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27 March 2020

[redacted]

By email only: [redacted]

Dear [redacted]

Official Information Act #19.151 - Sentencing Decisions

1. We refer to your request received on 16 March 2020 for copies of the sentencing decisions for the below two articles on the Commerce Commission (Commission) website:

   1.1 Owner fined $151,875 for misrepresenting cladding as premium brand Supercrete, dated 5 October 2017;[1] and

   1.2 Supercrete Auckland director fined $37,500 for claiming generic cladding was premium brand, dated 16 February 2018.[2]

2. We have treated this as a request for information under the Official Information Act 1982 (OIA).

Our response

3. We have decided to grant your request.

4. We have **attached** the relevant sentencing decisions:

   4.1 Commerce Commission v Darryl Arthur Campbell [2017] NZDC 22290;

   4.2 Commerce Commission v Cavan James John Forde [2018] NZDC 2600; and

   4.3 The Queen v Christopher Leon Middleditch [2018] NZDC 2942.

[1] https://comcom.govt.nz/news-and-media/media-releases/2017/owner-fined-$151,875-for-misrepresenting-cladding-as-premium-brand

[2] https://comcom.govt.nz/news-and-media/media-releases/2018/supercrete-auckland-director-fined-$37,500-for-claiming-generic-cladding-was-premium-brand

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5. Please note the Commission will be publishing this response to your request in the Official Information Act register on our website.[3] Your personal details will be redacted from the published response.

6. Please do not hesitate to contact us at oia@comcom.govt.nz if you have any questions about this request.

Yours sincerely

Mary Sheppard
OIA Coordinator

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[3] https://comcom.govt.nz/about-us/requesting-official-information/oia-register

IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-012808
[2017] NZDC 22290

COMMERCE COMMISSION
Prosecutor

v

DARRYL ARTHUR CAMPBELL
Defendant

Hearing:	29 September 2017
Appearances:	S Lowery for the Prosecutor D J C Russ for the Defendant
Decision:	3 October 2017

SENTENCING DECISION OF JUDGE B A GIBSON

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[1] The defendant has pleaded guilty to nine representative charges laid under s.13(a) of the Fair Trading Act 1986 concerning misrepresentations made to at least 83 customers of his company Christchurch Lightweight Concrete Limited ("Christchurch Lightweight") in relation to the sale or the offering for sale of Autoclaved Aerated Concrete Panels ("AAC"). The panels were sold or marketed under the name "Hebel", an established brand with the panels predominantly used as non-structural, and exterior cladding for buildings. The brand was developed in Germany by the Xella Group of Companies and panels were manufactured in Australia. Hebel as a generic name was sufficiently established in the Canterbury region, where the defendant's company largely sold its products, so that builders and architects would specify particular panels by reference to the brand name of Hebel.

[2] The summary of facts, accepted by the defendant, notes that in relation to various other defendants being prosecuted by the Commerce Commission, the charges cover the period 17 July 2007 to 17 December 2013, although for the defendant, the representative charges only cover the period July 2007 to December 2010.

[3] The summary of facts describes the Hebel panels as being a premium brand associated "*with high quality AAC products*". One of the points of difference for Hebel panels and their sale in New Zealand is that its competitor's panels were manufactured in China whereas Hebel's were manufactured under licence in Australia. AAC panels were used extensively in the Christchurch re-build primarily for residential dwellings.

[4] Christchurch Lightweight, the company owned by the defendant and his wife, who were the sole directors and shareholders, was one of a number of companies trading through a group known as the Cavan Forde Group. The defendant's company, as with a number of the other companies which traded through that group has now been wound up so that Christchurch Lightweight is not itself charged with the misrepresentations.

[5] The false or misleading representations to which Mr Campbell has pleaded guilty were that he represented to his staff that 50 mm AAC panels were Hebel

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panels manufactured in China, when he knew they were not, but instructed his staff to inform customers that this was so. Those instructions amounted to false representations of the type prohibited by s.13(a) of the Fair Trading Act 1986 which forbids a person in trade, in connection with the supply or possible supply of goods to:

> *"Make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style or model ..."*

[6] The other charges, all also representative charges, concern the sale of 50 mm AAC panels to various customers of Christchurch Lightweight who were led to believe they were Hebel panels, Mr Campbell's staff having been instructed by him to tell customers this when he knew they were not. Panels were supplied and offered for supply in relation to at least 83 properties on the false premise they were Hebel panels, when they were not. Consequently there are eight representative charges in relation to those misrepresentations which cover approximately 10 properties each and/or customers.

[7] The defendant is 56 years of age and has been involved in the building industry for in excess of 14 years. He worked for a number of years for the Cavan Forde Group. Relevantly for sentencing purposes he has no criminal convictions. Mr Russ, in his written submissions, submitted that the defendant's conduct was not deliberate but reflected a degree of carelessness, a submission I do not accept, but nevertheless accepted that the appropriate response from the Court ought to be a penalty that amounted to deterrence and denunciation. I agree. The legislature has provided for substantial financial penalties for this type of offending so as to protect consumers and to enable businesses to compete effectively, purposes set out in s 1(a) of the Fair Trading Act 1986. Although the maximum penalty for each offence for sentencing purposes for Mr Campbell is $60,000, that penalty has been increased, in the case of an individual, to a fine not exceeding $200,000.

[8] Counsel were agreed on the range of appropriate penalty level, although both, correctly, acknowledged the overarching right of the Court to reach its own decision in relation to the level of fine. They agreed the offending warranted a global starting point in the range of $200,000 to $250,000 with discounts for cooperation with the

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Commerce Commission and for the entry of a guilty plea in relation to each charge collectively amounting to 35%. That approach has been endorsed by a full court of the High Court in *Commerce Commission v New Zealand Milk Corporation Ltd*[1] as being helpful in relation to guilty pleas as it enables the Court to take into account the benefit to the community of the early disposal of proceedings.

[9] CSR Building Products (NZ) Ltd which distributes Hebel products in the New Zealand market filed a victim impact statement noting that the known financial effect of the loss of sales in relation to the transactions the subject of the charges was approximately $210,000. The Commerce Commission did not seek reparation as part of the penalty to be imposed on Mr Campbell, nevertheless I accept CSR's submission through its victim impact statement that there has been significant reputational damage to its product in New Zealand, which undoubtedly would have led to lost business opportunities and in particular to the brand now being at a disadvantage in the Canterbury market as a result of potential customers being unsure as to the integrity of the Hebel AAC brand. I do not accept the submission on behalf of Mr Campbell that any loss of a share of that market has been caused by Hebel being unable to compete on price with Chinese alternatives. It was accepted by Mr Campbell, through his counsel, that the brand had a good and well-known reputation to the point that builders and architects would specify the product by name.

[10] It follows that as a result of the uncovering of the misrepresentation made by the defendant and, through him, unwittingly by staff at Christchurch Lightweight, there must have been significant reputational damage to CSR's product, particularly in the Canterbury region.

[11] Both counsel referred to a number of decisions. The Commission submitted that the facts of Mr Campbell's offending was similar to those in *Commerce Commission v Love Springs Limited and Phillip John Smart,*[2] a decision of Judge Collins which concerned door to door sales of water filters across the North Island and where the health effects of tap water were misrepresented in an attempt to

[1] *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730
[2] *Commerce Commission v Love Springs and Phillip John Smart* District Court Auckland CRI-2012-004-11695, 11 December 2013

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persuade consumers to purchase over-priced water filters. The offending was over seven months. The Court adopted a global starting point of $400,000 for the company and $200,000 for Mr Smart.

[12] Factually the case is not on all fours with this present case where the product was misrepresented in a sense that it was sold falsely under a particular brand name. I agree with counsel for the defendant that the more relevant authority is *Commerce Commission v Topline International and Jeffrey Bernard Cook*[3], a decision of Judge Dawson where bee pollen was sold as having been sourced in New Zealand when, in fact, it had been obtained from China. The starting point adopted by the Court was $180,000 for similar offending to that undertaken by Mr Campbell and committed prior to the increase in penalties on 17 June 2014. In that case, however, a corporate defendant who could bear part of the financial penalty was also sentenced, a distinguishing factor from this present sentencing as Christchurch Lightweight is in liquidation, and for that reason the overall starting point for Mr Campbell should be higher. Mr Campbell's culpability is similar, in my view, to that expressed for Mr Cook in the *Topline* decision where Judge Dawson noted his culpability was "*relatively high given his level of involvement in the management of the first defendant and in the marketing of the product*".

[13] I also accept the Commission's submission that Mr Campbell's conduct was deliberate. He very clearly knew the panels were not Hebel panels and he also knew, I am satisfied, of their reputation in the market. Therefore I am satisfied the penalty range suggested is appropriate and I have selected as a starting point, based on my view of Mr Campbell's culpability, a fine of $225,000 on a global approach. A fine of that level meets, in my view, the need for deterrence and denunciation of this type of conduct. Mr Campbell is entitled to discounts from that penalty. The discounts amount to 35% with which the Commission agrees, being 10% for lack of previous convictions and cooperation with the investigating authority, a matter that is significant in terms of the potential costs in prosecuting this type of offence to a conclusion, leading to a fine of $202,500 before a discount of 25% is applied for the pleas of guilty. That leads to an end sentence of $151,875 on a global basis which is

[3] *Commerce Commission v Topline International Limited and Jeffrey Bernard Cook* District Court Auckland CRI-2016-004-12802, 18 May 2017

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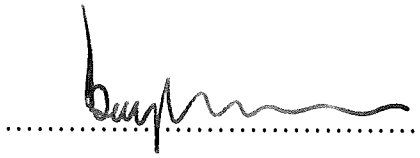
to be apportioned as a fine of $16,875 on each of the nine charges. Court costs of $132 for each charge are also to be paid by Mr Campbell.



Gibson DCJ

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IN THE DISTRICT COURT
AT AUCKLAND

CRI-2017-004-009377
[2018] NZDC 2942

THE QUEEN

v

CHRISTOPHER LEON MIDDLEDITCH

Hearing: 16 February2018

Appearances: S Lowery for the Crown
R Latton for the Defendant

Judgment: 16 February 2018

NOTES OF JUDGE N R DAWSON ON SENTENCING

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[1] Mr Middleditch you appear in Court for sentencing on two representative charges under Fair Trading Act 1986 and a further charge under the Fair Trading Act for your business operations. They relate to autoclaved aerated concrete (AAC) panels that were supplied or offered for supply by you to other entities.

[2] AAC is a lightweight concrete building product predominantly used in non-structural exterior cladding for buildings. During the period of the offending several brands of AAC were available in New Zealand, one of those brands being Hebel. Hebel is associated with a high quality AAC product and is a premium brand. The Hebel brand is owned by a group of companies based in Germany and they are available in New Zealand and, at the time concerned, they were manufactured under licence by a company in Australia. One of Hebel's point of difference from its New Zealand competitors was that its AAC panels were manufactured in Australia, in contrast to competitors' AAC panels which are manufactured in China.

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[3] During the period concerned, you operated as a distributor of AAC products in the Auckland region and you obtained AAC panels for supply from the Cavan Forde Group of companies. The Cavan Forde Group initially imported Hebel AAC products from CSR Limited Australia. In December 2012, CSR Limited stopped supplying Hebel AAC products to the Cavan Forde Group. On 24 December 2013, the Cavan Forde informed its distributors including yourself that it would source all future AAC products from suppliers based in Asia.

[4] The charges against you arise from representations you made to Hawkins Infrastructure Limited and Hawkins Construction Limited about AAC panels to be used as firewalls in a substation in Penrose in Auckland. You made representations that Supercrete Auckland would, and did, supply Hebel AAC panels to clad firewalls for the Penrose Substation. Supercrete Auckland supplied Chinese AAC panels instead of the promised Hebel panels. You made many misrepresentations to the Hawkins companies in several forms and quotes at a subcontract pre-letting meeting and in a number of signed agreements with Hawkins by email, invoices and in testing certificates. You represented to the Hawkins Group that the AAC panels were manufactured in Australia, when they were manufactured in China. You also issued an invoice to The Fireplace Limited for the supply of AAC panels described as Hebel, when they were not and they were in fact Chinese-manufactured. You made false or misleading representations that goods were of a particular kind and false or misleading representations concerning the place of origin of the goods.

[5] Your misrepresentations and misleading conduct resulted in customers purchasing AAC panels that they believed were premium Hebel panels, but were in fact generic panels manufactured in China. The customers were paying a price for AAC panels described as Hebel that reflected the value of the Hebel brand. In relation to some properties, customers were supplied with AAC panels that were not fit for purpose and quickly deteriorated. Your competitors were required to compete with AAC panels marketed as premium Hebel products, when they were in fact generic substitutes often manufactured by the same Chinese factories that supplied the competitors' own products.

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[6] Mr Middleditch, I have had extensive representations in writing made by the Crown and also by your counsel. I need to consider first of all the objectives of the Fair Trading Act which are to protect the interest of consumers, to ensure businesses compete effectively on a level playing field and to enable consumers and businesses to conduct their affairs in full confidence that they are dealing with the product that has been described.

[7] There are aggravating factors to your offending. First, in my view, there is the deliberate degree of wilfulness involved in that at least seven representations involved blatant deception. You had a number of opportunities to correct the misrepresentations made, but you failed to do so. There is significant prejudice to the consumers whose businesses suffered financial loss and reputational loss. It is also a risk to the wider community if constructions are made with materials that may not be fit for the purpose. Finally, your offending was carried out for financial gain.

[8] The sentencing factors I need to consider are firstly to hold you accountable for the harm to the victims of your offending. They were conducting their businesses on the basis of the products that you had represented as being quality premium products, and they were not; they were a different brand altogether. I denounce your conduct. This type of behaviour is not accepted in the business world. A sentence needs to be imposed to get the message home to you and others that when you are conducting your business affairs, you need to do so honestly and openly. The gravity of your offending and your degree of culpability are in the medium to high bracket.

[9] You did enter guilty pleas but not at the earliest stage but prior to trial, but it has to be said for what appears to have been a strong prosecution case against you. In my view, the maximum discount you are entitled to for the guilty pleas is 15 percent. You are a person previously of good character and you have not appeared before the Courts before.

[10] I have considered the cases that have been referred to me, in particular *Commerce Commission v Campbell* case and also *Commerce Commission v Topline International Limited*, although I do note that the *Campbell* case fell within the same time period as your offending but the fine imposed there was significantly

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higher than what I will be imposing today, because of the greater degree of offending involved.

[11] Taking into account all the submissions that I have seen; in my view, the starting point for the representative charges is a fine of $40,000 and, for the third offence, an uplift of $10,000 will be appropriate; taking it to $50,000.

[12] In mitigation, I would deduct $5000 for you having no previous convictions and $7500 for your early guilty pleas, bringing it down to a total fine of $37,500.

[13] I am therefore sentencing you to a fine of $16,000 each on the two representative charges and $5500 on the third charge.

[14] You also have Court costs to pay of $130.

N R Dawson
District Court Judge

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IN THE DISTRICT COURT
AT DUNEDIN

I TE KŌTI-Ā-ROHE
KI ŌTEPOTI

CRI-2016-004-012775
[2018] NZDC 26000

COMMERCE COMMISSION
Prosecutor

v

CAVAN JOHN JAMES FORDE
Defendant

Hearing: 19 November 2018

Appearances: S Lowery for the Prosecutor
R Latton for the Defendant

Judgment: 19 November 2018

NOTES OF JUDGE M A CROSBIE ON SENTENCING

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[1] Mr Cavan Forde who is for sentence on three representative charges under s 10 Fair Trading 1986 (the Act). The three charges relate to a prosecution under Act relating to two building products, the first being autoclaved aerated concrete or AAC panels and the second, a Supercrete 50 cladding system. The three representative charges against Mr Forde relate to representations made between May 2009 and December 2012 that were liable to mislead the public.

[2] The summary of facts is extensive and a copy has been made available to the press. However, an abridged version is that Mr Cavan Forde was the founder and controlling mind of the Cavan Forde Group of companies known as CFG. During the period of the proceedings CFG operated as an importer, manufacturer and national wholesale supplier of AAC and related building products and the business included

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the supply of cladding systems comprising AAC panels or blocks, mounting systems, coating textures and sealants.

[3] During the period May 2009 to December 2012 CFG used a network of regional distributors to sell its cladding systems and related building products. Two of those distributors, Messrs Campbell and Middleditch, have pleaded to and been sentenced separately in relation to charges under the Act concerning them. CFG was responsible for marketing the systems and products nationally.

[4] Initially all of CFG's AAC panels were the "Hebel" brand imported from CSR Limited in Australia. I record that there is a victim impact statement from the general manager of CSR before the Court that I will come back to. Hebel AAC panels were made under licence from the German Xella Group of companies which authorised the use of the Hebel brand. The CSR panels sold in New Zealand were manufactured in Australia by CSR under licence. The summary says that Hebel is a brand associated with quality AAC products with a point of difference being that during the charge period Hebel AAC panels were manufactured in Australia while competitors came out of China.

[5] The summary says that in the mid-2000s the CFG's market share was threatened by competitors selling 50 millimetre AAC panels made in China. Those panels were attractive because they were cheaper than the thicker Hebel panels, the thinnest of which was 75 millimetres. To deal with this market threat, CFG requested CSR Australia to manufacture 50 millimetre Hebel AAC panels. CSR declined. CFG then opted to obtain 50 millimetre AAC panels from China where some of its competitors' panels were manufactured. From 2007 to mid-1010 those 50 millimetre panels were manufactured in China and offered, distributed, supplied by CFG and branded as Supercrete 50, also a cladding system.

[6] In early 2010 CSR Australia began to manufacture 50 millimetre AAC panels meaning CFG was able to offer Australian made 50 millimetre AAC to customers for the first time. In around 2010 CFG imported these and distributed them and, with CSR's agreement, they were branded Supercrete 50 and also had the CSR Hebel logo on the packaging. In December 2012 CSR cancelled its supply agreement with CFG

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although it offered to supply Hebel on a non-exclusive basis. From that point, CFG ceased to receive any supply from CSR and relied exclusively on its Chinese suppliers.

[7] The three charges that Mr Forde has entered guilty pleas to amount to admissions that he made representations liable to create the incorrect impression that, first, AAC panels that he or his company supplied or offered to supply were manufactured in Australia under the brand name Hebel when they were manufactured in China. Second, that the CFG Supercrete 50 cladding system was endorsed by Opus International Consultants when it had not been.

[8] The representations were made through design guides that were available to both the industry and consumers in hard copy and on a website Hebel.co.nz. I have been referred to the design guides and been taken to aspects of the earliest one in particular by Mr Latton today.

Charge CRN 5759

[9] Two versions of CFG Supercrete design guides contained material liable to mislead the public. The first is the 2009 design guide that I am told was published from at least 23 May 2009 till 14 March 2011. That accounts for the charge in CRN ending 5759. Parts of the guide create the impression that CFG Supercrete 50 cladding system contained Hebel AAC panels manufactured by CSR. While there is some dispute over the extent and characterisation of the misrepresentations, it is agreed that, first, the front page displayed a Hebel logo at the bottom. Second, it represented that the systems in the design guide, "Are only to be used with Hebel Supercrete products manufactured by CSR Hebel Australia and distributed by CFG Concrete Limited". It also stated "This literature is not permitted to be used for other types of AAC including Hebel Supercrete from other manufacturers". Further, that "The Supercrete 50 cladding systems vary from the 75 millimetre Hebel Supercrete panel cladding system in panel thickness, panel screw length and available panel lengths." It is also agreed that the guide contained an installation diagram that described the 50 millimetre AAC panel as Hebel Supercrete panel.

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[10] Mr Latton spent some time stressing that this statement was the extent of the misrepresentations. He submits that when one sits back and looks at the overall context and size of the guide, they were very much in a minor category. The parties agree that the document, or at least parts of it, created a misleading impression about the types of panels in the Supercrete 50 cladding system.

Charge CRN 5766

[11] The second misrepresentation relates to the second design guide that covers two versions of the design guide (versions 1.9 and 2.2) published from 20 July 2011 until at least 7 February 2013. This was also on CFG's website. This relates to charge ending 5766, representing the logo of Opus, an independent appraiser, on the front page of the 2012 guide. This created an impression that Opus endorsed CFG Supercrete 50 cladding system when Opus had not in fact appraised that system. Opus had in fact appraised a Supercrete 75 system which is accepted had some elements in common with Supercrete 50.

Charge CRN 577

[12] The third charge is contained in CRN 577 and it relates to packaging. In late 2012 CFG used packaging on 18 pellets of Chinese 50 millimetre AAC panels liable to mislead the public by creating the impression that the AAC panels within were Hebel. They were not and featured 0800 HEBEL and the CFG Hebel website. The Court is told that Mr Forde was provided with the proof of the packaging while a director before its release. He sent an email on 24 December 2012 to distributors creating the impression that the product from Asian suppliers could be marketed as Hebel. However, the Commission accept that this could have been understood by some to refer to other CFG products as Hebel over which CFG did have a trademark.

[13] On my analysis, this charge is the least serious of all three. As I have commented, it relates to packaging for a product that had already been ordered. The packaging could perhaps be described more as gratuitous than inducing anyone into purchase the produce.

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Approach to sentencing

[14] I am bound to take the standardised approach to sentencing and look at the aggravating and mitigating features of the offending in order to assess a starting point and then the aggravating and mitigating features of the offender. I also take into account the purposes and principles of sentencing.

[15] The Court has been provided with guidance in a decision of *Commerce Commission v L D Nathan & Co Ltd* which contains principles that largely mirror the relevant considerations under s 7 to 9 Sentencing Act 2002. Those principles were held to include: the objectives of the Fair Trading Act; the importance of any untrue statements made; the degree of wilfulness or carelessness involved in making such a statement; the extent to which statements depart from the truth, the degree of dissemination; resulting prejudice; whether efforts were made to correct statements and, if so, what efforts; and the need to impose deterrent penalties.[1]

[16] Both Mr Lowery and Mr Latton in extensive written submissions have dealt with all such aspects. They are agreed as to the level of fine. Where they disagree is on assessment of Mr Forde's culpability.

[17] The Fair Trading Act is, and has been, a cornerstone of consumer protection in New Zealand for three decades. It is designed to provide that the interests of consumers are protected to ensure effective business competition and enable consumers and businesses to participate in commerce effectively. The dominant purposes of sentencing Mr Forde today are therefore: to hold him to account; to denounce his conduct as in breach of the principles under the Act; and to provide a sentence that deters other companies and directors from acting in a similar manner.

[18] I accept that by his plea Mr Forde accepts accountability and his role in what, on any analysis, is a much larger misuse of the brand when one incorporates the conduct of Messrs Campbell and Middleditch.

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[1] *Commerce Commission v L D Nathan & Co Ltd* [1990] 2 NZLR 160

[19] The Commission submits, and I accept, that the representations made were important as they involve cladding on homes which are regarded as a principal asset of many New Zealanders. It is not lost on the Court that cladding is a matter of some importance and must be seen so against a background of enormous loss and suffering as a result of non-weathertight homes. It follows that builders and consumers ought to have confidence in what they are using, purchasing and know that they are dealing with accurate representations.

[20] The Commission points to four features of the misrepresentations being: branding of Hebel against non-Hebel; the country of origin; manufacture; and third party endorsement. As a result the Commission submits that Mr Forde's conduct should be viewed as highly careless or negligent. The Commission submits that, as the controlling mind of CFG, he knew that Chinese-manufactured 50 millimetre AAC panels that his company was supplying were not Hebel and that during the charging period Hebel AAC was viewed as a quality offering amongst the various AAC products in the New Zealand market. The Commission submits that, against that backdrop, it was important for Mr Forde to ensure that the products he and his company supplied or offered to supply were marketed accurately. I agree that it is important the products are supplied and marketed accurately.

[21] The Commission accepts in relation to the guides that, although Mr Forde had ultimate responsibility for them in his capacity as the controlling mind of CFG, he did not personally approve of each and every aspect. That oversight role needs to be viewed against the direct role he took on the other matters subject to the charges, including being provided with a proof copy of the misleading packaging before it was released and the 24 December email. As I have already stated, those facets relate to the charge that is less serious than the other two and that may, therefore, downgrade somewhat the level of culpability on Mr Forde's part. But it is important that those who control companies, large or small, do ultimately bear responsibility for the work of those that they employ including in marketing material.

[22] Both counsel have worked through the various factors set out in *Commerce Commission v L D Nathan & Co Ltd.* It is clear from the plea that the representations conveyed an impression in relation to the Hebel brand that may have been misleading.

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[23] As to the degree of dissemination, the Commission submits this was significant. I would accept, at the very least, that it had the potential to be so, being contained not only in hard copy but on a website. The Commission notes that the representations were made over a three and a half year period.

[24] With respect to resulting prejudice, the Commission focuses on the groups of customers, competitors, the ultimate owner of the Hebel brand being Xella and further, all being affected in some way. As far as customers, tradespersons or consumers who made purchasing decisions in reliance on representations would not have received what they expected. AAC is not an everyday product for most people who had little or no ability to detect whether what they were receiving was what they expected.

[25] Mr Latton does not accept the Commission's viewpoint in terms of culpability. He stresses that there was a long-standing and legitimate contractual relationship between Mr Forde's companies and CSR and that the AAC products were components in different systems. He took me to the marketing literature, or descriptive literature, which he submitted must be viewed in the context of overall marketing and dissemination of literature on cladding systems. He submitted that the AAC panels were part of a cladding system involved a number of different products and materials all sold by CFG or related companies, and that the design guides at issue cover all aspects of the cladding system - not just AAC panels.

[26] Mr Latton submitted that a number of other Hebel branded products, predominantly coatings and plasters, were an integral part of the cladding system as well and some of these were manufactured by Mr Forde's companies who eventually owned the trademark that applied to them.

[27] Mr Latton noted the Commission's submission that the companies did not sell to the public. I am not sure that submission assists greatly. There is always a downstream effect. That is something that the Fair Trading Act looks to.

[28] Mr Latton notes the competitive pressure that the company was under and its inability to supply 50 millimetre panels. It therefore developed a cladding system initially using the 50 millimetre panels manufactured in China. They were very similar

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to the Hebel Supercrete 75 cladding system. He says that the panels utilised were at least as strong as CSR Hebel panels and independently appraised as compliant with the New Zealand Building Code by the Building Element Assessment Laboratory. In terms of assessing culpability, Mr Latton submits that what the Court is looking at is an issue of effectively trading off a brand rather than purposely trying to cover up an inferior product or a product that was not fit for the purpose. The Court has been provided with the information showing the product as compliant with New Zealand Building Code and Standards.

[29] By 2010 CSR Hebel was in fact able to supply some 50 millimetre AAC panels and came to the market. Mr Latton submitted that the Hebel Supercrete 50 cladding system is proven to be a very effective system and has not been the subject of any substantiated complaint.

[30] Mr Latton focused on the design guides, stating that they are not sales documents but technical documents which contained few misrepresentations. He accepts they were an error but submitted that, read in context, did not affect the overall intent of the document. There were aspects of products in the document that had been appraised by Opus but not that which is the subject of the charge.

[31] Addressing the *Commerce Commission v L D Nathan & Co Ltd* factors including the importance of statements, Mr Latton submitted that the statements in the 2009 design guide were isolated in nature. It is accepted that four of them may have been misleading. However, as I have said, it was in the overall context of a much larger document and inconsistent with the overwhelming substance of the design guides.

[32] While I understand Mr Latton's submission in the context of design guides or standards or prospectuses, the devil is often in the detail. There ought to have been an opportunity earlier in the piece for an error, if that is what it was, to be remedied.

[33] It is accepted if one looks at the 2012 design guide that there is a prospect of being misled into thinking that Opus had appraised the entire system, rather than some

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isolated aspects of it. The point is also made that there were aspects of what was contained in the guides that Opus had properly appraised.

[34] Mr Latton suggests there is no evidence that an appraisal by Opus is worth any more than an appraisal by BEAL and, if one reads the design guide as a whole, it is clear that Mr Forde's companies are only claiming BEAL appraisal for the overall Supercrete 50 cladding system. In Mr Latton's submissions this renders the statement concerning Opus unimportant.

[35] As I have said, the main issue between the parties is the degree of carelessness. The Commission submits that the offending was highly careless or negligent. Mr Latton does not accept this. He does accept there were four potentially misleading statements in the 2009 design guides. However, he submitted that the overwhelming majority of that document makes it clear that the AAC panel being used is Supercrete 50, not Hebel. The four minor errors do not impact on a clear message and do not amount to it being highly careless or negligent, he submitted. He made the same point in relation to the 2012 guide and submitted that there is a degree of ambiguity from looking at the front cover but that any ambiguity is clearly corrected by 75 pages that follow. He accepts that the statements at issue could have misled, but that all statements were isolated amongst material that could have left no one in any doubt as to the true situation.

[36] As to the degree of dissemination, Mr Latton distinguished the case from the significant degree of dissemination in *Zenith*.[2] As against that, the guide was both physically available and distributed. Further, it was on the web which gave it a potential to be disseminated to anyone interested in the product.

[37] I have a different view to that taken by Mr Latton. I accept that the offending might not fall in the category of highly careless or negligent. However, it is more approaching that category than the lower end as submitted by Mr Latton. I say that because I sit back and look at the overall offending before the Court. It is not just one design guide, but two. Although I have made by comments in relation to the limited impact of the packaging, when one looks at the overall context, use and representation

[2] *Zenith Corporation Ltd v Commerce Commission* HC Auckland CRI-2006-404-245, 27 May 2008.

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of the brand, it could hardly be described as a low level of culpability. The context was a highly competitive industry coping with a number of issues arising out of cladding issues and an infrastructure that was having to deal with natural disasters, et cetera. The representations overall can only be viewed as an attempt to convey the company's products in the best possible light, even if that meant incorrectly attributing origin of manufacture and an effective endorsement through Opus.

[38] Counsel have conferred, as is becoming a routine and helpful in these cases, on the level of fine. I have had a discussion with counsel in Court about where this offending sits in relation to Messrs Campbell and Middleditch. Both were distributors of CSR products but those businesses were owned independently and operated under licence, in much the same way as CSR did in relation to any upstream consequences. What Mr Latton has sought to do is disabuse the Court of any notion that Mr Forde was the controlling mind over what Messrs Campbell and Mr Middleditch did.

[39] I accept, and indeed Mr Lowery confirms, that the initial charges which were before the Court and which might have made some assertion in that regard are no longer before the Court. Of course Courts can and must only deal with charges and facts that are before them. It would seem that the Court is able to make a distinction in terms of Mr Forde's culpability from that of Campbell and Middleditch in that there were others, it is accepted, who were responsible for the content of the documents concerned. His pleas indicate his responsibility as the owner of the company. It also appears from the sentencing notes that I have read from the Campbell and Middleditch cases that those two individuals went out and actively marketed the products in a misleading way.

[40] Sitting back and assessing overall culpability, both counsel are of the view that Mr Forde's culpability is somewhere between the two. Mr Campbell saw an end fine of $151,875. That was off a starting point of $225,000. There were nine charges there and a 10 percent discount for co-operation and lack of previous convictions, and 25 percent for guilty pleas. Middleditch saw an end fine of $37,500 from an overall starting point of $50,000 from which 10 percent was deducted for lack of previous convictions and 17 percent for guilty plea.

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[41] Here the plea came late in the piece although it has saved the Court from an estimated four weeks hearing time and a reserved decision. The Court has largely been able to fill that time with other work. Obviously the pleas represents a resolution from a large number of charges many of which were withdrawn today.

[42] The Commission suggests a starting point in the range of $110,000 to $120,000, submits that a discount of 10 percent for co-operation and remorse is appropriate. Mr Latton accepts that the end point should be at the lower point of that range. Applying the Commission's deductions of 10 to 20 percent, the Commission submits an end fine in the range of $65,000 to $105,000 after rounding. Mr Latton accepts that the end point should be within that range in the order of $85,000.

[43] I accept the starting point is around $110,000 to $120,000. I am going to give Mr Forde some credit for his plea and co-operation, give him a global deduction and arrive at the overall agreed figure which I accept is appropriate after careful analysis by the parties of $85,000.

[44] I intend to apportion that by levying the sum of $50,000 on the first of those charges which is CRN 759 and then splitting the balance of $17,500 on the two remaining charges with Court costs of $130 on each of the three charges.

M A Crosbie
District Court Judge

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