IN THE DISTRICT COURT
AT AUCKLAND

CRI-2012-004-012339

THE QUEEN

v

VODAFONE NEW ZEALAND LIMITED

Hearing: 10 September 2012

Appearances: N Flanagan and I Brookie for the Crown
B Gray and K Morris for the Defendant

Judgment: 10 September 2012

NOTES OF JUDGE DAVID J HARVEY ON SENTENCING

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[1] In 2007, 2008 and 2009 Vodafone New Zealand Limited was engaged in an extensive advertising campaign associated with the rollout of broadband and internet based services. This was a significant development for the company and one where it was attempting to obtain a competitive advantage in a highly competitive market.

[2] I think it is well known that, for many years, Telecom has been the dominant player in the telecommunications market and, effectively, new entrants into the market (like Vodafone, which is probably one of the older new entrants, if I can put it that way and, more latterly, companies like 2Degrees) depend for their survival, economically, upon customer shifts where customers move from one provider to another provider on the perception that they are going to receive advantages either in terms of service or in terms of savings and generally and, hopefully, both.

[3] In the course of the rollout over their new technologies (and the campaigns that were associated with them) Vodafone New Zealand marketed three services and products which are the subject of 11 representative charges to which it has pleaded guilty before the Court. Those charges cover a campaign relating to an offer, of super prepay customers of a $10 free prepay credit once they had registered on Vodafone's website, the marketing of a Vodem Stick with the claim that broadband was everywhere, and the third series of charges where Vodafone claimed to have the largest 3G mobile network, whereas, in fact, its coverage was less than that of Telecom.

[4] In its submissions, the Crown points out that mobile telephony and mobile internet are critical services for both consumers and the wider New Zealand economy, depending upon the provision of reliable information and strong competition between telecommunications providers for ongoing development and international competitiveness. The Crown submits that the misleading conduct in this case went to the heart of the pricing and availability of mobile telephony and internet services. Certainly one of the big aspects of the campaign that Vodafone was running was the ability for internet users, or data users in particular, to be free from the necessity of having a landline connection and being able, effectively, to roam wirelessly.

[5] A memorandum of agreed facts has been placed before the Court and those facts cover in some detail (which I shall now address) the nature of the charges.

[6] As far as the $10 free credit is concerned, between 25 May 2007 and 26 September 2008, Vodafone sold super prepay connection packs to customers at the price of $35 and it offered up to $15 free airtime of which $5 was preloaded onto the SIM card and the remaining $10 was to be credited to the consumer when they completed registration online. The problem was that, as a result of technical problems, a number of consumers were unable to obtain that credit. As a result of difficulties with the online registration systems all the data was unable to be made available because of, as Mr Gray puts it, "the website timing out".

[7] Vodafone was aware of these problems and was unable to rectify them, although I am satisfied that it tried, and this affected up to 20 percent of consumers who attempted to register their details. Now I think it is fair to point out that not all of the consumers who bought these super prepay packs attempted to register so we are dealing with those so did try. The problem was that notwithstanding the attempts of remedying the difficulty Vodafone was unable to do so effectively but it continued to advertise the availability of the credit without informing customers of the ongoing errors that existed relating to registration.

[8] Of the 30 percent of customers who tried to register for the free credit 20 percent would have failed due to issues with the registration system. The total activations of credit amounted to 308,638 which is in fact closer to 40 percent of the total number of packs sold (but not a lot turns on that) but the benefit that accrued to Vodafone was quite significant in terms of money. Because of the registration failures Vodafone in fact gained thousands of dollars from prepay phone use which should have been free to customers, representing something in the vicinity of $400,000 to $450,000.

[9] As far as the Broadband Everywhere campaign is concerned, in 2006 Vodafone launched its campaign marketing its new 3G Mobile Broadband services and they made available a device known as a Vodem, which in fact was a wireless modem that was connected to a laptop or a computer. This promotion lasted until the end of February 2007 and the advertising represented that the broadband was available everywhere, that it was in fact ubiquitous. The reality of the matter was that broadband was not available everywhere (that is, from North Cape to the Bluff and everywhere in between) but where the service was available. In fact, there were a number of parts of even the main centres where it was not available at all.

[10] In October of 2006, a month after the launch of the campaign, coverage was limited to 42 percent of the population but, in fact, only one percent of the geographical area of New Zealand. There were a number of complaints that were made but the important thing about it, as far as the Crown is concerned, is that the advertising claims were made at a vital time in the uptake of a critical piece of new infrastructure, namely Mobile Broadband Networks and, certainly, there has been a

lot of publicity about the importance and necessity of fast and reliable broadband as being fundamental to New Zealand's economic development. So it was not just a question of customers, it was also a question of the market itself that was being affected.

[11] The advertising campaign relating to the largest 3G network depends, I suppose, upon one's definition of "network" – does it involve customers, or does it involve geographical spread. As far as the first definition is concerned – customers – yes, the network of customers that Vodafone had was larger than Telecom, and Mr Gray has been at some pains to point this out, but the fact of the matter was that, in terms of coverage of the population, Telecom's 3G network was bigger than Vodafone's.

[12] Now the advertising campaign was quite significant. It involved print, billboards, Christmas gift catalogues, flyers distributed to letterboxes, advertisements on cinemas and on television and also advertising online. Once there was an awareness of the problem Vodafone attempted to qualify its representation but did so by the addition of small print references to comparisons being based on WCDMA network coverage but the other problem was that Telecom's 3G network was based on a different technology called CDMA and a particular revision (or flavour of that) which was called the EVDO revision. And, effectively, the comparison that was being advanced was not between apples and apples but between two entirely different systems. So although Vodafone's network could be described in fact as the largest, in terms of the number of connections, it was not, really, in terms of geography. Now there were not any complaints from consumers about this but there was a complaint from Telecom of course their competitor.

[13] Now Mr Gray has gone to some pains to point out the mitigating factors and the explanations that have been involved. This was part of a huge infrastructure revision and there were going to be gremlins in the system. The problem was it seems that the gremlins either were not expelled quickly enough or consumers were not told of the problems or were misled in that regard.

[14] As far as the explanations for the $10 credit are concerned this was somewhat complex. It did not only involve the Vodafone infrastructure, but it involved relationships with a company known as Siebel and another company, IBM - both of them big players in the technology field.

[15] As far as the importance of the representations are concerned Mr Gray points out that of course the $10 offer would have been a factor in the purchasing decisions of customers but we do not know, in terms of the number of customers, how many were influenced in this regard, and perhaps that can be supported by the fact that a lot of them did not even try to take up the offer in the first place. On the other hand, there was a bonus as far as customers were concerned and the Crown suggests that that representation would have assumed a critical importance in the purchasing decision of prepay customers who were a highly price sensitive sector of the market – and indeed they are, they do not want to be tied to contracts for 12 or 24 months, they want to pay as they go, so the prepay customer is very price oriented in this regard.

[16] In terms of the importance of the representations, therefore, it is rather difficult to determine whether or not all the customers were motivated by that factor but given, as I have said, that prepay customers are indeed motivated by price, then it must be taken into account as a factor of some importance.

[17] Mr Gray argues that the degree of culpability (as far as the $10 credit campaign) is low to medium, particularly for the first half of the charge period. There had not been any issues initially but it was only after implementation that difficulties became apparent – culpability is increased and Vodafone concedes this during the second half of the charge period. It continued to make the offer on the packs but did not take consistent steps to warn customers of the difficulties that were encountered. The Crown points out that whilst the offending may have started as a result of carelessness little was done to inform consumers and I think it is acknowledged that Vodafone's culpability increased as time went on.

[18] As far as dissemination of the statements are concerned it is acknowledged by Vodafone that there was significant dissemination of the information, as far as

prejudice or harm is concerned. Once again, it is difficult to determine that but, by that same token, the advantages that accrued to Vodafone in terms of those who did not take up the offer or, alternatively, who were unable to take up the offer as a result of difficulties with registration, presented Vodafone with a significant benefit.

[19] The Broadband Everywhere situation is a little bit different. Clearly, there is an underlying suggestion in that advertising campaign that there was geographic availability of Vodafone's services and broadband services. The whole point of mobile internet, or mobile wireless internet, and of broadband availability, means that consumers are not tied to a location as they are with landline. It means that broadband and data and internet may be available wherever the customer might choose to be - be it on a train, on a bus, on a street corner, in an office or in a car, although one hopes that the car is not moving when the broadband is being accessed.

[20] Of course the availability of broadband in 2006 was in its infancy – now, with wireless devices and mobile devices such as iPads and other tablets, it becomes even more important but this was where it started and, certainly, there was significant amount of importance to the representations that it was available everywhere because customers could think that it was going to be in fact available wherever they might be – and it was not. It is acknowledged that there was some difficulty in this regard. Mr Gray puts it out that this was a developing network and, as the network increases, it depends upon funding from existing customers and existing users, and I accept that. But, in terms of representing that it was universally ubiquitous availability, was clearly false and clearly misleading. In that respect there was wide dissemination of the information and it did, in my view, potentially result in significant harm.

[21] Furthermore, the availability of the broadband devices – the Vodems – were not only through Vodafone outlets but also through a number of other mobile outlets such as First Mobile, Digital Mobile and Dick Smith stores. The print media advertisements were quite heavy – in magazines and in newspapers, and also in the Freedom to Move television commercials which broadcast it on network television and also upon Sky. This was a key market and, as has been suggested, it is not only damage to consumers but also potential damage to the market that is of concern. The

Crown points out that these sorts of misrepresentations distort the market by disillusioning customers who do not get what they are expecting.

[22] Mr Gray, in his submissions, acknowledges that Vodafone accepts that customers would have understood that Broadband Everywhere meant that it was more widely available than in fact it was and, certainly, those who expected internet at broadband speeds but found themselves using it at slower rates would be very frustrated, and Vodafone accepts that complainants were not treated well when they were unable to secure the expected service.

[23] The third charge, relating to the largest 3G network, suggests (from the Crown's point of view) different levels of culpability – the offending spanning a total period of some two years and four months. Mr Gray pointed out (and I have already made reference to the way in which that representation should have been taken) that it was based upon connections to the network rather than the broadest geographical coverage. Mr Gray concedes that the representation of "largest network" may well have induced customers to use Vodafone services, believing them to have been broadly spread, and it also was aware that it did not have the largest network in terms of the geographical sense, although he says the word "largest" in the sense that the thought was most important to customers, namely the number of connections, was the way in which Vodafone was approaching it – although, in my view, with the greatest of respect, there is a certain naivety to that. Certainly, the statement was untrue in terms of geographical coverage although there was an element of truth to it in terms of the number of connections, and Mr Gray acknowledges that the statements were broadly disseminated. An important factor perhaps is that there were not any complaints by consumers in relation to the campaign and that the complaint came from a competitor. So those are the circumstances of the various charges and the approaches that have been made by counsel.

[24] Parties are agreed on the role of the Court as set out by Hansen J in *Commerce Commission v Ullstrum*. He said:

> Finally, in discussing the general approach to fixing penalty I acknowledge the submission that the task of the Court in cases where penalty has been agreed between the parties is not to embark on its own enquiry of what

> would be an appropriate figure but to consider whether the proposed penalty is within the proper range.

[25] As noted by the Court in the case of *NW Frozen Foods v ACC* and by Williams J in *Commerce Commission v Coppers*:

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

[26] In this particular case there has been considerable negotiation between the parties. There has been an agreement upon a summary of facts, there have been pleas of guilty that have been entered to representative charges, which properly reflect the nature of the offending, and there has been a realistic approach to the assessment of penalty – both in terms of the suggested starting point and in terms of the discount that should be available for guilty pleas and in terms of the final finishing point, if I can put it that way.

[27] It is necessary to consider the various circumstances of the offending in terms of aggravating and mitigating features. Mr Gray suggests that there are in fact no aggravating features but the Crown points out that there are three discreet types of offending where representations about the extent of services, or types of services, or the quality of services have gone seriously wrong. Furthermore, the Crown points to the sustained period of the offending as far as the $10 credit was concerned, some 16 months; Broadband Everywhere, 19 months and the largest, 3G Network, six months. And they also point to the potential for harm – if not actual harm - and the significant financial gains to Vodafone, which it certainly got as far as the $10 credit were concerned in terms of prepay fees and in terms of new customers, that is the migrating customer to which I referred at the beginning of my remarks.

[1] Certainly, I consider there is an aggravating circumstance in the fact that when Vodafone became aware of these difficulties although it attempted to do something about it, it did not succeed and did not perhaps address the problem with the level of seriousness that the problems required. I say that because this is a highly

competitive market – one where consumers are exposed to a considerable amount of advertising, where decisions are being made on a daily basis by consumers particularly in terms of the rollout of new technologies and new services that are being offered and in this case, of course, we have the new services that can be broadly defined as data.

[2] The fact that Vodafone did not do sufficient to deal with the problem and the fact that, as a technology company, it certainly had the resources available to it (not only in terms of finances but in terms of expertise to address the problem) seems to me to be an aggravating circumstance. But there are mitigating factors and they should properly be acknowledged.

[3] Mr Gray points out that Vodafone has accepted responsibility. Pleas of guilty have been entered and although he concedes they are not at a first reasonable opportunity I believe that it should be accepted that cases such as these are complex and some time is required to resolve the matter as between counsel and to agree upon a summary of facts and the nature of charges which properly reflect the wrong that has been committed by Vodafone.

[4] I think that the suggestion of a 20 percent discount for guilty pleas is a proper one and one hesitates to imagine what a defended hearing of a case of this nature would be like in terms of time and Court resources, and also in terms of the necessary education that would be required on the part of the fact finder to understand just exactly what was going on. Mr Gray also points to the mitigating factors of an agreed statement of facts and also the fact that Vodafone has co-operated with the Commerce Commission in terms of its investigation - although it should be pointed out that that co-operation has not been perhaps as full and free as it could have been and there have been occasions when Vodafone has retreated from getting involved with the Commerce Commission and assisting perhaps as far as it could.

[5] In terms of sentencing authorities I consider that the proposals that have been made by counsel fit within the ranges that have been suggested in the case of *Commerce Commission v Telecom* and in the case of

Commerce Commission v Vodafone Live – and I term it in that way because it dealt with that campaign (which was a decision of Judge Joyce) and the decision in *Commerce Commission v Vodafone $1 A Day,* which was a decision of Judge Kiernan. Those decisions actually involve campaigns that were part and parcel of this overall rollout which was not so much a situation where Vodafone had been dealt with by the Court and had then gone out and committed fresh offences.

[6] The sentencing in respect of the *Vodafone Live* case was in August of 2011 and the sentencing in respect of the *$1 A Day* case was on 21 November 2011 so this was not (if I could term it that way) corporate recidivism, but indeed, part and parcel of an overall problem. But, once again, what must be taken into account is a totality view of the behaviour that has been the subject of the particular offending.

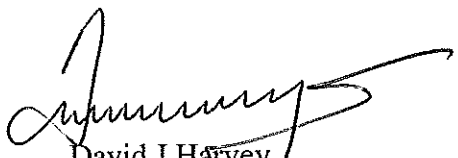
[7] From that respect the totality approach requires fixing a starting point that properly reflects the overall nature of culpability in respect of the 11 charges to which Vodafone has pleaded guilty. The parties are agreed that a starting point penalty of $1.2M does just that. The offending is more serious than that in the previous *Telecom* and *Vodafone* decisions and it relates to three discreet marketing campaigns targeting consumers of prepay mobile telecommunication services, broadband internet and 3G Mobile internet services respectively. And that addresses the seriousness of the offending, the critical importance of mobile and broadband markets to consumers in New Zealand's economic development and the substantial potential for harm caused by conduct, the centrality of the representations to consumer decisions to purchase mobile telecommunication services, broadband and mobile internet access and to make those decisions to shift providers where that may be appropriate.

[8] Dissemination of the representations and the duration is also a factor of culpability that must be reflected in the penalty and the Crown suggests that culpability is high, ranging from carelessness, initially, as far as the $10 credit is concerned, and it characterises it as recklessness but I think that might be a little bit too serious to reflect the corporate responsibility as far as the remaining two categories are concerned. I would suggest, however, that perhaps the words "gross carelessness" might be more appropriate and, furthermore, it was repeated

and persistent in the face of consumer complaints, particularly in respect of the first two sets of charges which it did not remedy and which as a technology company that had the resources and the expertise to do so.

[9] Certainly there is justification for a nett discount that should be applied in recognition of all of the mitigating factors to which I have referred and it is suggested that 20 percent properly reflects that.

[10] The total penalty, therefore, on all charges would amount to $960,000. And that leads to a final penalty per charge (and I note that there are 11 charges) of $100,000. $10 free credit charges, $100,000 per charge; Broadband Everywhere $50,000 per charge and the largest, 3G network, $17,778 for each charge. The fact of the matter is that the overall penalty is $960,000, which reflects the seriousness of the offending, the culpability of the defendant company and the mitigating circumstances to which I have referred.



David J Harvey
District Court Judge

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MINUTE RECALLING DECISION AND AMENDING FINE

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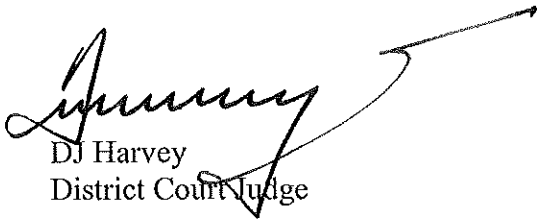
[1] Paragraph 10 of my sentencing notes of 10 September 2012 contain a miscalculation following upon advice of counsel as to the apportionment of the total penalty of $960,000. Pursuant to section 77 of the Summary Proceedings Act 1957 and now that I have to recall the decision to correct what in effect is a clerical error the final penalty should be follows.

[2] As to the charges described as the $10 credit charges (Informations 5634, 5642, 5645 and 5646) the fine should be $100,000 each.

[3] As to the Broadband Everywhere charges (Informations 5849, 5850, 5863, 5887, 6014, 6016, 6022, 6035 and 6046) the fine should be $44,444 each.

[4] As to the largest 3G Network charges (Informations 5723, 5734, 5735, 5737, 5738, 5739, 5760 and 5764) the fine will be $20,000 each.

[5] The effect is that as to the $10 credit charges the total fines are $100,000, as to the Broadband Everywhere charges the total fine is $400,000 and as to the largest 3G Network charges the total fine is $160,000.



DJ Harvey
District Court Judge