

**IN THE DISTRICT COURT  
AT AUCKLAND**

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

**CRI-2018-004-004799  
[2018] NZDC 22699**

**COMMERCE COMMISSION**  
Prosecutor

v

**HRV CLEAN WATER LIMITED**  
Defendant

Hearing: 19 October 2018  
Appearances: A McClintock for the Prosecutor  
B Stewart QC for the Defendant  
Judgment: 5 November 2018

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**SENTENCING REMARKS OF JUDGE J E MACDONALD**

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[1] On 19 October 2018 the defendant was sentenced on 11 representative charges under the Fair Trading Act 1986 (the FTA).

[2] On each charge, I imposed a fine of \$40,000 with Court costs of \$130. This meant fines totalling \$440,000 which reflected my acceptance that an overall starting point of a fine of \$650,000, agreed to by counsel prior to sentencing, was appropriate and reasonable. I also accepted an agreed deduction of 10 percent for the defendant's co-operation and lack of prior convictions with a further 25 percent deduction for the entry of guilty pleas.

## **The charges**

[3] Nine of the 11 charges were laid under s 12A of the FTA for making unsubstantiated representations about:

- (a) the ability of its water filtration system (Water Filter) to soften water;
- (b) the benefits of soft water that consumers could expect from the use of the Water Filter; and
- (c) the ability of the Water Filter to reduce skin conditions, including eczema and dermatitis.

[4] The other two charges were brought under s 13(h) of the FTA for making false or misleading representations about the level of degradation of New Zealand's domestic water supply and the corresponding need for consumers to purchase the Water Filter to address the water quality problems.

[5] The offending related to the period between 2 July 2014 and 12 October 2017 with the representations being made through various means including on the defendant's website and in promotional material provided to customers.

[6] The maximum penalty for each offence was a fine not exceeding \$600,000.

## **Summary of facts**

[7] The defendant was incorporated in 2011 and is owned by E-Co Products Group Limited. The HRV brand is a well-known New Zealand company that sells home environment products, most notably, ventilation and heating systems.

[8] In April 2012, the defendant added the Water Filter to the available products sold under the HRV brand. The Water Filter was developed by a New Zealand company Kiwipure Limited (Kiwipure), and manufactured in China. In 2012 the defendant entered into a licencing agreement with Kiwipure that allowed it to sell the Water Filter.

[9] The defendant supplied customers with the Water Filter from February 2013 until the termination of the agreement in April 2016. They were sold at the recommended retail price of \$2,795, which included the cost of installation.

[10] In August 2016 the Commission began an investigation after receiving a complaint alleging that the Water Filter being sold by the defendant was not providing the claimed soft water benefits. The defendant co-operated fully with the investigation which concluded in March 2018.

[11] The investigation revealed that between July 2014 and October 2017 the defendant had made a number of representations about the ability of the Water Filter to soften water and the benefits that would result. When asked to substantiate those claims the defendant said it had relied on information provided by Kiwipure and testing conducted by Revolution Fibres Limited

[12] Ultimately, for the reasons detailed in the summary of facts, the investigation established that there were no reasonable grounds for the defendant to make the representations it did regarding the Water Filter's ability to soften water.

[13] As to the representations about reduced skin conditions these were made between July 2014 and July 2015. In making such representations the defendant told the Commission it had relied upon a World Health Organisation report, a research article and a study which identified and discussed the possible link between chlorine and skin conditions.

[14] Again, however, it was found that such information did not provide reasonable grounds for the representations made.

[15] In respect of the need for consumers to purchase the Water Filter, the defendant made various representations on its website between May 2015 and August 2016. The representations were directed at pollution in waterways, contaminants in the Waikato River and hard metals leaching into water. There were also representations as to the ability of the Water Filter to remove additives found in the domestic water supply.

[16] In response to a request to substantiate such claims the defendant conceded that it did not have any reasonable grounds to make the claims about pollution in the water ways or contaminants in the Waikato River. As to the representations about hard metals leaching into water it said it relied on information published by the Dunedin City Council. As to the ability of the Water Filter to remove additives found in the domestic water supply it could not identify any substance added to the water, other than chlorine.

[17] The defendant was therefore again unable to substantiate its representations and it concedes that they were false and/or misleading.

[18] The summary of facts refers to the defendant having sold 4,298 units of the Water Filter between 2 July 2014 and 12 October 2017 generating revenue of more than \$9 million (excluding GST).

[19] It was accepted that the defendant's conduct caused financial detriment to consumers, although that was impossible to quantify. Competitors were also disadvantaged.

### **Submissions as to penalty**

[20] For the Commission, it was submitted that the offending was serious because it spanned a considerable period of time, it was highly careless and it prejudiced both consumers and the defendant's competitors. It was also submitted that the defendant's culpability was high and warranted a significant deterrent penalty.

[21] Both counsel referred to the principles and purposes of sentencing under ss 7 and 8 of the Sentencing Act 2002. They also referred in detail to the general sentencing factors to consider when imposing a penalty under the FTA as set out in *Commerce Commission v L D Nathan Limited*.<sup>1</sup>

[22] For the defendant, it was emphasised that this was not a case where the defendant made no attempt to comply with its obligations under the FTA. It had

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<sup>1</sup> *Commerce Commission v L D Nathan Limited* [1990] 2 NZLR 160.

obtained material from its supplier (Kiwipure) in support of the claims made about the benefits and capabilities of the Water Filter and it commissioned scientific testing (from Revolution Fibres Limited). As mentioned, there was also regard to a World Health Organisation report, a research article and a study. Despite that, the defendant accepted that the material it relied upon fell short of the threshold required by the FTA.

[23] The defendant submitted, however, that while its conduct was careless, it did not involve any underhanded, deliberate or financially motivated behaviour. The defendant fully co-operated with the Commission's investigations, took immediate steps to remediate the breaches and made improvements to its staff training programme and compliance.

[24] As to the approach to sentencing, counsel for the Commission submits that the offending under ss 12A and 13(h) can be viewed as quite distinct; the former relates solely to unsubstantiated representations made in promotional media claiming benefits of the water filter and the latter to misleading representations designed to build the need for the water filter in consumers' minds. It is submitted that both categories of offending are serious and warrant a significant penalty.

[25] In fixing an appropriate starting point for the s 12A offending Ms McClintock for the Commission referred to *Commerce Commission v Fujitsu General New Zealand Limited* and *Commerce Commission v Timber King Limited & NZ Steel Distributor Limited*.<sup>2</sup> She also submitted that some assistance could be drawn from *R v Love Springs Limited & Phillip John Smart* and *Commerce Commission v Ecoworld* as both involve similar subject matter, namely representations about a water filter and tap water quality, albeit decided under different provisions of the FTA.<sup>3</sup>

[26] Counsel were agreed that in terms of comparable cases the one that provides the most assistance is *Fujitsu*. In that case there were guilty pleas to seven charges; five representative charges under s 12A of the Act for making unsubstantiated representations on its website about the efficiency of its heat pumps, and two

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<sup>2</sup> *Commerce Commission v Fujitsu General New Zealand Limited* [2017] NZDC 21512; *Commerce Commission v Timber King Limited & NZ Steel Distributor Limited* [2018] NZDC 510.

<sup>3</sup> *R v Love Springs Limited & Phillip John Smart* DC Auckland CRI-2012-004-011695, 11 December 2013; *Commerce Commission v Ecoworld* [2005] DCR 921.

representative charges under 13(e) of the Act for making misleading representations about performance characteristics of its heat pumps. The offending occurred over a two year, four month period. The sentencing Judge viewed the unsubstantiated representations as a matter of “exaggeration” rather than what he saw as the more dramatic and more specific representations under s 13(e) which he considered were more likely to have influenced buyers. Accordingly, this was reflected in a starting point for the two s 13(e) charges of \$270,000 and a starting point for the five s 12A charges of \$240,000. This meant a global starting point of \$510,000 which was reduced to \$480,000 for totality reasons.

[27] The Commission submitted that the defendant’s offending in the present case was more serious than *Fujitsu’s* for several reasons. The offending went on for almost a year longer; the defendant’s claims had no proper basis and they extended beyond claims of effectiveness as a product to the making of alarmist health claims. It is submitted that the claim of an ability to assist with common problems such as eczema and dermatitis is likely to have resonated particularly strongly with consumers.

[28] Having discussed the other cases mentioned above the Commission submitted that the appropriate starting point range for the s 12A offending would be a fine between \$450,000 and \$500,000.

[29] As for the starting point in relation to the s 13(h) offending, the Commission suggests that such charges relate to the need for goods and therefore cases involving company’s selling techniques and building the need are relevant in assessing the appropriate starting point. Two examples can be found in *Love Springs* and also in *Commerce Commission v Auckland Academy of Learning*.<sup>4</sup>

[30] For the defendant, it was submitted that the representations were designed to raise consumer concern that risks follow from the consumption of domestically supplied water in New Zealand which was not treated and in turn, to create the need for the Water Filter.

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<sup>4</sup> *Commerce Commission v Auckland Academy of Learning* [2017] NZDC 27148.

[31] The Commission submitted that if the s 13(h) offending was standing alone, then the appropriate starting point range would be a fine between \$250,000 - \$300,000. As mentioned before, agreement had been reached prior to sentencing that a totality adjusted starting point of a fine of \$650,000 was within the range available to the Court. This involved taking the bottom figure for each starting point range and then allowing an adjustment of \$50,000 for the purposes of totality.

[32] While accepting both starting point ranges and the overall totality adjusted starting point, as advocated by the Commission, Mr Stewart was anxious to place the defendant's conduct as being in the category of careless. As to the degree of carelessness, he submitted that needed to be tempered by the attempts the defendant made to substantiate the claims.

[33] Furthermore, while it was accepted that further due diligence was required, the submission was made that the defendant should have been entitled to rely upon the information provided by the specialist supplier who developed and designed the Water Filter. In any event, the defendant did not rely exclusively upon its supplier, as it also commissioned testing by Revolution Fibres. Although the results of the tests varied, it was submitted that a number were positive.

[34] The defendant accepted that the representations made about skin conditions were careless but again pointed to the fact that an attempt was made to substantiate them, as previously discussed. Similarly, the representations made about water quality resulted from the defendant misreading and misunderstanding the material that was relied upon. Therefore, this was not a case where the representations had no basis whatsoever. It was also emphasised by the defendant that there was no underhanded behaviour and the conduct was not deliberate or financially motivated.

[35] As to the financial detriment to consumers, it was conceded by the Commission that it was impossible to quantify. The defendant also pointed out that the product sold by the defendant was of value and it filtered water as represented.

[36] In respect of the comparable sentencing authorities, the defendant agreed that the most comparable case was *Fujitsu* and while it was accepted that the defendant's

offending was more serious, and that was reflected in the agreed starting point, it was important to note that the revenue generated by Fujitsu was over ten times that made by the defendant, and over a shorter period of time. There was also the extensive television advertising that was not present with the defendant's case.

### **Assessment**

[37] In my assessment, the defendant's conduct giving rise to the s 12A charges was undoubtedly careless but I accept Mr Stewart's submission that it was tempered by the fact that a basis for making the representations existed. To an extent there was also an argument that it was entitled to rely upon its supplier (Kiwipure) and the testing it commissioned through Revolution Fibres. I further accept that I am not dealing with deliberate conduct that was motivated in some underhanded way to make financial gain at the expense of consumers.

[38] In respect of the conduct giving rise to the charges under s 13(h) I consider the defendant to be on my much weaker ground. Its representations about pollution in the water ways and contaminants in the Waikato River had no reasonable foundation. As for hard metals leaching into the water the Dunedin City Council information did not sound overly authoritative at all. The claim about removing additives from the water, other than chlorine, was plainly untrue.

[39] Overall it is difficult to ignore the stark reality that the defendant made a large number of unsubstantiated representations, which were widely disseminated, for a lengthy period of time (three years and three months). Although it could not be quantified the conduct caused detriment to consumers and competitors. And, so viewed in that way, the offending was plainly very serious and that was reflected in the agreed starting point for a fine.

[40] While easier perhaps to fix a starting point when considering a single charge as opposed to multiple charges, and representative charges at that, I was satisfied that the suggested starting point ranges for both the s 12A and the s 13(h) offending, as advocated by the Commission were appropriate, as was the totality adjusted starting point of a fine of \$650,000.



[41] In my view that properly reflected the purposes of the FTA, the principle of deterrence and the circumstances of the case. It was also consistent with and within the range of the comparable cases that had been considered in the submissions.

[42] I confirm my view that a ten percent discount for the defendant's co-operation, remediation, remorse and prior good character, as agreed by counsel, was also appropriate, as was a 25 percent discount for the guilty pleas, to bring the total fines imposed to \$440,000.

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Judge JE Macdonald  
District Court Judge

Date of authentication: 05/11/2018

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