likely to mislead the public due errors about the competitors' products. This includes about air resistance. These make it appear that Barricade Plus was a superior product in comparison to competitors' products. This adds to the misleading impression caused by the false representations found in the charges under s 10 of the FTA.

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10 Sentencing Act 2002, s 24(1)(b).
11 Para [6]-[11] above.

[21] It is important to emphasise that charges under s 10 and s 13 of the FTA are strict liability offences. There is no legal ingredient of these charges requiring the prosecution to prove that the defendants intended to commit the offences or knew that the representations were false. While the issue of whether a defendant's conduct was inadvertent, careless or wilful informs the issue of culpability, it does not do so because it represents a legal ingredient.

[22] It follows from the above that it is not open to either defendant to assert as some form of mitigation that the false representations as alleged in the charges and as found in the agreed summaries of fact were in fact true. Further, for the charge under s 10 of the FTA, it is not open to the second defendant, Masons, to assert that the representations were not misleading. To do so would be to deny a legal ingredient.

[23] Second, the Court may accept as proved any facts agreed on by the parties. In this case, those are the facts found in the respective agreed summaries of facts.[12] The Court of Appeal has made it clear that where there exists an agreed summary of facts, the defence cannot put forward in mitigation alternative facts that undermine that agreed position.[13]

[24] As to the agreed facts I can take into account on sentencing, they are self-evident from the contents of the agreed summaries of facts. I will attach both agreed summaries of facts to this decision. At issue is, first, whether or not what is asserted by the parties is contrary to what is in the agreed summaries of facts. Second, for evidence I have heard and accepted that is not contrary to the agreed summaries of fact, what weight should be given it.

[25] Third, the Court may take into account facts that either justify a greater penalty or which justify a lesser penalty. Those facts may be found in information and submissions placed before the Court at sentencing by counsel.

[26] In terms of the third category, where a party asserts a fact that either justifies a greater penalty or which justifies a lesser penalty and the other party disputes the

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12 Sentencing Act 2002, s 24(1)(a).

13 *Pokai v R* [2014] NZCA 3356; *R v Apostolakis* (1997) 14 CRNZ 492; *R v Whiunui* CA 212/05 9 November 2005.

existence of that fact, the Court must make a decision about whether or not to accept the disputed fact. Section 24 of the Sentencing Act provides the mechanism for doing this.

[27] In this case there is a dispute between the parties about the facts that I can take into account for sentencing. That is notwithstanding the pleas of guilty and the filing of separate agreed summaries of facts for the offending of each defendant. The second defendant, Certmark, sought a disputed facts hearing in order to adduce evidence that they said would give greater clarity to what is in the agreed summary of facts and provide additional mitigation. Close to the date for the disputed facts hearing Masons decided to join the disputed facts hearing and to call evidence to prove mitigating facts.

[28] For its part, the Commission opposed the disputed facts hearing. The prosecution is of the view that the disputed facts hearing endeavours to undermine or change either what is in the agreed summary of facts and what is implicit in the guilty plea, and such evidence is inadmissible. As for additional mitigating evidence sought to be led by the defendants, the prosecution does not accept such evidence can be established to the required standard.

[29] Certmark have called two witnesses, John Charles Thorpe and William Robert Irvine, who were both cross examined on behalf of the Commission.

[30] The first defendant, Masons, retained a watching brief on the hearing of the Certmark evidence and was happy to take advantage of any mitigating facts or points of clarification that also assists their position. More substantively Masons has called Roydon Charles Turner. In rebuttal to Masons' evidence the Commission called Philip Vernon O'Sullivan.

If both defendants pleaded guilty with agreed summaries of facts, why is there a disputed facts hearing?

[31] In order to understand why there has been a disputed facts hearing it is useful to go through the history of when and how the issue arose. This assists to some extent

in setting the parameters of what is in dispute and can assist on the issue of costs. The chronology starts with the guilty pleas:

(a) 11 August 2020: In the Auckland District Court Masons plead guilty to five charges of making a false representation under s 13 of the FTA and one charge of engaging in conduct that was liable to mislead the public under s 10 of the FTA. An agreed summary of facts was presented to the Court, and signed off by the presiding judge , confirming it as being agreed by the parties. The case was remanded to a sentencing date of 28 October 2020 and timetabling orders made for filing submissions.

(b) 11 August 2020: At the same hearing as for Masons, Certmark plead guilty to one charge of making a false representation under s13 of the FTA. An agreed summary of facts is presented to the Court and signed off by the presiding judge, confirming it as being agreed by the parties. Notwithstanding that, the issue of disputed facts was a live one before the Court that day. That said, the Court file does not reveal any detail of what was in dispute at this time, the presiding judge simply notes on the charging document:

> "Adj [adjourned] to 22/9/2020 for C/O [call over] to see if disputed facts resolved."

(c) 4 September 2020: Affidavits of John Charles Thorpe and William Robert Irvine are sworn in support of Certmark's position on sentencing (the "Certmark affidavits"). The original affidavit of John Charles Thorpe was filed in the Auckland District Court on 4 November 2020. The original affidavit of William Robert Irvine is stamped as being received by the Court registry on 23 September 2020. However, the prosecution acknowledges receiving service of copies of both on 4 September 2020.[14]

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[14] Memorandum of the Commerce Commission regarding disputed facts dated 21 September 2020, para 5.

(d) 21 September 2020 the Commission files a memorandum setting out its objection to parts of the Certmark affidavits. In Schedule 1, attached to the memorandum, the Commission identified the passages in the Certmark affidavits it disputed and considered as potentially requiring a disputed facts hearing.[15] Further, the Commission took issue with other passages in the Certmark affidavits which it argued were contrary to the agreed summary of facts.[16] These passages were identified in Schedule 2 to the Commission's memorandum. The Commission argued that these facts were accordingly inadmissible.

(e) 22 September 2020: At the callover in the Auckland District Court, in the light of the matters identified in the Commission's memorandum, Judge Crosby directed that the parties needed to agree as to what exactly was in dispute. The case was adjourned to 29 October 2020 for that to happen.[17] The Court would then be in a position to the identify the weight to be attached to the disputed matters for the purposes of sentencing. At that point, the parties and Court could determine whether a sentence indication was warranted.[18]

(f) 23 October 2020: The Commission and Certmark file a joint memorandum in anticipation of the hearing on 29 October 2020. Attached to the memorandum were two schedules. Schedule 1 identified the disputed passages in the Certmark affidavits. Schedule 2 identified the contents of the Certmark affidavits that the Commission claimed were contrary to the agreed summary of facts and accordingly were inadmissible at sentencing. I note that these schedules are identical to the ones attached to the Commission's memorandum dated 22 September 2020. Having reached agreement as to what was in dispute, the parties sought a hearing to at which the Court would state

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15 Memorandum of the Commerce Commission regarding disputed facts dated 21 September 2020, para 5 – 7.

16 Memorandum of the Commerce Commission regarding disputed facts dated 21 September 2020, para 8

17 Minute of Judge M A Crosbie dated 22 September 2020, at para [6].

18 This follows the procedure set out in s24(2) Sentencing Act 2002.

the likely weight it would likely attach to the disputed facts if found to exist. Once that was done a disputed facts hearing could be set down if needed.[19] The joint memorandum also sought timetabling over the issue of admissibility of the disputed matters in Schedule 2. As a result of receiving and considering the joint memorandum the Court vacated the hearing on 29 October 2020 and set a new date of 11 November 2020 to confirm if a disputed facts hearing was needed.

(g) The next hearing date was deferred to 19 November 2020. At that date Mason's sentencing was adjourned so that those charges could join the disputed facts hearing date, which was set for 11 & 12 March 2021.

(h) On 2 February 2021, due to problems with counsel being available the disputed facts hearing date was vacated, with a new date to be set.

(i) On 5 May 2021, a new disputed facts hearing date of 13 & 14 May 2021 was confirmed. Because the Commission did not accept large portions of the contents of the Certmark affidavits as being admissible it meant that the Certmark witnesses had to be called to give viva voce evidence. Accordingly, the passages in affidavits agreed to be in dispute became irrelevant, as any dispute would now depend on what oral evidence emerged at the hearing. As a result, I put to one side the Certmark affidavits.

[32] Unfortunately, although all parties had tried to approach the matter in the way laid down under s 24 of the Sentencing Act, the preliminary step required under that section of a judge identifying what weight he or she would give to the matters in dispute did not occur. In any event, given the scope of the material in dispute, it is hard to see how that could have been achieved in a practical way.

[33] I also before outlining these matters there is a live issue over costs. Given what was in dispute and the difficulty getting to a hearing, I am of the view that hearing

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[19] In seeking this the parties were properly following the process set in s24(2) Sentencing Act 2002.

evidence was the only pragmatic way of resolving the issues. I would be reluctant to lay the "blame" for that on any party.

How should the disputed facts hearing proceed?

[34] At the start of the disputed facts hearing, I made a ruling in which I proposed hearing the evidence on a provisional basis. The prosecution is correct that where there are agreed summaries of facts, the defendants must accept those and cannot then adduce evidence to undermine the agreed position. However, that does not preclude the defence calling evidence of mitigating facts that are outside the ambit of the agreed summary of facts or giving evidence of further information that may help clarify what is in the summaries of facts, without contradicting it.

[35] The parties agreed that I should proceed on the basis of hearing the evidence. I could then give such weight as I considered appropriate to any mitigating features that the evidence properly disclosed, if any. The parties were happy to provide submissions on sentencing, knowing that that would be subject to such decisions that I made in terms of the disputed facts hearing.

[36] What I propose is to determine the "disputed facts" issues and then give a provisional decision as to the level of sentencing. I will allow further submissions from counsel as to whether my provisional decision on sentencing should be varied. The reason I do that is to avoid any difficulty with noncompliance with s 24 of the Sentencing Act, which governs this type of hearing. That section provides:[20]

> **24 Proof of facts**
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> (1) In determining a sentence or other disposition of the case, a court—
>
> (a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and
>
> (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.
>
> (2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—

[20] Sentencing Act 2002, s 24.

(a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:

(b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:

(c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:

(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:

(e) either party may cross-examine any witness called by the other party.

(3) For the purposes of this section,—

aggravating fact means any fact that—

(a) the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case

mitigating fact means any fact that—

(a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.

[37] Where there is a dispute over the existence of a mitigating fact, s 24 of the Sentencing Act provides that it gets resolved in this way:

(a) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence.

(b) The prosecutor must negate beyond a reasonable doubt any other form of disputed mitigating fact raised by the defence, i.e. a mitigating fact that is related to the nature of the offence or the offender's part in the offence.

[38] In terms of assessing the evidence that has been placed before me, I am required for each disputed mitigating fact raised by the defence, to first determine:

(a) Is the disputed fact essential to the plea of guilty? or

(b) Is the claimed disputed fact contrary to material in the agreed summaries of facts?

[39] If (a) or (b) are answered yes, the provisions of s 24 and the Court of Appeal authorities already referred to preclude me from taking into account the disputed mitigating fact in determining the sentence.[21]

[40] If the disputed mitigating fact does not fall within (a) or (b) above I must determine:

(a) Whether it is one that relates to the nature of the offence or the offender's part in the offence.

(b) If it is, whether the prosecution has negated beyond reasonable doubt, the existence of that disputed mitigating fact.

(c) If the prosecution has failed to negate beyond reasonable doubt the existence of the disputed mitigating fact, I must indicate the weight that I attach to that disputed mitigating fact and the effect it will have on the final sentence.

(d) If I determine that the disputed mitigating fact does not relate to the nature of the offence or the offender's part in the offence, then I must

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[21] That in essence is the prosecution's position in terms of the disputed facts hearing.

make a determination as to whether the offender has proved on the balance of probabilities the existence of the disputed mitigating fact.

(e) If the offender has failed to prove on the balance of probabilities the existence of any disputed mitigating fact, I simply put that to one side.

(f) If the offender has proved on balance of probabilities the existence of the disputed mitigating fact, not related to the nature of the offence or the offender's part in the offence, I must determine the weight that I would attach to that disputed fact and set out the effect that will have on the sentence itself.

[41] As noted above, the usual course to be followed under s 24 of the Sentencing Act is that before there is a disputed facts hearing the Court must indicate to the parties the weight it would likely attach to the disputed facts, if found to exist, and the significance to the sentence. In this case, it has not been possible to follow that process. That was in part because of the extensive nature of the matters in dispute, and the fact that there is an issue as to whether the disputed facts were excluded because they were already covered by what was in the agreed summary of facts. All parties agreed that the most sensible way of resolving that was to hear the evidence. At that point, I could indicate the weight that I would give to the disputed facts insofar as they were found to exist. By allowing the parties to make further submissions in the light of my determination, I consider that this way of dealing with the disputed facts hearing is consistent with the underlying scheme and purpose of s 24 of the Sentencing Act.

The respective positions of the parties as to what is relevant to sentence and what should be the sentence starting and end points

[42] Before turning to the specific matters at issue by way of disputed facts, I shall summarise the respective positions of the parties as to relevant factors as to culpability and the resulting starting and end points.

[43] Regarding Masons, the Commission emphasises the following as being of weight in determining culpability and in assessing the appropriate starting point: [22]

(a) The nature of the good and the use to which it is put.

(b) The importance, falsity and dissemination of the untrue statement.

(c) The existence of compliance systems and the culture of care within Masons, and the reasons why they failed. The Commission's position is that Mason's conduct in making the air barrier representations, the five charges under s13 FTA, was reckless, if not deliberate. Masons' conduct in making the comparison chart representations, the one charge under s10 FTA, was careless.[23] The Commission accepts it is likely that the offending did not involve "intentional deception".[24]

(d) Any harm done to consumers and other traders.

[44] Further, the Commission identifies as factors informing the starting point:

(a) Given Mason's role as provider of building products, it stood to profit from false claims, which put customer's homes at risk. Its comparison chart unfairly disadvantaged competitors and limited choice. As such this strikes at the heart of heart of the purposes of the FTA and the objectives of the Building Code.[25]

(b) Deterrence must be a primary aim of sentencing.[26]

[45] For its part, Masons' position is:

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22 Commerce Commission's submission on sentence dated 4 May 2021 at 2.5.
23 Commerce Commission's submission on sentence dated 4 May 2021 at 2.13 – 2.14.
24 Commerce Commission's submission on sentence dated 4 May 2021 at 2.15.
25 Commerce Commission's submission on sentence dated 23 September 2020 at 5.3 – 5.4.
26 Commerce Commission's submission on sentence dated 23 September 2020 at 5.36 – 5.40.

(a) The conduct in making the false representations seen in the five charges under s13 FTA was no more than carelessness.[27]

(b) The conduct in making the false representation seen in the one charge under s10 FTA was inadvertent.[28]

(c) Masons relied upon Certmark to independently certify the properties of Barricade Plus before it was placed on the market. Masons reasonably relied on Certmark's assessment brief for the representations it made. However, the assessment brief turned out to include false information.[29]

(d) The harm to customers was low. The value of the product as an air barrier was limited and the product had other advantages that were correctly identified.[30]

(e) Only 10 houses have required limited remediation, which has been done at Masons' expense. In any realistic way the only area of concern potentially requiring remediation are gable ends and, in limited circumstances, the cladding over the area between ceiling and the next floor on multi-level buildings.[31]

(f) Masons cooperated with the Commission's investigation and took immediate steps to remove false representations. It was proactive in remediating any problems at its own cost.[32]

[46] In the light of the above the respective positions on starting point and end sentence between the Commission and Masons are as follows:

Commission

(a) Global starting point: $500,000 to $550,000.
Less 10% for cooperation and lack of previous convictions.

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27 Mason Plastabrick Limited's submissions on sentence dated 7 May 2021 at 7.1.
28 Mason Plastabrick Limited's submissions on sentence dated 7 May 2021 at 7.3.
29 Mason Plastabrick Limited's submissions on sentence dated 7 May 2021 at 18 – 21.
30 Mason Plastabrick Limited's submissions on sentence dated 7 May 2021 at 7.2.
31 Mason Plastabrick Limited's submissions on sentence dated 7 May 2021 at 7.2.3.
32 Mason Plastabrick Limited's submissions on sentence dated 7 May 2021 at 7.4 – 7.5.

Less 25% for guilty pleas.

(b) End sentence (allocated over all charges): $325,000 - $360,000

Masons

(c) Starting point for air barrier representations: $150,000 to $175,000.
Less 10% for totality: $135,000 - $157,500.
Starting point for the comparison chart representation: $25,000.
Combined starting point: $160,000 - $182,500.
Less 15% for cooperation, lack of previous, remorse etc.
Less 25% for the early guilty pleas.

(d) End sentence (allocated over all charges): $96,000 – $109,500.

[47] Regarding Certmark, the Commission emphasises the following as being of weight in determining culpability and in assessing the appropriate starting point:[33]

(a) The nature of the service and the use to which it is put.

(b) The importance, falsity and dissemination of the untrue statement.

(c) Any compliance systems and culture and the reasons why they failed. The Commission's position is that the offending displayed recklessness.[34]

(d) Any harm done to consumers and other traders.

[48] Further, the Commission identifies as factors informing the starting point:

(a) Due to Certmark's position as a certifier under the Code Mark scheme, the false representations made in the course of that role strike at the heart of the purposes of the FTA and the objectives of the Building Code.[35]

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33 Commerce Commission's submission on sentence dated 5 March 2021 at 5.1, drawing on considerations identified as useful by the Court of Appeal in *Steel & Tube*.

34 Commerce Commission's submission on sentence dated 5 March 2021 at 5.16 – 5.22 & 6.23 – 6.25.

35 Commerce Commission's submission on sentence dated 5 March 2021 at 6.19 – 6.22.

(b) Deterrence must be a primary aim of sentencing.[36]

[49] Finally, the Commission argues that Certmark has a reckless and cavalier attitude to its obligations as evidenced in 2018 by MBIE suspending six Code Mark certificates issued by Certmark in relation to external cladding of the same type used in Grenfell Towers. This is also seen in its unhelpful attitude to the Commission's investigation. Not only does this show the lack of a culture of compliance and care it means that there should be no discount for the corporate equivalent of "good character".[37]

[50] For its part, Certmark places primary emphasis on:

(a) The false representation relied upon for the charge against it is found in the assessment brief and not in the Code Mark certificate.[38] The assessment brief is not required under the Building Code.[39] The false representation in the assessment brief was incidental to Certmark's role as a certifier under the Code Mark scheme and cannot be seen as a failure to maintain standards in that role.

(b) Insofar as the assessment brief has any relevance to the use of Barricade Plus it was only as to the installation of Barricade Plus and not as to whether it had functional suitability as an air barrier.[40] Those using Barricade Plus would only refer to the assessment brief, if at all, for the purposes of installation instructions, so that the false representations would not be relied upon.[41] If installed properly it would function properly as an air barrier.[42]

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36 Commerce Commission's submission on sentence dated 5 March 2021 at 5.23 -5.26.
37 Commerce Commission's submission on sentence dated 5 March 2021 at 5.20 -5.22.
38 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 7(a).
39 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 7(a).
40 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 7(a) and 20(b).
41 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 20(b) [para 6] and 20(d) [para 5].
42 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 20(b) [para 2].

(c) There is no evidence of any identified person being aware of the false representations, having relied on them or of any harm occurring.[43]

(d) The false representations in the assessment brief were the result of an inadvertent mistake by a non-technical member of Certmark's staff. It was not identified by senior staff at Certmark or by Masons.

(e) The only reason that Certmark has any criminal liability is that it knew through discussions with Masons that Masons would put the assessment brief on a website, thereby creating the possibility that the document would mislead consumers.[44]

[51] In addition to that Certmark also refers to:

(a) The false information happened because a non-technical employee of Certmark copied and pasted information from a BRANZ appraisal for a different product into the assessment brief. It was a human error and steps have been taken to ensure it does not happen again.[45]

(b) Certmark has in place correct procedures to mitigate the risk of incorrect information in the context of the Code Mark scheme.[46] In this case the Code Mark certification was correct. There is no admissible evidence of a culture of noncompliance or carelessness.

(c) Any reference to Certmark being suspended from providing certification is false.[47] The reference to Code Marks for external cladding being suspended is taken out of context. Further, the reference to Grenfell Towers is emotive and misleading.

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43 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 20(b) [paras 5 & 6].

44 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 7(b).

45 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 20(a) [para 4].

46 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 7(c) [para 1].

47 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 7(c) [para 3 & 5].

(d) General and/or specific deterrence is not relevant on sentencing because the false representation was the result of an inadvertent mistake.[48]

(e) There was either nil or minimal harm to end users of the product.[49]

(f) Certmark did not benefit from the false representation in the assessment brief. That is because it was paid a set fee for the Code Mark certificate only.[50]

(g) Certmark took immediate measures to ensure that Masons did everything it should do to minimise the risk to suppliers and consumers.

[52] In the light of the above the respective positions on starting point and end sentence between the Commission and Certmark are as follows:

Commission

(a) Global starting point: $250,000 to $300,000.
No discount for cooperation and lack of previous convictions.
Less 12.5% for guilty pleas (halved due to disputed facts hearing).[51]

(b) End sentence: $218,750 to $255,500.

(c) Costs for the expense of the disputed facts hearing.[52]

Certmark

(d) Starting point: $8,000.
Less 15% for cooperation, lack of previous, remorse etc.
Less 25% for the early guilty pleas.

(e) End sentence: $4,800.

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48 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 7(c) [para 4] and 24 -25.

49 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 7(d).

50 Memorandum of submissions of counsel for the second defendant (sentence) dated 11 May 2021 at 7(d) [para 11].

51 That presupposes I find against Certmark on issues raised at the disputed facts hearing.

52 See fn 50.

Sentencing principles

[53] In terms of deciding what are mitigating facts or aggravating facts for the purposes of s 24 of the Sentencing Act, I must take into account those factors that legitimately form part of the sentencing procedure. In the first instance, this relates to the principles and purposes of sentencing as found in the Sentencing Act. I also now have the benefit of the Court of Appeal decision in *Steel & Tube* .

[54] The Court of Appeal in *Steel & Tube* provided a useful summary of principles that may be appropriately applied is as follows:[53]

> [90] The cases recognise that sentencing should begin with the objects of the Fair Trading Act, which pursues a trading environment in which consumer interests are protected, businesses compete effectively, and consumers and businesses participate confidently. To those ends it promotes fair conduct in trade and the safety of goods and services and prohibits certain unfair conduct and practices.
>
> [91] Customary sentencing methodology applies. Factors affecting seriousness and culpability of the offending may include: the nature of the good or service and the use to which it is put; the importance, falsity and dissemination of the untrue statement; the extent and duration of any trading relying on it; whether the offending was isolated or systematic; the state of mind of any servants or agents whose conduct is attributed to the defendant; the seniority of those people; any compliance systems and culture and the reasons why they failed; any harm done to consumers and other traders; and any commercial gain or benefit to the defendant.
>
> [92] Factors affecting the circumstances of the offender include: any past history of infringement; guilty pleas; co-operation with the authorities; any compensation or reparation paid; commitment to future compliance and any steps taken to ensure it. The court may also make some allowance for other tangible consequences of the offending that the defendant may face. By tangible we mean to exclude public opprobrium that is an ordinary consequence of conviction; publicity ordinarily serves sentencing purposes of denunciation and accountability. The defendant's financial resources may justify reducing or increasing the fine. Of course any other sentencing considerations applicable, such as totality and the treatment of like offenders, will also be taken into account.
>
> [93] This catalogue of considerations is derived from the legislation and the cases. It is not exhaustive, nor is it mandatory. We offer it for several reasons. It seeks to make clear that the offender's state of mind is just one of a number of culpability factors, albeit important. It treats state of mind as a question of fact and degree. It recognises that the starting point should reflect not only the conduct and state of mind of those employees or agents responsible for the contravention but also their seniority and the existence and effectiveness of

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53 *Steel & Tube* at [90] – [93], footnotes omitted

> any compliance systems and culture, which are usually attributable to senior management. It includes the extent of any commercial gain or benefit and the defendant's size or financial capacity, as one would expect for offending in a commercial setting. Finally, it is organised according to circumstances of the offence and the offender, consistent with modern sentencing methodology.

[55] It is clear from the summary of the parties' respective positions that they have used and applied the principles articulated by the Court of Appeal in *Steel & Tube*. One of the factors that was central to the Court's decision turned on issue of attribution of an employee's "state of mind" to the company and the importance of establishing the company's state of mind for the purpose of sentencing. That is notwithstanding these are strict liability offences.

[56] In *Steel & Tube* it was noted that in sentencings such as these it is common to categorise the conduct as either "inadvertent, careless or wilful".[54] Establishing the company's state of mind in this regard was an orthodox and necessary sentencing consideration.[55] Establishing the appropriate state of mind of the respective defendants, and the weight it has in terms of culpability, is very much a live issue in this sentencing.

[57] In assessing culpability, the Court of Appeal in *Steel & Tube* succinctly articulated what lies at the heart of the sentencing process.[56]

> "…liability is binary – a defendant is guilty or not – but culpability is a sliding scale."

[58] Sentencing is a process of applying known and set criteria, e.g. ss 7-9 of the Sentencing Act. But it is not a process of applying criteria by rote or by pigeonholing. Even where tariff cases give guidance by reference to bands, the ranges of the bands will overlap. The Court of Appeal has been at pains to note that the bands can be departed from, as long it is done in a principled and transparent way. It is important and useful to isolate individual factors that inform sentencing so as to ensure all relevant matters are considered, but the reality is they are often interrelated. What is most important is the overarching contextual assessment of culpability.

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54 *Steel & Tube* at [71].
55 *Steel & Tube* at [70].
56 *Steel & Tube* at [75].

[59] I raise this at this time because issues of statement of mind, e.g. inadvertence, carelessness and wilfulness, are important to culpability in this case, but importance is governed by context. For instance, a lack of wilfulness by a defendant may mean offending is not at the highest end, but it does not follow that it therefore is at the lowest end. That would be a binary approach. Further, inadvertence or carelessness can still be indicative of serious offending where there is an expectation and necessity of scrupulous attention to detail.

Matters in issue for sentencing

[60] I now turn to the matters in issue for sentencing. These necessarily include matters that are disputed. As noted above, these factors do not stand alone but at times significantly merge into each other. I propose to list the factors. I will then deal with issues that arise from the evidence at the disputed facts hearing. I will endeavour to make determinations on the disputed facts that were the subject of evidence. These findings will assist me to get to an assessment of culpability for each defendant. While I appreciate that I must analyse these separately for each defendant there are many factual issues that are relevant to both.

[61] In the broad terms the sentencing issues may be summarised as follows:

(a) The nature of the good or service and the use to which it is put. For, Certmark this includes an assessment of what weight its role as a Code Mark certifier has on culpability, if any. For Masons, it includes what level of culpability follows from presenting false information with the apparent imprimatur of a Code Mark certifier.

(b) The importance, falsity and dissemination of the untrue statements. The falsity of the statements is accepted and self-evident. But the untrue statement's importance and dissemination follows from the previous consideration. That also merges into the issue of risk of harm and actual harm done.

(c) Any compliance systems and culture and the reasons why they failed. This factor also engages the issue of intent as an indicator of culpability.

(d) Any harm done to consumers and other traders. The actual level of harm and risk of harm has been a significant factor in the disputed facts hearing for both defendants.

(e) What has been done to put right any harm caused and to ensure there is no repeat of this.

[62] Two issues took up most of the evidence at the disputed facts hearing. They also have an influence on a number of the sentencing issues identified above. There are:

(a) Certmark place considerable weight on the fact that the Code Mark certificate did not contain any inaccuracy. It was the assessment brief that had the false representations. Certmark's position was that this was not a document that would be expected to be publicly available. Accordingly, it is argued that it would have little to no practical influence on users of Barricade Plus. That meant at worst there was misleading conduct of a marginal nature only.

(b) Both defendants place considerable weight on the fact the actual and potential damage to customers was limited. It is argued that this is because with the modern design of buildings there is a very limited area where an air barrier wrap has any practical effect, i.e. gable ends and occasionally between floor levels.

[63] Before I deal with the sentencing issues, I will set out my factual findings. As I do that, I will necessarily address the appropriate onus and burdens of proof and determine if they have been meet. Then when addressing the sentencing issues, I will set out the weight I give to those matters I find proven to be relevant to the sentencing process. I also address the issue of weight when I discuss the other relevant sentencing decisions to which the parties referred me.

[64] Some of these factors apply equally to Certmark and Masons, while others have greater weight for one or other. Where there the culpability runs together, I will tend to discuss them together. Where it is separate, I will discuss it separately.

The significance of the assessment brief as a document relied on by the purchasers

[65] I turn first to my assessment of the significance of the assessment brief and how that related to the Code Mark provided by Certmark to Masons. These findings are relevant to all of para [61](a) – (e) above.

[66] Certmark called as a witness John Thorpe. He is the director of Certmark. While he does not have technical expertise surrounding the Code Mark certification process, he was able to give evidence about the practice and policies of the company in relation to this. He had sworn an affidavit that supported Certmark's position. However, due to the Commission's objection to the admissibility of part of the affidavit, Mr Thorpe gave his evidence viva voce rather than via the affidavit with cross examination on its contents.

[67] As to the function of the assessment brief, the explanation as to why it was created and what it is intended to do, his evidence was as follows:[57]

> Q: In addition to issuing a building certificate to a client, are there any other documents, if at all, that your business issues to the client?
>
> A: Previously, and this is something we do not do anymore, previously we were issuing an assistant brief to the clients. The reason that we were doing that predominantly in New Zealand is the template that was supplied by MBIE for the CodeMark Certificate was a one-page template which allowed you to put on the clauses of the Building Code that were relevant and any conditions and limitations that belong there. It didn't give you enough room really to detail a lot of the testing that was done, a lot of installation things and various other things that we went along with when we did the actual certification process. Part of the CodeMark scheme rules was that when we are doing a certification that we are required under the scheme to create a technical evaluation report on how we went around issuing the certificate, what evidence we looked at and all of that. That particular document is an in-house

[57] NOE, 13 May 2021, page 6 line 21 – page 7 line 7.

> document, it's not a public one, but the majority of the information that would go onto the assessment brief would come off of that technical evaluation.
>
> Q: And in this particular case, was, if at all, an assessment brief provided by your company to Masons?
>
> A: Yes, it was. Masons had assessment briefs for all of the certificates that they had with us.

[68] Mr Thorpe's description of the Certmark certificate being a comparative short document with references to the Building Code clauses is borne out by the certificate itself.[58] Further, his description of an assessment brief as having far greater information is borne out by the assessment brief in this case.[59] That is a nine page document, the scope and nature of which is shown in a number of the statements that appear in it. For instance, I note the following:

(a) "The company named above [Masons] has been awarded a Code Mark™ Certificate in this Assessment Brief for the product described herein. The product has been assessed by CMI [Certmark] as being fit for its intended use provided it is installed, used and maintained as set out in related documents, **including this Assessment Brief**.[60] [my emphasis]

(b) "Certmark International Pty Limited [CMI] has assessed the following aspects in undertaking the undertaking of the Code Mark™ certificate of the subject and generation of this assessment brief…

Note: This certification is an alternative solution in terms of the New Zealand Building Code Compliance".[61]

(c) At the foot of every page is the statement: "It is advised to check that this Assessment Brief is currently valid and not withdrawn, suspended or superseded by a later issue by referring to the CMI Register website and searching the Certificate Licence Number".

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58 Prosecution exhibit 1
59 Prosecution exhibit 2
60 Prosecution exhibit 2 at page 1.
61 Exhibit 2 at page 3 under the heading "Basis of this assessment brief".

[69] The assessment brief itself organises its information under headings. Within the document there are numerous references to Barricade Plus being an air barrier. These include:

(a) '3. Description' which sets out the benefits of the particular product. Notably one of those benefits is "FR1 Wall Wrap/Barricade Plus Building Wrap is suitable as an air barrier on walls that are not lined".

(b) '4. Assessment and technical investigations', that claims the product has "Air resistance to BS 6538.3". That is a reference to the testing standard for air resistance.

(c) '5. Design Considerations', under which is a table which sets out properties of the product, the test standards it has met and actual property performance. In that table, there is a reference to it being an "Air Barrier" which passed a test standard of "Air resistance: 0.1MNs/m3" and with an "Actual Property Performance" recorded as "Pass. Masons FR1 Building Wrap/Barricade Plus Building Wrap can be used as an air barrier".

(d) There is then a series of paragraphs relating to the product's installation and technical investigations. Under the latter, there is a subheading 'Tests'. This claims that "the following tests have been carried out on Masons FR1 Building Wrap/Barricade Plus Building Wrap". In particular "pH on extract in accordance with AS/NZS 1301.421s and air resistance to BS6538.3".

(e) Further, under "Tests" it is noted that "CMI has also investigated the following criteria's [sic] in generating this Assessment Brief: …physical properties".

(f) Finally, there is a heading 'Bibliography'. That refers to the test standard "BS 6538.3". It identifies that as being "1985 method for determination of air permanence".

[70] For completeness sake I note that in different parts of the assessment brief various exclusions of liability are asserted. For instance, it is stated under 'Conditions and Limitations' that "this assessment brief is valid only within the Australia [sic]". No attempt has been made to argue that Certmark are able to contract out of their obligations under the FTA. Obviously, such argument would have been given short shrift.

[71] My reading of the assessment brief is that it provides significant information relevant to the process whereby the Code Mark certification happened. It also provides information about the way the product must be handled in order to get the benefit of the Code Mark certification. For instance, it must be installed properly. The level of detail in the assessment brief itself is consistent with Mr Thorpe's description of it. As he notes, the assessment brief very much draws on the technical evaluation report used by Certmark to undertake the certification.

[72] It is notable that an assessment brief was provided with all Certmark's Code Mark certificates when dealing with Masons, which was their biggest customer in New Zealand. Mr Thorpe accepted that Certmark knew that Masons had put this assessment brief on its website so that it was accessible to those interested in using the Barricade Plus product.

[73] I also find it of interest Mr Thorpe's response when the problems with the assessment brief in relation to Barricade Plus not being an adequate air barrier came to light. This is what he said in his evidence:[62]

> Yes, we advised him that he should be withdrawing any product from sale and he should be quarantining it and clearly marking it, that its not to be sold as an air barrier. We did discuss the fact **that the product obviously meets all the other requirements of the CodeMark scheme**, so it's not that the product is faulty in other respects, its just this claim that was being made for the air barrier. [my emphasis]

[74] I acknowledge that Mr Thorpe is not a technical expert and perhaps his answer here was not as carefully crafted as it might have been. Nevertheless, in this evidence he conflates the air barrier qualities with the requirements of the Code Mark scheme.

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[62] NOE, 13 May 2021, page 18 lines 11-16.

If he does that in these circumstances, it is hardly surprising that others who read and rely on the assessment brief might do the same.

[75] None of this supports the argument advanced on behalf of Certmark that the assessment brief is something quite independent of the Certmark certificate and is really an in-house document that would not normally be referred to by anyone. The document itself asserts that for the Code Mark to apply Barricade Plus must be "installed, used and maintained as set out in related documents, including this Assessment Brief".

[76] The second witness called for Certmark was William Irvine. Mr Irvine had extensive experience within the building industry. It started with hands on trade experience and qualifications and moved through to building inspection, arbitration and mediation, through to training of building officials and providing technical advisory services to local government and the like. He had also provided assistance to Certmark with product assessment in compliance with the Building Code. I accept that Mr Irvine has relevant expertise within his field and is able to assist the Court in providing expert evidence.

[77] Part of the evidence given by Mr Irvine was in relation to the status and use of an assessment brief. He noted that the assessment brief does not have any relevance to the Building Code itself. It is the Code Mark certificate that has standing under the Building Act.[63]

[78] Mr Irvine's evidence was consistent with Mr Thorpe's insofar as he confirmed that the Code Mark certificate was a single piece of paper with limited information on it. He explained that there was a move to have more technical information included in the certificate. Around the time that this assessment brief was issued, there was a transitional period where technical information was put into the assessment brief. He noted that assessment briefs have now all but disappeared as there is greater information on the Code Mark certificate itself. Nevertheless, in his view, it was the

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[63] NOE, 13 May 2021, page 40 lines 1-12.

Code Mark certificate that a building official would look to ensure that there has been compliance with the Building Code.[64]

[79] In cross examination there were a significant number of questions on the topic of who might access and use the assessment brief, particularly, as in this situation, if it was available on the supplier's website. Mr Irvine disagreed that a builder might access the website for that purpose. As he explained it, the days when builders do the design work have gone. Current practice is that the designer will designate a particular product which the builder will then use. What will normally happen is the plans and specifications will state that product by brand name.[65] However Mr Irvine accepted that, on his knowledge and understanding of the industry as it operates now, that means the designer will do the research to find the product that meets the requirements for the particular build.[66] That, of course, could include assessing the assessment brief if available.

[80] In terms of other information surrounding the relationship of the assessment brief and the Code Mark scheme, there is of course the summary of facts. In the agreed summary of facts for the Certmark offending the following appears:

> 1.5 The representations were made in an Assessment Brief created by Certmark for Code Mark certification of Barricade Plus (the certification did not reference the Assessment Brief). This document was provided to Masons on 25 February 2015 and was subsequently available for download on Masons website. The Assessment Brief was available to the public between at least 31 January 2016 and 19 February 2018 (the Charge Period).

[81] I now turn to my assessment of the significance of this evidence. What has been placed in issue by Certmark is that the document of primary importance is the Code Mark certificate itself. In this case there was no falsity in that certificate. Certmark argues the assessment brief is some sort of in-house subsidiary document that ordinarily would not be available to the public. In the circumstances it is unlikely to have been accessed or used by anyone.

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64 NOE, 13 May 2021, page 41 line 13.
65 NOE, 13 May 2021, page 49 lines 2 – 13.
66 NOE, 13 May 2021, page 50 line 6 – page 51 line 9.

[82] Insofar as the argument advanced by Certmark is designed to exclude Certmark's offending being at the highest level, there might be something in it. For instance, it would be offending at the highest end of the spectrum if a Code Mark certifier wilfully issued a false certificate knowing that use of the certified product would cause significant harm to users of the product and to subsequent owners an occupiers of the building. That would be particularly so if they did so for monetary gain. However, the prosecution is not arguing that this case is at that end of the spectrum and nor could they. It did not require a disputed facts hearing to work out that Certmark's offending is not the worst of its kind, either generally or for this charge. The fact that the false representation is not on the Code Mark certificate is self-evident from the agreed summary of facts.

[83] What the evidence, along with the agreed summary of facts, makes clear is this: The integrity of the Code Mark scheme is vital to the safe operation of our building industry; those who rely on Code Mark certification need to be assured that certification work is done to a high standard.

[84] This assessment brief was prepared as part of the Code Mark certification scheme. That is clear from the document itself and is accepted by Mr Thorpe and is implicit in what Mr Irving had to say.[67] To me, it is obvious that the assessment brief is of value not only to the organisation that gets the Code Mark, but also to those to whom it is selling its product. The breadth of technical information makes that clear. Even if I accept as a general proposition that Certmark understood that assessment briefs were not usually disseminated beyond the immediate client, in this case they knew that it was being put on Masons' website.

[85] As to Mr Irvine's evidence that builders no longer make decisions over product selection, that does not help Certmark. I do not consider there is any significance as to whether it is the builder or the designer who makes the decision as to what product to use. The point is that someone makes that decision. It is entirely foreseeable and expected that they would access the information found in the assessment brief in undertaking that task. Even though the assessment brief is not the certificate, it is

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[67] See [66] & [76] – [77] above

expressly linked to that process by the wording of the assessment brief itself. Further, it carries the imprimatur of the certifier.

[86] While I accept as a general proposition that an error in the assessment brief may not be as serious as an error in the certificate itself, in this case, the false representation found in the assessment brief is significant. As noted above, Barricade Plus having air barrier properties is mentioned numerous times throughout the assessment brief. The fact that this information was put there by the Code Mark certifier is also significant.

[87] For the purposes of s 24 of the Sentencing Act, an argument can be made that the false representation being in the assessment brief is part of the nature of the offence or the offender's part in the offence. That would mean the prosecution must prove beyond reasonable doubt that the connection between certification and the creation of the assessment brief is an aggravating factor. In other words, Certmark's status as a Code Mark certifier and the circumstances of how the false representation came about makes its culpability greater Alternatively, the prosecution would have to disprove beyond reasonable doubt the defence proposition that that the separation in nature between the certificate and assessment brief is a mitigating feature that reduces culpability.

[88] I don't see any need to get into a nuanced argument over this or about who has to prove what. The reason being, the evidence I have heard proves to me, beyond reasonable doubt:

(a) That the assessment brief was created as part of the Code Mark certificate process.

(b) The error was made by a Code Mark certifier.

(c) Certmark knew Masons had put the assessment brief on their website where it could be accessed by those interested in using the product.

[89] Accordingly, it was entirely foreseeable that the false representation would be relied upon by those using the product. For those looking to use the product, the false representation could mislead them about its qualities. Those representations had heft because they appeared to have the weight of a Code Mark certifier behind them. The Commission is right to categorise this as a serious feature of the offending informing culpability.

How did the misrepresentation happen?

[90] The next issue that was covered in the evidence relates to how the mistake arose. This has a bearing on the relevant "state of mind" and underlying culture attributable to the defendants and to the steps necessary to avoid this happening in the future. This issue was covered in the evidence called by Certmark.

[91] In submissions Masons dealt with this issue in the context of "state of mind". I will discuss Masons' position on how the misrepresentation came about when considering Masons' "state of mind" submissions below.

[92] From Certmark's perspective, this circumstances of how this happened is explained in the evidence of John Thorpe.[68] In summary, when Masons sought certification, they sent various documents to Certmark. Amongst the documents was evidence of testing by BRANZ of the product "Barricade". As already noted, Barricade and Barricade Plus are not the same. It would seem that the fact that these two products are not the same was overlooked. When the assessment brief was being put together, an employee of Certmark cut and pasted the reference of the BRANZ testing for Barricade as if it were a reference for testing of Barricade Plus. This error was not picked up.

[93] As above, the argument can be made that insofar as this was not deliberately done, it is not as serious as if it was deliberately done. That is true as far as it goes but did not require a disputed facts hearing to resolve.

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[68] NOE, 13 May 2021, page 16 lines 1 – 33.

[94] In my view, the real issue though is this: Certmark have the responsibility of analysing material in order to provide a certificate that will be accepted at face value as showing compliance with the Building Code. The obligation is on Certmark, as it is on every certifier, to meticulously check the information that is provided to ensure that it is accurate and relevant.

[95] The fact that a staff member thought it appropriate to copy and paste wrong information is concerning. It indicates a lack of care and a lack of proper systems. The fact that this error was not picked up by Certmark is also concerning. I am not impressed by Certmark seeking to mitigate its fault by pointing out that Masons didn't correct the fault. While that is certainly a black mark against Masons, it does not help Certmark. Procedures should have been in place to ensure that:

(a) All information is properly scrutinised.

(b) That appropriately qualified individuals make decisions about what goes into documents produced as part of the certification process.

(c) There are systems in place that check and double check that the work has been done properly.

[96] Given the importance of Code Mark certification, a failure of this nature is serious. That seriousness cannot be explained away or reduced by saying it's a piece of inadvertence by an ill qualified employee.

Steps taken by Certmark to avoid future problems

[97] I now turn to the steps taken by Certmark to address the circumstances of how the false representation arose. In both the evidence of John Thorpe and William Irvine, they spoke of an audit undertaken on Certmark files where assessment briefs had been provided. This was to ensure that there were no errors in the assessment briefs similar to what happened in this case. As a director, Mr Thorpe authorised this step being taken, and Mr Irvine was involved with the audit. Both gave evidence that no other errors were detected.

[98] This evidence was not significantly challenged in cross-examination. I accept on balance of probabilities that Certmark undertook the steps set out in evidence. That is to its credit. It is a legitimate matter of mitigation that they took the allegation seriously and acted to check files in this way. Had there been more mistakes, it would have been indicative of a widespread systemic problem that needed addressing. This will have a bearing on "state of mind". I consider Certmark are entitled to a discount on sentencing for the steps taken in this way.

[99] That said, there is another way in which it is said that Certmark displayed a lax attitude to its obligations as a certifier. The agreed summary of facts in relation to Certmark contains the following:[69]

> 8.1 – Certmark does not have any previous convictions.
>
> 8.2 – In July 2018, MBIE suspended six Code Mark certificates issued by Certmark over concerns that external cladding of a type similar to those used in London's Grenfell Tower lacked documentation to support claims of fire retardants.
>
> 8.3 – On 10 July 2019, Certmark was suspended from acting as Code Mark product certification body by JAS-ANZ for failing to meet its accreditation requirements. Certmark subsequently withdrew from the Code Mark Scheme on 22 July 2019. Certmark continues to undertake Code Mark certification in Australia and is accredited by JAS-ANZ to provide product certification in New Zealand against the requirements of numerous product standard (separate to the Code Mark Scheme).

[100] The Commission argues that MBIE suspending the six Code Mark certificates is indicative of other errors committed by Certmark in certification. It is consistent with a culture of laxity in way it carries out its role.[70] Certmark disputes that the suspension of the certificates is relevant for sentencing. It states that the suspension had nothing to do with shortcomings by or on behalf of Certmark.

[101] Counsel for the Commission, Mr Flanagan, raised the issue of the suspension of the six certificates when cross examining Mr Thorpe. He put to Mr Thorpe the

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69 Agreed summary of facts (Certmark) 8.1 – 8.3.

70 Commerce Commission's submissions on sentence, 5 March 2021 at 5.19 – 5.22.

wording of paragraph 8.2 from the agreed summary of facts. Mr Thorpe's response was as follows:[71]

> A. No, that's totally incorrect. MBIE suspended those six certificates because it was after the Grenfell fire tower. Basic certificates were for aluminium composite panels, which were a fire-rated panel. All those panels had been tested against the requirements of the New Zealand Building Code for spread of flame, which is an NFPA 285 (inaudible 12:57:28), which means that the panel is not permitted to have more than 1.5 metres spread of flame. All of those products met that requirement. What happened was there was dispute in New Zealand between various fire engineers and bodies, about the suitability of the NFPA 285 testing, because the NFPA 285 testing is done on a test group which has no combustible material behind it. Apart from the stated fire source, buildings in New Zealand, particularly (inaudible 12:58:02), still use a lot of combustible materials such as insulations and claddings and things behind where the panel was going to be fitted, so MBIE decided to suspend those certificates. Not to do anything with what was below the actual quality of the product, they actually stated there was nothing wrong with those products. We were then went with JAS ANZ to MBIE and to the – with the help of the Auckland Council to say that if you want to have these mentioned on the certificate, the way forward is to make a statement that they have to be site-specific. MBIE decided they didn't want a site-specific clause on there and asked us to remove that one clause, which was done, and the certificates were reissued. So it was nothing to do with any fault of CMI.

[102] After further questions, Mr Thorpe was asked:[72]

> Q. So you now resile from the position in the summary of facts?
>
> A. I don't agree with the terminology, that there lacked documents to support the claims because the documents were there.

[103] This exchange and the position taken by Certmark throws up a number of difficulties. In the first instance, Certmark cannot resile from what is in the summary of facts[73] However, the significance of the lack of supporting documentation and who may have been at fault for it, if anyone, is not articulated in the agreed summary of facts.

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71 NOE, 13 May 2021, page 32, line 24 – page 33, line 12.
72 NOE, 13 May 2021, page 33, line 27 - 28
73 See fn 12.

[104] Further, Certmark were not prosecuted for failures associated with these certificates. Had there been a serious fault in Certmark's work, I would have expected action like that to be taken. The fact that the certificates have been suspended must be accepted, but that does not necessarily tell me whether Certmark was at fault or, if so, to what extent. Certmark disputes being at fault.

[105] For the purposes of the disputed facts hearing, there are two ways of approaching this. First, it could be regarded as a prosecution assertion that a mitigating feature might, on the face of it, exist but should not be given any weight. By that I mean Certmark would ordinarily be able to draw on the fact that they have no previous convictions -in other words, the corporate equivalent of "good character". The Commission are arguing that Certmark should not have the advantage of that mitigating feature. If that is so, the argument can be mounted that it is for Certmark to prove on balance of probabilities that the mitigating feature of "good character" exists. The second way of looking at it is the proposition that the lack of good character goes hand in hand with a culture of laxity and noncompliance, thereby requiring a greater sentence. That is, an aggravating feature which the Commission must prove beyond reasonable doubt.

[106] I consider that the relevance of problems with other certificates would be relevant if that showed defects in the way Certmark conducted itself, particularly if it indicated a culture of laxity of a cavalier attitude to its obligations. In a case such as this, I am wary using the material in the agreed summary of facts as proof of an aggravating feature without more. Had there been convictions, then that in itself would be significant. In that situation, I would have recourse to any agreed summary of facts and sentencing notes that reliably inform me as to the nature of the earlier offending. That might provide a sound basis to infer a lax culture. In the course of this hearing, I was not keen for the case to be significantly diverted into what could quickly become a contentious, time consuming, but potentially collateral, issue. In the circumstances, I am going to put to one side the issue of the suspension of the certificates as set out in paragraph 8.2 of the agreed summary of facts.

[107] I conclude that to find that Certmark was lax and cavalier in carrying out its obligations is to find the existence of an aggravating fact. That is something that the

Commission must prove beyond reasonable doubt. I am being asked to infer that from the fact of the suspensions. In the absence of other information, I cannot safely draw such an inference. As it stands, Certmark have no convictions. They are entitled to rely on that in mitigation.

Certmark's "state of mind"

[108] The next issue is characterisation of the defendant's statement of mind. As noted, for the purposes of sentencing it is possible to distinguish between inadvertence, carelessness and wilfulness. Certmark's position is that this was an inadvertent error by a non-technical member of staff.

[109] I disagree with that assessment. It appears to me on the information already outlined above, there are two alternatives. First, the person who did the cut and paste did not carefully read the material or take sufficient care to realise its significance. That of itself is carelessness. Even if it was an inadvertent error by someone not qualified to appreciate the significance of the material, that does not help Certmark in these circumstances. All that indicates is that Certmark allowed an important decision to be made by someone singularly unqualified to deal with it. On this occasion at least there was no effective system in place to catch the error. The only reasonable inference available to me is that Certmark was, at least, significantly careless. If this was truly a systemic fault, then it would be recklessness at a very high level. However, given the evidence about there not being any other errors of a similar nature in assessment briefs prepared by Certmark, I do not consider that conclusion is available to me.

[110] I find that Certmark displayed high end carelessness. That is because they are obliged to be scrupulous about how they carry out their function in their role as a certifier and the importance of what they are certifying.

Masons' "state of mind" (including how this all came about)

[111] Masons role in causing false information to be disseminated leading to the charges against them is a more nuanced one than that which applies to Certmark. On one hand it is possible for Masons to say that they sought the expert guidance of

Certmark as a Code Mark certifier and relied upon Certmark's expertise in making the representations. Indeed, in sentencing submissions counsel for Masons refers into the role of Certmark as a certifier.[74] That said, Masons must be aware that that argument has limited weight in the circumstances of this case. The reason being that it was Masons who provided to Certmark the inaccurate information. They provided Certmark with information regarding the "Barricade" product as if it was for "Barricade Plus". Certmark then failed to properly check the material it was given and by adding the test results into the assessment brief as if they were for Barricade Plus they provided Masons with information that was also false. Unfortunately, this was a very good example of the computer programming principle: "garbage in, garbage out". Masons compounded this problem by not checking or noticing the error.

[112] The Commission argues that from the information I have before me, it is an available inference that Mason's actions in sending the incorrect information to Certmark and/or then relying on it once included in the assessment brief, was reckless if not deliberate.[75] This position is clarified in the supplementary submissions that postdate *Steel & Tube*. There, the Commission maintains its position about Mason's actions being reckless if not deliberate but distinguishes it as being in some form of subcategory of "unintentional deception", i.e. short of knowing its representations were false and intending to profit from the deception.[76] I am not so sure that the Court of Appeal was looking to create some form of Beaufort Scale, finely calibrating states of mind in this way. It is an exercise of working out what can be inferred as to state of mind and make an assessment from that about culpability. The point made by the Court of Appeal in *Steel & Tube* is that cases involving deliberate deception, done to make a profit, are very bad and justify a high starting point. It is, as always, a fact specific exercise.

[113] Mason's actions as being deliberate or reckless is not conceded in the agreed summary of facts, nor is it an ingredient of any of the charges. It was not covered in the evidence at the disputed facts hearing. The Commission's argument is that "Mr

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74 For example, see paragraphs 18 – 21 Masons Plastabrick Limited submissions on sentence, 7 May 2021.

75 Commerce Commission's submissions on sentence dated 23 September 2020 at 5.21 -5.5.25

76 Commerce Commission's supplementary submissions regarding penalty dated 4 May 2021 at 2.13 – 2.15.

Mason had **full** control over operational decisions relating to product specifications and advertising material" [my emphasis]. Therefore, he knew or ought to have known that the test results provided to Certmark were not for Barricade Plus and that Barricade Plus had not been tested for air resistance.[77] It is argued that the role of Mr Mason in all this is established by the agreed summary of facts where it states:[78]

> Masons is 100% owned by its director, Trent Mason, and was incorporated in March 2011. Mr Mason has control over operational decisions relating to product specifications and advertising material.

[114] I understand from the agreed summary of facts that Masons had sales of $5.29m in 2014/15 and $7.38 in 2016/17.[79] That does not give the impression of a one man business or even a small business, where all significant decisions can be imputed to one individual. I have no other information before me about the structure of Masons.

[115] As to how the wrong information got from Mason's to Certmark, there is little clarity. In submissions filed on behalf of Masons, counsel refers to Certmark's voluntary interview.[80] In that interview, apparently Certmark acknowledged knowing that the test results were for a different product. It appears that in that interview Certmark saw the test results as a template or reference document and were not troubled by that. It was unfortunate that a Certmark employee then mistakenly cut and pasted the test results into the assessment brief.

[116] I am not sure that greatly helps me. I cannot understand what possible benefit there would be sending or receiving test results for a different product. That is a recipe for disaster. I am also at a loss why Masons would think Certmark needs a template or why Certmark would appreciate getting one. Indeed, it begs the question, a template for what? That said, none of this was explored at the disputed facts hearing.

[117] It seemed to me that in absence of a concession or evidence establishing deliberate action or recklessness, the most likely explanation is human error. Given

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77 Commerce Commission's submissions on sentence dated 23 September 2020 at 5.24.
78 Agreed summary of facts (Masons) at 3.2.
79 Agreed summary of facts (Masons) at 3.3.
80 Masons Plastabrick Limited's submissions on sentence dated 7 May 2012 at 47.

the lack of evidence or other information before me on this topic, I cannot be satisfied that Masons deliberately provided false information to Certmark. That is whether I apply standards of either beyond reasonable doubt or on balance of probabilities.

[118] My comments about Certmark's culpability being informed by its role as an expert in its field apply also to Masons. They are involved in this industry. They are a wholesale supplier of building products. They were seeking the benefit of certification. It behoves them to ensure that accurate information is sent through to Certmark and they check what comes back. Accordingly, they must take some responsibility for the echo chamber of error that was started by their carelessness.

[119] Further, there is force in the Commission argument that as Masons had not tested Barricade Plus they should have been surprised to discover, according to the assessment brief, that it had apparently been tested. Surely that begged the questions: who did that? when? and, most likely, who paid for it? Those questions it seems were either not asked or left unanswered. Nevertheless, I am not prepared, without more, to infer recklessness against Masons. Having said that, I have to comment it does come very close.

[120] A wilful mistake or recklessness would be an aggravating factor. In other words, one that the prosecution must prove beyond reasonable doubt. The Commission cannot do that. That said, I consider it is clear that there was carelessness by Masons, as a company involved in the industry, supplying incorrect information to the certifier. There was also carelessness in failing to check or realise the mistake. Worse than that, they publicised the false information. They are under an obligation to do better than they did. It is not enough simply to say that Certmark should have picked up Masons' error. Masons should not have made an error in the first place and if they did, they should have picked up Certmark's error.

[121] As to the comparison chart offence, Masons argue that this was inadvertence. The Commission argues it was careless. I do not see a basis to distinguish between the various charges. The problem with the comparison chart were the false statements in it. It the speaks to the same level of error as for the other charges. Carelessness created that problem and carelessness created this one.

Steps taken by Masons to put right the problems, cooperation and "good character"

[122] It is accepted that once aware of the issue, Masons cooperated with the Commission's investigation. It advised retailers of the issue and eventually withdrew Barricade Plus from sale. It has offered to remediate any problems caused by the product being used as an air barrier. To date it has remediated 10 houses. While arguments can be made over the speed of response and the need to more thoroughly seek out those who may have been harmed, it is accepted that Masons are entitled to a discount on sentence for its response to the investigation and their lack of convictions. The Commission says 10%, Masons say 15%.

Actual and potential harm (both Masons & Certmark)

[123] The next issue is the level of actual and potential harm that arises from the false representations. This formed a significant part of the evidence of the disputed facts hearing.

[124] In discussing this issue, I do not make a distinction between Masons and Certmark for the purposes of assessing culpability for sentencing purposes. Masons responsibility as the company marketing and supplying Barricade Plus is obvious. But it was Certmark that placed the incorrect information about the air barrier qualities of Barricade Plus in the assessment brief. Being an air barrier may not be the only purpose or even the primary purpose for the product, but Certmark cannot distance itself from the fact that their representations would be relied upon for that purpose. They must have known Masons would be putting this product on the market, at least in part, as an air barrier. For that reason, I consider that Certmark's responsibility for harm that follows, in terms of a prosecution under the FTA, is indistinguishable from Masons.

[125] The harm that can arise from the use of Barricade Plus in the context of the false representations is that it will be used as an air barrier when it is not suitable for that function. To that end this also engages the issues of the nature of the product, the use to which it is put and the importance and dissemination of the product.

[126] In terms of resolving this issue for the purposes of sentence, the disputed facts hearing was useful. First, because it explained how an air barrier works. It also provided information on the harm that can follow from an inadequate air barrier as well as the ability to make an assessment of the extent of the actual potential harm that arose in this instance. I was particularly assisted by the evidence of Royden Turner and Philip O'Sullivan.

[127] Royden Turner was called on behalf of Masons. He is an experienced builder. His evidence was from the perspective of someone with practical hands on experience based on over 24 years in that work. In response to his evidence, the Commission called Philip O'Sullivan. His qualifications included a Bachelor of Engineering with Honours. He is also a registered surveyor and a certified weathertightness surveyor. He has particular technical and practical expertise in issues of weathertightness.

[128] In order to assess the level of actual and potential harm it is useful to turn first to the way an air barrier works. One of the purposes of an air barrier as part of the cladding system is that it allows equalisation of pressure. The danger is that wind can cause the air pressure outside a house to be higher than inside. As the pressure seeks to equalise it can draw moisture through gaps in the cladding. If the moisture gets into the frame of the house and cannot dry out, it can cause damp, mould, mildew and rot.

[129] With a modern cladding system, an air barrier wrap covers the framing of the house. That can provide a barrier to moisture getting into the framing and interior of the building, but it can also act as a barrier to air getting in. There are then vertical battens that provide a gap between the framing, covered in the air barrier wrap, and the cladding. Because the air pressure within that gap between the cladding and the air barrier is equalised to the air pressure on the outside of the cladding, water should not get in. If it does, it will run down the back of the cladding and out the bottom. It will not affect the integrity of the structure. If the air barrier wrap is not adequate for its purpose, there will not be equalisation of pressure and moisture can be drawn further into the building with the potential to cause damp, mould and rot.[81]

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[81] NOE, 14 May 2021, page 19 line 17 – page 20 line 24, page 36 lines 18-29.

[130] One of the concerns raised by both Certmark and Masons is that the Commission has overstated the seriousness of the actual or potential harm. In the Commission's submissions in relation to sentencing for Masons, reference is made to the seriousness of the air barrier representations "given the leaky building crisis that has plagued New Zealand".[82] In relation to Certmark, the Commission argues that while the exact level of harm is impossible to ascertain, the potential risk is serious due to the risk of moisture getting into the structure.[83]

[131] In written and oral submissions, both defendants argue:

(a) The allusion to the leaky home crisis is a form of emotive exaggeration on the level of harm.

(b) The true level of harm is very low. That is because in modern housing, the areas where building wrap air barrier would be used is extremely limited. It is in fact largely gable ends which are no longer a common feature in modern house building.

[132] It is axiomatic that the prosecution should not rely on emotive appeals as a way of persuading the Court to a proposition, whether on sentencing or anything else. Further, the prosecution should not exaggerate or put forward unreasonable propositions to support its case. If that is what had happened in this instance, by reference to the leaky building crisis, then there would be validity to the defence criticism. That would be particularly so if the prosecution were advancing the proposition that the harm caused by the false misrepresentations in this case is of a scale comparable to the leaky building crisis of recent decades. However, I do not read that as being the proposition being put forward by the prosecution.

[133] What the prosecution has done is to emphasise that weathertightness is an important issue to the building industry and to the public. The use of an air barrier wrap engages the issue of weathertightness. An air barrier that is not fit for purpose risks causing harm through a lack of weathertightness. The leaky building crisis

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82 Commerce Commission submissions on sentence, 23 September 2020 at 5.15.
83 Commerce Commission submissions on sentence, 5 March 2021 at 5.7 – 5.32.

provides a dramatic illustration of how, in extreme circumstances, issues of weathertightness can cause extensive harm. But all I take from that is it is making the point that weathertightness is important. That is hardly a controversial proposition.

[134] Turning to the issue of the extent of harm, insofar as it can be ascertained. I am again assisted by the evidence of Mr O'Sullivan, Mr Turner and to an extent Mr Irvine. What this evidence was able to explain to me was that while air barrier wrap is one method of creating an air barrier, it is not the only one. Where the internal wall is lined, such as with gib board, that would also provide an air barrier. The reality is for modern homes all internal walls of occupied spaces are required to be lined.

[135] During the course of evidence, it was proposed that there were three areas where the internal wall of a building may not be lined. These are:

(a) Gable roof ends. That is the triangular piece at the end of a pitched roof that covers the unoccupied loft or attic space in the roof cavity.

(b) The external walls of attached garages.

(c) The area between ceiling and floor on multi-level buildings.

[136] These are spaces that either would not have or are not required to have internal lining. Accordingly, a method of providing an air barrier is to use air barrier wrap over the framing.

[137] The evidence was that in terms of the fashions of modern design gable ends do not feature on all houses.[84] As to what percentage of houses in New Zealand during the offending period were built with gable ends is not in evidence. Nor is there evidence of how many of the purchasers of Barricade Plus used it on gable ends.

[138] As to unlined external walls of attached garages, by the end of the cross-examination by Masons' counsel, Mr Thain, of Mr O'Sullivan, the witness had accepted that external walls in attached garages either have to be lined or to have a

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[84] NOE, 14 May 2021, page 4 lines 22-29.

rigid air barrier in place. In other words, they would not be walls that require an air barrier wrap such as Barricade Plus. Accordingly, I find that external walls of attached garages do not feature as an area of potential harm.

[139] The area between ceiling and floor on multi-level buildings may require an air barrier wrap depending on how it is built. Where a house has solid timber joists placed between the lower ceiling and upper floor, that will act as an air barrier. But where beams are used that are formed like "little trusses" and which are open so that air can blow through them, then an air barrier wrap will be needed. As to how many buildings are built in this way and whether the building wrap sold by Masons was used on any is unknown.

[140] In terms of level of harm, it is useful to refer back to the agreed summaries of facts. Both summaries contain the same information about this.[85] What the agreed summaries of facts provided is as follows:

(a) Masons sold approximately 9,500 units of Barricade Plus (of varying sizes) from May 2015 until April 2018. That equates to approximately 815,000 square metres of product.

(b) That amount of product would be sufficient for approximately 3,500 to 4,000 average sized New Zealand houses.

(c) In January 2018 Masons contacted all its customers, being building supply retailers, advising them of the problems with Barricade Plus as an air barrier.

(d) Masons offered to remediate any issues of concern to end users i.e. the homeowners. Masons advised that they have remediated 10 houses at their expense.

(e) It is not known how many buildings have been affected by air barrier issues.

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[85] Agreed summaries of facts at 6.1 to 6.4 for both defendants.

[141] I note that in the agreed summaries of facts record the areas of a building where the failure of an air barrier wrap would have an impact as follows:[86]

> Typically building wrap needs to have air barrier properties where the wrap is used on gable end walls of unoccupied roof spaces, or other areas where internal linings (e.g. plaster board) are not typically present.

[142] The evidence called as to where an air barrier wrap might be used and the harm that may have come from an inadequate product is not contradictory to what was in the agreed summaries of facts. As I have already noted it was useful for me to understand the way building wrap worked but in the end, there was not a lot of difference, if any, between the experts called by the parties on this subject. The conclusions I draw from this evidence are as follows:

(a) When used over parts of the building without internal lining, e.g. gable end walls of unoccupied roof spaces and depending on the construction method the joists between ceiling and floor of multi-level buildings, building wrap used as an air barrier needs to be of an adequate standard. Barricade Plus would not have been of that standard.

(b) A significant quantity of Barricade Plus was sold, i.e. sufficient for approximately 3,500 to 4,000 average sized New Zealand homes.

(c) There is no evidence of how much Barricade Plus was used in circumstances that its deficiencies as an air barrier would have been a potential cause of harm.

(d) Masons have remediated 10 houses; it is most likely that this involved retrofitting building wrap or lining to gable ends.

(e) Depending on the method used to remediate a gable end the cost could be $3,000 to $4,000 if the wrap could be put retrospectively installed from inside the roof cavity. If the cladding had to be removed, then the cost could be between $10,000 and $20,000 on a typical house.[87]

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[86] Agreed summaries of facts for Masons at 4.3 and agreed summaries of facts for Certmark at 4.3.
[87] NOE, 14 May 2021, page 6 lines 6-15.

(f) The issue of weathertightness is inherently serious. A misrepresentation of a product so that it would be used in the circumstances where weathertightness might be compromised is serious, in and of itself.

(g) In this instance it is not possible to state with any certainty at all the extent of harm done or even necessarily the risk of harm done. But it can be accepted that there was a risk of harm.

[143] In the light of the amount of Barricade Plus sold it is important to acknowledge that it was not being purchased only because of its wrongly asserted characteristic of being an air barrier. What the evidence has indicated is that building wrap is mostly not used for its air barrier qualities, and certainly not solely so. That is because once the building is lined internally that takes care of air barrier issues. Building wrap can also be chosen for numerous other reasons, such as because it has fire retardant properties, is water resistant, has anti-fungal properties, etc.

Summary of my findings as it informs sentencing

[144] In the light of the above findings, I will set out the position as it relates to the defendants. I will start with Masons and then turn to Certmark.

Masons

The nature of the good and the use to which it is put

[145] Barricade Plus was represented as having air barrier qualities. That meant that it could function as an important part of the cladding system for a building to prevent moisture getting into the building. I consider the Commission is right to emphasise the importance of weathertightness in relation to buildings. A product which can be used to ensure the weathertightness of a building is important.

[146] That said, it also appears clear that due to methods of building currently employed the areas where Barricade Plus would fail as an air barrier, to the detriment

of a consumer, are comparatively limited. In this case, it is gable ends of buildings and in some limited situations, the area between floors on multi storey buildings.

The importance, falsity and dissemination of the untrue statement.

[147] The falsity of the statement is self-evident. Barricade Plus was conspicuous in its failure as an air barrier under the testing performed by the Commission.

[148] The product was on sale for a period of well over two years. The amount of product sold was significant, being 9,500 units, which equates to approximately 115,000 square meters of product. That is sufficient for approximately 3,500 – 4,000 sized New Zealand homes.

[149] The reason that Masons' face five charges under s 13 of the FTA is that each charge covers a form of dissemination of the false representations. For instance, on its website,[88] in a brochure downloadable from the website,[89] in the assessment brief downloadable form the website,[90] in a specification document downloadable from the website,[91] and on labelling for Barricade Plus.[92] The sixth charge under s 10 of the FTA relates to a comparison chart showing qualities of Barricade Plus and competitors' products.[93] This included errors about the qualities of competitors products that gave the appearance that Barricade Plus had better performance by comparison.

[150] The false information on Masons' website, generally, derives from the false information proved in Certmark's assessment brief. It is also significant in my view that the assessment brief itself was available on Masons' website. Masons supply building products to the building industry, I consider it an available inference that those working within that industry, looking for a product that would provide air barrier qualities, are the very people who would check the website and technical information such as that found in the assessment brief.

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88 Charge 1 (crn 0381).
89 Charge 2, (crn 0391)
90 Charge 3 (crn 0394)
91 Charge 4 (crn 0397)
92 Charge 5 (crn 0400)
93 Charge 6 (crn 0407)

[151] The assessment brief is provided by Certmark, a Code Mark certifier. This means that the false information is being disseminated in a way that gives significant credibility to those representations. There is a clear risk that those looking for a product that has air barrier qualities would feel entitled to take what is in the assessment brief at face value without the need to make any further research. That follows from the very nature of the Code Mark scheme. I do not consider that the fact that it is the assessment brief and not the certificate itself that contains the false information as reducing the seriousness. Of course, a false certificate may well represent offending at the highest levels, but I consider that those involved in the building industry finding the assessment brief on Masons' website would read it as having real authority. They would be entitled to rely on what is in it at face value.

The existence of compliance systems and culture of care within Masons

[152] I do not accept the Commission's argument that Masons were reckless. I consider that their actions in sending the Barricade test results to Certmark were careless. That is because, in my view, there is no evidential basis to infer any higher form of culpability. Masons' carelessness was compounded by the fact that they did not check or notice the error about the air barrier qualities of Barricade Plus. While to a limited extent, Masons can argue that they should be entitled to rely on the expertise of an organisation such as Certmark, in these circumstances, Masons set in train the difficulty by providing wrong information and compounded it by not checking afterwards or noticing the obvious mistake.

[153] If Masons were only sending the Barricade information as some form of template, then they must have understood the limitations on Barricade Plus. They should have been in a position to pick up the error when the assessment brief came back. I note that the assessment brief was revised on a number of occasions, without the error being discovered.

[154] It follows from the above that I consider that Masons' actions were careless, and at the high end of carelessness.

Any harm done to consumers and other traders

[155] It is clear that an air barrier wrap that is inadequate for purpose has a risk of harm. It is a difficult, if not impossible, to quantify exactly what that level of harm would be. To some extent, that is made more difficult by the fact that failure of weathertightness and the flow on effects of rot, mildew and damp can take considerable time to manifest themselves. In any event, 10 houses have been remediated. It may well be that there are more properties that will require work.

[156] I accept the Commission's position that there is a real chance of harm. Further, when there is harm to a property of this nature, it can cause significant financial loss. That said, the exact level of harm cannot be ascertained. I need to be careful of over-emphasising an unquantified risk in the absence of clear evidence. I accept Masons' point that the areas of risk are comparatively limited due to the manner of building in New Zealand.

Purpose of the Act and deterrence

[157] I consider the Commission is right that offending of this nature is of the very type the FTA is designed to address. I refer back to the Court of Appeal's summary of the objects of the FTA in *Steel & Tube*.[94] Given that, deterrence must be the primary aim of sentencing in a case of this nature.

Discounts for co-operation and remediation

[158] I agree with the position advanced by both the Commission and Masons that they are entitled to a discount on sentence for cooperation with the Commission's investigation and taking steps to address the false representations. In particular, Masons' work in remediating houses effected by the use of Barricade Plus is to its credit. I understand that that will be an ongoing obligation for Masons. Further, the Commission is considering ways in which that obligation can be fulfilled in a more effective way.

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94 Steel & Tube at [90] quoted at [54] above.

Certmark

The nature of the service and the use to which it is put, the importance, falsity and dissemination of the untrue statement and any harm done to consumers and other traders

[159] In terms of the issues discussed above under the headings the nature of the good and the use to which it is put, the importance, falsity and dissemination of the untrue statement and any harm done to consumers and other traders, the comments made relating to Masons substantially apply to Certmark. The reason is that Certmark knew what the product was for, that Masons intended to market it and that Masons were publishing the assessment brief so that those considering using the product would be able to access it to assist them in their decision making. Certmark knew that the information would be disseminated, although they would not have had control over the extent.

[160] Masons faces six charges as opposed to Certmark's one. However, in terms of culpability, I do not consider that makes that great a difference. The charges faced by Masons relate to five different mechanisms by which the false representations were disseminated.[95] In addition, there is the charge that arises from the errors in the comparison chart.[96]

[161] I note that the Commission suggested a different starting point for Masons as for Certmark. The Commission suggested a global starting point for Masons of $500,000 - $550,000 and a global starting point for Certmark of $250,000 - $300,000. In the respect of defence submissions, there is also a suggested difference in starting point, but for reasons discussed further on I do not place any weight on that at all. Certmark's submissions on starting point are without a foundation of sound sentencing principles.

[162] There is weight in the argument that Masons as the distributor of Barricade Plus ultimately had control over dissemination of the information and the

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95 That being the five s 13 FTA offences.
96 That is the one charge under s 10 FTA.

extent of distribution of the product. They also stood to profit from the sales of the product. That can be distinguished from Certmark's position where they were paid a one-off fee for the Code Mark certificate, of which production of the assessment brief was but one part of that process.

[163] Against that, I agree with the Commission's submission that Certmark's role as a certifier under the Code Mark scheme places on it a particular obligation to be fastidious in how it carried out its work and the need to have systems that avoid errors of this nature. In that regard, an argument can be made that Certmark's culpability has some features that are separate and serious as compared to those for Masons.

[164] What this means is that while I accept on balance that Masons' role as the disseminator and distributor coupled with its opportunity to profit from the sale of the product justifies the higher starting point over Certmark, I consider the comparative levels of culpability to be far closer than that urged on me by all parties.

[165] I do not see the greater number of charges, as of themselves, being particularly significant. It simply reflects the manner of dissemination of the information. The real concern, in terms of culpability, is the falsity of the information, its importance given its relationship to weathertightness and the carelessness shown by both parties in enabling this to happen. That carelessness is particularly significant in terms of Certmark, given its role as a certifier. I consider that means Certmark's carelessness in this regard indicates a higher level of culpability than the carelessness of Masons. Both involve high level carelessness but the context of Certmark's actions make its carelessness more serious when it comes to assessing starting points.

Compliance systems and culture and the reasons why they failed.

[166] My finding has been that Certmark were careless rather than reckless. However, as I have already commented, carelessness on behalf of a body that has serious obligations such as Certmark indicates a significant level of culpability. I accept that Certmark's position as a certifier under the Code Mark scheme is an important factor to take into account. I accept the Commission's submission that the false representations made by an organisation in that role strike at the heart of the

purposes of the FTA and the objectives of the building code. Those in the building industry and those who rely on products used by the building industry must be able to have upmost confidence in assertions of quality made by a certifier. That includes assertions in an assessment brief rather than a Code Mark certificate.

Deterrence

[167] Certmark argues that deterrence need not be a purpose of sentencing in this case. The argument put forward is that this was an inadvertent mistake and Certmark got no financial gain beyond being paid for the Code Mark certificate. Accordingly, deterrence is not required. I reject that submission. First, this is not a case of inadvertence. Second, insofar as Certmark has not received a share of profit from the sale of the product that has some weight, but it is limited. I accept it means I don't need to concern myself with some notional calculation of a fine being greater than the potential profit. By contrast that is a factor that applies to my assessment of penalty for Masons. But that does not mitigate Certmark's culpability; it is merely the absence of an aggravating factor.

[168] None of this means that deterrence is not an issue. Certmark, and certifiers generally, need to be deterred from being slack. They must be encouraged to perform their vitally important function with care and precision. Deterrence is at the heart of the sentencing process in this case.

But no one was identified as being hurt

[169] A theme amongst Certmark's sentencing submissions is that there is no evidence of harm occurring. In particular, there has not been evidence of any identified person being harmed. That argument rather misses the point of the very purpose of the FTA and the Building Code. Harm from the use of inappropriate products as a result of false or misleading representations can be hard to detect, at least initially. Yet over time, the results can be catastrophic. That is the reason why appropriate standards are required and why they must be enforced.

[170] While it is fortunate that the problems of the air barrier qualities of Barricade Plus may only manifest themselves in a limited area e.g. gable ends and over certain types of floor joists, that does not mean there is no actual harm or risk of harm over time. I reject the argument that harm can only be assessed by identifying particular individuals who have suffered that harm. In my assessment that would defeat the very purpose of enforcement under the FTA.

[171] Another theme in Certmark's submissions relates to this being an inadvertent mistake. This argument fails to reflect why this offending is serious. It is the fact that Certmark's systems allowed this to happen and they did not pick it up that makes this serious.

[172] Similarly, the argument by Certmark that it was only the Code Mark that mattered, I reject entirely. I have already discussed this above. I accept that Certmark have undertaken a review of their assessment briefs. It would appear that no other problems are shown. That was taken into account when I reached the assessment that this was a mistake of carelessness rather than recklessness or a wilful mistake.

Starting points

[173] I now turn to the assessment of the starting point by refence to the various sentencing decisions referred to me by the parties. While each case turns on its own facts, I acknowledge that there is a requirement of consistency in the application of principles as between sentencing decisions. This should result in consistency in the end results.

[174] The majority of cases referred to me had the common feature of being prosecutions for misrepresentations regarding steel mesh.[97] In considering these decisions, I am of the view that the importance of the representations was greater in those decisions than in this one. The reason for that is that the use of steel mesh is vitally important for the structural integrity of buildings. In a country prone to earthquakes, such as New Zealand, there is the real prospect of danger to life and safety as well as the financial cost of building damage if the correct product is not used

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[97] *Steel & Tube, Timber King, Brilliance* and *Euro* in particular. See [8] for citations.

due to a misrepresentation as to quality. It is those factors that distinguish the steel mesh cases from this one. Here there are serious potential consequences to the integrity, functioning and life span of a building, but not the same issues of danger to human life.

[175] In addition to the structural steel cases there is the *Carter Holt Harvey* decision.[98] That case involved structural timber. While that case did not involve a likelihood of physical harm to homeowners, it did result in significant defects in the performance of the building. The extent of the offending was far greater than in this case. That case was decided under the lower maximum penalty of $100,000. The extent of the offending is perhaps best illustrated by the collective starting point under the lower maximum was $1.35 million. *Carter Holt* is not a particularly useful decision. That is because the scope of the offending and the size of the company involved puts it into a higher category than I am dealing with here.

[176] Turning to the steel mesh decisions. In *Timber King*, it was significant that there was a degree of wilfulness as well as carelessness in the offending. There was a misrepresentation that certain steel mesh complied with a standard when it did not. There was also a representation that a batch was independently tested when that had not happened. In respect of the independent testing representations, the Court took the view that that was "nothing short of fraudulent".[99] In the light of that and other factors, the appropriate starting point was $660,000.

[177] In *Brilliance*, there were representations that steel mesh complied with the building standard when it did not. Further, there were representations that steel mesh had been independently tested. That was untrue. It was considered significant that Brilliance had deliberately and consciously departed from the standard. It knew or ought to have known that its representations were false. The offending took place over a four-year period with over 56,000 sheets of mesh being sold.

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98 See [8] for citation.

99 *Timber King*, see footnote [8] above at [96](c).

[178] While it is impossible to say what the actual harm would be, it is understandable that consumers no longer had confidence in how the mesh would respond in an earthquake. A global starting point of $800,000 was applied.

[179] In *Steel & Tube* the steel mesh had not been tested in accordance with the relevant standard of the Building Code. Accordingly, it should not have been marketed as a particular grade of steel. It was also claimed that an independent certifier had tested the product. That was untrue. Samples that were tested did not meet the requirements of the relevant standard. The starting points for the compliance representations was $1.5 million and for the certification representations $900,000.

[180] In *Euro*, the misrepresentation was that steel mesh complied with the standard and had been independently tested. It was found that the conduct was careless. The representations as to independent testing had initially happened because of an oversight. However over time the continuation of the representations that were untrue became careless. It should have known that the mesh did not comply.

[181] In *Euro* there was no evidence of prejudice to consumers. The reason for that was notwithstanding the errors, the product could still satisfy the necessary requirements required by the standard. Both prosecution and defence considered that a starting point for all charges together, allowing for totality, would be approximately $470,000. The Judge assessed the combined starting point for all offences as being $451,250.00.

[182] Based on those decision, I consider that the seriousness of the false representation is less in this case than in the steel mesh cases. That is because of the nature of the product and risk of harm from noncompliance. The importance, falsity and dissemination of the untrue statement varies between the cases. Here a significant amount of product was distributed over a two year plus period.

[183] In terms of the systems and culture of compliance, as I have already indicated, carelessness of a significant nature applies to both Certmark and Masons, but it does not have the more aggravating features found for example in *Timber King* where there were deliberate and fraudulent representations. As to harm done to consumers, as

already noted, that is comparatively limited due to the use of the product in the comparatively limited places where air barrier wrap is a significant part of the cladding system.

[184] My conclusion is that the offending for both Certmark and Masons is at a level less than *Euro*. While the level of carelessness may have been greater for both Certmark and Masons than for Euro, that is more than balanced by the lesser importance of the nature of the product. In making that assessment I acknowledge that on the facts of *Euro* there turned out to be no prejudice to customers.

[185] In its submissions, Certmark argues that the starting point should for it should be $8,000. In support of that proposition, it relies on *Budge*.[100] That was a case whereby a company sold duvets. The company falsely claimed the product had a significant amount of alpaca wool in it. In fact, rather than the represented claim the duvets had something between 2.1 percent to 17.8 percent of alpaca fibre. The duvets were sold as a high-quality product when their true quality would have attracted a lesser purchase price. The company was warned about the misrepresentations but continued to sell the product. It appears that misrepresenting the quantity of alpaca wool in duvets had been something of a pattern around the time of the case, resulting in charges against other companies.

[186] I have two problems with the relevance of *Budge* to the current sentencing. First, the facts and circumstances are so different from those that apply to the current sentencing that the case really has no value. *Budge* relates to the mislabelling of duvets. The duvets had less alpaca wool than they should have. As a result of being able to sell a lesser product as being of higher quality, the defendant company made an unlawful gain of approximately $21,400.

[187] When considering the factors identified by the Court of Appeal in *Steel & Tube* as affecting seriousness and culpability, it becomes clear that *Budge* is of little relevance. The nature of the good and the use to which it is put are diametrically different between the cases. One is a duvet of a lesser quality than it is claimed to be, the other is a product that has the potential to affect the weathertightness of a home.

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[100] See footnote [8].

One is overstating the amount of alpaca wool in the duvet. The other is a false statement in a document prepared by an organisation trusted to certify building products. The difference in culpability is vast.

[188] The second difficulty with *Budge* is that the defendant's submissions are wrong. It is asserted by the defendant that:

> "The starting point was $8,000 for the company in the Budge Collection case. Counsel for Certmark has adopted the same starting point".[101]

[189] In the *Budge* decision, Judge Ronayne stated:

> For the company, I adopt a starting point for the overall offending of a fine of $80,000.[102]

[190] I refrain from an attempt to categorise this error within the categories of inadvertence, careless or wilful but counsel needed to do better than put misleading and wrong submissions in front of the Court. It follows I reject *Budge* as having any bearing on this sentencing, other than to observe if an $80,000 starting point applies to mislabelling an alpaca duvet, something significantly higher will apply to a Code Mark certifier that puts false representations in an assessment brief relating to a building product.

Masons' starting point and discounts

[191] In regard to Masons, taking a totality view of the offending, in other words the culpability for disseminating in different ways the false information for the purpose of selling the product, I reach a global starting point of $400,000. That will be apportioned between the charges.

[192] I accept that Masons is entitled to a discount for its cooperation with the Commission and for its lack of previous convictions. I assess that at 15 percent. It is

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101 Memorandum of submission of counsel for the second defendant (sentence), 11 May 2021 at page 16 at para 32.

102 *Budge* at [42].

also entitled to a discount of 25 percent for the guilty plea. That leads to an end sentence of $240,000.

Certmark's starting point and discounts

[193] In terms of Certmark, it has the advantage over Masons of not profiting from the sales of Barricade Plus. It also did not have control over dissemination once it had passed on the assessment brief. Against that, its role as a certifier places it in a category of culpability that does not exist for Masons.

[194] Certmark did not only provide the assessment brief, it provided further versions of it. At no point did it detect the error. Its' failure was allowed to become embedded in that material. I consider that this failure by a certifier is particularly egregious offending.

[195] One of the advantages of the disputed facts hearing is that it enabled me to eventually get a better idea of the role of the certifier and Certmark's role in this offending. That has not worked in Certmark's favour. While on balance I agree that the fine for Certmark should be less than Masons, I take a different view from the Commission as to how great that difference should be.

[196] In its submissions, the Commission argued that there should be a global starting point of $250,000 to $300,000 for Certmark. While Certmark only faces one charge, as already noted, I do not see that as being of a significant difference. Certmark must have known the information in its assessment brief would be circulated by Masons. The fact that Masons did that in different ways is hardly surprising. I assess the starting point for Certmark at $350,000.

[197] I disagree with the Commission that Certmark should not be entitled to a discount for the steps it took to check if there were other errors in its assessment briefs. Nor do I agree with the Commission that the problems over the suspension of certificates can be seen as the equivalent of convictions that either raise the penalty or eliminate the mitigating feature of lack of convictions. Accordingly, I will allow a 15 percent discount for steps taken, lack of previous convictions and cooperation. I note

the Commission says it has not found Certmark easy to deal with. However, in the absence of other information, I do not propose to reduce that discount.

[198] I also intend to allow a 25 percent discount for the guilty plea. Unless adjusted, due to the disputed facts hearing, that leaves an end point of $210,000.

The fallout from the disputed facts hearing and costs

[199] This now takes me to the issue of the disputed facts hearing and the fallout that should have in terms of reduction in discounts and/or costs. The Commission argues that if Certmark did not succeed on the disputed facts hearing then it's discount for a guilty plea should be reduced. That is certainly an available outcome from an unsuccessful disputed facts hearing.

[200] In this case it cannot be said that Certmark succeeded in a substantive way in terms of the disputed facts hearing. That said, as I have already noted, the disputed facts hearing was not without benefit to me. Also, as noted, through no fault of the parties, the way the case progressed to the disputed facts hearing made the calling of evidence inevitable.[103]

[201] The hearing assisted me in understanding many of the issues in this case. It did assist both Masons' and Certmark's positions to the extent that I had a better understanding of the potential harm that could be done as a result of the misrepresentations. I cannot help but observe, though, that should have been able to be achieved without the necessity of a disputed facts hearing.

[202] Unfortunately for Certmark, one of the consequences of my gaining a better feel and understanding of the factors at play and the issues of culpability is that I have come to the conclusion that Certmark's culpability is greater than what was initially apparent. Unfortunately for Certmark the disputed facts hearing has convinced me that its culpability is far closer to that of Masons.

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[103] See [31] – [33] above.

[203] In the end, the conclusion I come to is that the disputed facts hearing was of assistance to the Court in assessing culpability generally and obtaining an understanding of the issues. Given that, I do not propose to reduce the guilty plea discount to either defendant.

[204] Turning to the issue of costs. Costs can be awarded in criminal cases. However, it is comparatively rare that that happens. The prosecution of criminal charges is carried out by agents of the state. It is part of the way in which we discipline and protect citizens in a civilised community. I am of the view that in the ordinary course of events, there is a legitimate cost to be borne by the wider community through the state carrying out prosecutions. I am reluctant to order costs against a defendant, except in rare cases. Without more, I will not do so in this case.

Conclusion

[205] Accordingly, from my findings at the disputed facts hearing I propose sentences as follows:

[206] Masons:

(a) Starting point: $400,000

(b) Discount for lack of previous convictions and cooperation: 15%

(c) Discount for guilty plea: 25%

(d) Indicative end sentence: $240,000

[207] Certmark:

(a) Starting point: $350,000

(b) Discount for lack of previous convictions and cooperation: 15%

(c) Discount for guilty plea: 25%

(d) Indicative end sentence: $210,000

[208] Given this decision follows a disputed facts hearing I will give counsel an opportunity to make further submission on the indicative sentences. That can be arranged through the registry.

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Judge NJ Sainsbury
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 24/09/2021